THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Trial Court Case No. 2014CP2607634

Appellate Case No. 2017-02146

Ex Parte:

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

In Re:

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,

And

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

INITIAL BRIEF OF APPELLANT BITCO GENERAL INSURANCE CORPORATION

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STATEMENT OF ISSUES ON APPEAL

I. Does South Carolina law require a general liability insurer to intervene in an underlying action filed against its insured to preserve, by request for special interrogatories or verdict forms, sufficient facts to enable any resulting verdict to be allocated between damages that are covered and not covered under its policies?

II. Was the court below correct in denying the motions for limited intervention in this case?

STATEMENT OF THE CASE

This is an appeal from the order of the Hon. Clifton Newman, Circuit Judge for the Fifteenth Circuit, which denied the motion of Appellant BITCO General Insurance Corporation (hereafter "BITCO"), as well as the parallel motions of other insurers ("the Insurers"), requesting a right of limited intervention. The purpose of this motion was to request special jury interrogatories and/or special verdict forms sufficient to preserve information as to the nature of damages awarded in any verdict so that the terms, conditions, exclusions, and other provisions of applicable general liability insurance policies might be properly applied in a later proceeding, as contemplated in the case of *Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017).

The Harbour Cove Condominium Association ("the Association") filed this lawsuit on November 13, 2014, against numerous entities involved in the construction of their condominium complex alleging defective construction and resulting property damages. On August 2, 2017, BITCO, as insurer of defendant Martin Masonry, Inc., moved to intervene for the limited purpose "so as to pursue the ability to request that to the extent that any verdict or judgment is

rendered against Martin Masonry in this matter, the trial court reach a determination, whether by means of a special verdict form, special interrogatories to the jury, or by means of a detailed order, specifying the basis of any said verdict and/or judgment of law, with the result itemized, apportioned, and categorized so that the various causes of action and various elements of damages may thereafter be interpreted as covered, not covered, or excluded under the terms of the relevant insurance policies." (BITCO Motion to Intervene, p. 3)

Similar motions were filed by numerous other insurers of other contractors, and on September 28, 2017, those motions came for hearing before the lower court. (Tr. 9/28/17, pp.1–36.) The Circuit Court denied all of the insurers' motions for intervention by order filed October 13, 2017, which stated the following grounds:

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.

(Order, pp.3-4.)

On October 13, 2017, BITCO filed its notice of its appeal with the Circuit Court, filing also by mail to the Court of Appeals, which stamped the same as received on October 27, 2017. (Notice of Appeal.)

On October 25, 2017, the Court of Appeals consolidated this appeal with a similar denial of a motion to intervene in the case of *Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al.*, Civil Action No. 2014-CP-26-06573. BITCO was not a party to the *Beach Villas* case, and this brief only addresses the matters raised in *Harbour Cove* action.

FACTS

The Association alleges in its complaint that it had "the duty to repair and maintain the common elements of the Project known as Harbour Cove consisting of (90) units in (5) buildings and a pool house located in Horry County, South Carolina." (3d Amend. Complaint, p.2) The Association sued the general contractor, Centex Homes, and numerous subcontractors, for allegedly defective construction and resulting damages. (*Id.* at pp.2–11) These defendant subcontractors included an insured of BITCO, Martin Masonry, Inc., which allegedly installed "masonry, brick, and related flashings." (*Id.* at p.9) The Association alleged that Martin Masonry was negligent in "improperly installing the brick veneer and flashing" and in "failing to properly construct the brick veneer which resulted in excessive moisture and water intrusion causing damage to the sheathing, structural framing, and damage to other building components." (*Id.* at p. 20)

As a result of the alleged defective construction, the Association alleges that it "has suffered actual, incidental, consequential, and special damages and the expense of having to hire experts to investigate the causes of the water intrusion and construction defects and failures set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the condominiums and buildings at issue to make them safe and habitable, and that the Association has been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that intruded and continues to intrude into the subject condominiums and buildings causing and resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the condominiums and buildings." (*Id.* at p.21)

As set forth in the Statement of the Case, BITCO, as one of several insurers defending Martin Masonry, moved to intervene for the limited purpose of seeking special interrogatories to

provide information as to the nature of the verdict. The lower court denied that motion, and this appeal followed.

