

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

**RECEIVED**

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SC Court of Appeals

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, 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 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.

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**HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY INSURANCE  
COMPANY AND HARTFORD UNDERWRITERS INSURANCE COMPANY’S  
RETURN TO RESPONDENT BEACH VILLAS PROPERTY OWNERS  
ASSOCIATION, INC.’S MOTION TO DISMISS APPEAL**

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Hartford Fire Insurance Company, Hartford Casualty Insurance Company and Hartford Underwriters Insurance Company (collectively “Hartford”) file this return in opposition to the Motion to Dismiss filed by Respondent Beach Villas Property Owners Association, Inc. (“Association”). The Association contends that Hartford does not qualify as “a party aggrieved by an order, judgment, sentence or decision” under Rule 201(b), SCACR, and that the Court therefore lacks jurisdiction over this appeal. The Motion to Dismiss oversimplifies these issues, which turn on the merits of Hartford’s appeal.

Hartford moved to intervene in the face of uncertainty regarding Hartford’s obligations under *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E. 2d 288 (2017). Some litigants, including one of the Respondents in this appeal, interpret *Harleysville* as requiring insurers to intervene in underlying proceedings to request allocated verdicts. See Defendant Ocean Keys Development, LLC’s Memorandum in Opposition to Plaintiff’s Motion

to Lift Stay (Nov. 8, 2017) (attached as Exhibit A), at p.5 (“The *Harleysville* opinion radically changed the landscape of South Carolina law by holding that an insurer has not only a right, but a duty to intervene in the underlying proceedings.”).

This appeal involves two cases out of numerous alleged construction defects cases in which Hartford has moved to intervene as a cautionary measure. Hartford is pursuing this appeal to obtain clarity regarding its rights and obligations under *Harleysville*. Resolving the Association’s jurisdictional objection depends on the ultimate question of what *Harleysville* means. Where a motion to dismiss turns on issues that are intertwined with the merits of an appeal, appellate courts have denied the motion without prejudice to the respondent raising the issue in briefing. See *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). Hartford would request that the Court do so here.

### **Factual Background**

Hartford, along with other insurers, sought intervention in two sets of underlying litigation in which Hartford was defending its insureds under reservations of rights:

- *Harbour Cove Condominium Association, et al. v. Centex Homes, et al.*, Civil Action No. 2014-CP-26-7634 (Hartford’s insured: Coastal Plaster, Inc.); and
- *Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al.*, Civil Action No. 2014-CP-26-06573 (Hartford’s insured: First Exteriors, LLC).

Hartford advised each insured 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. Hartford’s insureds did not seek

allocated verdicts, and Hartford (and other insurers) sought intervention in both suits for the limited purpose of requesting such allocated verdicts.

The Circuit Court denied all of the insurers' motions for intervention. In the *Harbour Cove* action, it 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, pp.3-4 (Oct. 12, 2017) (attached as Exhibit C); *Beach Villas* Amended Order Denying Motion of Insurers for Limited Intervention, pp.4-5 (Oct. 13, 2017) (attached as Exhibit D). The *Beach Villas* order further noted that “counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action,” and that the “Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action.” *Id.* at p.4.

Hartford and other moving insurers filed appeals in both *Beach Villas* and *Harbour Cove*, which this Court consolidated. In the *Harbour Cove* matter, the Respondent Harbour Cove Association moved in this Court on October 17, 2017, to dismiss the insurers’ appeals, contending that this Court lacks jurisdiction. Hartford filed a return in opposition on October 26, 2017. That motion to dismiss remains pending.

The *Beach Villas* Association challenged the existence of appellate jurisdiction in the Circuit Court, by moving in the Circuit Court to lift the automatic stay under Rule 241, SCACR, on October 26, 2017.

Hartford moved for certification of this consolidated appeal to the South Carolina Supreme Court on November 8, 2017. On November 9, 2017, Hartford filed its return in opposition to the *Beach Villas* motion to lift automatic stay. Hartford argued that the proper procedure for the Beach

Villas Association to press its jurisdictional objection would have been for it to file a motion to dismiss in this Court.

The Circuit Court held a hearing in *Beach Villas* on November 13, 2017, and orally stated its intention to lift the stay. The resulting order, entered December 7, 2017, provided:

The adjudicative power of this Court carries with it the inherent power to control the order of its business and to safeguard the rights of litigants. *Williams vs. Borden's, Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980).

In determining whether to issue an order lifting stay, it is important to note that the appellant insurance companies are not named parties to this action. When questioned by the Court, each of the appellant insurance companies indicated they did not wish to become named parties to this action.

Rule 201(b), SCACR provides that: "Only a party aggrieved by an order, judgment, sentence or decision may appeal." This rule has been enforced in the cases of *Ex Parte Condon*, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003) ("The Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal"); and *In Re: South Carolina Department of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010) ("A well known rule of the appellate procedure is that only an aggrieved party may appeal.")

This Court is unaware of any authority allowing a non-party to file an appeal and thereby delay the trial of a case in which they are not actively involved. It would be unreasonable to allow the appellant insurance companies to delay the disposition of this matter while refusing to become named parties to this action.

The stay imposed by the filing of the appeals of the insurance companies is therefore lifted.

Order Lifting Stay (Dec. 7, 2017) (Ex. E). Hartford moved for rehearing, and in the meantime the Beach Villas Association moved in this Court to dismiss the appeal.

A hearing on Hartford's Motion to Reconsider was held on December 19, 2017, and the Circuit Court orally indicated it was denying rehearing on its order lifting the *Beach Villas* stay, and it set the *Beach Villas* action for trial on February 5, 2018. To date, the order denying rehearing has not been entered; Hartford will be separately petitioning the Court to address the order lifting the stay pending appeal.

## Argument

### **A. This Appeal's Purpose Is to Determine Whether, Under *Harleysville*, Hartford Has a Duty (and Therefore a Corresponding Right) to Intervene.**

In examining whether Hartford has a right to appeal under Rule 201, SCACR, it is important to understand why Hartford sought to intervene. *Harleysville* seemed to create uncertainty as to whether insurers have a duty to intervene in construction defect actions. That uncertainty prompted Hartford to move to intervene, and to appeal the denial of its motion to intervene.

*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 Supreme 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 Supreme Court further stated 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)). In a footnote, the Supreme 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.

Uncertainty regarding *Harleysville's* meaning compelled Hartford to seek intervention in these alleged construction defect cases. Hartford would prefer to leave all coverage questions for a subsequent declaratory judgment 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 the appellate courts resolve uncertainty regarding its holding in *Harleysville*, prudence dictates that insurers will continue to seek intervention to request allocated verdicts.

The Circuit Court cited *Sims, supra*, in both of its Orders 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: “Moreover, there is no suggestion how [the insurer] could have 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.

The South Carolina Supreme Court's citation to *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972), would seem to 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.

But even if such conclusions are implicit in *Harleysville*, as Hartford believes, they are not explicit. Absent such explicit guidance, Respondent Ocean Keyes Development, LLC, the developer in this case, interprets *Harleysville* as follows:

Under prior South Carolina law, insurance coverage issues were separated from tort issues; when an insurer reserved its rights as to coverage issues, it retained defense counsel whose loyalty was solely to the insured, and the liability insurer then retained separate coverage counsel to represent the insurer's interest in protecting its coverage position. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP*, 336 F. Supp. 2d 610, 615-16 (D.S.C. 2004). The *Harleysville* opinion radically changed the landscape of South Carolina law by holding that an insurer has not only a right, but a duty to intervene in the underlying proceedings. *Harleysville* 803 S.E.2d at 294 (finding that a liability carrier may not relitigate damages in a separate coverage action.)

As a result, the Insurers were forced to seek intervention in this action based upon the Supreme Court's directive. The Insurers' right to intervene includes a right to attend and participate in the trial because the evidence presented at trial may affect the special interrogatories and/or special verdict forms needed for findings of fact as to the Insurers' coverage. The Court's reasoning in *Harleysville* makes sense only if the liability insurer participates in the underlying action.

Defendant Ocean Keyes Development, LLC's Memorandum in Opposition to Plaintiff's Motion to Lift Stay (Nov. 8, 2017) (attached as Exhibit A), pp.5-6.

Hartford hopes that Ocean Keyes' interpretation of *Harleysville* is incorrect. But litigants like Ocean Keyes are pressing that interpretation, raising risks for insurers who do not move for intervention. For that reason, Hartford moved to intervene and appealed the order denying intervention.

**B. The Association's Jurisdictional Objection Is Inextricably Intertwined With the Merits of Hartford's Appeal.**

There is no way to untangle the Beach Villas' Association's objections regarding procedure and standing under Rule 201, SCACR, from the ultimate issue of what *Harleysville* means.

