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S.C. SUPREME COURT

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

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.

INITIAL REPLY BRIEF OF APPELLANT SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA

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I. SOUTH CAROLINA LAW PERMITS SELECTIVE TO INTERVENE IN THIS ACTION

As Selective detailed in its initial brief, the basis of its motion to intervene was the Supreme Court's decisions in *Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), and *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965). These cases, read as a whole, seem to create a duty upon insurers to request a damages allocation where appropriate. Here, Selective seeks to fulfill that duty by intervening in a limited capacity under Rule 24.

A) *Sims*, *Newman*, and *Harleysville*

Selective and the Association seem to agree that under *Sims*, if an insurer cannot defend its insured in a tort action (because the representation would trigger a conflict of interest), that insurer can relitigate liability determinations in a later declaratory judgment proceeding.

However, when there is not a conflict of interest, and the insurer can represent its insured, *Newman* applies – at least in the context of general verdicts. The Association recognizes *Newman*,[1] but fails to address the most crucial part of the holding relating to the instant dispute: in *Newman*, the court refused to allocate an arbitrator's general damages award because "it [was] not the purpose of [the] declaratory judgment action to relitigate the issue of damages" and the insurer "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. Importantly, the insurer had that opportunity because it hired counsel to defend its insured, and had defended its insured throughout the entire proceeding. *See id.* at 198 n.5 ("Auto–Owners represented Trinity in binding arbitration,

[1] Initial Brief of Respondent Harbour Cove Condominium Association at 8-9.

made mandatory by the terms of the insurance contract. Auto–Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto–Owners did not seek review of or otherwise contest the damages award.").

Therefore, the critical distinction between *Sims* and *Newman*, which goes unrecognized by the Association, is that *Sims* appears to apply to cases where an insurer cannot defend its insured, and *Newman* appears to apply to cases when the insurer is representing the insured. Here, Selective has been representing its insured throughout this proceeding. Therefore, under *Newman*, Selective has an opportunity to seek an allocation of damages during this tort action, and it must do so.

The Association argues that the insurer Appellants here read *Harleysville* as "carte blanche authority for intervention." That is not the case. The crux of the *Harleysville* decision was, indeed, that an insurer could not contest coverage absent a valid reservation of rights[2] letter which adequately put the insured on notice of the insurer's intent to contest coverage. *Harleysville*, 420 S.C. at 343, 803 S.E.2d at 300. However, the issue critical to this proceeding was this Court's further recognition that

> 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

[2] As noted by the Appellant Hartford, the Association has now – in passing – made an argument that the insurers here have not proven their reservations of rights letters are adequate. The insureds to whom the reservations were issued, however, have not contested the validity of the reservations of rights letters. Even if they had, as discussed *infra*, the Appellants' motions to intervene have put each party on notice as to the insurers' intent to seek a damage allocation.

> solely attributable to the non-covered faulty workmanship and finding that the insurer's duty to indemnify therefore covered the entire award).

Id. at fn. 11 (emphasis added). Thus, this Court recognized that if and when an insurer has an opportunity to ensure damages are allocated, its failure to take advantage of that opportunity is at its own peril. Selective has not, and would not, argue that *Harleysville* effectively abrogated the long-standing requirement that an intervenor satisfy the requirements of Rule 24 to intervene. Rather, Selective simply submits that because it has the opportunity to raise the issue of allocating damages, it seems to have a concurrent *obligation* to raise that issue under a reading of both *Newman* and *Harleysville*. Selective cannot raise that issue through defense counsel, because that would potentially create the conflict of interest that *Sims* and the law of this state try to avoid. Surely, Selective cannot rely on the Association or Centex to undertake this task, either. As a result, Selective is seeking a limited intervention under Rule 24, which is appropriate under the circumstances presented here.

