THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
NOV 16 2017
SC Court of Appeals

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-03326
Appellate Case No. 2017-000474

Ex Parte: Liberty Mutual Fire Insurance Company,......... Appellant.

v.

In re: Waverly at Hamlin Plantation Townhome Association, Inc., ... Respondent,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., ... Respondents,

and

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc. .... Respondents,

v.

Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc., Gerardo Rosette Sanchez a/k/a GR Painting, Jorge Medina, Jorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler

Company, Inc., Paul M. Vasquez, Richard Ditullio,
Richard Ditullio a/k/a RDT Contracting, LLC, ...

Respondents.

INITIAL REPLY BRIEF OF APPELLANT

C. Mitchell Brown
SC Bar No. 12872
Brian P. Crotty
SC Bar No. 16983
Blake T. Williams
SC Bar No. 100794
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street/17th Floor
Columbia, SC 29211
(803) 799-2000

Robert C. Calamari
SC Bar No. 064985
NELSON MULLINS RILEY & SCARBOROUGH LLP
3751 Robert M. Grissom Parkway, Suite 300
Myrtle Beach, SC 29577
(843) 448-3500

Attorneys for Appellant Liberty Mutual Fire Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE SUPREME COURT'S DECISION IN *HARLEYSVILLE* REQUIRES THAT AN INSURER ATTEMPT TO INTERVENE TO ADEQUATELY PROTECT ITS INTERESTS 1

A. *Harleysville* Imposes a Duty on Insurers to Attempt to Intervene in Order to Protect their Right to Obtain an Allocated Verdict 2

B. Liberty Mutual Satisfied the Requirements for Intervention under Rule 24 4

1. Rule 24 supports limited intervention under the unique circumstances of this case 5

2. *Harleysville* supports that the trial court should have permitted Liberty Mutual to intervene as of right on a limited basis 7

3. Under the circumstances, a pleading would not have served a useful purpose 9

4. Liberty Mutual's candid acknowledgement of the procedural questions generated by *Harleysville* does not resolve the important issues presented by this appeal 11

II. THE TRIAL COURT DID NOT GRANT LIBERTY MUTUAL THE RELIEF IT SEEKS 12

III. THIS APPEAL PRESENTS A JUSTICIABLE QUESTION FOR THIS COURT'S RESOLUTION 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

ADT Servs. AG v. Brady, No. 10-2107, 2014 WL 4415955 (W.D. Tenn. Sept. 8, 2014) 5

Auto Owners Insurance Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) 4

Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990) 4, 7, 9

Cmty. Vocational Sch. of Pittsburgh, Inc. v. Mildon Bus Lines, Inc., No. CV 09-1572, 2017 WL 1376298 (W.D. Pa. Apr. 17, 2017) 10

Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962) 6

Danner Constr. Co. v. Hillsborough Cnty., No. 809-CV-650-T-17TBM, 2009 WL 2525486 (M.D. Fla. Aug. 17, 2009) 10

Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007) 5

Fid. Bankers Life Ins. Co. v. Wedco, Inc., 102 F.R.D. 41 (D. Nev. 1984) 5

Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) 3

Gehm v. Timberline Post & Frame, 861 N.E.2d 519 (Ohio 2007) 14

Harleysville Group Insurance v. Heritage Communities, Inc., Opinion No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017 (Shearouse Adv. Sh. No. 2 at 21-54) 1

Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) 1, 3, 4, 6

In re Parr, 17 B.R. 801 (Bankr. E.D.N.Y. 1982) 9

John Wiley & Sons, Inc. v. Book Dog Books, LLC, 315 F.R.D. 169 (S.D.N.Y. 2016) 14

Landry's, Inc. v. Sandoval, No. 215CV01160GMNPAL, 2016 WL 1239254 (D. Nev. Mar. 28, 2016) 10

Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491 (10th Cir. 1994) 3, 6

Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016) 5

Schmidlin v. D & V Enterprises, No. 76287, 2000 WL 709039 (Ohio Ct. App. June 1, 2000) 6

Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965)...7

Spring Constr. Co. v. Harris, 614 F.2d 374 (4th Cir. 1980)..10

Thomas v. Henderson, 297 F. Supp. 2d 1311 (S.D. Ala. 2003)...6

Wise v. Wise, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011) 3

WJA Realty Ltd. P'ship v. Nelson, 708 F. Supp. 1268 (S.D. Fla. 1989).......................................10

Rules

Fed. R. Civ. P. 24 5

Rule 24, SCRCP..7, 9, 11, 12

Rule 411, SCRE 6

ARGUMENT

I. THE SUPREME COURT'S DECISION IN *HARLEYSVILLE* REQUIRES THAT AN INSURER ATTEMPT TO INTERVENE TO ADEQUATELY PROTECT ITS INTERESTS