ARGUMENT

BITCO filed its motion for limited intervention in the court below, and is pursuing this appeal, because it appears that the decision in *Harleysville* requires this step in order for BITCO to preserve its rights to pay only such damages which may be awarded against Martin Masonry as are covered under its policies. As explained below, the lower court disagreed that this procedural step is required after *Harleysville*, but BITCO contends that the discussion in *Harleysville* has either explicitly or implicitly created a requirement that insurers must intervene in preliminary proceedings so as to preserve, in those proceedings, enough information about any award of damages against insureds so that the terms of any applicable insurance policies can be properly applied. BITCO has previously joined in the arguments presented by the other similarly-situated insurers who filed motions to intervene in this matter, and files this brief with the expectation that it also joins in the relevant and consistent arguments being presented simultaneously by other insurers in this appeal. Because other insurers represent other insureds, however, and are therefore subject to withdrawal from this appeal should their individual clients settle, BITCO writes separately to preserve the following arguments:

I. STATE LAW PRIOR TO THE *HARLEYSVILLE* DECISION

Under longstanding South Carolina law, matters of insurance coverage are generally kept entirely separate from tort issues. Liability insurers may not be joined as parties in tort actions with their insured defendants. *Major v. Nat'l Indem. Co.*, 267 S.C. 517, 520, 229 S.E.2d 849, 850

(1976); *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003). Plaintiffs in underlying tort actions have no rights of direct action against defendants' liability carriers. *Major*, 267 S.C. at 520, 229 S.E.2d at 850; *Swinton v. Chubb & Son, Inc.*, 283 S.C. 11, 14, 320 S.E.2d 495, 496 (Ct. App. 1984). Therefore as a general rule, issues as to the availability of insurance are kept out of evidence and away from consideration by the jury to avoid prejudicing the verdict. *Bartell v. Willis Constr. Co.*, 259 S.C. 20, 24, 190 S.E.2d 461,.463 (1972); Rule 411, SCRE.

In many cases where defendants have insurance for potential liability, there are no significant coverage issues, and there is no concern in the underlying case about preservation of information about the verdict necessary for proper application of any available policies. In construction defect matters, however, which often involve both claims for which coverage exists and claims for which coverage does not exist, there are ultimately two distinct issues for determination: (1) whether there is liability in the underlying action on the part of the insured defendant, and (2) whether the liability assessed in the underlying action is covered under any policies of insurance applicable to the claim.

Claims in a construction defect action generally depend upon a finding that a contractor in a particular project violated applicable building codes, deviated from industry standards, or constructed housing that the builder knew or should have known posed a serious risk of physical harm. *Kennedy v. Columbia Lumber & Mfg. Co. Inc.*, 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989). On the other hand, the question of whether a particular claim is covered under a policy of insurance turns on the separate matter of interpretation of the insurance contract between the contractor and the insurer. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514

S.E.2d 327, 330 (1999). Although both questions can involve issues of both law and fact, liability in the underlying tort action primarily presents a question of fact for the jury, while interpretation of insurance contracts primarily presents an issue of law for the court. *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013).

Coverage disputes are common in construction defect cases because the liability policies which are generally involved are not performance bonds, but policies which cover property damage caused by an accident, and not repair or replacement of work that is noncompliant with contract, or otherwise defective, but undamaged. *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1994), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996).

As South Carolina case law has evolved, property damage resulting from water intrusion caused by construction defects has been deemed to be an accident which, subject to other terms and conditions of a policy, may be covered under a general liability policy. *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, 835 F. Supp. 2d 104, 107 (D.S.C. 2011). Coverage exists for property damage to otherwise non-defective building components that are damaged as a result of accidental water intrusion caused by defective work, but not for the cost of repair or replacing the defective work itself. *Crossmann Cmties. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011).

Given the normal conjunction of facts which involve both (1) defective work and (2) damage to property other than the defective work, issues regularly arise as to how and when the terms of the insurance policy are to be applied. Liability insurers owe a duty of good faith and fair dealing in defending their insureds in the underlying tort action. *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). However, liability insurers also "have

the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *B.L.G.*, 334 S.C. at 535, 514 S.E.2d at 330. It is important that a legal framework exists under which both insurers and insureds are able to understand and preserve their respective rights under the policies, because if policy terms and conditions are ignored, insurers will be unable to limit exposure according to expected risk, with the result being that insurance policies would likely be available only at the costs of much higher premiums, or conceivably not available at all.

