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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.

RECORD ON APPEAL
VOLUME I of II

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
	)	**ORDER DENYING MOTION OF**
Plaintiffs,	)	**INSURERS FOR LIMITED**
	)	**INTERVENTION**
v.	)	
	)	
Centex Homes, et al.,	)	
	)	
Defendants.	)	

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek 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.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

(1) definition of progressive damages;

(2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

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(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (*citing* South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. *Ex parte* Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." Id. A party has standing if the party has a personal stake in the

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subject matter of a lawsuit and is a "real party in interest." Id. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Id.

BACKGROUND

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

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 Harbour Cove Condominium 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 Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not

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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.E2d 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.

CW

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

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ELECTRONICALLY FILED - 2017 Oct 13 4:22 PM - HORRY - COMMON PLEAS - CASE#2014CP2606573

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
BEACH VILLAS AT OCEAN KEYES PROPERTY OWNERS ASSOCIATION, INC., Plaintiff, vs.	)	CASE NO. 2014-CP-26-6573
OCEAN KEYES DEVELOPMENT, LLC, KEYE CONSTRUCTION CO., INC., RUSSELL P. BALTZER, FIRST EXTERIORS, LLC, CAREFREE EXTERIORS INC., COASTAL STUCCO, INC., RICHARD H. CONSTRUCTION, LLC a/k/a RICARDO HERNANDEZ d/b/a RICHARD FRAMING CONSTRUCTION, RICHARD H. CONSTRUCTION, LLC a/k/a RICARDO HERNANDEZ d/b/a RICHARD FRAMING CON., INC., BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC, STEEL HOMES INTERNATIONAL, INC., RENAISSANCE STEEL INSTALLATION, LLC n/k/a RENAISSANCE STEEL, LLC, BENCHMARK STEEL SERVICE, LLC AND DIETRICH BUILDING SYSTEMS n/k/a CLARKWESTERN DIETRICH BUILDING SYSTEMS, LLC, Defendants.	)	**AMENDED ORDER DENYING MOTION OF INSURERS FOR LIMITED INTERVENTION**
OCEAN KEYES DEVELOPMENT, LLC AND KEYE CONSTRUCTION CO., INC., Third-Party Plaintiffs, vs. RENAISSANCE STEEL INSTALLATION, LLC f/k/a RENAISSANCE STEEL, LLC n/k/a INNOVATIVE STEEL TECHNOLOGIES, BENCHMARK STEEL ERECTORS, and TOTAL CONSTRUCTION, LLC, Third-Party Defendants.	)	

THIS MATTER comes before this Court upon Motions of Canopius US Insurance Inc. ("Canopius"); Hartford Fire Insurance, Hartford Casualty Insurance Company and Hartford Underwriters Insurance Company (collectively "Hartford"); and Selective Insurance Company of

South Carolina ("Selective") seeking to intervene in the trial of this matter for the limited purpose of submitting special interrogatories to the jury regarding issues related to insurance coverage.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek 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.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

(1) definition of progressive damages;

(2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work

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of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (*citing* South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. *Ex parte* Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." Id. A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a "real party in interest." Id. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Id.

BACKGROUND

At the outset of the hearing in this matter, counsel for Plaintiff agreed to allow each of the Insurers to fully intervene as named parties in the case and allow counsel for each of the Insurers to participate in the actual trial, including the questioning of witnesses and making of arguments to the jury. Each of the Insurers stated that they did not wish to intervene in this case as parties to

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the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

Additionally, 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. 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.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

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 Beach Villas 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 Beach Villas 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

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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.E2d 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.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

ELECTRONICALLY FILED - 2017 Oct 13 4:22 PM - HORRY - COMMON PLEAS - CASE#2014CP2606573

The South Carolina Court of Appeals

Ex Parte:

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

And

Beach Villas at Ocean Keyes Property Owners Association, Inc., Plaintiff,

v.

Ocean Keyes Development, LLC, Keye Construction Co., Inc., Russell P. Baltzer, First Exteriors, LLC, CareFree Exteriors Inc., Coastal Stucco, Inc., Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Con., Inc., Builders FirstSource-Southeast Group, LLC, Steel Homes International, Inc., Renaissance Steel Installation, LLC n/k/a Renaissance Steel, LLC, Benchmark Steel Service, LLC and Dietrich Building Systems n/k/a Clark Western Dietrich Building Systems, LLC, Defendants,

And

Ocean Keyes Development, LLC and Keye Construction Co., Inc., Third-Party Plaintiffs,

v.