As Liberty Mutual detailed in its initial brief, the basis of its motion to intervene, and appeal of the trial court's denial of that motion, was the Supreme Court's decision in *Harleysville Group Insurance v. Heritage Communities, Inc.*, Opinion No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21-54). At the time Liberty Mutual filed its initial opening brief in this action, the initial *Harleysville* decision was pending rehearing. However, on July 26, 2017, the Supreme Court issued a refiled opinion in *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017) ("*Harleysville*"). The refiled *Harleysville* opinion did not affect the merits of Liberty Mutual's appeal.[1]

---

[1] Of the numerous Respondents in this matter, only Respondent Waverly at Hamlin Plantation Townhome Association, Inc. ("Respondent" or "Waverly") filed a Brief of Respondent. However, Liberty Mutual's insureds—Respondents John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., and John Wieland Homes, Inc. f/k/a Builders Support Services of the Carolinas, Inc.'s ("the Wieland entities")—did file a motion to dismiss the appeal on July 24, 2017. Prior to the deadline for Liberty Mutual to respond, the Supreme Court issued the refiled *Harleysville* decision. Accordingly, the Wieland entities amended their motion on August 3, 2017. Liberty Mutual opposed the motion via a Return filed August 11, 2017, and the Court denied the motion via order dated September 14, 2017. On October 16, 2017, the Wieland entities sent a letter to the Court noting that they would not be submitting a brief of respondents or participating any further in the case.

The only other Respondent to file anything in response to Liberty Mutual's initial brief was Respondent Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC, which filed a motion to dismiss the appeal solely as to itself. This Respondent did not file anything in response to Liberty Mutual's motion to intervene or appear at the hearing. Moreover, it has had no involvement in this appeal. Accordingly, Liberty Mutual does not object to dismissal of the appeal as to this Respondent only, so long as it does not impact the Court's ability to hear the merits of the appeal.

A. *Harleysville* Imposes a Duty on Insurers to Attempt to Intervene in Order to Protect their Right to Obtain an Allocated Verdict

In the refiled *Harleysville* decision, the Supreme Court disposed of the cross-petitions for rehearing that were pending at the time of Liberty Mutual's motion to intervene. Harleysville Group Insurance raised many of the questions presented by this appeal in its petition for rehearing. The Supreme Court, however, reached the same conclusion and did not offer any additional clarification regarding the concerns raised by Liberty Mutual herein. Therefore, the questions presented in this appeal still remain critical, unsettled questions of South Carolina law for this Court's resolution. This appeal thus presents a live, justiciable controversy for resolution by this court.

As Liberty Mutual detailed in its initial brief, the original *Harleysville* opinion indicated that insurance carriers have a duty to attempt to intervene in liability actions where they are defending their insureds under a reservation of rights to protect their right to obtain an allocation of the verdict between covered and non-covered damages. (*See* Initial Br. of Appellant at 3, 6-7.) Accordingly, in order to preserve its rights, Liberty Mutual moved to intervene in the present liability action. (*Id.* at 3.) After the trial court denied its motion, Liberty Mutual appealed, asserting that the trial court erred by denying intervention. (*Id.* at 4-5.) As Liberty Mutual explained, *Harleysville* suggested that Liberty Mutual bore the burden of requesting special interrogatories or a special verdict in order to clarify coverage of damages. (*Id.* at 5-7.) The trial court, however, refused to permit Liberty Mutual to do precisely that—intervene on a limited basis to propose special interrogatories or a special verdict. Therefore, Liberty Mutual contended that the trial court's ruling was incorrect in light of *Harleysville*.

The refiled *Harleysville* decision did not remove the language suggesting that insurers have such a duty. The refiled opinion continued to quote case law stating that the 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." *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)). Likewise, the *Harleysville* court explained that if the "burden of apportioning damages between covered and non-covered were to rest on the insured," the insurer could "obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories." *Id.* (quoting *Magnum Foods, Inc.*, 36 F.3d at 1498).

Furthermore, the refiled opinion continued to affirm the Special Referee's holding in his final orders that "Harleysville made a conscious decision not to intervene in the underlying action[s] and took no action to seek an allocated verdict by informing the trial court of the need for an allocated verdict or by submitting special interrogatories for the Court's consideration for submission to the jury." (*See Harleysville* Consolidated Record on Appeal ("Harleysville CR") at 0037 & 0086.)[2] It also affirmed the Special Referee's conclusion that: "Harleysville's failure to intervene or otherwise seek an allocated verdict cannot now be used to prejudice the rights of its insureds or the rights of the claimants who step into the shoes of the insureds." (Harleysville CR at 0058 & 0107.)[3] Finally, it affirmed the Special Referee's finding that Harleysville's request for

[2] It is well established that a court may "take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); *see also Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (same).

