THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

Ex Parte:

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, Appellants,

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., 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,

Of whom The Harbour Cove Condominium Association, is the Respondent.

Appellate Case No. 2017- 002146

# INITIAL REPLY BRIEF OF APPELLANT NATIONAL FIRE & MARINE INSURANCE COMPANY

John L. McCants, Esquire
Rogers Lewis Jackson Mann & Quinn, LLC
PO Box 11803 (29211)
1901 Main Street, Suite 1200
Columbia, SC 29201
Tele: (803) 978-2834
Fax: (803) 252-3653
jmccants@rogerslewis.com
Attorney for Appellant National Fire &
Marine Insurance Company

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## ARGUMENT

THE CIRCUIT COURT ERRED IN NOT ALLOWING NATIONAL FIRE & MARINE INSURANCE COMPANY TO INTERVENE ON A LIMITED BASIS WHEN BINDING CASE LAW COMPELS INTERVENTION.

**(A) Intervention Should be Liberally Granted, Analyzed For The Pragmatic Consequences, and a Circuit Court Should Avoid Rigid Application.**

Respondent The Harbour Cove Condominium Association ("Harbour Cove Association") argues for a rigid application of Rule 24, SCRCP and a limited application of prior case law. Appellant National Fire & Marine Insurance Company ("National Fire") submits that Rule 24 and case law interpreting the Rule involve neither a rigid application nor standard. In analyzing intervention for a particular case, the South Carolina Supreme Court has recognized that intervention controversies arise in a myriad of contexts. Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). The Supreme Court has stated the following about intervention:

> We interpret the rules to permit liberal intervention particularly where as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected. Accordingly, [the Supreme Court] must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2).

Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714.

"Each case will be examined in the context of its unique facts and circumstances." Berkely Elec., 302 S.C. at 189, 394 S.E.2d at 714. National Fire respectually submits that the Supreme Court should consider the pragmatic consequences of the circuit court's ruling in this matter, avoid a rigid application of Rule 24(a)(2) and examine the appeal in the context of the facts and circumstances. See Berkely Elec., 302 S.C. at 189, 394 S.E.2d at 714. As argued in its Initial Brief, National Fire seeks no more than a solution or a procedure that allows National Fire

to pay what the Supreme Court has repeatedly found to be the *insured* damages rather than being forced to pay the *uninsured* damages.

**(B) South Carolina Supreme Court Decisions Compel an Insurer To Take Some Action to Allocate Damages in a Construction Defect Trial In Order to Litigate Insurance Coverage in a Declaratory Judgment Action.**

Harbour Cove Association argues that South Carolina law does not compel or mandate intervention by an insurer. For this position, Harbour Cove Association focuses almost entirely on Harleysville Group Ins. v. Heritage Cmtys., Inc., 420 S.C. 321, 803 S.E.2d 288 (2017)("Heritage Communities") and discusses Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546 (2009) only briefly. National Fire submits that in ruling on this appeal, the Supreme Court cannot ignore Newman. The Supreme Court in Newman bound an insurer to pay an entire award in a construction defect case. Newman, 385 S.C. at 198, 684 S.E.2d at 547. The Supreme Court in Newman found that the record in the underlying arbitration was insufficient to support a determination in the declaratory judgment action as to what damages were covered. Newman, 385 S.C. at 198, 684 S.E.2d at 547.[1] Accordingly, the Supreme Court held that Auto-Owners Insurance Company was obligated to pay the *entire* arbitration award even though there were uncovered damages in the award. Newman, 385 S.C. at 198, 684 S.E.2d at 547. The Supreme Court stated the following:

> [W]e hold 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.
>
> Nevertheless, it is 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 relitigate the issue of damages. Auto–Owners had

[1] A CGL insurance policy does not insure (i) the cost to remove defective work, or (ii) the cost to replace defective work even when replacement of the defective work may be incidental to the repair of property damage covered by a policy. Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546 (2009).

> 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. *See* Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.").

Newman, 385 S.C. at 198, 684 S.E.2d at 547.