Renaissance Steel Installation, LLC f/k/a Renaissance Steel, LLC n/k/a Innovative Steel Technologies, Benchmark Steel Erectors, and Total Construction, LLC, Third-Party Defendants,

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

Appellate Case No. 2017-002146

ORDER

The motions to dismiss this appeal are denied. Nothing, however, prevents Respondents from raising the issue of appealability in their briefs.

The caption is amended as set forth above. All future filings shall reflect this amended caption.

James E. Lockemy C.J.
FOR THE COURT

Columbia, South Carolina

FILED
January 24, 2018

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

Beresford Commons Homeowners Association, Inc.,

Plaintiff,

v.

Portrait Homes-South Carolina, LLC, Portrait Homes-Beresford Commons, LLC, Pasquinelli Homebuilding, LLC, JJA Construction, Inc., d/b/a JJA Framing, Jose Castillo d/b/a JJA Framing, Samuel Glover, Glover's Brickworks, Inc., Z & Z, Incorporated, United Siding Specialists, Inc., Superior Solution, LLC, All American Roofing, Inc., Juan Luis Sanchez, Alfonso Villa Vicenio d/b/a Alfonso's Painting, Heritage Construction Consultants, Inc., Robert H. Yarnall d/b/a Heritage Construction Consultants, Inc., Victor Manuel Fernandez Jimenez d/b/a MJF Roofing Specialist, Arturo Torres Solache, Trinidad Olivia Garcia, Luis Hernandez d/b/a CNN Roofing, Norlan Cerrato, American Residential Services of SC, Inc., American Residential Services, LLC, Smith's Heating & Air Conditioning Co., Inc., Maurilio G. Demendonca, Gildo Rodrigues de Melo d/b/a Brazil Vinyl Siding, Vinicius Araujo a/k/a Vinicius Araujo Freitas, Lucas Rodriguez Barcelos, Guilhermerme Dos Santos, Renato Secomandi d/b/a New Canaan Carpentry, Donald Lee d/b/a Vinyl Siding Specialists, Ronedues Ventura d/b/a Providencia Siding, Nicholas Owens, Welinton Rezende, Levi Arruda, Argentino Jose Campos, Wellen Resende Bueno, Charles Bowser d/b/a CBW Services, Marcio Nunes da Silva, Jose Geraldo Dos Reis, Milton Dias

Civil Action No. 2013-CP-08-0179

ORDER GRANTING MOTION TO INTERVENE

FILED
17 JAN 23 PM 2:18
CLERK OF COURT
BERKELEY COUNTY, S.C.

d/b/a Milton Dias Siding, and Leandro de Paulo Araujo, Tom's Vinyl Siding, Universal Forest Products, Inc., Universal Forest Products Eastern Division, Inc. n/k/a UFP Eastern Division, Inc., Universal Forest Products Shoffner, LLC, Guy C. Lee Building Materials, LLC, Benjamin Mora d/b/a Mora Construction, Benjamin Mora Construction, LLC, Builders' Firstsource-Southeast Group, LLC, James W. Wentling, AIA, R.B.A., Inc. d/b/a Lifestyle U.S.A. Design, Lifestyle Design USA, Ltd., CTS of Summerville, Inc. f/k/a Carolina Truss Systems, Inc., Grade A Land Services, LLC, Saluda Hill, Inc., Marciniak Construction Co., Inc., Carolina Landscape Group, Inc., Plantation Scapes, Inc. and M and J Siding and Construction, LLC,

Defendants.

This matter is before the Court upon the motion of Selective Insurance Company of the Southeast ("Selective") to intervene in this action. A hearing was held on October 18, 2016, in Moncks Corner, South Carolina. After hearing the arguments of counsel present for the hearing and reviewing the written submissions, the Court hereby grants Selective's motion to intervene.

Based upon the filings, the Court understands that Selective provides insurance coverage to the Defendant United Siding Specialists, Inc. ("USSI") under Commercial General Liability (CGL) Policies and Commercial Umbrella Liability Policies. Those policies insure USSI for certain risks under the insuring agreement and exclude certain risks through policy exclusions. USSI, which was a siding subcontractor on the Beresford Commons project, sought coverage for this litigation, and Selective has been defending this lawsuit and a companion lawsuit under a reservation of rights. Selective disputes that USSI is entitled to coverage under the CGL Policies for each of the causes of

action or for all of the claims for damages as asserted by the Plaintiff in this action, based upon certain terms, conditions, and exclusions contained within the CGL and Commercial Umbrella Policies. Selective has identified a number of potential coverage issues that may be implicated by the facts of this litigation.