The Motion to Dismiss relies on three authorities—the unreported order in *Tesenair v. Professional Plastering & Stucco, Inc.* (S.C. Court of Appeals Order filed April 9, 2014) (attached as Exhibit E), and the Supreme Court's decisions in *Ex parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003), and *Ex parte S.C. Dep't of Motor Vehicles (SCDMV)*, 390 S.C. 457, 702 S.E.2d 568 (2010). All three decisions make clear, however, the appellate courts were dismissing the appeals because the appealing party never filed a motion to intervene under Rule 24, SCRCF. *See Ex parte SCDMV*, 390 S.C. at 457, 702 S.E.2d at 568 (SCDMV attempted to appeal order to issue a driver's license, but the Supreme Court dismissed appeal because “[a]t no time did SCDMV file a motion to intervene under Rule 24, SCRCF”); *Ex parte Condon*, 354 S.C. at 642, 583 S.E.2d at 434 (Attorney General sought to contest and appeal an award of attorney's fees in a class action, but the Supreme Court “dismiss[ed] th[e] appeal based on the Attorney General's failure to move for intervention as required by Rule 24, SCRCF”); *Tesenair* (Exhibit E), p.1 (dismissing appeal of insurer who “never moved to intervene”).<sup>1</sup>

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<sup>1</sup> The insurer in *Tesenair* requested, without moving for leave to intervene, that it be allowed to request a special verdict form and/or general verdict form accompanied by written interrogatories. The respondents moved to dismiss the appeal, arguing that this Court should dismiss the appeal precisely because the insurer did not move to intervene under Rule 24, SCRCF. *See Respondents' Motion to Dismiss Appeal* (attached as Exhibit G), pp.2-3.

Hartford, in contrast with the appellants in *Teseniar*, *Ex parte Condon*, and *Ex parte SCDMV*, moved to intervene under Rule 24, SCRCF, before noting an appeal. This Court recently addressed an appeal by an insurer who moved to intervene in *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). In *Beresford*, an insurer moved to intervene to request an allocated verdict based on the original January 11, 2017 opinion in *Harleysville*. See Motion to Dismiss Appeal (filed Feb. 6, 2017) (attached as Exhibit F), p.4. The insurer appealed from the Circuit Court's order refusing to hear its motion, and the homeowners association moved to dismiss the appeal. *Id.* at pp.1–2. The 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.” Exhibit B.<sup>2</sup>

In this case, as in *Beresford*, the jurisdictional question of appealability is intertwined with the merits of the appeal. If *Harleysville* mandates insurer intervention, as Ocean Keyes contends, there must be a procedure for intervention. The only procedure for intervention under the South Carolina Rules of Civil Procedure is Rule 24, which imposes no requirement that an intervenor become a “party” in the technical sense. See Rule 24, SCRCF. The denial of a motion to intervene (in contrast with the grant of a motion to intervene) has always been considered an appealable order. S.C. Code § 14-3-330(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 or discontinues the action ....”); *Ex parte Johnson, in re Rutledge v. Tunno*, 63 S.C. 205, 207–08, 41 S.E. 308, 309 (1902) (insofar as an

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<sup>2</sup> The case has not been addressed on the merits and, although it is still pending, the parties have notified the Court of a settlement.

intervenor is concerned an “order [denying intervention] affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken”). If *Harleysville* gives insurers a right and an obligation to intervene, then an insurer would by definition have a right to appeal from an order erroneously denying intervention.

What the Supreme Court could not have meant in *Harleysville* is that—as the Beach Villas Association appears to suggest—an insurer must move to intervene as a *party* before the jury at trial, giving a plaintiff the opportunity to make use of the well-known prejudicial effect from a jury’s belief (correct or incorrect) that there is insurance that will pay a potential verdict. *See Todd*, 385 S.C. at 514-16, 685 S.E.2d at 616-17. A limited intervention, for purposes of asking the Circuit Court (outside the jury’s presence) to submit an allocated verdict form to the jury, is the only form of intervention that could even arguably be consistent with *Harleysville*. It is, however, possible that the Circuit Court was correct in holding that *Harleysville* imposes no obligation, and confers no right, upon insurers to intervene to request allocated verdicts, and that the denial of intervention has no impact on Hartford’s ability to seek a separate declaration of coverage. *See supra* § A. In that case, Hartford would have no interest that would warrant intervention under Rule 24, SCRCR, the denial of Hartford’s motion would not affect a substantial right under § 14-3-330(2), or aggrieve Hartford under Rule 201(b), SCACR. Either way, the Association’s jurisdictional objection depends on the ultimate merits question of what *Harleysville* means.

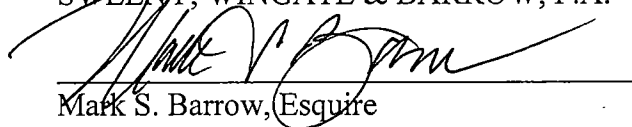
### **Conclusion**

Because the Association’s jurisdictional arguments are intertwined with the merits of Hartford’s appeal, the Court should, as in *Beresford*, deny the Motion to Dismiss without prejudice to the Association arguing the question of appealability in its briefs. Ex. B; *see also Ex parte Condon*, 354 S.C. at 638, 583 S.E.2d 432 (“Respondents filed a motion to dismiss the appeal on

grounds that the Attorney General lacked standing to appeal. This Court denied the motion to dismiss, but did so “without prejudice to [Respondent’s] right to argue this issue in its brief.”).

December 21, 2017

SWEENEY, WINGATE & BARROW, P.A.

A handwritten signature in black ink, appearing to read 'Mark S. Barrow', is written over a horizontal line.

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STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

BEACH VILLAS AT OCEAN KEYES )  
PROPERTY OWNERS ASSOCIATION, )  
INC., )

Plaintiff, )

vs. )

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 CLARKWESTERN DIETRICH )  
BUILDING SYSTEMS, LLC, )

Defendants. )

OCEAN KEYES DEVELOPMENT, LLC )  
Third-Party Plaintiffs, )

vs. )

RENAISSANCE STEEL )  
INSTALLATION, LLC N/K/A )  
RENAISSANCE STEEL, LLC AND )  
BENCHMARK STEEL ERECTORS, )  
TOTAL CONSTRUCTION, LLC )  
Third-Party Defendants )

IN THE COURT OF COMMON PLEAS )  
FIFTEENTH CIRCUIT )

Civil Action No. 2014-CP-26-6573 )

**DEFENDANT OCEAN KEYES )  
DEVELOPMENT, LLC'S )  
MEMORANDUM IN OPPOSITION TO )  
PLAINTIFF'S MOTION TO LIFT )  
STAY )**

COMES NOW Ocean Keyes Developments, LLC (hereinafter "Ocean Keyes"), by and through its undersigned counsel, and hereby submits this memorandum in opposition to the Motion to Lift Automatic Stay filed by Beach Villas at Ocean Keyes Property Owners Association, Inc. ("Plaintiff").

### BACKGROUND

This appeal arises from a construction defect case commenced by Beach Villas at Ocean Keyes Property Owners Association (hereinafter "Beach Villas") against various defendants, including Ocean Keyes. As Insurers of the various defendants, Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company (collectively "Hartford"), Canopus US Insurance Inc. (hereinafter "Canopus"), and Selective Insurance Company of South Carolina's (hereinafter "Selective") (collectively "Insurers") filed Motions to Intervene in the underlying action. The Insurers sought to intervene for the limited purpose of submitting special interrogatories to the jury regarding issues related to insurance coverage and the amount of damages award that is for defective work as opposed to resulting damage to building components outside their insureds' scope of work.

Oral arguments pertaining to the above Motions, as well as others in the underlying action, were heard on September 28, 2017. The court entered an Order denying the Insurers' Motions to Intervene on October 12, 2017 finding that (1) The Insurers lacked the necessary standing to intervene and did not meet the requirements for intervention under Rule 24, SCRPC; (2) The insurers could satisfactorily protect any purported interests they may have in a separate declaratory judgment action; (3) The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 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 claim; and (5) The special interrogatories and/or special verdict forms requested by the Insurers would likely be confusing to the jury and could unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issue into an already complex construction defect case. Subsequently, Hartford filed its Notice of Appeal on October 13, 2017.<sup>1</sup> The underlying action was set for trial to begin on October 16, 2017, however, on the eve of trial the case was continued. At a pre-trial motions hearing on October 16, 2017, this Court heard the parties' arguments regarding the impact of the appeal on the underlying action. On October 27, 2017, Plaintiff filed a Motion to Lift Automatic Stay imposed by the Notice of Appeal.

### ARGUMENT

- 1. Insurers have been aggrieved by the order denying their Motions to Intervene in the underlying proceeding.**

Beach Villas relies on Ex Parte Condon in arguing that Insurers are barred from filing Notices of Appeal because the Insurers are not parties to the action. However, this reliance is misplaced. Ocean Keyes does not dispute that pursuant to SCACR 201(b), “[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal.” Ex Parte Condon, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003). However, in Ex Parte Condon, the party attempting to appeal had never moved to intervene in the underlying case. The Court in Ex Parte Condon found this to be a distinguishing factor in its determination of whether to allow the party to appeal stating, “[t]he Attorney General is required, like everyone else to formally intervene and become a named party by he can file an appeal.” See id. Likewise, the Plaintiff’s citation to the Court of Appeals order in Teseniar v. Professional Plastering & Stucco, Inc. (S.C. Court of

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<sup>1</sup>Canopus and Selective and filed their Notices of Appeal on October 27 and 30, 2017, respectively.

Appeals Order filed April 9, 2014) is inapposite because the appellant in that case had not moved to intervene in the underlying action as noted by the Court. *See* Order attached as Exhibit 1.

In the present case, Insurers have moved to intervene in the underlying case. The very issue on appeal is the denial of the Insurers' Motions to Intervene. If Plaintiff's argument is accepted, the denial of a motion to intervene would never be appealable. *See Rutledge v. Tunno*, 63 S.C. 205, 41 S.E. 308, 309 (1902) Thus, a determination of the issue pending on appeal prior to commencement of the underlying case is imperative to judicial economy and protection of the rights of all interested parties.