B) Rule 24

Selective respectfully submitted in its initial brief, and reiterates here, that it should not be required to show that it has standing in order to intervene under Rule 24 because it is not seeking to intervene as a party-litigant, or otherwise pursue its own, independent claim for relief. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("**For all relief sought**, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing **when it seeks additional relief beyond that which the plaintiff requests**.") (emphasis added). While the Association attempts to distinguish *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d

601 (1991),[3] the crux of the issue cannot be ignored – this Court has recognized that a party may intervene under Rule 24, in certain circumstances, absent a showing of standing.

Additionally, prior to the United States Supreme Court ruling on this issue in *Town of Chester*, other jurisdictions had also recognized that intervenors do not always have to establish standing.[4] *See N.A.A.C.P., Inc. v. Duplin County, N.C.*, 2012 WL 360018, n. 3 (E.D.N.C. Feb. 2, 2012) ("[T]he court declines to impose the requirement that defendant intervenors must show Article III standing in order to intervene as a matter of right . . . . To hold otherwise would impose a stricter requirement on Rule 24(a)(2) intervention than what appears to be warranted under the law of this circuit.") (internal citations removed); *U.S. v. DeKalb County, Ga.*, 2011 WL 6369569, *5 (N.D. Ga. Oct. 11, 2011) ("A litigant also ordinarily must show that they have standing to bring an action in federal court. '[A] party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit.' ") (internal quotations and citations omitted); *Armor Screen Corp. v. Storm Catcher, Inc.*, 2009 WL 10667863, *1-2 (S.D. Fla. May 14, 2009) (permitting limited intervention in the insurance context, absent a showing of standing).

Because the insurers are not seeking to intervene as party-litigants, and are not seeking their own, independent relief, or to litigate the merits of any claim presented here, they should not be required to establish their own, independent standing. Instead, their ability to intervene should be controlled only by the language of Rule 24.[5]

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[3] Initial Brief of Respondent Harbour Cove Condominium Association at 13-14.

[4] Rule 24 of the SCRCP and Rule 24 of the FRCP are similar- because of this, the Court may look to interpretations of the federal rule for guidance. *See, e.g., Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.").

[5] *See Government Employee's Ins. Co., Ex parte*, 373 S.C. 132, 143-44, 644 S.E.2d 699, 705 (2007) (Pleicones, J., dissenting) ("I cannot reconcile the standing discussion in *Bailey v. Bailey,* 312 S.C. 454, 441 S.E.2d 325 (1994) with my understanding of Rule 24. As I read *Bailey,* there is no discussion of Rule 24(a)(2), and it is patent

1. Rule 24(a)[6]

It appears that the Association is only disputing whether the insurers have an "interest" for purposes of Rule 24(a). As a result, this reply will not reiterate whether that interest is adequately represented by other parties, or whether the disposition of this action will impair or impede the insurers' ability to protect that interest.

The Association recognizes that the insurers have an interest in preserving evidence to use in a later declaratory action.[7] That interest is "relate[ed] to the . . . transaction which is the subject of the action" because, as the Association also recognizes, the subject matter of the action is its construction defect claims. Damages are necessarily part and parcel to a construction defect claim. The insurers must be able to preserve damages evidence, in order to litigate coverage for those damages later. As explained *supra*, the Association's brief reference to *Sims*, and the proposition that the insurers can simply present additional evidence in a separate action and "need not protect the trial record" completely ignores the standard set forth in *Newman*, recognized by the Special Master in the construction defect case precipitating *Harleysville*, and recognized by this Court in *Harleysville*: if and when the insurer has the ability to preserve evidence related to damages, it must do so, or be bound by the terms of a general verdict. The "litigate again later" standard permitted by *Sims* is simply not applicable to this case.

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that the Court conducted no rule-based analysis. In my opinion, if a party meets the requirements of Rule 24(a)(2), that is, it is entitled to intervene as a matter of right, then it *ipso facto* has "standing." *Bailey* may have reached the correct result, but its discussion of intervention as an issue of "standing" rather than as a matter governed by Rule 24, SCRCP, is simply misdirected.")

