THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable Clifton B. Newman, Circuit Court Judge

Case No. 2014-CP-26-76349

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 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,

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RESPONDENT HARBOUR COVE CONDOMINIUM ASSOCIATION'S REPLY TO NATIONWIDE MUTUAL INSURANCE COMPANY F/K/A HARLEYSVILLE INSURANCE COMPANY'S RETURN IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS APPEAL

COMES NOW the above-named Respondent Harbour Cove Condominium Association

(hereinafter "Respondent"), by and through its undersigned counsel, submits the following Reply to Nationwide Mutual Insurance Company a/k/a Harleysville Insurance Company's (hereinafter "Appellant") Return in Opposition to Respondent's Motion to Dismiss Appeal.

BACKGROUND

This appeal arises from a construction defect case commenced by Respondent against various defendants. Appellant is an insurer of Defendant Martin Masonry, Inc. Appellant filed a Motion to Intervene in the underlying action on September 13, 2017. By Order entered October 13, 2017, the Court ruled that Appellant's Motion to Intervene was denied. Appellant 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 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. Appellant filed this appeal on October 13, 2017, and Respondent filed its Motion to Dismiss Appeal on October 16, 2017. Respondent believes the Court of Appeals does not have jurisdiction to hear this interlocutory appeal.

LAW AND ANALYSIS

The South Carolina appellate courts may only entertain appeals of final orders and orders affecting a substantial right when it determines the action and prevents a judgment from which an appeal might be taken or discontinues the action is immediately appealable. S.C. Code Ann. § 14-3-330 (1991).

I. Intervention Would Violate Respondent's Due Process Rights

First, Appellant argues that its rights would be affected should they not be allowed to intervene. However, Respondent has significant rights that would be affected should Appellant be allowed to intervene in this late stage of the case. As stated in Respondent's Opposition to Appellant's Motion to Intervene, should the trial court allow Appellant to intervene, Respondent's Due Process rights would be violated. The Court must balance the rights of the parties and in allowing Appellant to become a party to this action under Rule 24(a), Respondent has certain procedural due process rights to be able to question the party's representative, present evidence to the jury, gather information prior to trial, and present alternative views to the jury based on Appellant's special interrogatories. Respondent is entitled to conduct discovery with other parties and present the necessary evidence to the jury, including calling a representative of Appellant to the trial of this matter. By asking interrogatories or submitting a special jury verdict form, it stands to reason that Respondent would have to introduce evidence and then argue to the jury as to how it should complete the verdict form or answer interrogatories, as would be done in any trial with any verdict form or interrogatories. Respondent would also like the opportunity to present special interrogatories to the jury if Appellant is afforded this opportunity. Evidence needs to be developed to create these special interrogatories. With no explanation of why such questions and arguments were being made, the jury would be confused and would be forced to speculate as to the reason for such arguments. It would be a violation of Due Process if Respondent did not have the ability to cross-examine these witnesses and present evidence. *Vora v. Lexington Med. Ctr.,* 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) "Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Brown v. S. C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d

866, 867 (1990) citing *Goldberg v. Kelly*, 397 U.S. 254,90 S.Ct. 10011,25 L.Ed.2d 287 (1970). Pursuant to the Due Process Clause of the Fifth and Fourteenth Amendment of the United States Constitution, Respondent should be allowed to present evidence relating to Appellant's request to intervene. *Olson v. S.C. Dep't of Health & Envtl. Control,* 379 S.C. 57, 69, 663 S.E.2d 497, 503 (Ct. App.2008).

Respondent has the due process right to be able to evaluate Appellant's position, reservations of rights correspondence, and the application of the facts of the case to the particular policy endorsements at issue in this case. The discovery of this information is tethered to the question of whether Appellant should be allowed to intervene. The Court should not allow Appellant to circumvent the rules of discovery and due process rights by intervening in a vacuum. While Respondent understands the Court of Appeals is not determining these underlying issues and simply whether the appeal is properly before this Court, Respondent believes the underlying issues and logistics of this intervention are connected to Appellant's arguments about the mode of trial.