In order to protect its interests, Selective seeks to intervene in this action for a limited purpose. Selective seeks the ability to request that the trial judge submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury's verdict against the Defendant USSI, if a verdict is returned in favor of the Plaintiff.

Selective is seeking to intervene pursuant to Rule 24(a)(2), SCRCP, which provides:

> Upon timely application anyone shall be permitted to intervene in an action: ... (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.

Rule 24(a)(2), SCRCP. Therefore, in order to intervene as a matter of right, Selective must demonstrate that it has an interest in the underlying lawsuit and that the disposition of the action may impede its ability to protect its interests. This Court finds that Selective has made that showing.

Selective has demonstrated that it has an interest in the subject matter of this litigation and that the disposition of the action may impede its ability to protect its interests. Moreover, Selective has shown that its interests and the interests of its insured, USSI, are not identical, and as a result, the interests of Selective are not fully protected in this litigation. Specifically, Selective argues that in the event both covered and non-covered elements of damages are submitted to the jury and if the jury returns only a general verdict, Selective would likely be compelled to indemnify USSI for what would be, in whole or in part, an non-covered loss unless Selective takes action, as it is attempting to do with

this motion to intervene, to make certain that the jury's verdict, if any, is allocated between covered and non-covered claims or elements of damages. This Court agrees with Selective's position.

Selective relies heavily on the 2009 decision of the South Carolina Supreme Court in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), to demonstrate the necessity of the intervention it seeks. In *Newman*, Auto-Owners Insurance Company was the general liability insurer for a homebuilder. A homeowner brought a claim for defective construction which was arbitrated. The arbitrator issued an award in favor of the homeowner. Auto-Owners then pursued a declaratory judgment action to determine which damages awarded by the arbitrator were covered under its CGL policy. The Supreme Court reversed the trial court's ruling and found that the portion of the arbitrator's award for removal and replacement of defective stucco was not covered under the CGL policy. Yet, the Supreme Court still held Auto-Owners responsible to pay that non-covered portion of the damages because:

> [I]t is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. *Auto-Owners had 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.

684 S.E.2d at 547. (Emphasis added). Auto Owners was not a party in that underlying litigation. Yet, the Supreme Court nonetheless explained that "Auto-Owners represented Trinity in binding arbitration, 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." 684 S.E.2d at 547, n.5.

In short, the Supreme Court in *Newman* has held that a liability insurer – even though not a party to the underlying action – has a responsibility to seek an allocation of damages from the factfinder in that underlying action or waive the ability to "relitigate the issue of damages" in a subsequent declaratory judgment action. In other words, the *Newman* decision makes it mandatory for an insurer to seek an allocation of damages for coverage purposes in the underlying action, which is what Selective is attempting to accomplish with its intervention in this litigation. This Court concludes, based on *Newman*, that the failure of an insurer (although not a party) to raise the damages allocation in the underlying case will bar the insurer from litigating the issue in a later declaratory judgment action, which may (as was the case in *Newman*) result in the insurer being compelled to pay non-covered claims or damages. Thus, this Court agrees with Selective that *Newman* demonstrates the propriety of and necessity for Selective moving to intervene in this litigation so as to avoid later having to pay non-covered claims or damages.

Moreover, Selective has demonstrated that its interests are not adequately represented by other parties to the action. As discussed above, Selective has interests in this litigation separate from the actual defense of its insured, USSI. Selective also has interests with regard to its obligation to indemnify the insured, if a verdict is returned on any cause of action or any element of damages that is covered. That interest is not being protected by counsel retained to represent USSI who must follow the instructions of his client with respect to the proffer of a verdict form.

As indicated, Selective seeks to intervene for a limited purpose. Selective seeks only the ability to request that the trial court submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury's verdict against USSI, if a verdict is returned in favor of Plaintiff. Selective does not seek to actively participate in the trial of this action, that is, with the limited exception of making a motion, if necessary, at the appropriate stage of the trial to submit a special

verdict and/or special interrogatories to the jury. Selective is not seeking to participate in discovery. Selective is not attempting to delay the trial of this action. And finally, Selective is not seeking declaratory relief from this Court and is not asking this Court to determine any coverage issues. The trial judge will determine whether or not the jury will be informed that Selective has intervened or is represented in the courtroom. Likewise, the trial judge will determine whether Selective's motion for the submission of special interrogatories or a special verdict will occur outside the presence of the jury.