The Supreme Court stated that, "Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator…." Newman, 385 S.C. at 198, 684 S.E.2d at 547. This is precisely what National Fire is attempting to do by moving to intervene in this matter. National Fire is seeking to ensure that the trial court has the jury allocate the damages in accordance with an established Rule of Civil Procedure. National Fire is seeking to ensure that a party does not later argue that National Fire passed up the opportunity; and a court determining insurance coverage does not find that it is unable to allocate damages that comprise a general verdict after the fact. Otherwise, National Fire will find itself in the same position in which Auto-Owners was found to be in Newman, with no recourse after a general verdict.

In focusing on Heritage Communities, Harbour Cove Association argues that the Supreme Court in Heritage Communities did not allow Harleysville Insurance Group to allocate damages or revisit the general verdict because the company's reservation of rights letter was inadequate. Additionally, National Fire has "made no showing of sufficient reservations of rights to contest coverage so the question of intervention is moot for the instant appeal." (Respondent's Initial Brief, Pg. 12).

First, the circuit court did not hold that National Fire needed to submit its reservation-of-rights letter for review by the circuit court. A challenge to the sufficiency of National Fire's reservation of rights letter is a matter that (as happened in Heritage Communities) would need to be litigated in the declaratory judgment action. Nothing in Heritage Communities, Newman, or

the present ruling suggest that National Fire would need to introduce and litigate the sufficiency of its reservation-of-rights letter in the construction defect action.

During the motions hearing, an insurer offered to submit its reservation-of-rights letter for in camera review. (Beach Villas Transcript, p.58).[2] The circuit court asked: "Does this interject me into the coverage aspect of things?" Id. The insurer responded that it believed the reservation-of-rights were better considered in a subsequent coverage action, but it did not want to be accused of waiving anything. Id. Counsel for the plaintiff homeowners association saw no need to introduce those letters in the construction defect action. Id. Although the circuit court was "happy to look at" the letters, it did not "know what [e]ffect it would really have on the issues before me." (Id. p.59). Because the insurers did not believe the letters would have any effect, the insurers refrained from submitting the letters "as long as it's not considered a condition precedent to you considering our motion to intervene." Id. The circuit court did not find that the insurers failed to produce their reservation-of-rights letter or that the production of such letters is a prerequisite for intervention in the construction defect action.

Second, the Supreme Court in Heritage Communities held Harleysville Insurance Group's reservation of rights letters to be inadequate. Heritage Communities, 420 S.C. at 343-44, 803 S.E.2d at 300-01. However, National Fire submits that the findings in Heritage Communities concerning reservation-of-rights letters and the general verdict are separable; and the decision does not require a court to approve a reservation-of-rights letter before allowing an insurer to

[2] There were three construction defect civil actions pending before the circuit court on September 27 and 28, 2017. There were motions to intervene filed in each civil action. Since the motions and arguments were similar, each of the insurers and Plaintiffs agreed to incorporate their respective sides' arguments so as not to be repetitive. (Harbour Cove Transcript Pg. 5 L 8-14); (Harbour Cove Transcript Pg. 6- L 22-25; L 1-2); (Harbour Cove Transcript Pg. 8 - L 1-5); (Harbour Cove Transcript Pg. 8 - L 22-25); (Harbour Cove Transcript Pg. 9 - L 1); (Harbour Cove Transcript Pg. 19 - L 7-9).

intervene in a construction defect action. The Supreme Court affirmed the Special Referee's other finding that the Special Referee would not revisit the general verdicts after the fact for insurance coverage. Heritage Communities, Inc., 420 S.C. at 332, 803 S.E.2d at 294 ("Although the Special Referee found that the costs to remove and replace the faulty workmanship were not covered under the policies, the Special Referee concluded that it would be improper and purely speculative to attempt to allocate the juries' general verdicts between covered and non-covered damages. Accordingly, the Special Referee ordered the full amount of the actual damages in the construction defect suits would be subject to Harleysville's duty to indemnify in proportion with its time on the risk."). As such, while issues concerning reservation-of-rights letters and general verdicts are related, the two are not absolutely interwined. [3]

**(C) The Circuit Court Did Not Find National Fire's Application to be Untimely.**

Harbour Cove Association argues National Fire's application was untimely. The circuit court heard timeliness objections at the motions hearing, and its reaction was that the insurer's motions were early, if anything, because the circuit court had not yet reached the stage of considering verdict sheets. (Cypress Bend Transcript, p.30.) The circuit court ultimately denied intervention, irrespective of timing, on grounds that would prohibit intervention at any time. (Order, pp.3-4.)

