THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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.

FINAL BRIEF OF APPELLANTS HARTFORD FIRE INSURANCE COMPANY AND HARTFORD CASUALTY INSURANCE COMPANY

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STATEMENT OF THE CASE

Harbour Cove Condominium Association filed this lawsuit on November 13, 2014, suing for alleged construction defects. On August 7, 2017, Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively, "Hartford"), as the insurers of defendant Coastal Plaster Systems, Inc., moved to intervene "for the limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury that addresses factual issues related to the indemnity coverage." (R. p. 41.)

The Circuit Court heard Hartford's motion, along with similar motions to intervene filed by other insurers, on September 28, 2017. (R. pp. 315–501.) The Circuit Court denied all of the insurers' motions for intervention by order entered October 12, 2017:

> 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.

(R. pp. 3–4.)[1]

On October 13, 2017, the day after the denial of its motion to intervene, Hartford filed and served the notice of its appeal. (R. p. 112-13.)

[1] In the consolidated *Beach Villas* appeal, discussed *infra*, the Circuit Court further noted that "counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action," and that the "Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action." (R. pp. 9–10).

On October 25, 2017, the Court of Appeals entered an order consolidating the *Harbour Cove* appeals, along with the appeals from the denial of intervention in *Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al.*, Civil Action No. 2014-CP-26-06573. *Beach Villas* is an action alleging construction defects, filed October 7, 2014. Hartford (including Hartford Underwriters Insurance Company) moved to intervene on September 18, 2017. The Circuit Court heard the motions to intervene on September 28, 2017. It denied them by order entered October 12, 2017, and then by amended order entered October 13, 2017. Hartford served a notice of appeal on October 13, 2017, followed by Canopius US Insurance Inc. (Oct. 27, 2017) and Selective Insurance Company of South Carolina (Oct. 30, 2017).

On January 24, 2018, the Court of Appeals denied motions to dismiss the appeals filed by the plaintiffs in *Harbour Cove* (Oct. 17, 2017) and *Beach Villas* (Dec. 19, 2017). It held: "Nothing, however, prevents Respondents from raising the issue of appealability in their briefs." (R. p. 14.) This Court granted certification under Rule 204(b), SCACR, on February 1, 2018.

Following certification, all claims against Hartford's insured in the *Beach Villas* action were resolved. For that reason, Hartford's brief addresses only its *Harbour Cove* appeal.

FACTS

The Association's operative complaint alleges that it has "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." (R. p. 244.) The Association sued the general contractor, Centex Homes, and numerous subcontractors. (R. pp.243–73.) Those subcontractors included Coastal Plaster Systems, Inc., which allegedly "installed and/or supervised the installation of the stucco and related flashings." (R. p.253.) The Association alleged that Coastal Plaster was negligent in "improperly installing the stucco facade in violation of the building code, standard building practices and accepted construction industry standards and

practices" and in "constructing the condominiums and/or buildings which fail to provide sufficient barriers against the intrusion of water into the wall system and an adequate avenue for exit of water that gets into the system resulting in damage to the units and buildings." (R. pp. 258–59.)

As a result, the Association alleges, 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." (R. p.263.)

As set forth in the Statement of the Case, Hartford, as the insurer defending Coastal Plaster, moved to intervene "for the limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury that addresses factual issues related to the indemnity coverage." (R. p. 41.) The Circuit Court denied that motion. (R. pp. 1-5.).

ARGUMENTS

I. UNCERTAINTY IN THE LAW COMPELLED HARTFORD TO SEEK INTERVENTION TO REQUEST AN ALLOCATED VERDICT.

Hartford was compelled to seek intervention because litigants have argued that this Court's recent rulings on insurance coverage, in the context of litigation over alleged construction defects ("CD litigation" or "CD actions"), require insurers to intervene to request verdicts or special interrogatories that allocate between covered and uncovered damages. Failure to intervene may

result in serious potential consequences for insurers, namely in the insurers bearing responsibility for the uncovered portions of verdicts. In denying Hartford's motion, the Circuit Court concluded intervention is not mandatory or even permissible, and further ruled that a separate declaratory judgment action adequately protected the carriers' rights to dispute coverage. However, the difference in opinion, and the significant potential consequences, create tension between the Circuit Court's order and this Court's recent rulings, thus prompting Hartford to seek intervention for the limited purpose of requesting an allocated verdict.