**2. The Insurers' appeal of the order denying their Motions to Intervene was appropriate.**

Under South Carolina law, a party seeking intervention under Rule 24(a)(2), SCRPC, must: (1) establish timely intervention; (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. *In re Horry County State Bank*, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App: 2004).

It has long been the rule in South Carolina that orders denying a motion to intervene are immediately appealable. *Rutledge v. Tunno*, 63 S.C. 205, 41 S.E. 308, 309 (1902); *see also Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707 (2005) (Generally, appeals may be taken from final judgments only, however certain types of interlocutory orders are subject to immediate appeal.) The grounds for an interlocutory appeal are set forth in Section 14-3-330 of the South Carolina Code. *Id.* An order affecting a substantial right is immediately appealable when such order (a) in effect determines the action and prevents a judgment from which an

appeal might be taken; or (c) strikes out an answer or any part thereof or any pleading in any action. S.C. Code Ann. § 14-3-330(2).

Appellate courts in South Carolina have decided cases appealed from denials of motions to intervene on a number of occasions. See Ex Parte Horry County State Bank, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004); Ex Parte Gov't Employees Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). Additionally, the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right. Hagood, 362 S.C. at 196, 607 S.E.2d at 709. Orders denying a right to a particular mode of trial must be immediately appealed or any later objection in a subsequent appeal will be waived. Hagood, 362 S.C. at 198, 607 S.E.2d at 710; see also Lester v. Dawson, 327 S.C. 236, 266, 491 S.E.2d 240, 241 (1997). An order that effectively deprives a litigant of a trial is also included within this rule. Salmonsens v. CGD, Inc., et al., 377 S.C. 442, 452-53, 661 S.E.2d 81, 87. (2008).

Under prior South Carolina law, insurance coverage issues were separated from tort issues; when an insurer reserved its rights as to coverage issues, it retained defense counsel whose loyalty was solely to the insured, and the liability insurer then retained separate coverage counsel to represent the insurer's interest in protecting its coverage position. Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP, 336 F. Supp. 2d 610, 615-16 (D.S.C. 2004). The Harleysville opinion radically changed the landscape of South Carolina law by holding that an insurer has not only a right, but a duty to intervene in the underlying proceedings. Harleysville 803 S.E.2d at 294 (finding that a liability carrier may not relitigate damages in a separate coverage action.)

As a result, the Insurers were forced to seek intervention in this action based upon the Supreme Court's directive. The Insurers' right to intervene includes a right to attend and

participate in the trial because the evidence presented at trial may affect the special interrogatories and/or special verdict forms needed for findings of fact as to the Insurers' coverage. The Court's reasoning in Harleysville makes sense only if the liability insurer participates in the underlying action.

Further, the relief requested by the Insurers in their Motions to Intervene affects a mode of trial – jury findings that can now only be obtained in the proceeding establishing liability. *See Harleysville*. Because the trial court's denial of the Motions to Intervene affects a substantial right such as mode of trial, the immediate appeal was appropriate. Denial of the Insurers' Motions to Intervene may severely prejudice their rights due to the Harleysville court's holding that failure to intervene waives an insurer's coverage defenses. *Id.* The trial court's denial of the Insurers' motions to intervene effectively denies Insurers a trial with respect to issues the Supreme Court now holds may not be considered in separate coverage actions. *See Harleysville*.

The Insurers are in a position such that, without intervention, disposition of the underlying action will impair or impede their ability to protect their interest, as none of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the Plaintiff and Ocean Keyes, as well as other Defendants, are aligned against the interest of the Insurers, therefore "there is an obvious lack of adequate representation. *In re Horry County State Bank*, 261 S.C. at 509, 604 S.E.2d at 726. Accordingly, the Insurers satisfied all of the elements for intervention of right under Rule 42(a)(2), SCRCF. The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to a court's discretion, thus the Insurers' appeal was appropriate.

3. **A stay in the underlying proceedings is necessary to effectuate the purpose of Rule 24, and to preserve legally protectable interests of all parties.**

Whether to stay a case is a decision made in the exercise of discretion by the court as part of its inherent power to control its own docket. Landis v. North American Co., 299 U.S. 248, 254 (1936). Economy of time and effort for the court, counsel, and litigants is taken into consideration in this decision, "which must weigh competing interests and maintain an even balance." *Id.* at 254-55; *see also* United States v. Ga. Pac. Corp., 562 F.2d 294, 296 (4th Cir. 1977) ("The determination by a judge in granting or denying a motion to stay proceedings calls for an exercise of judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket."). A party seeking a stay must demonstrate a pressing need for one, *id.* at 255, and that the need for a stay outweighs any possible harm to the non-movant. Mike's Train House v. Broadway Ltd., 2011 U.S. Dist. LEXIS 22224 at \*1 (D. Md. Mar. 3, 2011). Courts consider three factors in weighing a motion to stay: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." Davis v. Biomet Orthopedics, LLC, 2013 U.S. Dist. LEXIS 24529 (D. Md. Feb. 22, 2013). Sound administrative procedure favors the disposition of all claims or defenses in a single action. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 72 (Ct. App. 1988). As discussed above, the underlying action represents the only forum in which an allocation of covered versus non-covered damages can be made. Thus, a stay of the underlying proceedings is necessary to avert the prospect of a decision on the merits before the question of intervention is resolved, which would be contrary to the very purpose of Rule 24.

The Insurers' Motions to Intervene were for the limited purpose of presenting the jury with special interrogatories, instructions or a special verdict form for finding as to allocation

between covered and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991).

Ocean Keyes is in a position such that, without a final a determination on the intervention appeal, there is a strong likelihood that the case may need to be tried twice, which is an incredible waste of judicial resources. Although the proposed limited intervention has no impact on the ability of the original parties to present their claims and/or defenses at trial, the final determination on whether the Insurers are able to participate will undoubtedly impact the original parties' posture and the framing of their arguments. For example, if it is determined that the coverage issues will be addressed, counsel for Ocean Keyes will have to reframe their arguments and evidence to address those charges to the benefit their client.

As stated above, Ocean Keyes respectfully requests that the Court stay the trial of the underlying proceedings pending resolution of the Insurers' appeal. Staying the case would be more efficient and less costly than proceeding while Insurers', the proposed intervenors, appeal remains pending. "It would indeed be a questionable rule that would require prospective intervenors to wait on the sidelines until after a court has already decided enough issues contrary to their interests. The very purpose of intervention is to allow interested parties to air their view so that a court may consider them before making potentially adverse decisions." Brumfield v. Dodd, 749 F.3d 339, 345–46 (5th Cir. 2014).

If the court were to move forward with the trial of the underlying proceedings and the Insurers' appeal concurrently, any judgment in the trial could be negatively affected if the denial of intervention is reversed. *See* Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 136 (1967) (concluding that "the entire merits of the case must be reopened to give [proposed intervenors] an opportunity to be heard as of right as intervenors"); Edwards v. City of Houston,

78 F.3d 983, 1006 (5th Cir. 1996) (en banc) (reversing denial of intervention as of right and vacating judgment entered at fairness hearing in which intervenors could not fully participate); *see also* In re PaineWebber Inc. Ltd. P'ships Litig., 94 F.3d 49, 52 (2d Cir. 1996) ("If the intervenor prevailed on appeal, the entire matter might have to be relitigated.").

### CONCLUSION

Based upon the foregoing, in the interests of justice, fairness, and judicial economy, Ocean Keyes respectfully requests this Court to deny Beach Villas' Motion to Lift Automatic Stay in the trial of the underlying proceedings and to affirm a Stay pending the resolution of the Insurers' appeal. Orders denying motions to intervene are immediately appealable. The trial court's ruling of Insurers' Motions to Intervene effectively denied a mode of trial to which the Insurers claim as entitlement as of right. Thus, the ruling was immediately appealable. Comity and efficiency support resolution of the appeal of the proposed intervenors prior to the trial of the underlying proceedings. Absent an order of this Court staying further proceedings, many parties would be required to concurrently litigate this matter in both courts. Such a concurrent litigation process is unnecessarily duplicative and costly. Similarly, the final determination on the participation of the Insurers in the underlying proceedings is necessary for the original parties' trial framework. Accordingly, the Court should affirm the stay of the trial in the underlying proceeding pending the resolution of the Insurers' appeal regarding their intervention and deny Beach Villas' Motion to Lift Stay.

Respectfully submitted,

RESNICK & LOUIS, P.C.

s/N. Keith Emge, Jr.  
N. Keith Emge, Jr. ("Chip"), Esq.  
SC Bar No.: 65955  
Patrick J. McDonald, Esq.  
SC Bar No.: 16921  
234 Seven Farms Drive  
Suite 128  
Charleston, SC 29492  
(843) 494-5527

*Attorneys for Defendant Ocean  
Keyes Development, LLC*

November 8, 2017  
Charleston, South Carolina



# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
www.sccourts.org

April 07, 2014

The Honorable Julie J. Armstrong  
100 Broad St Ste 106  
Charleston SC 29401-2210

## REMITTITUR

Re: Teseniar, Mark v. National Fire  
Lower Court Case No. 2008CP1000049  
Appellate Case No. 2011-193671

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

Enclosure

cc: Jesse A. Kirchner, Esquire  
Justin O'Toole Lucey, Esquire  
Phillip Ward Segui, Jr., Esquire

FILED  
2014 APR -9 PM 3:54  
JULIE J. ARMSTRONG  
CLERK OF COURT

ELECTRONICALLY FILED - 2017 Nov 08 3:27 PM - HORRY - COMMON PLEAS - CASE#2014CP2606573

W. Jefferson Leath, Jr., Esquire  
John T. Chakeris, Esquire  
Michael A. Timbes, Esquire  
John Lucius McCants, Esquire  
Kirby Darr Shealy, III, Esquire

# The South Carolina Court of Appeals

Mark F. Teseniar & Nan M. Teseniar,  
on behalf of themselves and others  
similarly situated, and Twelve Oaks At  
Fenwick Property Owners Association,  
Inc.,

Respondents,

v.