[6] "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[7] Initial Brief of Respondent Harbour Cove Condominium Association at 16.

2. Rule 24(b)[8]

a) The commonality requirement

The Association contends that there is no commonality between the construction defect claims and the separate declaratory action. This is simply incorrect. Several decisions cited in Selective's initial brief[9] specifically show that this is not true, and that coverage actions and underlying tort actions *do* have issues in common with one another. The damages issues that Selective seeks to preserve here are the *exact* issues that will already be litigated in the case.

b) Undue delay or prejudice

The Association spends considerable time arguing that Selective's intervention will necessarily insert questions of insurance into this construction defect matter,[10] create a conflict of

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[8] "Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[9] *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) ("The issue of interpretation of the policy supplies a sufficiently strong nexus between the district court action and the state actions to satisfy the commonality requirement. Further specificity., e.g., that the claim involve the same clause of the policy, or the same legal theory, is not required when intervenors are not becoming parties to the litigation."); *Armor Screen Corp. v. Storm Catcher, Inc.*, 2009 WL 10667863, *2 (S.D. Fla. May 14, 2009) ("In order to determine whether defendants are covered by the insurance policy with FCCI, it must be determined whether any of the defendants acted with knowledge or intent, which defendants are liable for which claims, the dates of any wrongful publication or advertising and which laws or statutes each defendant violated; these are exactly the issues a jury will have to determine when rendering a decision in this case."); *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1326 (S.D. Ala. 2003) ("There is no question that Old Republic's proposed intervention has questions of fact in common with those of the pending action."); *Backus v. South Carolina*, 2012 WL 406860, *2 (D.S.C. Feb. 8, 2012) (citing *Thomas v. Henderson* and noting that courts permit intervention under Rule 24(b) in the interest of judicial economy when common questions of fact exist); *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 44, 75 A.L.R. Fed. 861 (D. Nev. 1984) ("In order to be entitled to punitive damages, a plaintiff must prove that the defendant acted with fraud, oppression or malice. [] Damages resulting from fraudulent or malicious acts of the insureds are specifically excluded from the coverage of the errors and omissions policies. The future defense of the insurance companies, therefore, has questions of fact in common with the main action.") (internal citation removed).

[10] Initial Brief of Respondent Harbour Cove Condominium Association at 18-19

interest,[11] confuse the jury,[12] and/or prejudice its due process rights[13]. All of these concerns are easily remedied by recognizing that Selective only seeks to intervene in a limited capacity.

As stated in its initial brief, Selective does not seek to intervene as a party litigant. Selective does not wish to defend or prosecute any claim, and does not wish to interfere with or otherwise participate in the insured's defense. Put simply, Selective will have no involvement in the litigation on the merits.

Further, Selective does not wish to, as the Association alleges, "distinguish . . . between covered and non-covered damages" in this action.[14] Rather, Selective intends to litigate any and all coverage issues in a separate declaratory proceeding. Selective only seeks to preserve evidence here, and further limits that request to preserving evidence relating to damages. The Association argues that "[t]he need to establish what damages may be consequential versus which are related to correcting defective work is unduly burdensome on both the plaintiff and defendants in this action and prejudicially adds to the plaintiff's burden of proof."[15] This simply misses the point. The Association and Centex will already need to establish this information. At trial, both the Association and Centex will presumably proffer evidence related to, for example, the amount of damages caused to the windows, and which subcontractors were responsible for that damage. If this were not the case, it is not clear how the Association would prove its claim against Centex in the first instance, or how Centex would, in turn, argue that its liability should be attributed to and among its subcontractors. Selective simply seeks to have a resulting verdict allocated, and any

[11] *Id.* at 22-24.
[12] *Id.* at 25-28.
[13] *Id.* at 28-30.
[14] *Id.* at 23.
[15] *Id.* at 26-27.

evidence needed for that allocation will have already been determined during the trial, absent any participation by Selective.