**(D) Intervention Does not Violate Harbour Cove Association's Due Process Rights and National Fire Should Not Be a Named Party.**

Harbour Cove Association argues that if intervention is warranted, it has a due process right to take discovery from the insurers on "all potential coverage positions" and to turn the construction defect action into a simultaneous trial on coverage. Harbour Cove Association

[3] There was no issue in Newman concerning a reservation-of-rights letter.

offers no authority or basis for such notion that coverage disputes would thus be at issue. The only purpose for National Fire's intervention was to seek an allocation between those damages that, under settled South Carolina law, are covered versus those that are not covered. National Fire did so because pursuant Heritage Communities and Newman, an allocated verdict is necessary, required, and predicate to create a factual record for such an allocation in a subsequent declaratory judgment action.

Nothing in Heritage Communities or Newman suggests that the insurer's participation should or would put coverage issues before the jury. To do so would inject prejudicial insurance issues into the trial. *See* Rule 411, SCRE; 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). National Fire submits that naming an insurer as a party or disclosing that Coastal Plaster is insured is not persmissble under South Carolina law and is thus not a viable solution. See Major v. Nat'l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976); see also Trancik v. USAA Ins. Co., 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003). Insurance does not have to be raised before the jury; a request for identification of the two different types of damages in interrogatories reveals neither the presence of insurance nor the amount of coverage. Duke v. Hoch, 468 F.2d 973, 979 (5th Cir. 1972),

The courts permitting intervention have imposed conditions precisely to avoid injecting insurance issues into trial. Thomas v. Henderson, 297 F. Supp. 2d 1311 (S.D. Ala. 2003). Further, taking discovery from insurers would also violate Rule 26(b)(3), SCRCP, which protects against the disclosure of materials "prepared in anticipation of litigation or for the trial" by or for the insured or its insurer.

**(E) There is a conflict Among Circuit Court Judges Concerning Intervention.**

Harbour Cove Association did not address the merits of an analogous circuit court decision involving intervention in a similar construction defect case. As discussed in National Fire's Initial Brief, the Honorable J.C. Nicholson, Jr. ruled in favor of an insurer being able to intervene on a limited basis in a construction defect case not unlike this case or the underlying actions in Newman and Heritage Communities.[4] (Beresford Commons Homeowners Association, Inc. v. Portrait Homes - South Carolina et al., Order, pg. 7). In contrast to Judge Newman, Judge Nicholson found that the insurer did have an interest in the subject matter of the litigation and that the disposition of the action may impede the insurer's ability to protect its interest. (Judge Nicholson Order, pg. 3). Judge Nicholson found that the insurer sufficiently showed it would be prejudiced if intervention were denied. (Judge Nicholson Order, pg. 6). There is no legal or material factual distinction between the Harbour Cove Association civil action and the Beresford Commons Homeowners Association civil action. Rather, the underlying facts and legal issues are strikingly similar. The two circuit court judges were faced with the same legal arguments and general facts and yet reached different results. As such, there is a split in authority among circuit court judges and how they rule on the same legal issues.

**(F) A Declaratory Judgment Action Does Not Protect an Insurer From a General Verdict.**

The Harbour Cove Association argues that National Fire can protect its interest in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. National Fire submits this position is erroneous and untenable. No action can be taken in the declaratory judgment action that can allocate a verdict already rendered or avoid the result

[4] Judge Nicholson issued his Order on January 17, 2017. The Order, of course, preceded the Heritage Communties decision. Judge Nicholson relied on Newman.