A. The Mandatory-Intervention Reading of *Harleysville*

The Court, in *Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), addressed coverage in a CD action that concerned both the cost to repair faulty workmanship itself (which is uncovered) 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)). In requiring the insurer to pay for both types of repair costs, *Harleysville* held that the insurer's reservation of rights "letters were not sufficiently specific to put [its insured] on notice of [the insurer's] specific defenses, particularly as to the need for an allocated verdict." 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)). In a footnote, 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.

The Court made no express reference to the intervention issue, and cited to *Newman*, without explanation. *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. However, the Court found 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 relitigate 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. Thus, *Newman* suggested that the insurer could have taken some action—perhaps

intervention—to obtain an allocated award, and failure to do so obligated the insurer to pay all damages, even those which were expressly not covered under the policy.

The Special Referee in *Harleysville* concluded that, under *Newman*, one of the reasons the insurer could not "relitigate" the allocation of damages was its "decision not to file a motion to intervene or otherwise seek an allocated verdict as it could have done under Rules 24 and 49, SCRCP."[2]

Responding to *Harleysville*'s citation to *Newman*, the dissent wrote that "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)).

Footnote 11 in *Harleysville*, when read in conjunction with *Newman* and with the *Harleysville* dissent, has led some litigants to conclude that insurers must intervene to request a special verdict if the parties do not request one. For a perfect example, Ocean Keyes Development, LLC, the developer in *Beach Villas*, told the Circuit Court:

> Under prior South Carolina law, insurance coverage issues were separated from tort issues; when an insurer reserved its rights as to coverage issues, it retained defense counsel whose loyalty was solely to the insured, and the liability insurer then retained separate coverage counsel to represent the insurer's interest in protecting its coverage position. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP*, 336 F. Supp. 2d 610, 615-16 (D.S.C. 2004). The *Harleysville* opinion radically changed the landscape of South Carolina law by holding that an insurer

[2] *Harleysville v. Heritage*, S.C. Sup. Ct. No. 2013-001281, Consolidated Record on Appeal, p.56, *available at* http://ctrack.sccourts.org/public/document/view.do?documentID=195246. "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (quoting *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984)); *see* Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding."). Hartford cites the docket materials not for the truth of any statement in those materials, but to examine what was (and was not) reviewed, argued, and decided by this Court in *Harleysville*.

> has not only a right, but a duty to intervene in the underlying proceedings. *Harleysville*, 803 S.E.2d at 294 (finding that a liability carrier may not relitigate damages in a separate coverage action.)
>
> As a result, the Insurers were forced to seek intervention in this action based upon the Supreme Court's directive. The Insurers' right to intervene includes a right to attend and participate in the trial because the evidence presented at trial may affect the special interrogatories and/or special verdict forms needed for findings of fact as to the Insurers' coverage. The Court's reasoning in *Harleysville* makes sense only if the liability insurer participates in the underlying action.

(R. pp. 59–60)

Hartford moved to intervene in this action given that interpretation of *Harleysville* and in an abundance of caution.[3] Nevertheless, other reasonable interpretations of *Harleysville* suggest that the Court did not intend to change the litigation landscape by requiring insurers to intervene. As discussed in greater detail below, Hartford moved to intervene in *Harbour Cove* to avoid losing its right to allocate between covered and uncovered damages should coverage litigation become necessary, if the mandatory-intervention reading of *Harleysville* was this Court's intention. However, Hartford seeks a ruling that under *Harleysville* and other existing case law, an adequate reservation of rights letter is sufficient preserve the right to allocate between uncovered and covered damages in a separate declaratory judgment action without intervention in the underlying construction defect action.