Professional Plastering & Stucco, Inc.,  
Maria Arias, and Miquel Rosales,

Defendants,

National Fire & Marine Insurance  
Company,

Appellant.

FILED  
2014 APR -9 PM 3:54  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

The Honorable Kristi Lea Harrington  
Charleston County  
Trial Court Case No. 2008-CP-10-00049

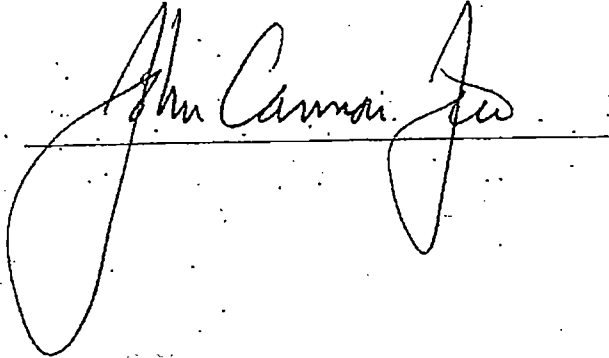
ORDER

National Fire & Marine Insurance Company (National Fire), who was not a party to the underlying action, has filed a notice of appeal from the trial court's oral ruling denying National Fire's request for a Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories pursuant to Rule 49, of the South Carolina Rules of Civil Procedure. Respondents have filed a motion to dismiss, arguing National Fire cannot appeal from any matter arising from the underlying trial because National Fire was not a party in the action, and never moved to intervene. National Fire filed a return.

After careful consideration, this appeal is dismissed. See Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); Ex parte Condon, 354.

S.C. 634, 642, 583 S.E.2d 430, 434 (2003) ("[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal.").

IT IS SO ORDERED.

A large, stylized handwritten signature in black ink, appearing to read "John L. McCants". The signature is written over a horizontal line.

Columbia, South Carolina

cc: John L. McCants, Esquire  
Jesse Kirchner, Esquire  
Michael A. Timbes, Esquire  
John T. Chakeris, Esquire  
Justin O'Toole Lucey, Esquire  
Phillip Ward Segui, Esquire  
W. Jefferson Leath, Esquire

**FILED**  
cc 4/5/18

# 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

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ORDER

---

The motion to dismiss is denied at this time. Nothing in this order prevents the parties from arguing the issue of appealability in their briefs.

  
FOR THE COURT

Columbia, South Carolina

cc:

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

**FILED**

March 7, 2017

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

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

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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 ("SCRCF"). 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.

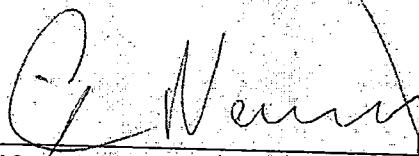
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel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



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Clifton Newman  
Presiding Judge

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

BEACH VILLAS AT OCEAN KEYES PROPERTY OWNERS  
ASSOCIATION, INC.,

Plaintiff,

vs.

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 CONSTRUCTION,  
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  
CLARKWESTERN DIETRICH BUILDING  
SYSTEMS, LLC,

Defendants.

OCEAN KEYES DEVELOPMENT, LLC AND KEYE CONSTRUCTION  
CO., INC.,

Third-Party Plaintiffs,

vs.

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.

) IN THE COURT  
) OF COMMON  
) PLEAS  
) FIFTEENTH  
) JUDICIAL  
) CIRCUIT  
)  
) CASE NO. 2014-  
) CP-26-6573

) AMENDED  
) ORDER  
) DENYING  
) MOTION OF  
) INSURERS  
) FOR LIMITED  
) INTERVENTIO  
) N

THIS MATTER comes before this Court upon Motions of Canopus US Insurance Inc. ("Canopus"); Hartford Fire Insurance, Hartford Casualty Insurance Company and Hartford Underwriters Insurance Company (collectively "Hartford"); and Selective Insurance Company of

South Carolina ("Selective") seeking to intervene in the trial of this matter for the limited purpose of submitting special interrogatories to the jury regarding issues related to insurance coverage.

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

At the outset of the hearing in this matter, counsel for Plaintiff agreed to allow each of the Insurers to fully intervene as named parties in the case and allow counsel for each of the Insurers to participate in the actual trial, including the questioning of witnesses and making of arguments to the jury. 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.

Additionally, counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action. The Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action.

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 Beach Villas 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 Beach Villas 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.

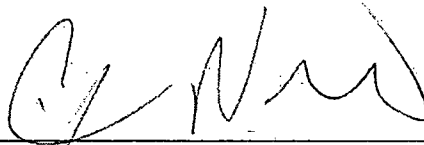
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel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



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Clifton Newman  
Presiding Judge

# The South Carolina Court of Appeals

Mark F. Teseniar & Nan M. Teseniar,  
on behalf of themselves and others  
similarly situated, and Twelve Oaks At  
Fenwick Property Owners Association,  
Inc.,

Respondents,

v.

Professional Plastering & Stucco, Inc.,  
Maria Arias, and Miquel Rosales,

Defendants,

National Fire & Marine Insurance  
Company,

Appellant.

FILED  
2014 APR -9 PM 3:54  
JULIE J. ARMSTRONG  
CLERK OF COURT

The Honorable Kristi Lea Harrington  
Charleston County  
Trial Court Case No. 2008-CP-10-00049

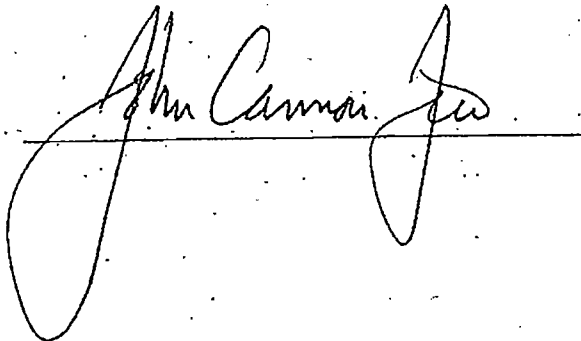
ORDER

National Fire & Marine Insurance Company (National Fire), who was not a party to the underlying action, has filed a notice of appeal from the trial court's oral ruling denying National Fire's request for a Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories pursuant to Rule 49, of the South Carolina Rules of Civil Procedure. Respondents have filed a motion to dismiss, arguing National Fire cannot appeal from any matter arising from the underlying trial because National Fire was not a party in the action, and never moved to intervene. National Fire filed a return.

After careful consideration, this appeal is dismissed. See Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); Ex parte Condon, 354.

S.C. 634, 642, 583 S.E.2d 430, 434 (2003) ("[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal.").

IT IS SO ORDERED.

A handwritten signature in cursive script, appearing to read "John L. McCants", is written over a horizontal line.

Columbia, South Carolina

cc: John L. McCants, Esquire  
Jesse Kirchner, Esquire  
Michael A. Timbes, Esquire  
John T. Chakeris, Esquire  
Justin O'Toole Lucey, Esquire  
Phillip Ward Segui, Esquire  
W. Jefferson Leath, Esquire

**FILED**  
CC 4/5/18

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

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

The Honorable Kristi Lea Harrington, Circuit Court Judge

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Case No. 2013-CP-08-00179

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Nationwide Mutual Fire Insurance Company, .....Appellant,

In Re:

Beresford Commons Homeowners Association, Inc., .....Respondent,

v.

Superior Solution, LLC, .....Respondent.

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**MOTION TO DISMISS APPEAL**

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

**BACKGROUND**

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

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

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

## LAW AND ANALYSIS

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

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

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

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

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

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

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

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

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

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

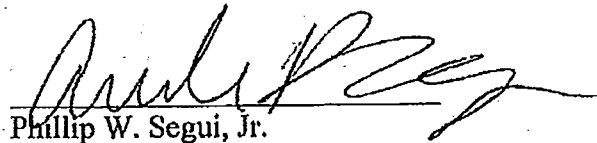
As applied to this case, the foregoing authorities are clear and unambiguous in their message: The Court of Appeals does not have jurisdiction to hear this interlocutory appeal.

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

### CONCLUSION

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

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



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Email: [psegui@seguilawfirm.com](mailto:psegui@seguilawfirm.com)  
[ablundy@seguilawfirm.com](mailto:ablundy@seguilawfirm.com)

February 6, 2017  
Mount Pleasant, South Carolina

- AND -

John T. Chakeris  
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Charleston, SC 29401  
(843) 853-5678  
Email: [john@chakerislawfirm.com](mailto:john@chakerislawfirm.com)

## 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:

J.R. Murphy, Esquire  
Adam J. Neil, Esquire  
Timothy J. Newton, Esquire  
P.O. Box 6648  
Columbia, SC 29260  
[jmurphy@murphygrantland.com](mailto:jmurphy@murphygrantland.com)  
[aneil@murphygrantland.com](mailto:aneil@murphygrantland.com)  
[tnewton@murphygrantland.com](mailto:tnewton@murphygrantland.com)

Albert A. Lacour, III, Esquire  
Clawson & Staubes, LLC  
126 Seven Farms Drive, Suite 200  
Charleston, SC 29492  
[alacour@clawsonandstaubes.com](mailto:alacour@clawsonandstaubes.com)

This 6th day of February, 2017.