II. Case Law Does Not Support Appellant's Position

It is important to note that none of the cases to which Appellant cites to support its position that this Appeal is proper have any resemblance or bearing on the matter at hand, and are all distinguishable from the facts of this case. *Ex Parte Roe v. L.C. (Ex Parte Carter)*, No. 2015-001006, 2017 WP 164493 (S.C. Ct. App. Filed January 13, 2017) and *Ex Parte Wells*, No. 2012-MO-002, 2012 WL 10906587 (S.C. Sup. Ct. filed March 7, 2012) both have no precedential value, as mentioned in Appellant's brief. Additionally, *Johnson v. House*, 171 Ga. 278, 155 S.E. 199 (Ga. 1930) comes from the Supreme Court of Georgia, *Carter v. Smith*, 170 S.W.3d 402, 2004 Ky. App. LEXIS 289 (Ky. Ct. App. 2004) is a decision by the Kentucky Court of Appeals,

Care & Prot. Of Richard, 456 Mass. 1002, 921 N.E.2d 535 (Mass. App. Ct. 2010) is from the Supreme Judicial Court of Massachusetts, and *Berg v. Nelson*, 2016 UT App 16, 366 P.3d 860 (Utah Ct. App. 2016) is a Utah Court of Appeals case. While these cases may be persuasive, they are by no means binding on this Court and should not be relied upon by the Court when evaluating the appropriateness of this Appeal.

The South Carolina cases cited by Appellant that do have mandatory authority on this Court are all significantly distinguishable from the facts of the instant case and should not be considered by this Court when evaluating Respondent's Motion to Dismiss this Appeal. Though referenced multiple times by Appellant, *Rutledge v. Tunno*, 63 S.C. 205, 41 S.E. 308 (1902) merely stands for the proposition that the South Carolina appellate courts may consider an appeal from an order affecting a substantial right. The facts of *Rutledge* involve French spoliation claims from 1902 and the administration of a will. Absolutely nothing other than the Court's statements regarding the ability to appeal an order affecting a substantial right apply to this case.

Additionally, the only bearing the *Hagood v. Sommerville* case has on this Appeal is the fact that it is another example where the South Carolina Supreme Court held that orders affecting a *substantial interest* are immediately appealable. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) (emphasis added). In *Hagood*, a bicyclist suing the woman who ran him down with her car appealed an order requiring him to either replace his expert witness or his attorney. The Court held that the order very obviously affected the party's ability to choose his own counsel which was a substantial right and was immediately appealable. *Hagood* at 199, 607 S.E.2d at 711. Appellant presumptively considers its position akin to that of the bicyclist – if it is not permitted to intervene, its rights with respect to coverage determinations will be effectively extinguished. The difference is that Appellant's right to have coverage allocated is not eliminated

by the denial of its Motion to Intervene as it still has the ability to bring a declaratory judgment action to have the coverage issues decided by a Court. Appellant's rights are not substantially affected by the denial of its Motion to Intervene, Appellant is not *Hagood*'s bicyclist, and the holding of *Hagood v. Sommerville* has no bearing on this Appeal.

The South Carolina Supreme Court in *Berkeley Electric Coop., Inc. v. Mt. Pleasant*, 302 S.C. 186, 394 S.E.2d 712 (1990) did permit the appeal of a denial of a motion to intervene, but only when it was abundantly clear that intervention on the part of SCE&G was exceedingly necessary to protect its interests. The Court in *Berkeley* used the *Sagebrush* test to evaluate SCE&G's rights to intervene, and held that it was absolutely necessary for SCE&G to be made a party to the action between Berkeley Electric Cooperative and the Town of Mount Pleasant in order for it to protect interests it may have. *Berkeley* at 190. 394 S.E.2d at 716. The facts of *Berkeley* are distinguishable from the facts of this case as SCE&G had no other means to protect its interests, yet Appellant still has the ability to initiate a declaratory judgment action in order to protect its interests in having insurance coverage allocated by a Court. Appellant's use of this case to support its position that this appeal is proper is misguided.