[3] As acting Justice Pleicones reiterated in his refiled dissent, "there is no suggestion how Harleysville could have intervened in [the underlying] lawsuits and asserted a defense against

the court to allocate between covered and non-covered damages in the declaratory action was an attempt to "relitigate" the issues decided in the underlying liability action. (*Harleysville* CR at 54-55, 59.) This was the case even though the Special Referee acknowledged that the verdict included damages not covered by the Harleysville policies. (*Harleysville* CR at 53.)

The Supreme Court affirmed the Special Referee's findings *in toto*, aside from "slightly modifying as to the loss-of-use damages in the Riverwalk litigation." *Harleysville*, 420 S.C. at 348, 803 S.E.2d at 303. Finally, the refiled decision continued to cite to *Auto Owners Insurance Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009), which held that an arbitrator's award could not be apportioned because it was "not the purpose of this declaratory judgment action to relitigate the issue of damages." *Id.* at 198, 684 S.E.2d at 547.

Therefore, the refiled *Harleysville* decision has not resolved any of the questions raised herein by Liberty Mutual. Liberty Mutual properly asserted the issues herein to the trial court. *Harleysville* indicates that insurers have such a duty or else risk losing the ability to obtain an allocation of damages. The impact of the insurer being prohibited from doing so by the trial court remains uncertain, and this is why the issues presented in this appeal are proper for this Court's consideration.

B. Liberty Mutual Satisfied the Requirements for Intervention under Rule 24

Respondent correctly notes Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP") governs intervention under South Carolina law. Rule 24 permits "liberal intervention," particularly where it would further judicial economy. *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). As Liberty Mutual stated

---

coverage without creating an impermissible conflict of interest." *Harleysville*, 420 S.C. at 363, 803 S.E.2d at 311 (Pleicones, J., dissenting).

in its initial brief, there does not appear to be an unconditional or conditional statutory right to intervene. Thus, Rule 24(a)(2) governs the analysis for intervention of right and Rule 24(b)(2) governs the analysis for permissive intervention.

1. Rule 24 supports limited intervention under the unique circumstances of this case

Respondent first contends that Rule 24 does not support the "limited" intervention sought by Liberty Mutual. Rule 24, however, is silent regarding the scope of intervention. The trial court has discretion to determine whether to grant or deny a motion to intervene under Rule 24. *Ex Parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007). Inherent in this discretion is the ability to permit limited intervention if it so chooses. No South Carolina authority prohibits a court from exercising its discretion to allow limited intervention.

Moreover, as Liberty Mutual detailed in its brief, there are a number of cases analyzing intervention under the similar Federal Rule of Civil Procedure ("FRCP"), *see* Fed. R. Civ. P. 24, that recognize the propriety of limited intervention.[4] Rule 24 of the FRCP is similarly silent as to availability of limited intervention. However, several cases have recognized that it, or a similar state rule, supports limited intervention under facts similar to this case. *See, e.g.*, *ADT Servs. AG v. Brady*, No. 10-2107, 2014 WL 4415955, at *1 (W.D. Tenn. Sept. 8, 2014) (granting an insurer's motion to intervene for the limited purpose of being heard regarding special interrogatories it proposed to submit to the jury); *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41 (D. Nev.

[4] Because Rule 24 of the SCRCP and Rule 24 of the FRCP are similar, the Court may look to interpretations of the federal rule for guidance. *See, e.g.*, *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.").

1984) (same); *Thomas v. Henderson*, 297 F. Supp. 2d 1311 (S.D. Ala. 2003) (same); *Schmidlin v. D & V Enterprises*, No. 76287, 2000 WL 709039 (Ohio Ct. App. June 1, 2000) (same).

Moreover, even if Respondent could point to authority weighing against limited intervention, *Harleysville* provides support for the concept. *Harleysville* suggests 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." *Harleysville*, 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum Foods*, 36 F.3d at 1498). Because it was not a party to the underlying case, Liberty Mutual would have had no standing to request special interrogatories or a special verdict. The only mechanism by which Liberty Mutual could comply with this directive was to request intervention on a limited basis. Liberty Mutual could not direct its insured to comply with the *Harleysville* directive without risking the creation of a conflict of interest or subjecting itself to the risk of a bad faith claim. Moreover, it would have been improper for Liberty Mutual to seek "full" intervention, as its participation in the trial would contradict South Carolina's policy disfavoring the disclosure of the presence of liability coverage to the jury.[5]

For these reasons, Rule 24 supports limited intervention under the unique circumstances presented in this case.