The parties have not demonstrated any legal prejudice to the proposed intervention. There will be no delays in the litigation as a result of the intervention, and the Court has not been shown that any changes in trial strategy would result from Selective's intervention. In contrast, this Court finds that Selective has shown prejudice that it will suffer if the intervention is denied. A denial would result in the impairment of its interests in that the Selective may ultimately be compelled to pay the entire judgment despite the fact that a portion of that judgment may not be a covered risk for which a premium was paid. That very result occurred in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), and given the admonitions by the Supreme Court, this Court believes that Selective in fairness should be permitted to intervene in this action to prevent the same detrimental result from occurring here.

In granting the motion to intervene, the Court is not deciding whether a special verdict and/or special interrogatories must be submitted to the jury. That decision will depend on the posture of the case at the time the case is submitted to the jury and specifically the nature of the elements of damages being presented to the jury. The Court's decision today recognizes the issues raised by the Supreme Court in *Newman* and gives Selective the standing to make a motion for a special verdict and/or special interrogatories to the trial judge. In sum, the decision whether to submit a special verdict

and/or special interrogatories or the language to be used in any special verdict form and/or special interrogatories that are submitted to the jury is reserved to the discretion of the trial judge.

IT IS, THEREFORE, ORDERED that the motion to intervene filed by Selective Insurance Company of the Southeast is hereby granted as set forth herein.

AND IT IS SO ORDERED.

J.C. NICHOLSON, JR.
Presiding Judge,
Ninth Judicial Circuit

Charleston, South Carolina

January 17, 2017

ELECTRONICALLY FILED - 2017 Jul 27 5:07 PM - HORRY - COMMON PLEAS - CASE#2014CP2607634

STATE OF SOUTH CAROLINA COUNTY OF HORRY THE HARBOUR COVE CONDOMINIUM ASSOCIATION, Plaintiff, v. CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, ET AL., Defendants.	IN THE COURT OF COMMON PLEAS CASE NO.: 2014-CP-26-7634

NOTICE OF MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR LIMITED INTERVENTION PURSUANT TO RULE 24, SCRCP TO HAVE COURT SUBMIT A SPECIAL VERDICT FORM AND/OR GENERAL VERDICT FORM ACCOMPANIED BY ANSWER TO INTERROGATORIES PURSUANT TO RULE 49, SCRCP

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for National Fire & Marine Insurance Company ("National Fire"), will move before the Honorable Clifton Newman, for the Fifteenth Judicial Circuit, ten (10) days from the date of this motion, or as soon thereafter as counsel may be heard, for an order permitting National Fire to intervene in the civil action pursuant to Rule 24, SCRCP for the limited purpose to participate in the preparation and submission by the Court of a special verdict form and/or a general verdict form accompanied by answer to interrogatories to the jury at the trial of the civil action.

Background

Plaintiff commenced Civil Action No. 2014-CP-26-7634 against various parties, including Defendant Coastal Plaster Systems, Inc. ("Coastal Plaster"), involved in the development and construction of the Harbour Cove condominium project that is located in Horry County, South

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Carolina. ("Harbour Cove"). Defendant Centex Homes ("Centex Homes") was the general contractor for the construction of Harbour Cove. Centex Homes and Coastal Plaster purportedly executed a subcontract agreement for Coastal Plaster to install the stucco cladding on Building 1 and Building 5 of Harbour Cove.[1] The Certificate of Occupancy for Building 1 is dated March 19, 2003. The Certificate of Occupancy for Building 5 is dated December 5, 2002.

Plaintiff alleges various construction defects with the Harbour Cove buildings' envelopes, including the stucco cladding; and contends that the defects have allowed the weather to physically damage parts of the buildings over time. (See e.g., Second Amended Complaint ¶ 49). Plaintiff alleges that Coastal Plaster installed the stucco for the construction of Harbour Cove and did so improperly. (Second Amended Complaint ¶ 42). Because Costal Plaster allegedly installed the stucco improperly, Plaintiff contends that the weather has physically damaged other parts of the buildings that would otherwise be protected essentially if the stucco had been properly installed. (See e.g., Second Amended Complaint ¶ 49). Plaintiff alleges causes of action in its Second Amended Complaint against Coastal Plaster for the following: 1) negligence; and 2) breach of implied warranties; and 3) unfair trade practices.