in Newman and Heritage Communities. The declaratory judgment action cannot proceed until there is a verdict in the construction defect action. It is a reversible error to find there is a duty to indemnify before a jury renders a decision. Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 604, 748 S.E.2d 781, 791 (2013) ("We hold the declaratory judgment action was procedurally proper save for a ruling on the issues regarding property damages as there are related questions of fact that must be decided by a jury on retrial."). The import of Rhodes is that no final adjudication can be made concerning property damages in the declaratory judgment action until the jury determines the damages in the construction defect action. Accordingly, allocation of damages must occur during the construction defect action unless the Supreme Court wishes to forego Newman and Heritage Communites and follow the principles in Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 86, 145 S.E.2d 523, 525(1965). ("It is, however, obvious that the binding effect of a judgement against an 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.").

Harbour Cove Association argues that the jury will be confused by having to answer interrogatories. As argued in its initial brief, National Fire submits that like any other trial procedure, a circuit court judge can control the proceedings and make decisions consistent with the Rules of Civil Procedure that minimize confusion for a jury. The Fifth Circuit Court of Appeals has stated: "[a]ssuming 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.

Asking a jury to answer interrogatories is not nearly as complicated as other tasks required by juries in construction defect cases, including having a jury grasp building codes, industry standards and construction estimates. In the instant action, the task is practically completed because Harbour Cove Association's expert has done that task in his estimate. (Procon & Associates Estimate dated June 22, 2016).

Harbour Cove Association argues that it will have to in effect reconstruct its case if the court presents interrogatories that may ultimately address insurance coverage. National Fire disagrees. Again, the circuit court did not find National Fire's motion to be untimely. Second, from the start, Harbour Cove Association has pursued insurance coverage for the damages it will seek against the defendants including Coastal Plaster:

> That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness, wantonness of these Defendants, the Plaintiff 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. Additionally, the Plaintiff 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. Each year since completion new areas of damage have occurred, separate and apart from any damage already in progress of occurring. All of which has or will require the Plaintiff to expend great amounts of money to correct and repair as well as suffer the loss of use and enjoyment of their property by virtue of the defects and damages aforesaid.

(Harbour Cove Association Complaint ¶ 28).

In the above, Harbour Cove Association alleged facts in its Complaint that track Crossmann for an occurrence, property damage and time-on-risk principles, in order to require (multiple)

insurers to defend their respective insured contractors named as defendants in the civil action.[5] Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011).

Third, it is Harbour Cove Association that must have the incentive to allocate damages at trial. Under the majority rule in the United States, once an insurer establishes that part of the liability represented by a judgment is for noncovered damages, the proponent of insurance then has the burden to prove the precise portion of the unallocated verdict that represents insured damages. Duke, 468 F.2d at 977. It is incumbent upon Harbour Cove Association to make a record with sufficient evidence as to the allocation of damages so that a court hearing a declaratory judgment action will have more than a general verdict. If Harbour Cove Association falls short, then Harbour Cove Association should bear the consequences – not an insurer.

**(G) The Circuit Court Order is Immediately Appealable Because it Affects a Substantial Right; and National Fire Has Standing to Appeal.**

Harbour Cove Association argues that the circuit court order is not immediately appealable pursuant to S.C. Code § 14-3-330(2)(1977). "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 precisely the same statutory language,[6] the Supreme Court held that an order

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[5] National Fire's duty to defend is triggered in part if the allegations in a Complaint raise the possibility that there are damages insured by the National Fire insurance policies. See Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C.12, 459 S.E.2d 319 (S.C. Ct. App. 2012).

[6] Johnson/Rutledge, 63 S.C. 205, 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

denying a motion to intervene was immediately appealable - even though "the merits of the action hereinbefore mentioned [had] not been determined and as the trial of that action will still be necessary" - because insofar "as the rights of the [putative intervenor] 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 (Rutledge v. Tunno), 63 S.C. 205, 41 S.E. 308, 309 (1902). See also 15 S.C. Jur. Appeal and Error § 23 South Carolina Jurisprudence (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.' "); Ex parte Wells, No. 2012-MO-002, 2012 WL 10906587, at *1 & n.1 (S.C. Sup. Ct. filed March 7, 2012) (allowing immediate appeal of an order denying a request to intervene in an abuse and neglect action) (citing Johnson/Rutledge)[7]; Ex parte Carter v. L.C., No. 2015-001006, 2017 WL 164493, at *2 (S.C. Ct. App. filed January 13, 2017)[8] (citing Johnson/Rutledge with favor that "an order denying a motion to intervene is immediately appealable").