---

[5] South Carolina policy weighs against disclosing the availability of liability coverage to "avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it." *Crocker v. Weathers*, 240 S.C. 412, 424, 126 S.E.2d 335, 341 (1962). This principle is memorialized in Rule 411 of the South Carolina Rules of Evidence, which prohibits admission of evidence of liability insurance "upon the issue whether the person acted negligently or otherwise wrongfully." Rule 411, SCRE.

2. *Harleysville* supports that the trial court should have permitted Liberty Mutual to intervene as of right on a limited basis

Rule 24(a)(2) permits intervention as of right "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." Rule 24(a), SCRCP. The Supreme Court has explained that a party seeking intervention under Rule 24(a)(2) must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. *Berkeley Elec.*, 302 S.C. at 189, 394 S.E.2d at 714 (1990).

Respondent first contends that Liberty Mutual's motion was untimely because it came after the case had been pending for three years on the eve of trial. However, as Liberty Mutual explained in its initial brief, there would have been no reason for Liberty Mutual to attempt to intervene earlier. Liberty Mutual's involvement in this case was limited to providing a defense to its insureds pursuant to a reservation of rights. The provision of a defense, however, did not entitle Liberty Mutual to advance arguments that would conflict with the interests of its insured. *See Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965) (acknowledging that if an insurer were to defend a tort action and assert defenses to coverage in that action, "a clear conflict of interests between insurer and insured" would be presented). Therefore, Liberty Mutual refrained from attempting to intervene until it became clear that the matter would proceed to trial, and tailored the scope of its request to the confines of *Harleysville*.

Moreover, contrary to Respondent's claim, Liberty Mutual satisfied the other Rule 24(a)(2) factors as well. Liberty Mutual has a clear interest relating to the property or transaction which is the subject of the action. To the extent the underlying verdict contained damages that were not property damages and to the extent such was not ascertainable under the evidence submitted in the underlying action, Liberty Mutual has an interest in obtaining an allocated verdict. Otherwise, under *Harleysville*, Liberty Mutual could be required to pay damages that are not covered by the terms of its policies. Therefore, Liberty Mutual had an important interest in the transaction that is the subject of the action.

Next, Liberty Mutual is situated such that disposition of this action without addressing the allocation issue would impede or impair its ability to protect its interest. Liberty Mutual cannot wait until a subsequent coverage action to raise this argument, because the declaratory judgment court may find that, in light of *Harleysville*, Liberty Mutual is bound by a general verdict in the underlying construction defect litigation. Therefore, the circumstances forced Liberty Mutual to attempt to comply with the directives of *Harleysville* and ask that the court clarify its rights and duties.

Finally, the current parties would not—and in fact, did not—adequately protect Liberty Mutual's interests. The Wieland entities' unwillingness to protect Liberty Mutual's interests was evidenced by the memorandum they filed opposing Liberty Mutual's motion to intervene. (*See* Mem. in Opp'n to Mot. to Intervene; R. pp. __.) Respondent Waverly likewise had no motivation to assist the opposing parties' insurer. Counsel for the Wieland entities and counsel for Respondent Waverly both argued at the hearing on Liberty Mutual's motion that Liberty Mutual should not be permitted to intervene. (*See* Transcript of Hearing on Mot. to Intervene ("Tr.") at 12:6-16:8; R. pp. __.) After Liberty Mutual appealed the trial court's denial of its motion, the Wieland entities

and Respondent Waverly both opposed the appeal. The Wieland entities submitted a motion to dismiss Liberty Mutual's appeal and later an amended motion to dismiss. Likewise, Respondent Waverly has submitted a brief opposing the arguments raised by Liberty Mutual. In light of this opposition to Liberty Mutual's position, the existing parties failed to "make all of the intervenor's arguments," and were not "capable and willing to make sure arguments." *See Berkeley Elec.*, 302 S.C. at 189, 394 S.E.2d at 715. Liberty Mutual would have offered a different knowledge, experience, and perspective on the proceedings that would have otherwise been absent. *See id.*

For all of these reasons, the Rule 24(a)(2) factors were met and the trial court should have granted Liberty Mutual's motion. Because Liberty Mutual attempted to comply with *Harleysville* and intervene on a limited basis, this Court should find that it may seek allocation of the general verdict in a subsequent declaratory action regarding coverage.

3. Under the circumstances, a pleading would not have served a useful purpose

Respondent notes that Liberty Mutual declined to file a pleading in this matter. This argument was not raised to the trial court and it did not rely on this point to deny Liberty Mutual's motion. For this reason alone, this argument is arguably without merit. *See, e.g., In re Parr*, 17 B.R. 801, 804 (Bankr. E.D.N.Y. 1982) ("The failure to attach such a proposed pleading, however, is not fatal to the motion to intervene and may be waived by a failure to object."). In any event, this is not determinative of Liberty Mutual's motion.