National Fire CGL Insurance Policies

National Fire issued insurance policies with commercial general liability ("CGL") coverage to Coastal Plaster Systems, Inc. for the following periods: 1) Commercial General Liability Policy No. 72LP 147980 – March 14, 2002 to March 14, 2003; 2) Commercial General Liability Policy No. 72LP 153044 -- March 14, 2003 to March 14, 2004; and 3) Commercial General Liability Policy No. 72LP 161282 -- March 14, 2004 to March 14, 2005. National Fire is

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1 National Fire understands that Harbour Cove has five buildings and a clubhouse.

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providing a defense to Coastal Plaster for the Civil Action through Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC, pursuant to the National Fire policies and a reservation of rights to contest whether the damages being sought against Coastal Plaster are insured by the National Fire Policies.

CGL Insurance Law

A CGL policy contains two insuring provisions that are notable herein: 1) a duty to defend an insured to the extent a party seeks damages that may be insured by the CGL policy; 2) and duty to indemnify an insured for damages covered by the policy to which an insured becomes legally obligated to pay a third party. Sloan Const. Co., Inc. v. Central Nat. Ins. Co. of Omaha, 269 S.C. 183, 236 S.E.2d 818 (1977). Third-party liability insurance contracts are indemnity contracts whereby an insurer agrees to pay an insured the amount for covered damages the insured may become legally obligated to a third party. Trancik v. USAA Ins. Co., 354 S.C. 549, 581 S.E.2d 858 (S.C. Ct. App. 2003). The duty to indemnify is based on the evidence found by a jury at trial. Ellett Bros., v. U.S. Fidelity & Guar. Co., 275 F.3d 384 (4th Cir. 2001) citing Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 476 S.E.2d 708, 711 (1996).

Under South Carolina law, a CGL policy does not absolutely insure damages that Plaintiff seeks to recover against Coastal Plaster in the Civil Action. For example, a CGL policy does not insure Coastal Plaster's defective construction itself or the defective installation of the stucco. Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011); Auto Owners Ins. Co. v. Newman, 385 S.C.187, 197-198, 684 S.E.2d 541, 546; and Bennett and Bennett Construction, Inc. v. Auto-Owners Insurance Company,

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405 S.C. 1, 8, 747 S.E.2d 426, 430 (2013).[2] A CGL policy does not insure the costs to repair Coastal Plastering's defective work even if the cost of removing the defective work is incidental to repairing water damaged other property that may possibly be insured under a CGL policy. Crossmann, 395 S.C. 40, 50, 717 S.E.2d 589, 594; Newman, 385 S.C.187, 197-198, 684 S.E.2d 541, 546. A CGL policy does not insure the costs to *replace* Coastal Plastering's defective work. Newman, 385 S.C.187, 197-198, 684 S.E.2d 541, 546-547.

A CGL policy does not insure an insured's work itself but consequential risks that stem from an insured's work. Bennett and Bennett Construction, Inc. v. Auto-Owners Insurance Company, 405 S.C. 1, 8, 747 S.E.2d 426, 430 (2013). "CGL coverage 'is for tort liability for injury to persons and damage to *other* property and not for contractual liability of [the] insured for economic loss because [the] completed work is not that for which the damaged person bargained [.']" Bennett and Bennett Construction, Inc., 405 S.C. 1, 8, 747 S.E.2d 426, 430. For example, the Supreme Court found that continuous water intrusion resulting from the defective installation of the stucco cladding on the home that caused water damage to wood sheathing underneath the stucco prompted an insured loss under the CGL policy in the record for the appeal. Auto Owners Ins. Co. v. Newman, 385 S.C.187, 194, 684 S.E.2d 545 (2009). For the present civil action, Plaintiff will contend that water damaged wood sheathing caused by the improper installation of the stucco is an insured loss. As evidenced by the discovery produced in the civil action, Plaintiff does seek monetary damages to compensate Plaintiff for the cost to repair construction defects

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2 By commenting on the allegations herein, National Fire does not suggest that any allegations made by any party seeking relief against Coastal Plaster have merit.