B. The Intervention-Neutral (Reservation of Rights) Reading of *Harleysville*

Harleysville can reasonably be read as a decision grounded in the adequacy of an insurer's reservation-of-rights letter, and one that did not reach the question of intervention. Thus, intervention is not mandatory when a carrier has properly and adequately reserved its rights. This

[3] The exception is that Hartford does not see any reason to conclude that the "Insurer's right to intervene includes a right to attend and participate in the trial." (R. p. 60). In the few cases where insurers have intervened, the insurer has not been an "active litigant." *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1325 (S.D. Ala. 2003). As discussed in section I.D, *infra*, general intervention would be unworkable.

reading finds support from the face of the *Harleysville* opinion, the briefing in that case, prior South Carolina law, and in broader legal principles.

First, the Court's entire discussion of the issue, at section III.A of its opinion, was under the heading "Reservation of Rights to Contest Coverage." *Harleysville*, 420 S.C. at 336, 803 S.E.2d at 296. It cited the principle that a "reservation of rights is a way for an insurer to avoid breaching its duty to defend and seek to suspend operation of the doctrines of waiver and estoppel prior to a determination of the insured's liability." *Id.* at 338, 803 S.E.2d at 297 (citing 14 Couch on Ins. § 202:38). The Court held that "there is evidence in the record to support the Special Referee's finding that Harleysville's reservation letters were insufficient to reserve its right to contest coverage of actual damages, and therefore, we affirm." *Id.* at 343, 803 S.E.2d at 300. That holding sufficiently resolved whether the insurer needed to pay the award of actual damages, without deciding whether the insurer could have or should have intervened.

Second, the *Harleysville* respondents did not actually contend that the insurer was entitled to intervene. The insurer offered substantial reasons for why it did not move to intervene:

- "In a similar lawsuit involving the same insured that reached trial several years before these actions, Harleysville filed a motion to intervene, which was strongly opposed by the insureds. Accordingly, in that instance, Harleysville withdrew its motion."[4]
- "An intervention by Harleysville would have resulted in an adversarial relationship between insured and insurer." *Id.*

[4] *Harleysville v. Heritage*, No. 2013-001281, Appellant Brief p.9, *available at* http://ctrack.sccourts.org/public/document/view.do?documentID=192921. As discussed in footnote 2, *supra*, the Court can take judicial notice of the briefs on its docket in *Harleysville* for the purpose of examining what arguments were before the Court. *See Wise*, 394 S.C. at 601, 716 S.E.2d at 122 Rule 201(f), SCRE. The parties' arguments are relevant to identifying what issues the Court determined within the rule of stare decisis. *See Hutto v. S. Farm Bureau Life Ins. Co.*, 259 S.C. 170, 173, 191 S.E.2d 7, 8–9 (1972).

- An "intervention by Harleysville would have revealed the presence of liability insurance in contravention of Rule 411, SCRE." *Id.* at p.10.
- *Newman* involved "an arbitration, not a jury trial, and thus the *Newman* Court had no reason to consider the various disincentives and prohibitions—for example, Rule 411, SCRE or the potential for confusing the jury—that prevented Harleysville from intervening in the underlying actions here." *Id.* at p.13.

The plaintiffs (who succeeded to the insured's rights) did not argue that the insurer actually could have intervened. Instead, they argued that nothing prevented from the insurer from *moving* to intervene—regardless of whether the insured would have opposed the motion or the trial court would have been compelled to deny it:

- "*Newman* gives the insurance carrier the incentive to take all legal avenues including intervention, submission to the Court of special interrogatories, or in the very least, informing its insured of the need for an allocated verdict."[5]
- "There is nothing in the record to even imply that Harleysville was in some way prevented from filing a motion to intervene." *Id.* at p.14.
- "They had an obligation to their insureds to at least attempt to intervene or to advise them and counsel of the need for an allocated verdict and the catastrophic loss of coverage or protracted litigation that may result from an unallocated verdict." *Id.* at p.21.

[5] *Harleysville v. Heritage*, No. 2013-001281, Respondent Brief p.9, *available at* http://ctrack.sccourts.org/public/document/view.do?documentID=188562. *See supra* n.2 (judicial notice).