Respondents are correct that Rule 24(c) states that a motion to intervene "shall state the ground therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Rule 24(c), SCRCP. Courts interpreting analogous Federal Rule of Civil Procedure 24(c), however, have held found that a pleading is not mandatory. For example,

the Fourth Circuit has found that where a motion to intervene is not accompanied by a pleading, "the proper approach is to disregard non-prejudicial technical defects." *Spring Constr. Co. v. Harris*, 614 F.2d 374, 376–77 (4th Cir. 1980); *see also Danner Constr. Co. v. Hillsborough Cnty.*, No. 809-CV-650-T-17TBM, 2009 WL 2525486, at *2 (M.D. Fla. Aug. 17, 2009) ("[T]he majority of circuits, including the Eleventh Circuit, have chosen to disregard non-prejudicial technical defects in motions to intervene and allow intervention where the motion does not prejudice the party.").

"The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the position, claim, and relief sought by the intervenor." *WJA Realty Ltd. P'ship v. Nelson*, 708 F. Supp. 1268 (S.D. Fla. 1989). Courts have sometimes relaxed this requirement, however, "where the purpose of intervention and the claims and defenses the intervenor intends to pursue are made clear in the motion to intervene." *Landry's, Inc. v. Sandoval*, No. 215CV01160GMNPAL, 2016 WL 1239254, at *3 (D. Nev. Mar. 28, 2016). One example is under the precise circumstances presented here: where a party seeks limited intervention to submit special interrogatories. *See, e.g.*, *Cmty. Vocational Sch. of Pittsburgh, Inc. v. Mildon Bus Lines, Inc.*, No. CV 09-1572, 2017 WL 1376298, at *3 (W.D. Pa. Apr. 17, 2017) ("Given that Erie seeks to intervene in order to submit special interrogatories, not to file a pleading, and there is no evidence that Erie's failure to submit a pleading along with its motion to intervene caused prejudice to the existing parties, the court will exercise its discretion and waive the pleading requirement.").

Liberty Mutual's decision not to file a pleading is a mere technical issue that was non-prejudicial to the parties. A pleading would have served no useful purpose, because Liberty Mutual clearly explained that it did not seek to assert any claims or directly participate in the defense. The reasons for Liberty Mutual's motion were set forth fully therein. Furthermore,

Respondents have not suffered any prejudice from Liberty Mutual's decision not to file a pleading. Thus, Rule 24(c), SCRCP did not support denial of Liberty Mutual's motion.

4. Liberty Mutual's candid acknowledgement of the procedural questions generated by *Harleysville* does not resolve the important issues presented by this appeal

Respondent suggestion that Liberty Mutual's frank discussion of the procedural issues presented by *Harleysville* is a concession of the issues raised in appeal is without merit. Liberty Mutual has been upfront throughout its participation in this matter that the *Harleysville* decision creates procedural problems for insurers. However, to adequately protect its interests, Liberty Mutual must assert the arguments it raised in its motion to intervene and in this appeal. If neither the insured nor the plaintiff are willing to seek a special verdict, how does an insurer protect its right to only have to pay for damages covered by the terms of the policy? Moreover, what are an insurer's rights and duties where the court denies intervention? Those are is the fundamental question presented in this appeal.

Respondents are correct that coverage issues are typically litigated in a subsequent declaratory judgment action. In this situation, however, *Harleysville* indicates that an insurer has a duty to request special interrogatories or a special verdict in a liability action involving its insured. Liberty Mutual believes it should not direct the insured's counsel to make such a request due to the conflict of interest it could create. Accordingly, the only option available to Liberty Mutual was to request permission to intervene in its own right on a limited basis solely to propose questions for the jury's consideration regarding allocation. This is what it attempted to do.

Liberty Mutual has been candid about recognizing the problems that intervention would present. This concern was the driver behind Liberty Mutual's suggestion that this Court strike a balance by definitively holding that if an insurer attempts to intervene but is not permitted to do

so, allocation may be had in a subsequent declaratory action concerning coverage. Such a holding would avoid the procedural morass that intervention could create without foreclosing an important right of insurers.