Under traditional practice in South Carolina, insurers have implemented their contractual duties to defend their insureds from claims by reserving rights as to coverage issues and retaining defense counsel whose loyalty is solely to the insured. *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). Only if a significant coverage dispute exists do insurers or insureds file a declaratory judgment action separate from the underlying case. As a result, coverage issues are generally resolved as part of the settlement of the underlying action, and unnecessary litigation is avoided.

II. THE EFFECT OF THE *HARLEYSVILLE* DECISION

In *Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), this Court addressed coverage issues arising from a construction defect action in which the plaintiff sought 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 covered "property damage"). *Id.* at 335, 803 S.E.2d at 296; *see Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009). Under the facts of *Harleysville,* the insurer's policy defenses were overruled, and the insurer was held to be re-

quired to pay for both types of repair costs. This result was reached for a number of reasons that revolved around the absence of information as to which part of the general award constituted covered damages and which part constituted damages not covered under the policy.

The *Harleysville* court ruled 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." 420 S.C. at 342, 803 S.E.2d at 299. The 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)). Further, in footnote 11, the Court stated:

> In addition to finding [the insurer's] attempted reservation of rights to be insufficient, the Special Referee also found 'the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict' as to the negligent construction, breach of warranty, and breach of fiduciary duty claims, and the Special Referee refused to 'engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making.' *See Newman*, 385 S.C. at 198, 684 S.E.2d at 547 (finding that even though arbitrator's award improperly included amounts for replacing and repairing faulty workmanship itself, there was insufficient evidence in the record to allow the Court to determine which costs were solely attributable to the non-covered faulty workmanship and finding that the insurer's duty to indemnify therefore covered the entire award).

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

This reasoning in the *Harleysville* decision either explicitly or implicitly recognizes a requirement that the insurer intervene to protect the record in a construction defect proceeding which could lead to a general verdict or award.

Newman, which involved an arbitration of a defective-stucco claim, held that the policy's terms "prohibit[ed] recovery for the cost of removing and replacing the defective stucco—even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy," and that "any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy." 385 S.C. at 198, 684 S.E.2d at 546. Nevertheless, the *Newman* court barred the insurer from enforcing its policy provisions relevant to the date on which damages arose because the Court found that it was "not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to re-litigate the issue of damages." *Id.* at 198, 684 S.E.2d at 547. The insurer "had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits." *Id.*

Although recognizing that the insurer defended its insured "with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding," the Court held the insurer responsible for the entire award because when "the arbitrator determined damages, [the insurer] did not seek review of or otherwise contest the damages award." *Id.* at 198 n.5, 684 S.E.2d at 547 n.5. *Newman* therefore implies that the insurer should have taken additional action — presumably including intervention in the underlying proceeding — to preserve evidence sufficient to allow the application of policy provisions.

The *Harleysville* opinion itself recognized ambiguity in the proper procedure by which an insurer must preserve its rights to implement policy provisions. The dissent in that case wrote "there is no suggestion how Harleysville 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." 420 S.C. at 363, 803 S.E.2d at 311 (Pleicones, Acting Justice, dissenting) (citing *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965)).

Rather than interpreting the concern as to conflicts of interest as indicating that intervention is not required, this statement emphasizes the need for insurers to seek further clarification as to how the right to apply insurance policies as written should be protected and implemented.

III. ERRORS IN THE CIRCUIT COURT'S DECISION TO DENY INTERVENTION

In the Order on appeal the Circuit Court held that *Harleysville* "does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms." (Order, p.4) (¶ 3) BITCO has explained in the section above why it appears that *Harleysville* does in fact mandate that BITCO and other similarly-situated insurers attempt to preserve their rights by moving for limited intervention.