BY:

  
SEGUI LAW FIRM, PC  
864 Lowcountry Blvd., Suite A  
Mount Pleasant, SC 29464  
(843) 884-1865

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Beresford Commons HOA, Inc.

Plaintiff

v.

Penuel Construction, LLC, et al.,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.  
2013-CP-00179

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney: , Bar No. Address: phone: fax: e-mail: other:	Defendant's Attorney: Tim Newton, Esquire Address: P.O. Box 6648, Columbia, SC 29260 phone: 803-782-4100 fax: e-mail: <a href="mailto:newton@murphygrantland.com">newton@murphygrantland.com</a> other:
---	--

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**


Nature of Motion: Motion to Intervene

Estimated Time Needed: 30 minutes Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

- Written motion attached  
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

  
Signature of Attorney for  Plaintiff /  Defendant

January 25, 2017  
Date submitted

**SECTION III: Motion Fee**

- PAID - AMOUNT:  
 EXEMPT:  Rule to Show Cause in Child or Spousal Support  
(check reason)  Domestic Abuse or Abuse and Neglect  
 Indigent Status  State Agency v. Indigent Party  
 Sexually Violent Predator Act  Post-Conviction Relief  
 Motion for Stay in Bankruptcy  
 Motion for Publication  Motion for Execution (Rule 69, SCRPC)  
 Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions  
Name of Court Reporter:  
 Other:

**JUDGE'S SECTION**

- Motion Fee to be paid upon filing of the attached order.  
 Other:

JUDGE

CODE: Date:

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_

Date Filed:

- MOTION FEE COLLECTED: \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \_\_\_\_\_

SCCA/233 (11-03)

RECEIVED

EXHIBIT A

FEB 08 2017

SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

BERESFORD COMMONS HOMEOWNERS  
ASSOCIATION, INC.,

Plaintiffs,

vs.

PORTRAIT HOMES-SOUTH CAROLINA,  
LLC, PORTRAIT HOMES-BERESFORD  
COMMONS, LLC, PASQUINELLI  
HOMEBUILDING, LLC, JJA  
CONSTRUCTION, INC., D/B/A JJA  
FRAMING, JOSE CASTILLO D/B/A JJA  
FRAMING, SAMUEL GLOVER,  
GLOVER'S BRICKWORKS, INC., Z & Z,  
INCORPORATED, UNITED SIDING  
SPECIALISTS, INC., SUPERIOR  
SOLUTION, LLC, ALL AMERICAN  
ROOFING, INC., JUAN LUIS SANCHEZ,  
ALFONSO VILLAVICENIO D/B/A  
ALFONSO'S PAINTING, HERITAGE  
CONSTRUCTION CONSULTANTS, INC.,  
ROBERT H. YARNEL D/B/A HERITAGE  
CONSTRUCTION CONSULTANTS, INC.  
VICTOR MANUEL FERNANDEZ JIMENEZ  
D/B/A MJF ROOFING SPECIALIST,  
ARTURO TORRES SOLACHE, TRINIDAD  
OLIVIA GARCIA, LUIS HERNANDEZ  
D/B/A CNN ROOFING, NORLAN  
CERRATO, AMERICAN RESIDENTIAL  
SERVICES OF SC, INC., AMERICAN  
RESIDENTIAL SERVICES, LLC, SMITH'S  
HEATING & AIR CONDITIONING CO.,  
INC., MAURILIO G. DEMENDONCA,  
GILDO RODRIGUES DE MELO D/B/A  
BRAZIL VINYL SIDING, VINICIUS  
ARAUJO A/K/A VINICIUS ARAUJO  
FREITAS, LUCAS RODRIGUEZ  
BARCELOS, GUILHERMERME DOS  
SANTOS, RENATO SECOMANDI D/B/A  
NEW CANAAN CARPENTRY, DONALD  
LEE D/B/A VINYL SIDING SPECIALISTS,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-08-0179

**NOTICE OF MOTION AND  
MOTION TO INTERVENE BY  
NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY  
FOR THE LIMITED PURPOSE OF  
SUBMITTING A SPECIAL VERDICT FORM  
OR SPECIAL INTERROGATORIES**

RONEDUES VENTURA D/B/A  
PROVIDENCIA SIDING, NICHOLAS  
OWENS, WELINTON REZENDE, LEVI  
ARRUDA, ARGENTINO JOSE CAMPOS,  
WELLEN RESENDE BUENO, CHARLES  
BOWSWER D/B/A CBW SERVICE,  
MARCIO NUNES DA SILVA, JOSE  
GERALDO DOS REIS, MILTON DIAS  
D/B/A MILTON DIAS SIDING, AND  
LEANDRO DE PAULO ARAUJO, TOM'S  
VINYL SIDING, UNIVERSAL FOREST  
PRODUCTS, INC., UNIVERSAL FOREST  
PRODUCTS EASTERN DIVISION, INC.  
N/K/A UFP EASTERN DIVISION, INC.,  
UNIVERSAL FOREST PRODUCTS  
SHOFFNER, LLC, GUY C. LEE BUILDING  
MATERIALS, LLC BENJAMIN MORA  
D/B/A MORA CONSTRUCTION  
BENJAMIN MORA CONSTRUCTION,  
LLC, BUILDERS' FIRSTSOURCE-  
SOUTHEAST GROUP, LLC, JAMES W.  
WENTLING, AIA, R.B.A., INC. D/B/A  
LIFESTYLE U.S.A. DESIGN, LIFESTYLE  
DESIGN USA, LTD., CTS OF  
SUMMERVILLE, INC. F/K/A CAROLINA  
TRUSS SYTEMS, INC., GRADE A LAND  
SERVICES, LLC, SALUDA HILL, INC.  
MARCINIAK CONSTRUCTION CO., INC.  
CAROLINA LANDSCAPE GROUP, INC.,  
PLANTATION SCAPES, INC. AND M AND  
J SIDING AND CONSTRUCTION, LLC,

Defendants.

**TO: ALL COUNSEL OF RECORD:**

PLEASE TAKE NOTICE THAT pursuant to Rule 24(a)(1), SCRCP, or, in the alternative, pursuant to Rule 24(b)(2), SCRCP, Applicant, Nationwide Mutual Fire Insurance Company, hereby moves to intervene in this action for the limited purpose of submitting a special verdict form or special interrogatories to the jury.

Nationwide Mutual Fire Insurance Company ("Nationwide") is entitled to intervention as a commercial general liability ("CGL") carrier for Defendant SUPERIOR SOLUTION, LLC ("Superior Solution"), as its rights may be affected by a disposition of this case on the merits. This motion is made on the following grounds:

1. Superior Solution is a named insured under two CGL policies (hereinafter collectively "the Policies") issued by Nationwide. Policy number 61 AC 762-152-3001 was in effect from November 18, 2005 to November 18, 2006. A renewal policy was issued with the same policy number, and that coverage was in effect until May 17, 2007, when the named insured on the policy was changed to reflect another entity that is not named as a defendant in this action. Copies of the Policies are attached as Exhibits A and B, respectively.

2. The Policies only cover "sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' . . . to which this insurance applies." (Exh. A and B, Form ACP-0007 (6-05), ¶ A.1.a.)

3. The Policies only apply to "property damage" if it is caused by an "occurrence." (Id. at ¶ A.1.b.(1)(a).)

4. The policies define "property damage" as physical injury to tangible property, including all resulting loss of use of that property. (Id. at ¶ F.16.a.) "Occurrence" is defined as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions." (Id. at ¶ F.12.)

5. Under the contractual terms of the Policies, as interpreted by South Carolina law, defective construction is not covered. Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011). However, resulting damage to otherwise non-defective components may constitute covered "property damage" caused by an "occurrence," satisfying the requirements of the insuring agreement. Id.

6. Additionally, the contractual terms of the Policies exclude coverage for “‘property damage’ to ‘your work’ arising out of it or any part of it. . . .” (Exh. A and B, Form ACP-0007 (6-05), ¶ B.1.m.) This exclusion applies to completed operations claims. The exception for subcontractor work does not apply because there is no evidence that Superior Solution used subcontractors to complete its work. Accordingly, any damage to Superior Solution’s work that is caused by Superior Solution’s negligence is excluded.

7. Upon information and belief, the plaintiff in this matter intends to present evidence of defective construction by Superior Solution at the trial of this action.

8. To the extent damages are awarded against Superior Solution for defective construction that has not caused damage to building components outside of Superior Solution’s scope of work, the damages awarded are not damages to which the Policies apply, and they are therefore not covered.

9. The contractual terms of the Policies and South Carolina law require an allocation between damages awarded because of defective workmanship and damages awarded because of resulting damage to building components outside of Superior Solution’s scope of work.