II. THE TRIAL COURT DID NOT GRANT LIBERTY MUTUAL THE RELIEF IT SEEKS

Respondent contends that Liberty Mutual already received the relief it seeks because in the Order denying Liberty Mutual's motion for limited intervention, the trial court stated that Liberty Mutual was not precluded from bringing a subsequent declaratory judgment action to obtain a ruling apportioning damages. This statement by the trial court, however, was not a finding or order of the court. Instead, the trial court was merely positing that the Supreme Court of South Carolina's *Harleysville* opinion, at a time when rehearing was pending, would not prohibit a subsequent declaratory judgment action.

In its motion to intervene, Liberty Mutual requested that the trial court find that it had met the requirements of Rule 24, SCRCP and find that Liberty Mutual be permitted to intervene for a limited purpose. (*See* Liberty Mutual's Second Mot. to Intervene; R. __.) The Wieland Respondents' Memorandum in Opposition to Liberty Mutual's Motion acknowledged that post-trial allocation of damages will "necessarily include interpretation and application" of *Harleysville*. (*See* Wieland Respondents' Opp'n to Liberty Mutual's Second Mot. to Intervene; R. __.)

At the end of the hearing, the trial court offered an opinion on one potential outcome of the case—assuming that it did not permit intervention and that the jury returned a verdict against the defendants—noting that:

> Now, having said that, in a dec action, if there's -- sort of looking ahead if I have a crystal ball, and I were clairvoyant which

> I don't claim to be, in looking ahead if a verdict comes back against the Defendant, how are they prejudiced in really trying these issues that they claim would deny coverage? There's nothing that precludes you from calling experts. There is nothing that precludes you from calling the same expert to apportion this damage and to preserve your client's rights in terms of when you start talking about -- when you deal with a dec action you start talking about very specific language in an insurance is included under the ambit of that language. And I really can't discern any prejudice to you that would preclude you from being able to do that, from calling experts, from saying and even using portions of this record from the experts who are going to testify. . . .

(Tr. at 20:12-21:6; R. __.) Likewise, in its Order denying intervention, the trial court explained that Liberty Mutual would not suffer prejudice from the denial of its motion because "it is not precluded from bringing a declaratory judgment action after the verdict for the purpose of obtaining a ruling that apportions damages, if any, found in this case." (Order Denying Mot. to Intervene; R. __.) Again, this was stated at a time when rehearing was pending in *Harleysville*.

Thus, contrary to the Respondents' assertion, Liberty Mutual did not already receive the relief it requests.

III. THIS APPEAL PRESENTS A JUSTICIABLE QUESTION FOR THIS COURT'S RESOLUTION

Because Liberty Mutual did not receive the relief it seeks, this appeal presents a justiciable question for this Court's consideration. The issues raised in this appeal could only be raised herein. As Liberty Mutual explained in its opening brief, it cannot wait until a subsequent declaratory judgment action to assert these issues because the declaratory judgment court may be precluded from allocating the general verdict into covered and uncovered damages under *Harleysville*.

Respondents also fail to explain how Liberty Mutual would be able to assert its intervention argument via a declaratory judgment action. That question would be purely academic if Liberty Mutual failed to attempt to intervene in the liability matter, or abandoned the intervention question

in this action. Therefore, the questions presented in this appeal are ripe for the court's consideration. Liberty Mutual would have risked waiving critical arguments—which only this Court can address—if it proceeded with a declaratory judgment action on the coverage issue prior to this Court's consideration of this appeal.

In this appeal, Liberty Mutual is simply asking that this Court to determine the impact of a recent decision, which is something this Court is tasked with doing every day. Liberty Mutual asks the Court to determine whether the trial court erred by denying intervention despite the *Harleysville* decision. Liberty Mutual seeks a judicial determination on the specific controversy raised herein. It does not seek to advance a claim for declaratory judgment or a pure academic question.

The framework proposed by Liberty Mutual in its initial brief is a potential solution that the Court could adopt to resolve the numerous questions raised by *Harleysville*. It appears that Ohio requires that an insurer first make an effort at limited intervention, but if that fails, then subsequent declaratory judgment litigation is permitted. Ohio recognizes that if a party seeks to intervene and it is denied, "collateral estoppel will not prohibit future litigation of similar issues." *Gehm v. Timberline Post & Frame*, 861 N.E.2d 519, ¶ 15 (Ohio 2007); *see also John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 315 F.R.D. 169, 174 (S.D.N.Y. 2016) (applying Ohio law and noting that if an insurer moves to intervene and it is denied, "Ohio law is clear that there is no collateral estoppel effect"). Therefore, if an insurer seeks intervention and it is denied, it is not "estopped from litigating its claims in another case." *Gehm*, 861 N.E.2d at ¶ 15. As the court explained in *John Wiley*, at most Ohio law "requires that an insurer make a motion to intervene" to avoid preclusion. *Id.* If the motion is denied, then those concerns are alleviated. Liberty Mutual suggested this framework as a way to avoid the procedural problems that intervention would

present while still protecting an insurer's right to an allocated verdict where there are potentially non-covered damages.