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(not covered) and that which is "physical injury to tangible [other] property" (possibly covered – exclusions may otherwise apply). [3]

General Verdicts

Again, the duty to indemnify an insured is based on the evidence found by a jury and that is the basis for a verdict against an insured. CGL insurance coverage for a construction defect claim (where South Carolina law discussed herein unmistakably holds there are non-insured damages) is made complicated when a jury renders a general verdict against an insured. When a general verdict is rendered, the question arises how does one determine whether and how much of a jury's verdict contains damages that are insured by a CGL policy. The question becomes even more complicated when a jury compromises and awards an amount of damages that is somewhere between what a Plaintiff submits is the estimated cost of repair and what Defendants submit is the estimated cost of repair. Should anyone take some procedural action before the jury deliberates to have the jury provide some reasoned explanation of the basis for the jury verdict - when insurance coverage is an issue?

The South Carolina Supreme Court has not altogether answered the specific question or the procedure to do so. However, in two published decisions of the South Carolina Supreme Court, the Supreme Court required the insurer in each appeal to pay a general verdict arising in a construction defect civil action where the Supreme Court believed that the Court could not discern what parts of the verdict were covered and not covered by the applicable CGL policies. Newman, 385 S.C.187, 684 S.E.2d 541; Harleysville Group Insurance v. Heritage Communities, Inc. Op. No. 27698 (S.C. Sup. Ct. refiled July 26, 2017)(Shearouse Adv. Sh. No. 28)("Harleysville").

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3 Plaintiff has produced an itemized estimate that segregates costs that are not insured as a matter of South Carolina law. See attached Exhibit A.

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In Newman, the facts involved a construction defect claim brought by the owner against the builder of a house. The builder and the owner submitted the owner's claims to binding arbitration. A hearing was held, and the arbitrator awarded the owner damages based on the cost to remove and replace the (defectively installed) stucco cladding and cost to repair the water damaged sheathing and framing underneath the stucco cladding. As discussed above, the Supreme Court held that the cost to remove and replace the stucco was not covered by a CGL policy, but the cost to repair the water damaged framing and sheathing underneath the stucco was covered by the CGL policy in the record. Newman, 385 S.C.187, 197-198, 684 S.E.2d 541, 546.

Notwithstanding, the Supreme Court held that Auto-Owners Insurance Company was obligated to pay the entire arbitration award because the Supreme Court was unable to discern what part of the award was for the cost to remove and replace the stucco (not insured) versus the cost to repair water damaged sheathing and framing (insured). The Supreme Court stated the following:

> These terms unambiguously prohibit 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 serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover. *See* L–J, 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.
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> Nevertheless, it is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto–Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. *See* Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.").

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Newman, 385 S.C.187, 198, 684 S.E.2d 54, 547.

In Harleysville, the Supreme Court again addressed a case where there was a general verdict in an underlying construction defect trial. This time the Supreme Court went into more detail on what an insurer must do vis- à-vis its insured in advance of trial and for trial from the perspective of the reservation of rights that an insurer issues to preserve the right to contest insurance coverage. Even so, the Supreme Court did not provide definitive instructions on which parties must take what actions during trial to avoid the consequences of a general verdict. In Harleysville, the facts in the underlying construction defect claim were similar as the facts in Newman. In the underlying construction defect claim, the plaintiff homeowners association sought damages for the cost to remove and replace the siding and cost to repair water damaged sheathing and framing behind the siding. Harleysville Group Insurance v. Heritage Communities, Inc. Op. No. 27698 (S.C. Sup. Ct. refiled July 26, 2017 (Shearouse Adv. Sh. No. 28 at 20). The jury rendered a general verdict in favor of the plaintiff homeowners association for costs to repair damages that included both insured and non-insured damages. Harleysville Group Insurance v. Heritage Communities, Inc. Op. No. 27698 (S.C. Sup. Ct. refiled July 26, 2017 (Shearouse Adv. Sh. No. 28 at 23).

In the subsequent declaratory judgment action to determine insurance coverage for the verdict, the Supreme Court affirmed the lower court which held that Harleysville Insurance Group was obligated to pay the general verdict. The Supreme Court also affirmed the lower court which held that Harleysville Insurance Group could not allocate the damages between insured and not-

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insured damages in the later declaratory judgment action.[4] Harleysville Group Insurance v. Heritage Communities, Inc. Op. No. 27698 (S.C. Sup. Ct. refiled July 26, 2017 (Shearouse Adv. Sh. No. 28 at 23-24).