As cited by Respondent in its Motion to Dismiss Appeal, the *Duncan* case also does not permit the appeal of an order denying a motion to intervene. The one-page opinion of *Duncan v. Gov't Emples. Ins. Co.*, 331 S.C. 484, 449 S.E.2d 580 (1994) explicitly states that an order granting a motion to intervene is not immediately appealable. Appellant presumptively uses this holding to reach its conclusion that if an order granting a motion to intervene does not affect a substantial right, an order denying a motion to intervene must affect a substantial right and therefore allow for immediate appeal. This is fallacy. Also, the Court in *Duncan* clearly states that, to be proper for appeal, an order involving the merits must "finally determine some

substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled." *Duncan* at 484, 449 S.E.2d 580 (quoting *Knowles v. Standard Savings and Loan Association*, 274 S.C. 58, 261 S.E.2d 49 (1979)). Again, because Appellant has the ability to bring a declaratory judgment action to determine insurance coverage, the Order denying its Motion to Intervene does not finally determine any matter pertaining to Appellant's interests in contesting coverage. The *Duncan* opinion supports the position of Respondent, rather than Appellant: the denial of Appellant's Motion to Intervene is not immediately appealable. Similar to the holding in *Duncan*, this Court held in *Dorn v. Cohen*, 418 S.C. 126, 791 S.E.2d 313 2016) that an order effectively permitting intervention by an interested third-party did not affect a substantial right such that it was immediately appealable. Again, to conclude that this case allows an appeal of a denial of intervention is a logical fallacy and is completely unsupported in the case law. Additionally, the facts of *Dorn* involve an order of a probate court regarding the beneficiary of a special needs trust and should not be considered as persuasive in this matter involving the denial of an insurance carrier's desire to intervene in a construction defect tort action.

III. Denial of Appellant's Motion to Intervene Does Not Affect Its Substantial Rights

The denial of Appellant's Motion to Intervene does not affect any of Appellant's substantial rights, and the appeal of that denial is not properly before this Court. South Carolina's Supreme Court has specifically held that an insurer may present evidence at a subsequent proceeding to support its position regarding coverage allocations. *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 87, 145 S.E.2d 523, 525 (1965). Generally speaking, in its Return in Opposition to Respondent's Motion to Dismiss Appeal, Appellant bases its entire argument on its position that the Court's denial of its Motion to Intervene "in effect determine[d] the action

and prevent[ed] a judgment from which an appeal might be taken" (Appellant Return in Opp'n, at 8), and cites to the several cases mentioned above where the South Carolina courts have permitted immediate appeals of orders affecting substantial rights. As alluded to in the preceding paragraphs, what Appellant fails to mention is that moving to intervene in the underlying tort action is not its only means to protect its interests. Nothing in the Court's Order prevents Appellant from bringing a subsequent declaratory judgment action to determine insurance coverage after a trial has been conducted and a jury verdict awarded, and South Carolina case law specifically permits Appellant to present evidence at a declaratory judgment action to support any position it may have regarding its duties to indemnify under its insurance contract. *See Sims v. Nationwide, supra*. In fact, declaratory judgment actions seem to be the usual order of complex construction defect tort litigation – nearly every single tort action has at least one accompanying declaratory judgment action to determine insurance coverage. The Order denying Appellant's Motion to Intervene does not substantially affect Appellant's rights as it does nothing to prevent it from protecting its right to have coverage assessed by a Court. The Order merely prevents Appellant from interfering with the trial of the instant case, it does not prejudice Appellant's rights to bring a declaratory action after a verdict is rendered. Appellant's rights are not substantially affected and the denial of its Motion to Intervene is not appealable to this Court.

Further, the South Carolina appellate courts are required to evaluate the effect of an order being appealed, and as stated above, the Order denying Appellant's Motion to Intervene has no effects on its substantial rights. This very Court of Appeals has previously stated that the rules require it to narrowly construe an order being appealed and to look specifically at the effects of the order to determine whether it may be appealed. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 302-303, 705 S.E.2d 475, 478 (Ct. App. 2011). As mentioned above, the denial of

Appellant's Motion to Intervene has minimal effect on Appellant's rights to contest coverage. Nothing in the Order denying Appellant's Motion to Intervene prevents Appellant from bringing a separate declaratory judgment action in order to seek allocation of any jury award, the Order solely prohibits Appellant from intervening at the trial of the underlying tort action. At no point has there been any indication that Appellant's rights are not preserved for a declaratory action; Appellant still has the right to contest coverage and seek an allocation of damages for coverage purposes, just not during the trial of the underlying construction defect litigation. Because the Order denying Appellant's Motion to Intervene has virtually no effect on Appellant's substantial rights, it is not immediately appealable and this appeal should be dismissed.