- "Whether Harleysville would be allowed to intervene is not decided by the lawyers, it is decided by the Trial Judge based upon the Rules of Civil Procedure. Harleysville made a conscious decision not to intervene and its reasons are irrelevant." *Id.* at p.50.

Given the *Harleysville* plaintiff's arguments, it would have made sense for the Court to decide not to reach the Special Referee's intervention holding.

Third, this Court generally decides important questions expressly, not by implication. The Court decided *Harleysville* without expressly mentioning intervention in the majority opinion, and without any party affirmatively arguing that the insurer could have intervened. "It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.'" *Hutto v. S. Farm Bureau Life Ins. Co.*, 259 S.C. 170, 173, 191 S.E.2d 7, 8–9 (1972) (quoting 20 Am. Jur. 2d Courts § 190 (1965)).[6] That principle is particularly true where any such implicit holding might conflict with other precedents. *Coleman v. Page's Estate*, 202 S.C. 486, 491, 25 S.E.2d 559, 560 (1943). As discussed in the next section, it is not easy to reconcile the mandatory-intervention reading of *Harleysville* with the Court's precedents on intervention.

C. The Circuit Court's Ruling Denying Intervention

The Circuit Court, consistent with the analysis in section I.B *supra*, held that *Harleysville* "does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms." (R. p.4 ¶ 3.) It cited four other reasons why, in its judgment, South Carolina law generally prohibits such intervention, and does not require intervention for subsequent allocation of covered versus uncovered damages pursuant to an insurance policy.

[6] That American Jurisprudence entry has been renumbered as § 130, and further states that "a case is not a binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced." 20 Am. Jur. 2d Courts § 130 (Supp. 2018).

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

The Circuit Court began by focusing on 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*"). There, 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 to 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 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." (R. pp. 3–4.) That analogy, however, is not perfect because *Harleysville* suggests the insurer's interest is more than financial.

It is true that this is a CD action, not an insurance coverage action. But *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). This passage arguably suggests that an insurer's interest in an allocated verdict is not merely a financial interest, but part of a duty to protect its insured from prejudice.

That does not fully answer the question of how far any such a duty goes—especially whether the duty extends so far as to require intervention when the insured does not request an allocated verdict and may not desire an allocated verdict. Still, the mandatory-intervention reading of *Harleysville* and *Newman* is in tension with *Ex parte GEICO*'s interpretation of Rule 24, SCRCP. *Newman* involved an arbitration, not subject to the strictures of Rule 24. And in *Harleysville*, the Court declined to opine as to how the insurer could have intervened under that rule. *Supra* § I.B. It stands to reason that the Court would have expressly addressed *Ex parte GEICO* in *Harleysville* or *Newman* if it had sought to give insurers clear standing to intervene under Rule 24, SCRCP. *See Coleman*, 202 S.C. at 491, 25 S.E.2d at 560. In sum, *Ex parte GEICO* leans against intervention, but does not preclude the possibility that the Court intended to require intervention.

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." (R. 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."
>
> 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 five decades, and it seems unlikely that the Court intended to abrogate it *sub silentio*.

The Restatement (Second) of Judgments offers a potential means of reconciling *Harleysville* with *Sims*.[7] The section that replaced § 107 of the first Restatement (cited in *Sims*)

[7] This Court has looked to other provisions of the Restatement (Second) of Judgments regarding a judgment's preclusive effect. *See Catawba Indian Nation v. State*, 407 S.C. 526, 536, 756 S.E.2d 900, 906 (2014); *Judy v. Judy*, 393 S.C. 160, 168, 712 S.E.2d 408, 412 (2011).

states that an "indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee." Restatement (Second) of Judgments § 58(1)(b). Such a "conflict of interest" arises "when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not." *Id.* § 58(2). The accompanying commentary notes that the "indemnitor may be required to manifest this differentiation by a reservation of its right qua indemnitor when it assumes the defense of the indemnitee." *Id.* § 58 cmt. a.