In addition, the Court below cited four other grounds why, in its judgment, the motions for intervention should be denied. BITCO contends that the ruling in *Harleysville* is sufficient in itself to negate each of these additional grounds, but addresses each further and in turn:

1. *Ex parte GEICO* and *Rule 24, SCRCP*

The Circuit Court supported its decision by citing this Court's decision in *Ex parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007) ("*Ex parte GEICO*"). In that case, GEICO moved to intervene in a proceeding to validate a common law marriage between its named insured and an individual making a claim under GEICO's policy. *Id.* at 134–135, 644

S.E.2d at 700. GEICO had denied coverage because the claimant was not its insured's spouse, and it sought intervention because "the family court's decision on the parties' common law marriage would impact GEICO's ability to protect its interests under the insurance policy." *Id.* This Court found that GEICO had no standing to intervene under Rule 24, SCRCP, because "GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the [family] court." *Id.* at 138–139, 644 S.E.2d at 702 (applying *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)).

Analogizing this case to *Ex parte GEICO*, the Circuit Court held that an insurer's "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." (Order, pp. 3–4)

The situation in *Ex parte GEICO,* however, was significantly different from the context presented in a construction defect action. In *Ex parte GEICO*, the decision being rendered by the Family Court answered the precise question which GEICO needed to know in order to apply its policy: whether its insured was married. GEICO had no legitimate interest in participating in litigation of the requirements for common law marriage in South Carolina, it simply needed to know whether South Carolina deemed its insured to be married or not. As the court noted, "GEICO has no real interest in whether Cooper and Goethe have a valid common law marriage." *Id.* at 138–139, 644 S.E.2d at 702. Once this precise question was answered, no further information about the details of the Family Court order was necessary or appropriate. Once the lower

court found whether the insured was married, application of the GEICO policy provisions would be clear and would require no further facts for proper interpretation of coverage.

In contrast, a general verdict in a construction defect case in no way answers the precise questions needed to apply the terms of a general liability policy. A general verdict does not explain when the damage arose, or whether the damage was the cost to repair and replace non-defective property, or whether the damage was the cost to repair property damage. Vital questions as to the nature of the damage to the insured's work go completely unanswered in such a general verdict.

Newman faulted the insurer for *not* raising the allocation issue "when the issue of damages was litigated before the arbitrator." 385 S.C. at 198, 684 S.E.2d at 547. *Harleysville* held 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). Critical information about the nature of components of a verdict – information which is necessary to both the insured and insurer - is not preserved by receiving a single general verdict. Therefore the facts and motivation for the ruling in *Ex parte GEICO* do not result in a rule which would deny the preservation of additional information about the nature of the verdict in a construction defect case.

2. Reservation of Issues for Separate Coverage Actions

The Circuit Court further reasoned that the insurers "can satisfactorily protect any purported interests they may have in a separate declaratory judgment action," and that "to avoid impermissible conflict determining coverage issues, this state requires a separate action." (Order, p.4) (¶¶ 2, 4) (*citing Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965)).

Sims addressed coverage under an automobile liability policy. 247 S.C. at 83, 145 S.E.2d at 523. The judge in the tort action held that "the defendant was negligent in passing [the automobile in which the plaintiff was riding] and colliding with same, but the defendant was not willful." *Id.* at 84, 145 S.E.2d at 524. The insurer, which had declined to defend its insured based on an intentional-injury exclusion, introduced evidence in the subsequent coverage action that the insured intentionally ran the automobile off the road and shot the driver. *Id.* This Court held that the insurer could introduce the evidence to disprove coverage. Although recognizing the general principle that "where an indemnitor has notice of and opportunity to defend an action against the indemnitee, he is bound by material facts established against the indemnitee," the Court adopted the "unassailable" logic of an exception for conflicts of interest:

> It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance. "If it cannot do this," as was said in the dissenting opinion in [*Stefus v. London & Lancashire Indem. Co. of Am.*, 166 A. 339, 341 (N.J. 1933)], "it is at the mercy of every unscrupulous litigant who, regardless of his facts, sees fit to falsely allege a claim on which the insurance company would be liable and thereunder establish another claim on which no liability could attach, and forsooth collect because the insurer cannot show the true facts."
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> In accord is Restatement of the Law of Judgment, Section 107(a), where the rights of indemnitee and indemnitor inter se after judgment against one of them are set out, and it is stated that if the third person has obtained a valid judgment against the indemnitee, both indemnitor and indemnitee are bound as to the existence and extent of the liability if the indemnitor has been given reasonable notice of the action and requested to defend; but in Comment (g) it is stated that this rule is binding only as to issues relevant to the proceeding; and that the judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the circumstances under which he was required to give indemnity do not exist.