Second, Harbour Cove Association argues that National Fire has no standing to appeal. Rule 201, SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence

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a judgment from which an appeal might be taken.'"). The current statute, S.C. Code Ann. Section 14-3-330, provides identically under (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...."

7 Please note that this opinion states, "[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by Rule 268(d)(2), 8(d)(2), SCACR".

8 Please note that this opinion states, "[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by Rule 268(d)(2), 8(d)(2), SCACR".

may appeal." First, the focus of Rule 201, SCACR, is on whether an appellant is someone *aggrieved* by an order. A party is aggrieved by a order when it operates on his or her rights of property or bears directly on his or her interest. Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 301–303, 551 S.E.2d 588, 589 (Ct. App. 2001) (Hearn, C.J.) citing Cisson v. McWhorter, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970); Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation. Id.

The circuit court order does aggrieve National Fire and affect its property and interest. As set forth in National Fire's initial brief and herein, the law on insurance coverage in South Carolina holds that portions of the damages sought by Harbour Cove Association, i.e, removal and replacement of Coastal Plaster's work, are not insured by a CGL insurance policy. Additionally, pursuant to Newman and Heritage Communities, insurers were bound to pay an entire award or judgment because the insurer had not taken some action in the underlying action to allocate damages. As such, the finanical consequences of being forced to pay an entire judgment versus the amounts that are actually insured for a construction defect claim are significant and materially affect National Fire's property and interest, clearly making National Fire an aggrieved party.

National Fire submits that the circuit court order plainly aggrieves National Fire by precluding National Fire from having a voice in whether and how the verdict is allocated by a jury, if at all.[9] Harbour Cove Association offers no solution that protects insurers or parties other than to have insurers added as named defendants. Doing so, of course, will lead to prejudice and

[9] The circuit court specifically found that defense counsel (retained by insurers) has a conflict of interest and cannot request special interrogatories or a special verdict form. (Order Denying Motion of Insurers for Limited Intervention ¶ 4, pg. 4).

will cloud the minds of jurors in deciding liability. One can fully expect that absent a motion to intervene by National Fire, Harbour Cove Association will argue, after a verdict, that National Fire could have and should have taken some action to have the verdict allocated – and would be then bound to pay the entire jury verdict.

Harbour Cove Association cites Ex Parte Condon, 354 S.C. 634, 583 S.E.2d 430 (2003) for its position that only a named party to the civil action may appeal an order. In Ex parte Condon, this Court dismissed an appeal by the South Carolina Attorney General pursuant to Rule 201, SCACR. The Attorney General was neither a party to the civil action nor the recipient of the specific ruling that was being appealed in the civil action. The Attorney General's interest in the civil action was only a general one, based on his position as a state officer, and his belief that he was charged to protect the interest of South Carolina citizens at large. Ex parte Condon, 354 S.C. at 640, 583 S.E.2d at 433. National Fire's particularized interest in the circuit court order is very different from the Attorney General's interest in Ex parte Condon. National Fire submits that it is a "party" for purposes of Rule, 201(b) because it brought the motion giving rise to the order that is the subject of this appeal. As a result, National Fire is clearly a party that was aggrieved by the ruling that is the subject of this appeal.

Ex parte Condon does not proscribe appeals by non-parties in all cases. Were that true, then even if the Attorney General had moved to intervene and been denied, he would have had no means of redress, as he would still not be a party to the suit. Such an outcome would be inconsistent with existing South Carolina law. See Berkeley Electric Cooperative, Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (non-party whose motion to intervene was denied allowed to appeal); Ex Parte Johnson, 63 S.C. 205, 41 S.E. 308 (1902) (same). "Generally, the only persons who may appeal include a party to the action or proceeding below, *or to the*

*judgment or order*, a legal representative of a party, or a person having privity of estate, title, or an interest that appears from the record." 4 C.J.S. Appeal and Error § 242 (2012). The term "party" is not narrowly construed by law:

> The term 'party' in a statute has been construed, not in the technical sense as necessarily importing a litigant before the court in the proceeding in which the judgment or order was rendered, but as including any one on whose interest it has a direct tendency to inure, and it has been held that one not a 'party' may nevertheless be a 'party aggrieved' within statutes governing the right of review. A statute granting a right to appeal by a person aggrieved has been given a liberal construction with regard to the word 'person,' as including a nonparty."