This matter presents a proper case or controversy for the Court to decide regarding how an allocation of the verdict in a liability action between covered and non-covered claims can occur when a trial court denies a motion for limited intervention. Liberty Mutual specifically requests that this Court provide guidance as to the impact of *Harleysville* under the circumstances presented in this case. This Court properly has jurisdiction over this question, as Liberty Mutual seeks permissible relief on justiciable questions presented to this Court for resolution.

CONCLUSION

For the reasons stated above and in Liberty Mutual's opening brief, this Court should reverse the trial court's denial of Liberty Mutual's motion for limited intervention, and find that the remedy for the error is that Liberty Mutual is permitted to litigate allocation issues in subsequent declaratory judgment proceeding.

Signature on Following Page

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: *[signature]*

C. Mitchell Brown
SC Bar No. 12872
Brian P. Crotty
SC Bar No. 16983
Blake T. Williams
SC Bar No. 100794
1320 Main Street/17th Floor
Columbia, SC 29211
(803) 799-2000

Robert C. Calamari
SC Bar No. 064985
3751 Robert M. Grissom Parkway, Suite 300
Myrtle Beach, SC 29577
(843) 448-3500

Attorneys for Appellant Liberty Mutual Fire Insurance Company

Columbia, South Carolina

November 16, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
NOV 16 2017
SC Court of Appeals

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-03326
Appellate Case No. 2017-000474

Ex Parte: Liberty Mutual Fire Insurance Company,......... Appellant.

v.

In re: Waverly at Hamlin Plantation Townhome Association, Inc., ... Respondent,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., ... Respondents,

and

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc. .... Respondents,

v.

Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc., Gerardo Rosette Sanchez a/k/a GR Painting, Jorge Medina, Jorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler

Company, Inc., Paul M. Vasquez, Richard Ditullio,
Richard Ditullio a/k/a RDT Contracting, LLC, ...

Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Liberty Mutual Fire Insurance Company, do hereby certify that I have served all counsel in this action with copies of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **INITIAL REPLY BRIEF OF APPELLANT**

Counsel Served: ***Attorneys for Waverly @ Hamlin Plantation Townhome Association, Inc.***

U.S. Mail
John C. Hayes, IV, Esquire
Mary-Margaret Fitzhenry Noland, Esquire
HAYES LAW FIRM LLC
180 Meeting Street, Suite 330
Charleston, SC 29401

U.S. Mail
Ivon Keith McCarty, Esquire
MCCARTY LAW FIRM, PC
Post Office Box 30055
Charleston, SC 29417

U.S. Mail
Jesse Sanchez, Esquire
THE LAW OFFICE OF JESSE SANCHEZ
98½ Broad Street, Suite B
Charleston, SC 29401

Attorneys for AC Construction Inc.

U.S. Mail
Caroline Coward McIntosh, Esquire
Kevin W. Mims, Esquire
LUZURIAGA MIMS, LLP
50 Immigration Street, Suite 200
Charleston, SC 29403

Attorneys for Barr Construction Inc.

U.S. Mail
Erin DuBose Dean, Esquire
TUPPER GRIMSLEY & DEAN, PA
Post Office Box 2055
Beaufort, SC 29901-2055

Attorneys for Benjamin Mora Construction LLC, Benjamin Mora, Mora Construction

U.S. Mail
Jonathan J. Anderson, Esquire
Curtis Brent Martin, Esquire
ANDERSON REYNOLDS & STEPHENS, LLC
Post Office Box 87
Charleston, SC 29402

Attorneys for Builder Support Services of the Carolinas, Inc., John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., John Wieland Homes Inc., John Wieland Homes of Charleston, Inc.

U.S. Mail
Christy Ford Allen, Esquire
John A. Massalon, Esquire
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, SC 29402

<u>**U.S. Mail**</u>
Andrew Elliott Haselden, Esquire
Justin Paul Novak, Esquire
HOWSER NEWMAN & BESLEY, LLC
215 East Bay Street, Suite 303
Charleston, SC 29401

<u>**U.S. Mail**</u>
Theodore Luke Manos, Esquire
ROBERTSON HOLLINGSWORTH & FLYNN
177 Meeting Street, Suite 300
Charleston, SC 29401

Attorneys for John Wieland Homes and Neighborhoods Inc., Wheelock Street Capital LLC

<u>**U.S. Mail**</u>
Marvin D. Infinger, Esquire
Cheryl D. Shoun, Esquire
NEXSEN PRUET, LLC
Post Office Box 486
Charleston, SC 29402