A limited intervention ensures that coverage issues will not be litigated here. Accordingly, the Association will not need to conduct discovery on potential coverage issues, and its due process rights will not be infringed upon. If the Association wishes to conduct discovery on coverage issues, it can feel free to conduct that discovery in the coverage action which is currently pending, to which the Association is already a party, and in which the Association has already appeared and filed responsive pleadings. *See* Reply and Counterclaim of Defendants The Harbour Cove Condominium Association, et al., at 10, *Centex Homes, A Nevada General Partnership v. The Cypress Bend Condominium Association, et al.*, No. 2016-CP-26-6670 (filed October 29, 2016) (seeking a declaration that the insurance policies cover the allegations and claims pending in this construction defect action, or alternatively seeking a reformation of the policies).

On the issue of conflicts of interest, the only conflict of interests which actually *does* exist in this case, exists regardless of whether Selective intervenes: the insured wants the most coverage possible, and Selective wants to make sure that it does not pay any more than it has contractually agreed to pay. Selective's insured performed work at the Association's property, and some damages arising from that work will be covered by its liability policy, and some will not. This is simply the nature of third-party liability coverage. Selective's limited involvement as an intervenor does not change or exacerbate this reality.

Finally, to the issue of jury confusion: allowing Selective to intervene does not automatically mean that a trial will be confusing and arduous for the jury members, because granting the motion is simply the first step in the process. As stated in Selective's initial brief, each party, the court, and the insurers will be able to participate in the creation of special verdict

forms and interrogatories. As a result, the court will still be able to determine, post intervention, whether Selective's proposed verdict forms or interrogatories are acceptable to present to the jury. In other words, all parties and the court will be able to ensure that any requested verdict allocation is presented to the jury in a straightforward, easy to follow manner.

Other courts presented with this issue have recognized the benefit of this approach. *See Armor Screen Corp.*, 2009 WL 10667863 at *2 ("[The insureds] will not be prejudiced from FCCI's intervention. First, FCCI is permitted to submit the proposed special interrogatories and an itemized verdict form for this Court's consideration. This Court will consider FCCI's submissions along with plaintiff and [the insureds'] submissions together. **At that point the Court will determine what jury instructions, special interrogatories and verdict forms will be submitted to the jury. Since this Court will also consider plaintiff and [the insureds'] arguments in determining what forms to submit to the jury, FCCI's presence will not prejudice [the insureds]**.") (emphasis added); *Thomas v. Henderson*, 297 F. Supp. at 1327 (finding that the potential for prejudice could be controlled by conditioning intervention on the understandings that, among other things, the right to proffer interrogatories did not obligate the court to approve them); *Plough, Inc. v. Int'l Flavors & Fragrances, Inc.*, 96 F.R.D. 136, 137 (W.D. Tenn. 1982) (allowing an insurer to intervene with the understanding that the parties would later submit interrogatories and verdict forms for the court's approval).

There are other ways to ensure that the trial is neither confusing, overly complicated, or complex. For example, the parties, court, and insurers might agree to bifurcate the trial into a liability action and subsequent damages action. In this instance, Selective would likely only need to intervene in the latter. Surely, this issue would need to be discussed by and resolved between the lower court, the insurers, and all party-litigants. However, the overarching point is that the

initial step of permitting intervention does not in and of itself guarantee that a conflict of interest, jury confusion, or undue delay will result. These concerns are easily put to rest by the parties meeting and conferring during the trial, in order to determine the best way to structure issues for presentation to the jury.

3. Timeliness

The motion to intervene is timely. Although the Association points out that the motion was made only two months before trial,[16] there would have been no reason for Selective to attempt to intervene earlier. Selective's need to preserve evidence is only relevant at trial, and it therefore refrained from attempting to intervene until it became clear that the matter would likely proceed to trial. Moreover, as noted by the Association, "if 'desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits,'"[17] late intervention is unlikely to cause prejudice.