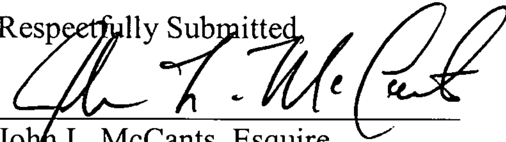
4 C.J.S. Appeal and Error § 242 (2012).

Rule 201(b), SCACR, has not been interpreted by our Supreme Court to require that an aggrieved party be a named party to have standing to appeal. See, e.g., Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986). In Ex Parte Whetstone, a non-party witness appealed from an order directing him to attend a deposition and produce certain documents. Id. The respondent moved to dismiss the appeal on the ground the order was interlocutory and not directly appealable. Id. The Supreme Court granted the motion to dismiss on the basis that an order directing a non-party to submit to discovery is not immediately appealable. Id. at 581, 347 S.E.2d at 882. The Supreme Court held that the non-party witness had two alternatives to contest discovery: 1) the witness may either comply with the discovery order and waive any right to challenge it on appeal, or 2) refuse to comply with the order *and appeal* after he is held in contempt for his failure to comply. Id. at 580, 347 S.E.2d at 881-82. This instruction is premised upon the assumption that a non-party has a right of appeal. Reading Rule 201, SCACR to require that one must always be a named party to a civil action to institute an appeal disregards the situation where a non-party is specifically aggrieved by an order or judgment of the court, as is the case for National Fire in this matter.

## Conclusion

For the reasons stated herein and National Fire's Initial Brief, this Court should reverse the Order Denying Motion of Insurers for Limited Intervention of the circuit court.

Respectfully Submitted,



John L. McCants, Esquire
Rogers Lewis Jackson Mann & Quinn, LLC
PO Box 11803 (29211)
1901 Main Street, Suite 1200
Columbia, SC 29201
Tele: (803) 978-2834
Fax: (803) 252-3653
jmccants@rogerslewis.com
Attorney for Appellant National Fire & Marine Insurance Company

June 8, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

RECEIVED
JUN 08 2018
S.C. SUPREME COURT

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Civil Action No. 2014-CP-26-07634
Appellate Case No. 2017-002146

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Ex Parte:

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, Appellants,

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., 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

Of whom The Harbour Cove Condominium Association, is the Respondent.

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**APPELLANT NATIONAL FIRE & MARINE INSURANCE COMPANY'S PROOF OF SERVICE OF INITIAL REPLY BRIEF**

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I certify that I have served National Fire & Marine Insurance Company's Proof Of Service Of Reply Brief, Designation Of Matter To Be Included In The Record On Appeal, And Certificate Of Counsel by depositing a copy of it in the United States Mail, postage prepaid, on June 8, 2018 addressed to their attorneys of record, listed as follows:

cc: Peter H. Dworjanyn, Esquire
Collins & Lacy, P.C.
PO Box 12487
Columbia, SC 29211
Attorney for Appellant Canopius US Insurance, Inc.