Through that lens, *Harleysville* did not abrogate *Sims* when it held that the insurer could not challenge coverage in the separate declaratory judgment action, even though a conflict of interest arose between the insurer and its insured. In *Sims*, the insurer did not defend. In *Harleysville*, the insurer did defend, but its reservation of rights was inadequate. Consistent with the § 58 commentary, the insurer in *Harleysville* could not litigate that issue in the coverage action because it did not adequately advise the insured of the differentiation giving rise to a conflict of interest.

Still, it is not clear that the Circuit Court's reading of *Sims* was correct. *Harleysville* did not cite the Restatement, and only the dissent cited *Sims*. *Newman* noted the insurer's "reservation of rights and [the] understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding"—but, without finding that reservation inadequate, held that it was "not the purpose of this declaratory judgment action" to "determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco." 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5. If, however, this Court adopts

Restatement (Second) of Judgments § 58 in this appeal, the Circuit Court's decision was almost certainly correct.

3. Defense Counsel's Situation

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." (R. 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.*

Sims and the Restatement favor separate resolution of coverage questions where a conflict of interest exists between insurer and insured. *Supra* § I.C.2. If a plaintiff put on evidence unreasonably weighted toward consequential damages, with an eye to maximize coverage, defense counsel's paramount loyalty to the insured would restrict or prevent a challenge to the plaintiff's allocation.

There are other reasons, apart from coverage, that may persuade defense counsel, in the best interests of their client (the insured), not to challenge an unreasonable allocation. "One of the hardest decisions defendants in civil cases have to make, in both personal injury and commercial cases, is whether to argue liability only, or to argue both liability and damages." Thomas A. Mauet, TRIALS: STRATEGY, SKILLS, AND THE NEW POWER OF PERSUASION 480 (Aspen 2015). "Views differ. Some defense lawyers believe that you cannot credibly argue both liability and damages, and that if you do, you essentially concede liability." *Id.* Although others, acknowledging that choice can be difficult, still "believe that you can credibly argue both issues if you set it up carefully," *id.*

If allocation issues are in tension with counsel's other goals at trial, it is far less likely that the jury can produce a reliable allocation of damages. Trial is fundamentally a truth-seeking process. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251–252, 489 S.E.2d 472, 477 (1997); Rule 102, SCRE; 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) (criminal context). 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). At least one outside court has denied intervention in large part because of concerns regarding defense counsel's situation. *High Plains Co-op. Ass'n v. Mel Jarvis Constr. Co.*, 137 F.R.D. 285, 290–291 (D. Neb. 1991).

Authority cited in *Harleysville* indicates that the solution is to give the final decision to the insured, rather than compelling insurer intervention. The Court's discussion of the allocated-verdict issue relied principally on *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972).[8] *See Harleysville*, 420 S.C. at 341–343, 803 S.E.2d at 299–300. *Duke* began by adopting 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

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

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.[9]

If an insured expresses its opposition to a special verdict sheet, the Court may well conclude that the insurer should not move intervene, and that defense counsel must request no special verdict sheet. *See* Rule 5.4(c), RPC, Rule 407, SCACR ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

However, it is not uncommon to find a situation where, despite a reservation of rights advising it of the allocation issue, the insured does not respond to the insurer and gives no instruction to defense counsel. An insured may be "defunct," *Harleysville*, 420 S.C. at 337, 803 S.E.2d at 297, or lack personal counsel separate from the counsel retained by the insurer. In holding that "the insureds, represented by their own retained counsel, would be entitled to make the

[9] 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.

decision whether to seek an allocated verdict," *Duke* expressly did "not explore the situation in which the insured does not have his own counsel." 468 F.2d at 979 & n.4.

When the insured lacks personal counsel, a motion to intervene does make a record that the trial judge and all of the parties—including the plaintiff—were on notice of the potential benefits of an allocated verdict. *See Duke*, 468 F.2d at 980 (discussing *Morris v. W. States Mut. Auto. Ins. Co.*, 268 F.2d 790 (7th Cir. 1959) (burden fell on judgment-creditor plaintiff to establish the amount of a general verdict within coverage, where insurer suggested an allocated verdict at trial, and the plaintiff opposed it)); *see also Uvino v. Harleysville Worcester Ins. Co.*, 708 F. App'x 16, 20 (2d Cir. 2017) (insurer's motion to intervene gave plaintiffs notice and "ample opportunity to present evidence distinguishing between covered and non-covered damages"). Still, although a motion to intervene puts all parties on notice of the benefits of an allocated verdict vis-à-vis insurance coverage, the same objective can be achieved by disclosure of the insurer's operative reservation of rights letter.