Id. at 86–87, 145 S.E.2d at 525 (quoting *Farm Bur. Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949)).

Sims has been the law of the state for many years. In the absence of a direct ruling to the contrary, it is logical to presume that this Court intends that the resolution of coverage issues in a separate action still be the preferred procedure, just as indicated by the Court below. Given the decision in *Harleysville*, however, it is clear that the only way that the procedure in *Sims* can be implemented is if the hearing officer for the coverage matter is provided sufficient information about the nature of the verdict that the terms and conditions of the applicable insurance policies can be applied.

3. Defense Counsel Conflict Issues

The Circuit Court held 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." Order, p.4 (¶ 4) It reasoned that "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." *Id.*

These considerations, while important, do not lead inexorably to the conclusion that intervention must be denied. In *Harleysville* the Court's discussion of the allocated-verdict issue relied principally on *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972).[1] *See Harleysville*, 420 S.C. at

[1] *Magnum*, also quoted by the Court on that issue, in turn quoted from *Duke* but did not involve an allocation between covered and uncovered damages. *See Magnum*, 36 F.3d at 1498 (finding, based on jury instructions in underlying action, that punitive damage verdict was en-

341–343, 803 S.E.2d at 299–300. *Duke* followed the weight of authority that, where a verdict includes both covered and uncovered damages, the "burden of apportioning these damages is on the party seeking to recover from the insurer." 468 F.2d at 977 (quoting *Universal Underwriters Ins. Corp. v. Reynolds*, 129 So. 2d 689, 691 (Fla. Dist. Ct. App. 1961), and collecting other authorities). Because of this burden, *Duke* reasoned that the insurer "of course" has "an interest in the verdict's not being allocated which is in conflict with the insureds' interest that covered damages be segregated," and that by failing to request an allocation the insurer "protected its interest and secured for itself an escape from responsibility at the expense of the insureds." *Id.* at 979.

Duke's solution to that situation was *not* to require insurers to take all possible measures to ensure allocated verdicts in all cases, nor did *Duke* automatically require the insurer to pay the entire amount of an unallocated verdict. Instead, *Duke* held that the insurer's duty was to give "a sufficient notification to the insureds that they should protect their interest by requesting an appropriate verdict," and "the insureds, represented by their own retained counsel, would be entitled to make the decision whether to seek an allocated verdict." 468 F.2d at 979.[2]

Each case will present different circumstances as to how these issues should be handled, but the procedural concerns stated by the lower court do not override the requirements of justice in implementing considerations discussed in *Harleysville*. Justice is not served by allowing procedural complexities to override the truth of the matters in dispute. It is well-established that in the end, trial is fundamentally a truth-seeking process, and of course many authorities can be

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tirely uncovered). The other cases cited in section III.A of *Harleysville* addressed reservation-of-rights letters generally, not the allocated verdict issue in particular.

[2] If the insurer failed to give sufficient notice to its insured, *Duke* held that the only consequence was that the burden in a separate coverage action would fall on the insurer to show the uncovered portion of the verdict. 468 F.2d at 979–980, 984.

cited for that proposition. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251–252, 489 S.E.2d 472, 477 (1997); Rule 102, SCRE. The rules of civil procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. Preclusion rules assume that the adversarial process will ascertain the truth of contested matters. Restatement (First) of Judgments § 82 ("The rules of res judicata are based upon an adversary system of procedure which exists for the purpose of giving an opportunity to persons to litigate claims against each other."); *cf. Nance v. Ozmint*, 367 S.C. 547, 551, 626 S.E.2d 878, 880 (2006). For a judgment to conclude an issue, the issue must ordinarily have been actually litigated and essential to the judgment. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (adopting Restatement (Second) of Judgments § 27).