II) IF THE MOTION TO INTERVENE IS DENIED, THE INSURERS SHOULD NOT BE BOUND BY THE GENERAL VERDICT

Alternatively, if this Court should affirm the lower court's order, Selective respectfully requests that this Court enter an order clarifying that the insurers have no duty to indemnify their insureds for a general verdict which appears to contain elements of noncovered damages. By virtue of Selective's motion to intervene, it has fulfilled its obligations under *Newman* and *Harleysville* – all parties are apprised of the importance of seeking a damages allocation, and Selective attempted to preserve damages evidence when it had a chance. It would be inequitable and unreasonable to bind Selective to a judgment rendered in an action in which it was not a party

[16] Initial Brief of Respondent Harbour Cove Condominium Association at 2.
[17] *Id.* at 14 (citing *Davis v. Jennings*, 304 S.C. 502, 505, 405 S.E. 2d 601, 603 (1991).

and over which it had no control. *See D.R. Horton, Inc. v. Builders FirstSource—Southeast Group, LLC*, 422 S.C. 144, 153, 810 S.E.2d 41, 46 (Ct. App. 2018) (finding that a developer could not recover an arbitration award from a subcontractor, when the award contained some elements of nonrecoverable damages and the developer had requested a general verdict); *Uvino v. Harleysville Worcester Ins. Co.*, 708 Fed. Appx. 16 (2d Cir. 2017) (summary opinion) (holding that there was no reason to shift the burden to prove damages allocations from the insured to the insurer, when the insurer attempted to intervene to seek an allocated verdict, intervention was denied, and a general verdict was rendered); *Gehm v. Timberline Post & Frame*, 861 N.E.2d 519, ¶ 31 (Ohio 2007) (holding that when an insurer sought and was denied the ability to intervene, "collateral estoppel will not prohibit future litigation of similar issues."); *see also John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 315 F.R.D. 169, 174 (S.D.N.Y. 2016) (applying Ohio law and noting that, at most Ohio law "requires that an insurer make a motion to intervene" to avoid preclusion.").

III) THE MOTION TO INTERVENE IS APPEALABLE

The Association correctly recognizes that an order is immediately appealable when it affects a substantial right and "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action . . . ." S.C. Code Ann. § 14-3-330(2) (1962). However, the Association argues that the insurers' rights will not be substantially affected because they can still litigate coverage matters in the coverage action. Not only does this ignore *Newman* and *Harleysville* – both of which show that if the insurers do not intervene and request an allocated verdict, they will be bound to indemnify their insureds for the entirety of a general verdict – it also ignores South Carolina precedent holding that the denial of a motion to intervene does affect a substantial right. *See Ex parte Johnson, in re Rutledge v. Tunno*, 63 S.C. 205, 208, 41 S.E. 308, 309 (1902) (holding that an order denying an entity's petition to become a party to an action was

appealable, by reasoning that "[i]n so far as the rights of the 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.").

The Association also argues that Selective has no standing to appeal the order because it is not a party to the litigation. Selective concedes that it is not a party to the case, and further concedes that it is not attempting to intervene as a party. However, the order does affect Selective's rights here, and Selective is only attempting to intervene because it seems to have a duty to do so under *Newman*, *Harleysville*, and *Sims*. For this reason, Selective requests that the Court recognize its ability to appeal the lower court's order.

If the Court should hold that Selective is unable to appeal this order, due to its non-party status or otherwise, Selective respectfully submits that it should not be bound by the terms of a general verdict rendered herein. At this point, Selective has done all it is legally and practicably able to in order to ensure that an allocated verdict is rendered.

CONCLUSION

For the reasons stated above and in Selective's opening brief, this Court should reverse the trial court's denial of Selective's motion for limited intervention or, alternatively, hold that it will not be bound to indemnify its insured for a general verdict which contains elements of noncovered damages.

Signature on the following page

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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

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I certify that I have served Appellant Selective Insurance Company of South Carolina Initial Reply Brief by depositing a copy of same in the United States Mail, postage prepaid, June 8, 2018 addressed to the attorneys of record, listed as follows:

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