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." (R. p.4 ¶ 5).

The Court's discussion of allocated verdicts in *Harleysville* assumed that an allocated verdict would be a viable option in CD litigation. *Duke*, cited in *Harleysville*, found that allocated verdicts would more likely than not prove workable:

> 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.

The Circuit Court's rulings in both *Harbour Cove* and *Beach Villas*, suggest that allocated verdicts will not be workable in the typical CD trial. The decision whether to submit a special verdict form or interrogatories to a jury is committed to a Circuit Court's discretion. *See* Rule 49, SCRCP; *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 906 (2007). Judge Newman, as the Presiding Judge over CD litigation throughout the South Carolina coast, draws from a deep well of experience in exercising discretion under Rule 49, SCRCP. The Circuit Court is familiar with how evidence is ordinarily presented in CD actions, including whether a jury is likely to have evidence sufficient to make an allocation.

Evidence of a defendant's liability insurance, moreover, is highly prejudicial and inadmissible. *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). The jury could not be told the reason for the allocation. *Duke*, 468 F.2d at 979. Still, the Circuit Court noted the potential for confusion if the jury does not have the evidence to make an allocation.

The posture of *Harbour Cove* and *Beach Villas*—jury trials on both liability and damages—may make it easier to reconcile the Circuit Court's holdings with *Newman* (an arbitration) and *Harleysville* (a damages-only trial). When the fact-finder is an arbitrator, as in *Newman*, "unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards[.]" Construction Industry Arbitration Rules and

Mediation Procedures, Am. Arb. Ass'n, R-47(b).[10] There was a breakdown in *Newman*, but 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[.]" 385 S.C. at 198, 684 S.E.2d at 547. In the less formal setting of an arbitration before an experienced CD arbitrator, it is much more reasonable to conclude that an insurer could have asked the arbitrator to provide a further breakdown—without the same level of risk of prejudice or confusion that exists with a jury. It is similarly more reasonable to conclude that the arbitrator would have sufficient independent expertise to make an allocation, even if the evidence was not completely clear.

Ultimately, however, the most straightforward way to reconcile the Circuit Court's ruling with *Harleysville* and *Newman* is for the insurer and defense counsel to abide by the insured's choice whether to request an allocated verdict. Upon such a request, a trial judge would still need to determine after the close of the evidence whether the allocated verdict would be appropriate and workable under Rule 49, SCRCP.

D. The Present Appeal

Hartford would prefer to leave all coverage questions for a subsequent coverage action under *Sims*, for largely the same reasons articulated by the Circuit Court. But, as set forth above, there is a tension created by *Sims*, *Newman* and *Harleysville*, and the suggestion that insurers must intervene if no party requests an allocated verdict, or lose its right to allocate between covered and uncovered damages. If the Court concludes that "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

[10] Available at https://www.adr.org/sites/default/files/Construction%20Rules.pdf. If the Court wished to mandate allocated verdicts, it could amend Rule 49, SCRCP, to impose a similar requirement in CD cases.

damages," *Harleysville*, 420 S.C. at 341, 803 S.E.2d at 299, includes a duty to intervene, Hartford was correct to move to intervene, and the Circuit Court's denial of intervention was improper.

Hartford could not safely rely on any agreement or consensus among the parties that the coverage issue should be reserved for a subsequent action under *Sims*. (R. p. 534, lines 7–8) (Centex argument, in opposition to intervention, that *Sims* allowed insurers to "bring a separate action to determine these coverage issues"). In *Newman*, the Court held that it was the insurer's responsibility to obtain a further itemization from the arbitrator, even though 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." 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5; *see also Harleysville v. Heritage*, No. 2013-001281, Appellant Brief p.43 (citing insurer's evidence of "agreement" to postpone coverage disputes for later action). For that reason, Hartford moved to intervene and has appealed the order denying intervention. Only this Court can settle *Harleysville*'s meaning.