Phillip W. Segui, Jr.
Amanda Blundy
Segui Law Firm
864 Lowcountry Blvd. #A
Mt. Pleasant, SC 29464
Attorneys for Respondent The Harbour Cove Condominium Association

John T. Chakeris
Chakeris Law Firm
231 Calhoun Street
Charleston SC 29403
Attorneys for Respondent The Harbour Cove Condominium Association

Shaun W. Cranford
Cranford Law
P.O. Box 50684
Columbia, SC 29250
Attorneys for Respondent The Harbour Cove Condominium Association

Mark S. Barrow
Christy E. Mahon
Everett A. Kendall, II
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street (29201)
PO Box 12129
Columbia, SC 29211
Attorneys for Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company

Steven M. Klepper
(admitted *pro hac vice*)
KRAMON & GRAHAM, P.A.
One South Street
Suite 2600
Blatimore, Maryland 21202
Attorney for Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company

Thomas C. Hildebrand, Jr.
F. Elliotte Quinn, IV, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston SC 29401
Attorneys for Respondents 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

Barbara J. Wagner
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401
Attorney for Respondent BR Brick & Masonry, Inc.

Lawrence M. Hunter, Jr.
Hunter & Foster, PA
P.O. Box 10309
Greenville, SC 29603
Attorney for BITCO General Insurance Corporation

Robert C. Calamari
Nelson Mullins Riley & Scarborough, LLP
3751 Robert M. Grissom Parkway, Suite 300
Myrtle Beach, SC 29577
Attorney for Appellant Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company

Jonathan J. Anderson
Curt Martin
Anderson Reynolds & Stephens, LLC
PO Box 87
Charleston, SC 29402
Attorneys for Respondent Coastal Plaster Systems, Inc., a/k/a Coastal Plastering Systems, Inc., a/k/a Coastal Plaster, Inc., innocently identified as Coastal Drywall d/b/a Coastal Plaster Systems, and Lundy Dowell d/b/a Coastal Plaster Systems

Shanna M. Stephens
W. Coleman Lawrimore
Anderson Reynolds & Stephens, LLC
PO Box 87
Charleston, SC 29402
Attorneys for Respondent Carolina Drywall & Interiors a/k/a Carolina Drywall Contractors, Inc.

Theodore L. Manos
Robel1son Hollingsworth & Flynn
177 Meeting St., Suite 300
Charleston, SC 29401
Attorney for Respondents South Carolina State Plastering, LLC, Georgia State Plastering, LLC and Florida State Plastering, LLC

J. Kenneth Carter, Jr.
Turner Padget Graham & Laney, PA
1901 Main Street, 17th Floor (29201)
P.O. Box 1473
Columbia, SC 29202
Attorney for Respondent Tri-City Insulation and Building Products of Myrtle Beach, Inc.

Brian E. Wolfe
Clay A. Campbell, Esquire
Baucom Claytor Benton Morgan & Wood
200 Providence Road, Suite 106
Charlotte, NC 28207
Attorney for Respondent Roof Doctor of the Carolinas, Inc.

E. Glenn Elliott, Jr.
Aiken Bridges Elliott Tyler & Saleeby, PA
181 E. Evans Street, Suite 409
P.O. Drawer 1931
Florence, SC 29503
Attorney for Respondent Gary Hunnell d/b/a Grand Strand Roofing
Carrie A. Fox

Aiken Bridges Elliott Tyler & Saleeby, PA
181 E. Evans Street, Suite 409
P.O. Drawer 1931
Florence, SC 29503
Attorney for Respondent Morningstar Consultants, Inc.

Theodore Parker, III
Parker Nelson & Associates
2460 Professional Court, Suite 200
Las Vegas, NV 89128
Attorney for Respondent Stock Building Supply, LLC

Jacqueline Dixon Phillips
Parker Nelson & Associates
211 King Street, Suite 202
Charleston, SC 29401
Attorney for Respondent Stock Building Supply, LLC

H. Mark Hamlet
Jessica Soles, Esquire
Hamlet & Associates, PLLC
5215 Junction Park Circle, Suite 202
Wilmington, NC 28412
Attorneys for Respondent Vance Johnson Plumbing Co., Inc.

G. Troy Thames
Wilson Jones Carter & Baxley, PA
421 Wanda Park Boulevard, Suite 100
Mt. Pleasant, SC 29464
Attorneys for Respondent Vance Johnson Plumbing Co., Inc.

Theodore L. Manos
Robertson Hollingsworth & Flynn, LLC
177 Meeting Street, Suite 300
Charleston, SC 29401
Attorney for Respondents RWG, Inc., RWGR, Inc., Right Way Construction, Inc., Right Way Group, Inc.