10. Nationwide contends that this allocation does not involve relitigating the issue of damages; it is rather a determination of the amount of covered damages under the contractual terms of the Policies and South Carolina law based upon a review of the evidence submitted at trial in this action. Nevertheless, the Supreme Court of South Carolina has recently held in *dicta* that this contractual allocation of covered damages may not be made in a separate coverage action. Harleysville Group Ins. v. Heritage Cmities, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 36 n.11).

11. The Supreme Court’s holding in Harleysville represents a fundamental change in South Carolina law.

12. Generally, insurers lack standing to intervene in underlying actions to determine liability. Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03 (2007); Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (1994) (citing Blue Cross and Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35 (1980)). These holdings were based upon the understanding that factual determinations for coverage purposes could be litigated in separate coverage actions. See Ex Parte GEICO, 373 S.C. at 137, 644 S.E.2d at 702. Harleysville appears to contradict this prior understanding.

13. The Harleysville court cited two cases in support of its holding. Neither of these cases presented an absolute bar to litigating factual issues intertwined with underlying tort actions in a separate coverage action.

14. The first case, Owens Insurance Co. v. Clayton, 364 S.C. 555, 561-62, 614 S.E.2d 611, 614-15 (2005), is inapplicable because it addressed a general verdict based upon more than one cause of action. Because one of the causes of action (defamation) was covered, the court held that the damages awarded were covered. Id. Owens does not stand for the proposition that simply because some damages are covered, the entire judgment is covered, despite policy language to the contrary.

15. The second case cited in Harleysville involved an arbitration proceeding in which the insurer was apparently a participant. See Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009). The court indicated that "Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract." Newman, 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5. In construction defect litigation, liability carriers typically do not "represent" their insureds in proceedings held pursuant to arbitration agreements in insurance policies. Therefore, the Newman holding appeared to be limited to the special facts and circumstances of that case until Harleysville.

16. Therefore, Harleysville represents a significant change in South Carolina law. Because the opinion appears to hold that insurers are barred from litigating factual issues that are intertwined with the underlying tort litigation in separate coverage actions, liability insurers now have no choice but to move to intervene in the underlying tort litigation. A holding that insurers lack standing to intervene would deny insurers a forum in which to litigate such coverage issues, thus violating due process.

17. Accordingly, Nationwide hereby moves to intervene in this action for the limited purpose of participating in the drafting of a special verdict form or submitting special interrogatories to the jury regarding the amount of any damages award that is for defective work as opposed to resulting damage to building components outside Superior Solution's scope of work.

18. Under South Carolina law, a party seeking intervention under Rule 24(a)(2), SCRPC, must: (1) establish timely intervention; (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. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004).

19. Nationwide's motion to intervene is timely. As discussed above, grounds did not exist for seeking intervention until the Harleysville opinion was released on January 11, 2017.

20. Nationwide has an interest relating to the property or transaction which is the subject of this action. As discussed above, this action represents the only forum in which Nationwide can obtain an allocation as to the amount of covered damages under the Policies.

21. Nationwide is in a position such that, without intervention, disposition of this action will impair or impede its ability to protect that interest. The Supreme Court has held that if intervention is not sought, an insurer waives its right to seek an allocation as to the amount of

covered damages. Harlevsille, 2017 WL 105021 at \*7 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547.

22. Nationwide is not adequately represented by other parties to this action. None of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the plaintiff and Superior Solution are aligned against the interest of Nationwide. Indeed, federal courts often realign parties to coverage litigation to reflect the fact that the interests of the liability carrier are adverse to the interests of both the plaintiffs and the defendants in the underlying tort litigation. See Bi-Lo, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, C.A. No. 0:14-cv-00335-CMC, 2014 WL 12605522 at \*7-8 (D.S.C. Apr. 30, 2014). When the interests of the party seeking intervention are adverse to the interests of the party litigants, "there is an obvious lack of adequate representation." In re Horry Bounty State Bank, 361 S.C. at 509, 604 S.E.2d at 726.

23. Accordingly, Nationwide has satisfied all of the elements for intervention of right under Rule 24(a)(2). The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to this Court's discretion.

24. In the alternative, Nationwide also moves to intervene under Rule 24(b). Permissive intervention is allowed at the court's discretion based upon the existence of a common question of fact or law between the underlying litigation and the intervenor's claims or defenses. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988). Sound administrative procedure favors the disposition of all claims or defenses in a single action. Id. As discussed above, this action represents the only forum in which an allocation of covered versus non-covered damages can be made.

25. Nationwide's motion to intervene is made for the limited purpose of presenting the jury with a special verdict or special interrogatories for a finding as to allocation between covered

and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (holding that intervention is appropriate for third-party challenges to protective orders).

26. Upon information and belief, the granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original parties to the instant action, in that intervention is for the limited purpose of determining the form of the verdict to be submitted to the jury, and intervention will not impact the ability of the original parties to present their claims and/or defenses at trial.

Nationwide respectfully moves to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of participating in the drafting of a special verdict or submitting special interrogatories to the jury in order to obtain findings of fact necessary for an allocation between covered and non-covered damages under the Policies. The grounds for this Motion are set forth above. Nationwide's proposed special interrogatories are attached.

**MURPHY & GRANTLAND, P.A.**



---

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*Attorneys for Nationwide Mutual Fire Insurance  
Company*

Columbia, South Carolina  
January 25, 2017

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

BERESFORD COMMONS HOMEOWNERS  
ASSOCIATION, INC.,

Plaintiffs,

vs.

PORTRAIT HOMES-SOUTH CAROLINA,  
LLC, PORTRAIT HOMES-BERESFORD  
COMMONS, LLC, PASQUINELLI  
HOMEBUILDING, LLC, JJA  
CONSTRUCTION, INC., D/B/A JJA  
FRAMING, JOSE CASTILLO D/B/A JJA  
FRAMING, SAMUEL GLOVER,  
GLOVER'S BRICKWORKS, INC., Z & Z,  
INCORPORATED, UNITED SIDING  
SPECIALISTS, INC., SUPERIOR  
SOLUTION, LLC, ALL AMERICAN  
ROOFING, INC., JUAN LUIS SANCHEZ,  
ALFONSO VILLAVICENIO D/B/A  
ALFONSO'S PAINTING, HERITAGE  
CONSTRUCTION CONSULTANTS, INC.,  
ROBERT H. YARNEL D/B/A HERITAGE  
CONSTRUCTION CONSULTANTS, INC.  
VICTOR MANUEL FERNANDEZ JIMENEZ  
D/B/A MJF ROOFING SPECIALIST,  
ARTURO TORRES SOLACHE, TRINIDAD  
OLIVIA GARCIA, LUIS HERNANDEZ  
D/B/A CNN ROOFING, NORLAN  
CERRATO, AMERICAN RESIDENTIAL  
SERVICES OF SC, INC., AMERICAN  
RESIDENTIAL SERVICES, LLC, SMITH'S  
HEATING & AIR CONDITIONING CO.,  
INC., MAURILIO G. DEMENDONCA,  
GILDO RODRIGUES DE MELO D/B/A  
BRAZIL VINYL SIDING, VINICIUS  
ARAUJO A/K/A VINICIUS ARAUJO  
FREITAS, LUCAS RODRIGUEZ  
BARCELOS, GUILHERMERME DOS  
SANTOS, RENATO SECOMANDI D/B/A  
NEW CANAAN CARPENTRY, DONALD

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-08-0179

**PROPOSED  
SPECIAL INTERROGATORIES  
SUBMITTED BY  
NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY**

LEE D/B/A VINYL SIDING SPECIALISTS,  
RONEDUES VENTURA D/B/A  
PROVIDENCIA SIDING, NICHOLAS  
OWENS, WELINTON REZENDE, LEVI  
ARRUDA, ARGENTINO JOSE CAMPOS,  
WELLEN RESENDE BUENO, CHARLES  
BOWSWER D/B/A CBW SERVICE,  
MARCIO NUNES DA SILVA, JOSE  
GERALDO DOS REIS, MILTON DIAS  
D/B/A MILTON DIAS SIDING, AND  
LEANDRO DE PAULO ARAUJO, TOM'S  
VINYL SIDING, UNIVERSAL FOREST  
PRODUCTS, INC., UNIVERSAL FOREST  
PRODUCTS EASTERN DIVISION, INC.  
N/K/A UFP EASTERN DIVISION, INC.,  
UNIVERSAL FOREST PRODUCTS  
SHOFFNER, LLC, GUY C. LEE BUILDING  
MATERIALS, LLC BENJAMIN MORA  
D/B/A MORA CONSTRUCTION  
BENJAMIN MORA CONSTRUCTION,  
LLC, BUILDERS' FIRSTSOURCE-  
SOUTHEAST GROUP, LLC, JAMES W.  
WENTLING, AIA, R.B.A., INC. D/B/A  
LIFESTYLE U.S.A. DESIGN; LIFESTYLE  
DESIGN USA, LTD., CTS OF  
SUMMERSVILLE, INC. F/K/A CAROLINA  
TRUSS SYSTEMS, INC., GRADE A LAND  
SERVICES, LLC, SALUDA HILL, INC.  
MARCINIAK CONSTRUCTION CO., INC.  
CAROLINA LANDSCAPE GROUP, INC.,  
PLANTATION SCAPES, INC. AND M AND  
J SIDING AND CONSTRUCTION, LLC,

Defendants.

1. If the jury finds in favor of Plaintiff and against Superior Solution, LLC and awards damages, indicate the amount of the damages that are for removal and replacement of the defective work of Superior Solution, LLC: \$ \_\_\_\_\_.