If the Court holds that insurers are obligated to intervene to preserve their right to allocate between covered and uncovered damages when the parties to the CD action do not request an allocated verdict, the Court should reverse and remand with directions to grant intervention.

II. IF HARTFORD HAD AN OBLIGATION TO INTERVENE, APPELLATE JURISDICTION EXISTS.

A. Appellate Jurisdiction Over Orders Denying Intervention

Before this Court certified this appeal, the Court of Appeals denied the Association's motion to dismiss the appeal. The denial of the motion was without prejudice to consideration of the issues at the merits stage. The Association argued that an order denying intervention is not immediately appealable. That objection is without merit.

"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,[11] this Court held that an order 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 [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.'").

The Association cited cases holding that "an order *granting* a motion to intervene is not immediately appealable." *Duncan v. Gov't Employees Ins. Co.*, 331 S.C. 484, 486, 449 S.E.2d 580, 580 (1994) (emphasis added); *see Dorn v. Cohen*, 418 S.C. 126, 139, 791 S.E.2d 313, 320 (Ct. App. 2016) (order adding a party was not immediately appealable where it "had the effect of an

[11] *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 Ann. Section 14-3-330, provides identically: "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...."

order granting a motion to intervene"). An order granting a motion to intervene is analogous to an ""an order making a third party a defendant," which does not put any party of out court and creates no immediate appeal right. *Duncan*, 331 S.C. at 485, 449 S.E.2d at 580. An order permitting intervention, in contrast with an order denying intervention, is not an order that "determines the action," that "prevents a judgment from which an appeal might be taken, or that "discontinues the action" as to the intervenor or any other party. *See* S.C. Code § 14-3-330(2).

The order denying Hartford's motion to intervene "in effect determine[d] the action and prevent[ed] a judgment from which an appeal might be taken," insofar as Hartford was concerned, within the meaning of *Ex parte Johnson*, 63 S.C. at 208, 41 S.E. at 309. It was therefore immediately appealable under S.C. Code § 14-3-330(2).

B. Hartford's Standing to Appeal Order

The plaintiff in *Beach Villas* challenged whether Hartford had standing to appeal under SCACR 201(b) ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."). Because the Court reviews questions of jurisdiction regardless of whether parties raise them, *see Amisub of S.C., Inc. v. Passmore*, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994), Hartford will address this jurisdictional objection, notwithstanding the *Beach Villas* settlement.

"There is no material distinction in general standing principles juxtaposed to the ability of an 'aggrieved party' to appeal pursuant to Rule 201(b) of the South Carolina Appellate Court Rules." *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008) (Kittredge, J.) (citing *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301–303, 551 S.E.2d 588, 589 (Ct. App. 2001) (Hearn, C.J.)); *see Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) ("an aggrieved party," for purposes of appellate jurisdiction, "is a person who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly

upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation").

Thus, if Hartford had standing to intervene under Rule 24, SCRCP, it follows that Hartford is an aggrieved party entitled to appeal the denial of that motion under Rule 201(b), SCACR. The *Beach Villas* plaintiff cited this Court's decisions in *Ex parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003), and *Ex parte S.C. Dep't of Motor Vehicles (SCDMV)*, 390 S.C. 457, 702 S.E.2d 568 (2010). Both decisions make clear, however, that the Court was dismissing the appeals because the appellant never filed a motion to intervene under Rule 24, SCRCP. *See Ex parte SCDMV*, 390 S.C. at 457, 702 S.E.2d at 568 (SCDMV attempted to appeal order to issue a driver's license, but the Court dismissed appeal because at "no time did SCDMV file a motion to intervene under Rule 24, SCRCP"); *Ex parte Condon*, 354 S.C. at 642, 583 S.E.2d at 434 (Attorney General sought to contest and appeal an award of attorney's fees in a class action, but the Court "dismiss[ed] th[e] appeal based on the Attorney General's failure to move for intervention as required by Rule 24, SCRCP"). Hartford, in contrast with the appellants in *Ex parte Condon* and *Ex parte SCDMV*, moved to intervene under Rule 24, SCRCP, before noting an appeal.