4. Potential for Confusion and Prejudice Before Jury

Finally, the Circuit Court held that the allocated verdict "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." (Order, p.4) (¶ 5)

In *Harleysville,* however, this Court's discussion assumes that an allocated verdict is a viable option in construction defect litigation. Further, the *Duke* decision cited in *Harleysville* had this to say about the practicality of an allocated verdict:

> The risks to the insurer in requesting an allocated verdict are of no such magnitude, if of any consequence at all. A request for identification of the two types of damages reveals neither the presence of insurance nor the amount of coverage. Assuming as we must that the jury will follow instructions and make a correct allocation, the insurance company loses no benefit to which it is validly entitled from having the jury earmark the losses. Arguably the jury might, while complying with instructions, at its option throw damages into that category which it will speculate is insured. This is too tenuous to deserve more than mention. There may, however, be some awkwardness in argument to the jury, but this is nominal when balanced against the consequences to the insureds.

Duke, 468 F.2d at 979.

As concluded in *Duke,* the additional requirements involved in preserving the information necessary to apply insurance terms and conditions are not unmanageable. Approaches tailored to both preserve evidence and avoid conflicts of interest can be fashioned by the underlying hearing officer as appropriate under the facts and circumstances of each case.

IV. APPELLATE JURISDICTION AND STANDING

BITCO contends that the denial of the motion to intervene is immediately appealable. "An order affects a substantial right and is *immediately appealable* when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action .... " *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (quoting S.C. Code § 14-3-330(2)) (emphasis added).

Interpreting the same statutory language as is involved here,[3] this Court held that an order denying a motion to intervene was immediately appealable—even though "the merits of the ac-

[3] *Ex parte Johnson*, 63 S.C. at 207–208, 41 S.E. at 309 ("Section 11 of the Code provides that 'the supreme court shall have exclusive jurisdiction to review upon appeal *** an order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.'"). The current statute, S.C. Code

tion hereinbefore mentioned [had] not been determined and as the trial of that action will still be necessary"—because insofar "as the rights of the [movant] are involved, the order [denying intervention] affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken." *Ex parte Johnson, in re Rutledge v. Tunno*, 63 S.C. 205, 208, 41 S.E. 308, 309 (1902); *see* 15 S.C. Jur. Appeal and Error § 23 (September 2017 Update) ("The refusal of a petition to intervene is directly appealable '[i]n so far as the rights of appellant are involved, the order affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken.'").

Because the orders denying the insurers' motion to intervene "in effect determine[d] the action and prevent[ed] a judgment from which an appeal might be taken," the order appealed from was immediately appealable under S.C. Code § 14-3-330(2).

CONCLUSION

The issues presented in this appeal are of great practical importance in the adjudication of construction defect cases. BITCO requests that this Court review this matter in light of *Harleysville* and rule that the lower court should have granted the motions to intervene. In the alternative, this Court should rule that *Harleysville* does not require intervention by an insurer in an underlying trial so as to ensure that a verdict is rendered with such specificity as is needed to apply the terms and conditions of applicable insurance policies in subsequent litigation. To the extent

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Ann. Section 14-3-330, provides: "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...."

that the Court determines that BITCO was obligated to intervene to request an allocated verdict, the Court should reverse and remand with directions to grant BITCO's motion to intervene. If, however, the Court determines that intervention is not mandatory, BITCO requests that this Court affirm the decision below with the provision that the right to litigate coverage issues remaining after a verdict in trial of a case such as this is reserved for determination later and separate coverage action, as contemplated by *Sims*.

March 19, 2018

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Trial Court Case No. 2014CP2607634
Appellate Case No. 2017-02146

RECEIVED
MAR 19 2018
S.C. SUPREME COURT

Ex Parte:

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

In Re:

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,

And

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

PROOF OF SERVICE

I hereby certify that I served the Initial Brief of Appellant BITCO General Insurance Corporation and Designation of Matter to be Included in the Record on Appeal by depositing a copy of same in the U.S. Mail, postage prepaid, on March 19, 2018, addressed to the counsel of record as follows:

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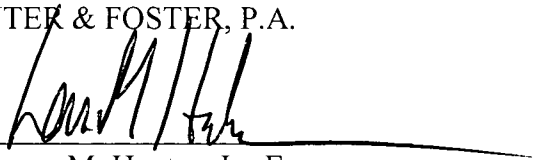

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