IV. Appellant Has No Standing to Appeal

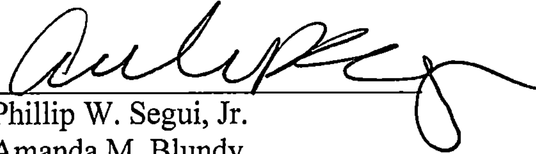
Additionally, Appellant is not a party to the instant action and as such has no standing to appeal nor any standing to intervene at all. "Rule 201(b), SCACR, provides that 'only a *party* aggrieved by an order, judgment, or sentence may appeal.'" *Ex Parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003). A party has standing to intervene in a case when it has a personal stake in its subject matter and is a real party in interest. *Ex Parte Gov't Emples. Ins. Co. v.* Goethe, 373 S.C. 132, 644 S.E.2d 699 (2007). A real party in interest is one who has a real, actual, material interest or substantial interest in the subject matter of the action, rather than only a formal or technical interest. *Id.* Appellant has no standing to appeal the denial of its motion to intervene, and had no standing to intervene in the first place. The South Carolina Supreme Court has specifically held that an insurance company does not have standing to intervene in an underlying action as its interest is merely in the financial implications of the action. *Ex Parte Gov't Emples. Ins. Co.* at 138-9, 644 S.E.2d at 702. Here, Appellant's interest is merely a technical financial interest in having any potential jury award allocated for the purposes of insurance coverage – it is

not a real party in interest and has no standing to intervene. Regarding its standing to appeal, Appellant is not a party to this case and did not seek to intervene as one. Appellant merely sought to submit certain special interrogatories to a potential jury in an effort to allocate damages awarded by a jury verdict. Appellant is not a party and does not have standing to appeal any ruling made by the Court in this case.

CONCLUSION

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

FOR RESPONDENT HARBOUR COVE CONDOMINIUM ASSOCATION:



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PROOF OF SERVICE

I, the undersigned attorney of the law offices of Segui Law Firm, PC, attorneys for The Harbour Cove Condominium Association, do hereby certify that I have ensured the service on all

counsel in this action with copies of Respondent Harbour Cove Condominium Association's Reply to Appellant Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company's Return to Respondent's Motion to Dismiss Appeal to the following address(es) via electronic mail:

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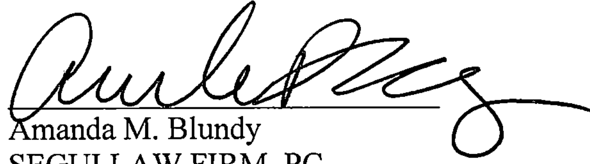

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October 31, 2017

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SC Court of Appeals

Via Federal Express
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: The Harbour Cove Condominium Association v. Centex Homes, a Nevada General Partnership, et al.
Case No.: 2014-CP-26-7634

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of Respondent Harbour Cove Condominium Association's Reply to Nationwide Mutual Fire Insurance Company f/k/a Harleysville Insurance Company's Return to Respondent's Motion to Dismiss Appeal. 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 do not hesitate to contact me.

Sincerely,

Amanda M. Blundy

AMB/ay
Enclosures
cc: John T. Chakeris, Esquire (w/enclosure) - via electronic mail only
Shaun W. Cranford, Esquire (w/enclosure) - via electronic mail only
All Counsel of Record (w/enclosure) - via electronic mail only

ORIGIN ID:RBWA (843) 884-1865
AMANDA M. BLUNDY

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UNITED STATES US

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TO HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF COURT
SOUTH CAROLINA COURT OF APPEALS
1220 SENATE STREET
COLUMBIA SC 29201
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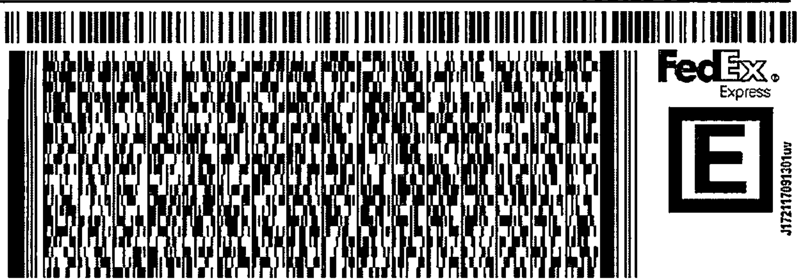

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