The *Beach Villas* plaintiff suggested that Hartford, to qualify as an "aggrieved party" under Rule 201(b), SCACR, needed to intervene as a party-defendant for all purposes. But the only procedure for intervention under the South Carolina Rules of Civil Procedure is Rule 24, which imposes no requirement that an intervenor become a party-plaintiff or party-defendant. *See* Rule 24, SCRCP. In the handful of cases where federal courts have permitted insurers to intervene to request special verdict sheets, applying the similarly worded Rule 24, Fed. R. Civ. P., they have done so under the understanding that insurer "is not seeking to interpose any claims against anyone in this action," that "no claims have been asserted against it," and that the insurer "will not and

should not be an active litigant." *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1325 (S.D. Ala. 2003); *see id.* at 1327 (listing restrictions, citing *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 44 (D. Nev. 1984)).

Even if the mandatory intervention reading of *Harleysville* is correct, Hartford does not see any reason to believe that the Court meant that an insurer must move to intervene as a *party* before the jury at trial, giving a plaintiff the opportunity to make use of the well-known prejudicial effect from a jury's belief (correct or incorrect) that there is insurance that will pay a potential verdict. *See Todd*, 385 S.C. at 514–516, 685 S.E.2d at 616–617. Except where required by statute, insurers are not to be joined in tort actions against their insureds. *Major v. Nat'l Indem. Co.*, 267 S.C. 517, 519–520, 229 S.E.2d 849, 849–850 (1976). A limited intervention, for purposes of asking the Circuit Court (outside the jury's presence) to submit an allocated verdict form to the jury, is the only form of intervention that could even arguably be consistent with *Harleysville* and South Carolina law. *See Thomas*, 297 F. Supp. 2d at 1325–1327.

It is, however, possible that the Circuit Court was correct in holding that *Harleysville* imposes no obligation, and confers no right, upon insurers to intervene to request allocated verdicts, and that the denial of intervention has no impact on Hartford's ability to seek a separate declaration of coverage. *See supra* § A. In that case, Hartford would have no interest that would warrant intervention under Rule 24, SCRCP, the denial of Hartford's motion would not affect a substantial right under § 14-3-330(2), or aggrieve Hartford under Rule 201(b), SCACR. Either way, the question of standing under Rule 201(b), SCACR, depends on the ultimate merits question of what *Harleysville* means.

CONCLUSION

To the extent that the Court determines that Hartford was obligated to intervene in the underlying construction defect action to request an allocated verdict, to preserve its right to allocate

between covered and uncovered damages in a subsequent declaratory judgment action, the Court should reverse and remand with directions to grant Hartford's motion to intervene. If, however, the Court determines that intervention in an underlying construction defect action is not mandatory, and an adequate reservation of rights letter is sufficient to preserve the right to allocate between covered and uncovered damages in a separate declaratory judgment action, the Court should affirm the decision below, with any coverage issues to be determined in a separate coverage action.

July 23, 2018

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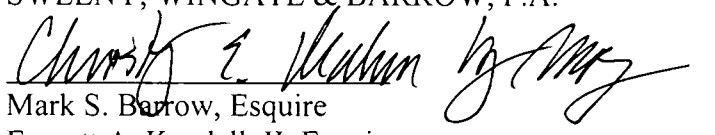

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. 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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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

APPELLANTS HARTFORD FIRE INSURANCE COMPANY AND HARTFORD CASUALTY INSURANCE COMPANY'S PROOF OF SERVICE OF FINAL BRIEF AND FINAL REPLY BRIEF

I certify that I have served Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company's Final Brief and Final Reply Brief on Appellants and Respondents by depositing a copy of each in the United States Mail, postage prepaid, on July 23, 2018 addressed to their attorneys of record, listed as follows:

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