Attorneys for JMC Construction, Inc., JMC Construction, LLC, Jorge Medina

<u>**U.S. Mail**</u>
Christopher M. Adams, Esquire
Andrew N. Cole, Esquire
COLLINS & LACY, PC
Post Office Box 12487
Columbia, SC 29211

Attorneys for Juan Luis Sanchez, Sanchez Brothers Painting

<u>**U.S. Mail**</u>
Julian Kane Allen, Esquire
ALLEN LAW
Post Office Box 12429
Charleston, SC 29422

U.S. Mail
Sarah Louise Fragale, Esquire
TURNER PADGET GRAHAM & LANEY, PA
40 Calhoun Street, Suite 200
Charleston, SC 29401

Attorneys for Builders Firstsource Southeast Group LLC

U.S. Mail
Stephen P. Hughes, Esquire
HOWELL GIBSON & HUGHES, PA
Post Office Box 40
Beaufort, SC 29901

U.S. Mail
James Andrew Yoho, Esquire
CARLOCK COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29407

Attorneys for Richard Ditullio and RDT Contracting LLC

U.S. Mail
Jared Hudson Garraux, Esquire
RICHARDSON PLOWDEN & ROBINSON, PA
1900 Barnwell Street
Columbia, SC 29201

Attorneys for Eli Inc.

U.S. Mail
Patrick T. Morrissey, Esquire
CLAWSON & STAUBES, LLC
127 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Attorneys for Latitude Construction Services LLC

U.S. Mail
Robert Michael Ethridge, Esquire
Laura Elizabeth Paris Paton, Esquire
CARLOCK COPELAND & STAIR, LLP
Post Office Box 20969
Charleston, SC 29413

Attorneys for J Mora Brick & Block Mason LLC, Jesus Mora

U.S. Mail
Elizabeth Fraysure Fulton, Esquire
PRITCHARD LAW GROUP LLC
129 Broad Street
Charleston, SC 29401

U.S. Mail
John Elliott Rogers, II, Esquire
Carl Reed Teague, Esquire
THE WARD LAW FIRM, P.A.
Post Office Box 5663
Spartanburg, SC 29304

Attorneys for The Muhler Company Inc

U.S. Mail
Peter Gunnar Nistad, Esquire
GALLIVAN WHITE & BOYD, PA
Post Office Box 22768
Charleston, SC 29413

Pro Se

U.S. Mail
Mr. Paul M. Vasquez
1417 Peach Blossom Lane
Charleston, SC 29492-8263

Cindy K. Hess
Sr. Administrative Assistant

November 16, 2017

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

Blake T. Williams
T 803.255.9597 F 803.255.9032
blake.williams@nelsonmullins.com

1320 Main Street | 17th Floor
Columbia, SC 29201
T 803.799.2000 F 803.256.7500
nelsonmullins.com

November 16, 2017

RECEIVED
NOV 16 2017
SC Court of Appeals

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Waverly at Hamlin Plantation Townhome Association, Inc. v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., et al.
Civil Action No. 2013-CP-10-03326
Appellate Case No. 2017-000474
NMRS File No. 00350.01785

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter please find the original and one copy of the Initial Reply Brief of Appellant. Please return a clocked-in copy to us via our courier.

By copy of this letter, we are serving all counsel with this document.

Very truly yours,

Blake T. Williams

Blake T. Williams

BTW:ckh
Enclosures

cc: John C. Hayes, IV, Esquire
Mary-Margaret Fitzhenry Noland, Esquire
Ivon Keith McCarty, Esquire
Jesse Sanchez, Esquire
Caroline Coward McIntosh, Esquire
Kevin W. Mims, Esquire
Erin DuBose Dean, Esquire
Jonathan J. Anderson, Esquire
Curtis Brent Martin, Esquire
Christy Ford Allen, Esquire
Andrew Elliott Haselden, Esquire
Justin Paul Novak, Esquire
Theodore Luke Manos, Esquire
Marvin D. Infinger, Esquire
Cheryl D. Shoun, Esquire
Christopher M. Adams, Esquire
Andrew N. Cole, Esquire
Julian Kane Allen, Esquire
Sarah Louise Fragale, Esquire
Stephen P. Hughes, Esquire
James Andrew Yoho, Esquire
Jared Hudson Garraux, Esquire
Patrick T. Morrissey, Esquire
Robert Michael Ethridge, Esquire
Laura Elizabeth Paris Paton, Esquire
Elizabeth Fraysure Fulton, Esquire
John Elliott Rogers II, Esquire
Carl Reed Teague, Esquire
Peter Gunnar Nistad, Esquire
Mr. Paul M. Vasquez