2. If the jury finds in favor of Plaintiff and against Superior Solution, LLC and awards damages, indicate the amount of the damages proximately caused by Superior Solution, LLC's

negligence that are for damage to building components that are outside of Superior Solution's scope of work: \$\_\_\_\_\_.

The amount indicated in response to Special Interrogatory #1 plus the amount indicated in response to Special Interrogatory #2 should equal the total damages awarded against Superior Solution, LLC.

**MURPHY & GRANTLAND, P.A.**

---

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*Attorneys for Nationwide Mutual Fire Insurance  
Company*

Columbia, South Carolina  
January \_\_, 2017

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-08-00179

BERESFORD COMMONS HOMEOWNERS  
ASSOCIATION, INC.,

Plaintiffs,

vs.

PORTRAIT HOMES-SOUTH CAROLINA,  
LLC, PORTRAIT HOMES-BERESFORD  
COMMONS, LLC, PASQUINELLI  
HOMEBUILDING, LLC, JJA  
CONSTRUCTION, INC., D/B/A JJA  
FRAMING, JOSE CASTILLO D/B/A JJA  
FRAMING, SAMUEL GLOVER,  
GLOVER'S BRICKWORKS, INC., Z & Z,  
INCORPORATED, UNITED SIDING  
SPECIALISTS, INC., SUPERIOR  
SOLUTION, LLC, ALL AMERICAN  
ROOFING, INC., JUAN LUIS SANCHEZ,  
ALFONSO VILLAVICENIO D/B/A  
ALFONSO'S PAINTING, HERITAGE  
CONSTRUCTION CONSULTANTS, INC.,  
ROBERT H. YARNEL D/B/A HERITAGE  
CONSTRUCTION CONSULTANTS, INC.  
VICTOR MANUEL FERNANDEZ JIMENEZ  
D/B/A MJF ROOFING SPECIALIST,  
ARTURO TORRES SOLACHE, TRINIDAD  
OLIVIA GARCIA, LUIS HERNANDEZ  
D/B/A CNN ROOFING, NORLAN  
CERRATO, AMERICAN RESIDENTIAL  
SERVICES OF SC, INC., AMERICAN  
RESIDENTIAL SERVICES, LLC, SMITH'S  
HEATING & AIR CONDITIONING CO.,  
INC., MAURILIO G. DEMENDONCA,  
GILDO RODRIGUES DE MELO D/B/A  
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LEE D/B/A VINYL SIDING SPECIALISTS,

**CERTIFICATE OF SERVICE**

RONEDUES VENTURA D/B/A  
PROVIDENCIA SIDING, NICHOLAS  
OWENS, WELINTON REZENDE, LEVI  
ARRUDA, ARGENTINO JOSE CAMPOS,  
WELLEN RESENDE BUENO, CHARLES  
BOWSWER D/B/A CBW SERVICES,  
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GERALDO DOS REIS, MILTON DIAS  
D/B/A MILTON DIAS SIDING, AND  
LEANDRO DE PAULO ARAUJO, TOM'S  
VINYL SIDING, UNIVERSAL FOREST  
PRODUCTS, INC., UNIVERSAL FOREST  
PRODUCTS EASTERN DIVISION, INC.  
N/K/A UFP EASTERN DIVISION, INC.,  
UNIVERSAL FOREST PRODUCTS  
SHOFFNER, LLC, GUY C. LEE BUILDING  
MATERIALS, LLC, BENJAMIN MORA  
D/B/A MORA CONSTRUCTION  
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LLC, BUILDERS' FIRSTSOURCE-  
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TRUSS SYTEMS, INC., GRADE A LAND  
SERVICES, LLC, SALUDA HILL, INC.  
MARCINIAK CONSTRUCTION CO., INC.  
CAROLINA LANDSCAPE GROUP, INC.,  
PLANTATION SCAPES, INC. AND M AND  
J SIDING AND CONSTRUCTION, LLC,

Defendants.

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for Nationwide Mutual Fire Insurance Company, do hereby certify that on January 25, 2017, I have served a copy of the foregoing Notice of Motion and Motion to Intervene by Nationwide Mutual Fire Insurance Company for the Limited Purpose of Submitting a Special Verdict Form or Special Interrogatory in connection with the above-referenced case by electronic mail and U.S. mail where indicated to:

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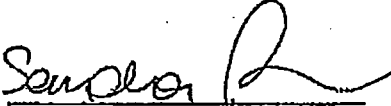
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[psegui@segulawfirm.com](mailto:psegui@segulawfirm.com)

February 7, 2017

Via Federal Express and electronic mail  
The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201  
[jkitchings@sccourts.org](mailto:jkitchings@sccourts.org)

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FEB 08 2017

SC Court of Appeals

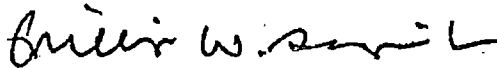
RE: Beresford Commons Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC, et al  
Case No.: 2013-CP-08-179

Dear Ms. Kitchings:

Please find enclosed eight (8) copies of Respondent's Exhibit A, which was inadvertently left off our Motion to Dismiss Appeal which was transmitted to the Court for filing late yesterday. If you would, please attach the copies of this Exhibit to our original Motion and each of the seven (7) copies, and please accept our apologies for neglecting to include it.

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

Sincerely,



Phillip W. Segui, Jr.

PWS/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

ORIGIN ID: CHSA (843) 884-1865  
PHILLIP W. SEGUI, JR.

864 LOWCOUNTRY BLVD.  
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MT. PLEASANT, SC 29464  
UNITED STATES US

SHIP DATE: 07FEB17  
ACTWGT: 1.15 LB  
CAD: 1671832/NET3850

BILL SENDER

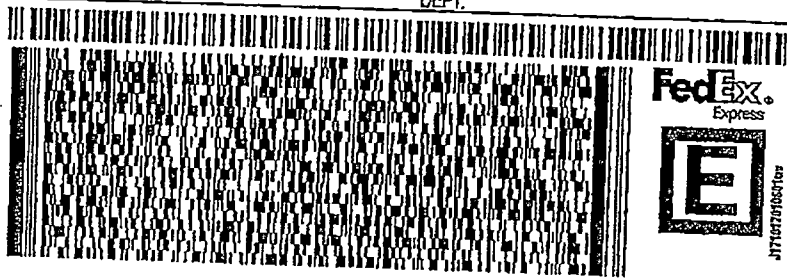
TO THE HON. JENNY ABBOTT KITCHINGS  
CLERK OF COURT  
SOUTH CAROLINA COURT OF APPEALS  
1220 SENATE STREET  
COLUMBIA SC 29201

(803) 734-1890  
NW.  
PC:

REF: BERESFORD

DEPT:

546J1398B633C1

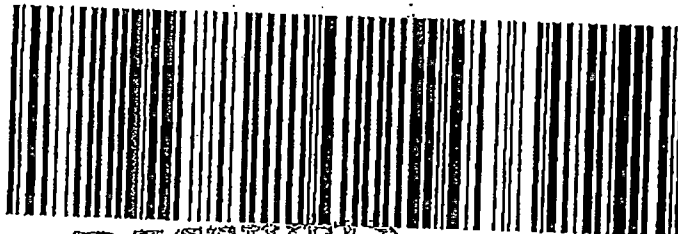


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FEB 08 2017

SC Court of Appeals

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

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

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. ....Appellant.

**MOTION TO DISMISS APPEAL**

**COME NOW** the above-named Respondents, by and through their undersigned counsel, and herewith move this Court for an Order dismissing the appeal filed by Appellant, National Fire & Marine Insurance Company, Inc.<sup>1</sup>

**BACKGROUND**

This appeal arises from a construction defect case commenced by Respondents against various defendants, including Professional Plastering & Stucco, Inc. ("PPS"). Appellant, National Fire & Marine Insurance Company, Inc., is an insurer of PPS. Before trial, Respondents settled the claims against all defendants except PPS. The trial against PPS ensued

<sup>1</sup> Case Tracking No.: 2011193671

from May 9 through May 13, 2011. The jury returned a verdict in favor of Respondents, finding PPS responsible for their significant damages.<sup>2</sup> Appellant thereafter commenced this appeal.

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 and/or general verdict form with special interrogatories. (*See Exhibit A, attached*). However, Appellant is not a party to the litigation. Respondents 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.<sup>3</sup> More importantly, Appellant never moved to intervene in the case pursuant to *Rule 24, SCRCF*. Respondents offered that they would consent if Appellant wanted to join in the action as party, but Appellant refused. Although Appellant never intervened, it did send counsel to observe the trial from the public gallery. However, the attorney never made an appearance in the action. Before the case was submitted to the jury, Appellant's counsel renewed its request to be heard regarding Appellant's own desires for the format of the verdict form. The circuit court orally refused to hear the request, as noted in Appellant's Notice of Appeal. This appeal follows.

### LAW AND ANALYSIS

*Rule 24, SCRCF*, provides for both intervention as a matter of right and permissive intervention, and expressly requires that "a person desiring to intervene shall serve a motion to intervene upon the parties." Appellants never moved to intervene, despite Respondents' offer to

---

<sup>2</sup> PPS has filed its own independent appeal from the verdict. (*See* Case Tracking No. 201196386). This Motion to Dismiss relates only to the above appeal filed by Appellant.

