

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

RECEIVED

JUL 23 2018

S.C. SUPREME COURT

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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ARGUMENTS

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

Hartford submits this reply brief to clarify a few points.¹ Although there are significant disagreements between the Association and the appellants other than Hartford, the differences between the Association and Hartford on the intervention question are quite narrow.

The Association asserts that the easiest and most sensible way to harmonize *Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), with *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965), is for the Court to adopt the Restatement (Second) of Judgments § 58 (1982). Hartford agrees. With that context, *Harleysville* is best understood as addressing only the question of the sufficiency of the insurer's reservation of rights.

According to the Association, the Circuit Court's decision in essence finds that there is no necessity or utility of allocated verdicts in CD actions—and the issue of covered versus uncovered damages instead should be addressed in a separate declaratory judgment action. Hartford agrees that any such allocation should be made in a separate declaratory judgment action. If the plaintiff and the insured lack incentive to vigorously contest the breakdown of damages in the CD action, the risk of jury confusion is high, and the likelihood of an accurate allocation is low. It is in not in the interest of anyone—the CD plaintiff, the insured, the insurer, or defense counsel—to submit an allocated verdict in that circumstance. Far preferable is to litigate the allocation in a subsequent

¹ Capitalized terms are defined in Hartford's opening brief. The lone difference is that, following the Court's dismissal of the *Beach Villas* appeal on May 25, 2018, Hartford Underwriters Insurance Company is no longer an appellant. "Hartford" therefore refers to Hartford Fire Insurance Company and Hartford Casualty Insurance Company. The Association's brief (p.4) incorrectly identifies Hartford Underwriters Insurance Company as an insurer of Coastal Plaster in the *Harbour Cove* case.

coverage action, where the insurer and the insured (or the insured's judgment creditor) have full incentive to establish the correct allocation.

Hartford does take issue with a few points in the Association's brief. First, the Association portrays Hartford as eager to intervene. Rather, as Hartford's motion below and its opening brief made clear, Hartford intervened as a precautionary measure, in response to other litigants' mandatory-intervention reading of *Harleysville*. Should the Supreme Court clarify that mandatory intervention is not necessary to protect Hartford's interests in a subsequent coverage action, Hartford would have no need to intervene in future cases to seek an allocation.

Second, the Association contends that Hartford's motion to intervene was untimely. The Association did not itself raise a timeliness objection at the September 28 *Harbour Cove* hearing. (R. pp. 333–39.) Nevertheless, the parties agreed, with the Circuit Court's leave, to incorporate by reference the arguments made in the September 27 *Cypress Bend* hearing (which did not give rise to an appeal) and the September 28 *Beach Villas* hearing (which settled on appeal). (R. pp. 315, 319, 321–22, 330, 332, 340.) The Circuit Court heard timeliness objections at the September 27 motions hearing, and its reaction was that Hartford's motion was early, if anything, because the Circuit Court had not yet reached the stage of considering verdict sheets. (R p. 531.) The Circuit Court ultimately denied intervention, irrespective of timing, on grounds that would prohibit intervention at any time. (R. pp.3-4.)

Third, the 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 CD trial into a simultaneous trial on coverage. The Association offers no authority or logic for the notion that coverage disputes would be at issue. The only purpose for Hartford's intervention was to seek an allocation between those damages that, under settled South Carolina law, are and are not covered.

Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009). It did so because, under a plausible reading of *Harleysville* and *Newman* (argued by other litigants), an allocated verdict is necessary to create a factual record for such an allocation. The Court may well adopt Restatement § 58 and permit the allocation to be made in a subsequent *Sims* action, assuming a sufficient reservation of rights. But even if intervention is necessary, nothing in *Harleysville* or *Newman* would suggest that the insurer's participation 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). The few courts permitting intervention have imposed conditions precisely to avoid injecting insurance issues into trial. *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1325, 1327 (S.D. Ala. 2003). Taking discovery from insurers would also violate Rule 26(b)(3), which protects against the disclosure of materials "prepared in anticipation of litigation or for the trial" by or for the insured or its insurer.