Michael D. Freeman
Griffith Sadler Sharp, PA
600 Monsoon Street
P.O. Box 570
Beaufort, SC 29901
Attorney for Respondent American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.

G. Michael Smith
Thompson & Henry, PA
1300 Second Avenue, 3rd Floor (29526)
Post Office Box 1740
Conway, SC 29528
Attorney for Respondent Dunn Plumbing

O. Carlisle Edwards, Jr.
McAngus Goudelock & Courie, LLC
P O Box 650007
Mt. Pleasant SC 29465
Attorney for Respondent Cohen's Drywall Company, Inc.

Michael Barfield
D. Summers Clarke, II
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street (29401)
Post Office Drawer H
Charleston, SC 29402
Attorneys for Respondent CEMS Engineering, Inc.

Jeffrey A. Ross
Philip P. Cristaldi
Jeff Ross Law LLC
1100 Queensborough Boulevard, Suite 201
Mt. Pleasant, SC 29464
Attorney for Respondent Martin Masonry, Inc.

J. Kenneth Cal l er, Jr.
Turner Padget Graham & Laney, PA
PO Box 1473
Columbia, SC 29202
Attorney for Respondent Tri-City Insulation and Building Products of Myrtle Beach, Inc.

Christina Bisset
McAngus Goudelock & Courie, LLC
PO Box 1349
Myrtle Beach, SC 29578
Attorney for Respondent Sunland Fire Protection, Inc.

Emily R. Gifford
Richardson Plowden & Robinson, PA
P O Drawer 7788
Columbia, SC 29202
Attorney for Respondent Martin Architectural Group, PC

David S. Black
Howell Gibson & Hughes, PA
P.O. Box 40
Beaufort, SC 29901
Attorney for Respondent Builders FirstSource-Atlantic Group, LLC

William E. Lawson
Turner Padget Graham & Laney PA
PO Box 2116
Myrtle Beach, SC 29578
Attorney for Respondent Air Mechanical, Inc.
Myra V. Whitener
Parker Nelson & Associates, CHTD
211 King Street, Suite 202
Charleston, SC 29401
Attorney for Respondent Vereen Concrete Co., Inc.

Mark Hamlet
Jessica A. Soles
Hamlet & Associate, PLLC
5215 Junction Park Circle, Suite 202
Wilmington, NC 28412
Attorney for Respondent Richard Blackwell d/b/a Synthetic Designs

Michael D. Freeman
Griffith Sharp & Liipfert, LLC
P O Drawer 570
Beaufort, SC 29901-0570
Attorney for Respondent ITP, Inc.

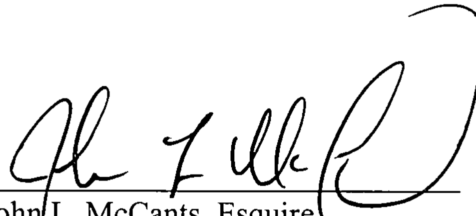
Tracie Brisson
Wright, Worley, Pope, Ekster & Moss, PLLC
228 North Front St., Suite 101-B
Wilmington, NC 28401
Attorney for Respondent Coastal Drywall, Inc., d/b/a Coastal Plaster Systems and Lundy Dowell d/b/a Coastal Plaster Systems

J. Austin Thomas
Grooms & Thomas, LLC
4420 Oleander Drive, Suite 104
Myrtle Beach, SC 29577
Attorney for Respondent Mike Phillips

John E. Rogers, II
Ginger Goforth
Ward Law Finn
PO Box 5663
Spartanburg, SC 29304
Attorney for Respondent Ansur America Insurance Co and JS Elite Flooring

[SIGNATURE PAGE TO FOLLOW]

June 8, 2018



John L. McCants, Esquire
Rogers Lewis Jackson Mann & Quinn, LLC
PO Box 11803 (29211)
1901 Main Street, Suite 1200
Columbia, SC 29201
Tele: (803) 978-2834
Fax: (803) 252-3653
jmccants@rogerslewis.com
Attorney for Appellant National Fire & Marine
Insurance Company