<sup>3</sup> Attention is drawn to the Motion Information Form and Cover Sheet filed accompanying Appellant's Motion when it was filed. The section for "Defendant's Attorney" is completely blank. Similarly, the moving attorney, John L. McCants, Esquire, did not identify himself as counsel for either the Plaintiffs or a Defendant in the space provided beneath his signature. The reason for this is self-explanatory: he did not represent any "party" in the action. (*See Exhibit A, attached*).

consent to such a motion if Appellant so desired. One who chooses *not* to participate cannot complain on appeal of the result at trial. *Rule 201(b), SCACR*, is similarly instructive, providing that only "a *party* aggrieved by an order, judgment, or sentence may appeal." (Emphasis added). Two decisions handed down by the South Carolina Supreme Court are directly on point and mandate the dismissal of this appeal.

For example, the present facts are *identical* to those presented in *Ex parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003). In *Condon*, the South Carolina Supreme Court dismissed an appeal filed by then Attorney General Charlie Condon. The Attorney General was never named as a party in the action, and he never moved at any point to intervene. After the trial, the Attorney General nevertheless sought to appeal. In dismissing his appeal, the Supreme Court aptly stated,

...[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal. Accordingly, we dismiss this appeal based on the Attorney General's failure to move for intervention as required by *Rule 24, SCRCF*. Such a ruling avoids the necessity of addressing the Attorney General's standing to become involved in this action, and makes clear that the Attorney General is required to follow the Rules of Civil Procedure when he wishes to become involved in a case.

*Id.* at 642, 583 S.E.2d at 434.

An identical result was reached by the Supreme Court after the South Carolina Department of Motor Vehicles ("SCDMV") tried to appeal from an order to which it was not a party. *Ex Parte: South Carolina Department of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010). Although the SCDMV filed various motions with the court relating to the on-going action, it never sought to actually intervene in the case. Relying on the "well-known rule of appellate procedure that only an aggrieved party may appeal" and citing to its prior ruling in

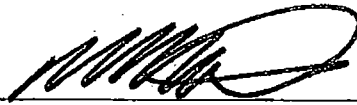
*Condon*, the Supreme Court once again stated, "Having failed to intervene as a party, SCDMV's appeal is dismissed." *Id.* at 458, 702 S.E.2d 568.

As applied to this case, the foregoing authorities are clear and unambiguous in their message: Because Appellant is not a party to the action and never sought to intervene in the case, it cannot, as a matter of law, appeal from any matter arising during the course of the trial. As such, Appellant's appeal must be dismissed.

### CONCLUSION

In light of the arguments and authorities set forth herein, Respondents hereby respectfully request an Order of this Honorable Court dismissing Appellant's appeal in its entirety.

**FOR RESPONDENTS:**



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**CERTIFICATE OF SERVICE**

The undersigned herewith certifies that she, on this date, January 31, 2012, did mail and serve via regular U.S. Mail one (1) copy of the foregoing "Motion to Dismiss Appeal", with proper postage affixed thereto, to all counsel of record, at the following addresses:

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This 31<sup>st</sup> day of January, 2012.

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

BY: \_\_\_\_\_



Moira W. Kerrigan

Legal Assistant to Michael A. Timbes

# **EXHIBIT “A”**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, et al.  
 Plaintiff

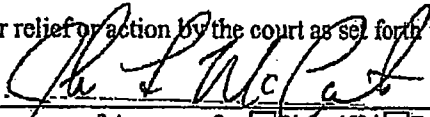
v.

Fenwick Plantation Tarragon, LLC, Et Al.  
 Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.  
08-CP-10-0049

MOTION INFORMATION FORM  
AND COVER SHEET

Plaintiff's Attorney: Phillip W. Segui, Jr., Esquire, Bar No. Address: Segui Law Firm, PC 864 Lowcountry Blvd., Suite A Mt. Pleasant, SC 29464 phone: (843) 884-1865 fax: e-mail: other:	Defendant's Attorney: , Bar No. Address:  phone: fax: e-mail: other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b> Nature of Motion: Request for a Special Verdict and/or General Verdict Form, etc. Estimated Time Needed: Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion Type</b> <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant	
Date submitted: <u>03/08/2011</u>	
<b>SECTION III: Motion Fee</b> <input checked="" type="checkbox"/> PAID - AMOUNT: 25.00 <input type="checkbox"/> EXEMPT:	
(check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	
<b>CLERK'S VERIFICATION</b> Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. - Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
Civil Action No.: 2008-CP-10-0049

BY \_\_\_\_\_

JULIE J. ARMSTRONG  
CLERK OF COURT

2011 MAR -9 AM 10: 17

FILED

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and  
D.M. Painting;

Third-Party Defendants.

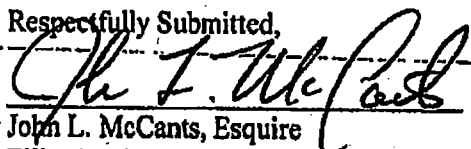
**REQUEST FOR A SPECIAL VERDICT FORM AND/OR GENERAL VERDICT FORM  
ACCOMPANIED BY WRITTEN INTERROGATORIES  
PURSUANT TO S.C.R.CIV.P. 49**

National Fire & Marine Insurance Company ("National Fire"), by and through the undersigned counsel, does hereby request that the Court provide a special verdict form to the jury and/or a general verdict form accompanied by written Interrogatories. National Fire issued an insurance policy with commercial general liability coverage to Professional Plastering & Stucco, Inc. ("Professional Plastering") for the period May 30, 2003 to May 30, 2004. National Fire is providing a defense to Professional Plastering by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC pursuant to the policy and a reservation of rights. National Fire is an interested party in the civil action as one or more parties may seek indemnity under the policy for any verdict. National Fire is informed and believes that the policy does not cover certain alleged damages. In that regard, National Fire cites to the South Carolina Supreme Court decisions in Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, S.C. Sup. Ct. Order dated January 7, 2011 pg. 32 (Shearouse Adv.Sh. No. 1)(Petition for Rehearing Pending), Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) and L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 621 S.E.2d 33 (2005).

To avoid potential prejudice with the verdict, National Fire requests that the Court submit a special verdict form and/or general verdict with special interrogatories without reference to National Fire or insurance coverage. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962) ("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

National Fire requests the Court submit appropriate forms to the jury pursuant to S.C.R.Civ.P. 49 for the jury to differentiate damages alleged to be caused by Professional Plastering. National Fire requests that the Court prepare these forms at such time during the course of the trial as is appropriate based upon the evidence presented at trial. National Fire reserves all rights as to the issues of defense and/or indemnity.

Respectfully Submitted,

  
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(803) 254-4190

**ATTORNEYS FOR NATIONAL FIRE &  
MARINE INSURANCE COMPANY**

Columbia, South Carolina  
March 8, 2011

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. - Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
Civil Action No.: 2008-CP-10-0049

CERTIFICATE OF SERVICE

2011 MAR -9 AM 10:17  
JULIE J ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

FILED

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and  
D.M. Painting;

Third-Party Defendants.

I, Susan Bennett, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of a Request for Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P. 49 upon the below-referenced counsel of record this the 8<sup>th</sup> day of March 2011 by depositing a copy of the same in the US Mail, postage prepaid and addressed as follows:

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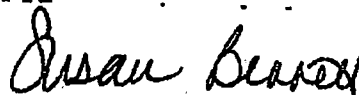
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---

Susan Bennett  
Paralegal to John L. McCants

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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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

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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 Keys Property Owners Association, Inc., Ocean Keys Development, LLC, Keye Construction Co., Inc., and Russell P. Baltzer are the Respondents.

---

**PROOF OF SERVICE**

---

I certify that I have served Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company's Return to Respondent's Motion to Dismiss Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on December 21, 2017 addressed to their attorneys of record, listed as follows:

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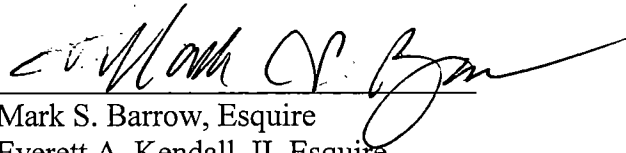
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DEC 21 2017

SC Court of Appeals

December 21, 2017

Reply to: Main Office

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**VIA HAND DELIVERY**

Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1015 Sumter Street  
Post Office Box 11629  
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RE: In Re: Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Clarendon National Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company

Harbour Cove v. Centex v. Hartford  
Civil Action No.: 2014-CP-26-7634

Beach Villas v. Ocean Keyes Development  
Civil Action No.: 2014-CP-26-6573

Appellate Case No. 2017-002146  
Our File: 4760-11126

Dear Ms. Kitchings:

Enclosed for filing is the original and seven (7) copies of Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company's Return to Respondents' Motion to Dismiss Appeal along with the Proof of Service. Please return a filed stamped copy of the Return to Respondents' Motion to Dismiss Appeal and Proof of Service with the courier.

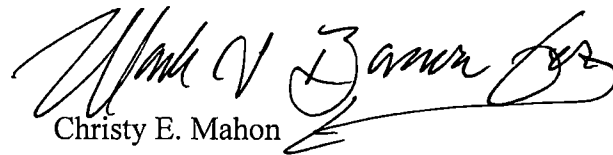
By copy hereof, all counsel of record are being served with the above.

**RECEIVED**  
DEC 21 2017  
SC Court of Appeals

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

Yours truly,

**SWEENEY, WINGATE & BARROW, P.A.**



Christy E. Mahon

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