Fourth, the Association makes a passing alternative argument, at page 12 of its brief, that Hartford has "made no showing of sufficient reservations of rights to contest coverage so the question of intervention is moot for the instant appeal." In this case, neither the Association nor any other party suggested that the insurers needed to submit their reservations of rights for review by the Circuit Court.² Nor did the Circuit Court make any such holding. A challenge to the

² In the *Beach Villas* motions hearing, held the day after the hearing on the motions to intervene in this case, one insurer offered to submit its reservation-of-rights letters for in camera review. (R. p. 464-65.) The Circuit Court asked: "Does this interject me into the coverage aspect of things?" *Id.* The insurer responded that it believed the reservations-of-rights were better considered in a subsequent coverage action, but it did not want to be accused of waiving anything. *Id.* The *Beach Villas* plaintiff saw no need to introduce those letters in the CD 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." (R. p. 466). Because the insurer did not believe the letters would have any effect, it refrained from submitting the letters "as long as it's not considered a condition

sufficiency of Hartford's reservation of rights is a matter that (as happened in *Harleysville*) would need to be litigated in the subsequent coverage action. Nothing in *Harleysville*, *Newman*, or the ruling here would even hint that, as the Association newly argues, Hartford would need to introduce and litigate the sufficiency of its reservation of rights in this action.³

Finally, Hartford does not concede any of the Association's arguments regarding liability and damages. Hartford has hired defense counsel to vigorously defend Coastal Plaster. Its preference is to allow defense counsel to focus exclusively on defending Coastal Plaster, using whatever strategy defense counsel sees fit, without any need to focus on allocation of damages. If the mandatory-intervention reading of *Harleysville* is correct, Hartford has moved and will continue to move to intervene, with its own counsel, separate and distinct from defense counsel retained to exclusively defend Hartford's insured. But Hartford's preference is to reserve all coverage disputes (including the adequacy of its reservation of rights) for a subsequent coverage action, if the Court rejects the mandatory-intervention reading of *Harleysville*.

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

On the question of appellate jurisdiction, which encompasses the Associations' arguments on both standing and whether the motion is immediately appealable, the differences between the Association and Hartford are, again, narrow. The Association reasons, at § II.A of its brief, that if

precedent to you considering our motion to intervene." *Id.* The *Beach Villas* order, issued at the same time as the order in this action, denied intervention because such coverage matters should be reserved for a coverage action under *Sims*. (R. p. 10.)

³ This argument is particularly odd coming from the Association, which hopes to become a judgment creditor and succeed to Coastal Plaster's rights under the Hartford policies. The Association is on notice of the distinction between covered and uncovered damages and is positioned to request an allocated verdict, if the Association thinks one appropriate.

the parties can litigate the allocation of damages in a subsequent coverage action under *Sims* and Restatement § 58, then Hartford is not an aggrieved party.⁴ Hartford agrees.

Hartford and the Association disagree, however, on appellate jurisdiction if the Court does adopt the mandatory-intervention reading of *Harleysville* and *Newman*. The Association contends that, even if Hartford were obligated to intervene to protect its rights, Hartford would need to intervene as a *party* to have standing to appeal the denial of that motion. But the Association does not address the authorities, cited by Hartford, broadly construing “party” in Rule 201(b), SCACR.⁵

If the Court concludes that only a person who moves to intervene as a full party can appeal under Rule 201(b), SCACR, then the mandatory-intervention reading of *Harleysville* would be all the more problematic. The premise of the mandatory-intervention reading of *Harleysville* is that an insurer is positioned to stop a CD action from proceeding to an unallocated verdict. Therefore, under the premise of the mandatory-intervention reading, the right to appeal an order denying intervention would be a necessary component of that theory. But an insurer, even if required to intervene, cannot intervene as a *party*. The handful of cases allowing insurer intervention have made clear that the insurer cannot be an active litigant and is an intervenor only for the limited purpose of requesting an allocated verdict. *See Thomas*, 297 F. Supp. 2d at 1325, 1327. Any greater role would risk great prejudice to the insurer and its insured. *Id.*; *see* Rule 411, SCRE; *Todd*, 385 S.C. at 514, 685 S.E.2d at 616. Any jurisdictional problems thus reinforce the conclusion that the mandatory-intervention theory is unworkable under current South Carolina law.

⁴ The Association does not appear to dispute that, as established in Hartford’s opening brief, the order is otherwise sufficiently final under S.C. Code § 14-3-330(2), and *Ex parte Johnson*, *in re Rutledge v. Tunno*, 63 S.C. 205, 208, 41 S.E. 308, 309 (1902).

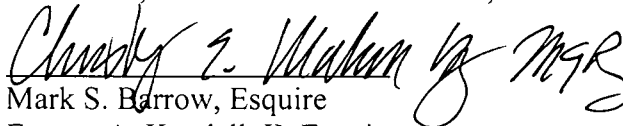
⁵ *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008) (Kittredge, J.) (citing *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301–303, 551 S.E.2d 588, 589 (Ct. App. 2001) (Hearn, C.J.)).

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

CERTIFICATE OF COUNSEL

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

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**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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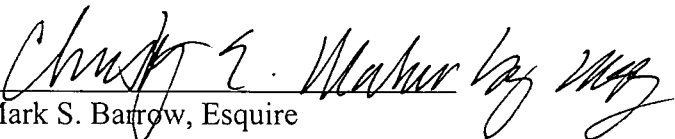
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