

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. 2014CP2606573
Trial Court Case No. 2014CP2607634
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 Keys Property Owners Association, Inc., Plaintiff,

v.

Ocean Keys Development, LLC, Key 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

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SC Court of Appeals

Building Systems n/k/a Clark Western Dietrich Building Systems, LLC, Defendants,

Ocean Keys 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, Canopus US Insurance, Inc., and American Empire Surplus Lines Insurance Company are the Appellants,

AND

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

MOTION TO TRANSFER CASE TO THE SUPREME COURT

BITCO General Insurance Corporation (“BITCO”) hereby joins in the motions filed by Hartford Fire Insurance Company (“HFIC”), Hartford Casualty Insurance Company (“HCIC”), and Hartford Underwriters Insurance Company (“HUIC”) (collectively, “Hartford”), filed on or about November 8, 2017, and in the motion filed by National Fire & Marine Insurance Company (“National Fire”), hereafter referred to as “the Insurer Motions,” that this case be certified for immediate review by the Supreme Court pursuant to Rule 204(b), South Carolina

Appellate Court Rules. BITCO does not duplicate the argument and presentation provided by Hartford and National Fire, but provides the following additional comment.¹

BITCO is an insurer of a contractor defendant in the underlying case of *Harbour Cove Condominium Association, et al. v. Centex Homes, et al.*, Civil Action No. 2014-CP-26-7634. BITCO is not directly involved in *Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al.*, Civil Action No. 2014-CP-26-06573, but the two cases have been consolidated on appeal due to the commonality of issues involved and the arguments of the Insurers apply to both. As described in the Insurers' motions, BITCO will lose important rights to apply the terms and conditions of its insurance policies to any legal liability determined to be owed by its insured if it is held to be bound by general verdicts in *Harbour Cove* and similar cases.

Transferring jurisdiction to the Supreme 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. The issues presented in this appeal derive from prior decisions in construction defect cases in which this Court has granted certification, such as *Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 332, 803 S.E.2d 288, 294 (2017) ("*Harleysville*"); and *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 190, 684 S.E.2d 541, 542 (2009). Due to the wide scope of the many interested parties in construction defect litigation – including homeowners, contractors, insurers, and the general public – the questions presented in this appeal should be resolved at the earliest possible date.

¹At the time of this filing, the Petitioner has received the motions filed by Hartford and National Fire as described herein, and incorporates those arguments and presentations in its own motion. BITCO expects that other insurers and/or parties may also be filing similar motions directed at the same issues. To the extent those motions are consistent herewith BITCO joins in all requests that this appeal be resolved by the Supreme Court in as expeditious manner as possible.

In the *Harbour Cove* action to which BITCO seeks the right of limited intervention, the

Circuit Court held in part:

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).

In ruling that “[t]he Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action,” the Circuit Court opinion does not address how those interests will be protected. If, as may be expected, the result at trial is a general verdict without additional information from the jury as to the nature and components of the damages awarded, then final payment of any award through any applicable insurance policies will be delayed and jeopardized pending litigation over whether and how a general verdict can be divided into identifiable components such as to allow application of the terms of any applicable insurance policies.

BITCO and other insurers have filed motions to intervene largely as a result of the statement by the Supreme Court that the “‘right to control the litigation carries with it certain duties,’ including ‘the duty not to prejudice the insured’s rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.’” *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)). The Court further stated in a footnote:

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.

The *Harleysville* decision indicates that insurers must intervene in underlying actions so as to request at trial level any information as to the nature of the verdict against an insured that will be necessary to determine whether the insurer owes indemnity for that judgment. Failure to request that information at trial level jeopardizes the insurer’s ability to apply policy conditions and fairly indemnify its insureds for those damages which are covered, while not indemnifying insureds for damages beyond the scope of the insuring agreement.

The issues involved in resolving these procedural issues are difficult, complex, and involve issues of considerable importance to the general public. It is in the interest not only of the parties to this litigation but to the general public to preserve access to insurance which is both affordable as well as sufficient in scope to protect the potential liabilities for which the stakeholders in construction projects seek coverage. If such insurance is to remain available, insurers must be able to apply coverage terms and conditions to payment of liabilities covered under applicable policies. BITCO therefore joins in the motions for certification presented by Hartford and National Fire, as well as with such other and consistent arguments which may be presented by other parties to this appeal, and requests that the Supreme Court grant certification to this matter under Rule 204(b).

November 20, 2017

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

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, SCRPC.” 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.

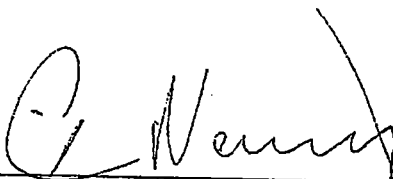
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel 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.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12 2017

A handwritten signature in black ink, appearing to read "Clifton Newman", written over a horizontal line.

Clifton Newman
Presiding Judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Appellate Case No. 2017-02146

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SC Court of Appeals

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,

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, Canopus 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.

PROOF OF SERVICE

I certify that I have served the Motion to Transfer Case to the Supreme Court Under Rule 204 on Respondents and counsel of record from both Trial Court Case No. 2014CP2606573 and Trial Court Case No. 2014CP2607634 (now combined in Appellate Case No. 2017-02146), by depositing a copy of them in the United States Mail, postage prepaid, addressed to their attorneys of record, listed as follows:

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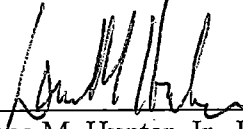
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November 20, 2017

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November 20, 2017

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SC Court of Appeals

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: In Re Motions to Intervene In:
***The Harbour Cove Condominium Association v. Centex Homes, a Nevada
General Partnership, et al.***
And
***Beach Villas at Ocean Keyes Property Owners Association v. Ocean Keyes
Development, et al.***
Appellate Case No.: 2017-002146

Dear Mr. Shearouse:

Please find enclosed the original and seven copies of a Motion to Transfer Case to Supreme Court in the above-referenced matter. We would ask that you file the original and return a clocked copy to us in the self-addressed, stamped envelope enclosed. Also enclosed is our check for the filing fee in the amount of \$25.00. By copy of this letter we are serving all counsel of record in this appeal, and also filing a copy of this motion with the Clerk of the Court of Appeals.

With highest regards,

HUNTER & FOSTER, P.A.



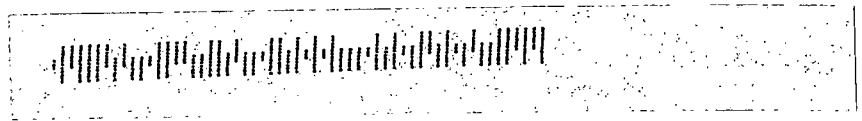
Lawrence M. Hunter, Jr.

LMH/abs
Enclosures

cc: All counsel of record per certificate of service
The Honorable Jenny Abbott Kitchings, SC Court of Appeals

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SC Court of Appeals



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