In Newman and Harleysville, the Supreme Court did not discuss the use of Rule 49 as a means for having a jury allocate damages at trial for the ultimate purpose of determining insurance coverage. The Supreme Court did not hold that a general verdict is the only option; and that insurers must bear the consequences under any circumstance. The South Carolina Supreme Court did not hold that it would be improper for an insurer to intervene and participate in the drafting of a special verdict form or a general verdict form that is accompanied by interrogatories to allocate damages for the ultimate purpose of determining insurance coverage.

Burden of Proof for Allocating Damages

In reaching the result that it did in Harleysville, the Supreme Court cited foreign authorities which have addressed in some detail the duty of an insurer to advise its insured about the insured's burden of proof for allocating damages in a trial and the effect of a general verdict on an insured. In Duke v. Hoch, 468 F.2d 973 (5th Cir. 1972), the Fifth Circuit Court of Appeals held that once an insurer establishes there are non-covered damages, the burden of apportioning the damages is on the party seeking to recover insurance for the damages that are awarded by a jury.[5] Duke v. Hoch, 468 F.2d at 977 citing Universal Underwriters Ins. Corp. v. Reynolds, 129 So.2d 689, 691 (Fla.Ct.App.1961)(The majority rule in the United States is that where a judgment includes

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4 The Supreme Court held that Harleysville Insurance Group was obligated to pay its time-on-risk part of the general verdict. Harleysville Group Insurance v. Heritage Communities, Inc. Op. No. 27698 (S.C. Sup. Ct. refiled July 26, 2017)(Shearouse Adv. Sh. No. 28 at 49).

5 Harleysville Group Insurance v. Heritage Communities, Inc. Op. No. 27698 (S.C. Sup. Ct. refiled July 26, 2017)(Shearouse Adv. Sh. No. 28 at 32).

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elements for which an insurer is liable and also elements beyond the coverage of the policy, the burden of apportioning these damages is on the party seeking to recover from the insurer).

In addressing the burden of proof, the Fifth Circuit made observations and conclusions concerning the relation of an insurer and insured as it pertains to their respective interest and a general verdict:

> [The insurer] Home has, of course, an interest in the verdict's not being allocated which is in conflict with the insureds' interest that covered damages be segregated. Insofar as the present record discloses, whether done ingeniously or ingenuously, Home, in control of the defense, has protected its interest and secured for itself an escape from responsibility at the expense of the insureds, who remain personally liable for the full judgment, unprotected even to the extent they have paid for protection. Having gained that advantage, Home insists upon it. The consequence to the insureds of a nonallocated verdict is the catastrophic total loss of coverage. **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 v. Hoch, 468 F.2d at 979.

The Fifth Circuit found that the record did not demonstrate whether the insurer or defense counsel for the insured (retained by the insurer) informed the insured about the need to allocate damages and consequences of not doing so. Duke v. Hoch, 468 F.2d at 980. The remedy imposed by the Fifth Circuit was less exacting than the one imposed by the South Carolina Supreme Court in Newman and Harleysville. The Fifth Circuit remanded the appeal with instructions for the trial court to determine whether the insured was advised to allocate damages at trial; and, if not advised,

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for the trial court to (in effect) re-hear parts of the action to allow the claimant an opportunity to allocate the damages for the purposes of insurance coverage. Duke v. Hoch, 468 F.2d at 984.

In another decision cited by the South Carolina Supreme Court in Harleysville, Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491 (10th Cir. 1994), the Tenth Circuit Court of Appeals heard an appeal concerning a general verdict that included punitive damages.[6] In a subsequent declaratory judgment action, the insurer, CNA, argued that its insurance policy did not insure punitive damages. While the Tenth Circuit ultimately found that the punitive damages were not insured, because of Oklahoma state law, the Tenth Circuit made the following statement concerning the relation of the insurer to its insured, allocating damages for insurance purposes and submitting interrogatories to a jury.

> The right to control the litigation carries with it certain duties. Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 627 (10th Cir.1942). One of these is 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. *See* Gay & Taylor, 550 F.Supp. at 716. The reason for this is that when grounds of liability are asserted, some of which are covered by insurance and some of which are not, a conflict of interest arises between the insurer and the insured. If the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories. Duke, 468 F.2d at 979. The insurer is in the best position to see to it that the damages are allocated; therefore, it should be given the incentive to do so.

Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d at 1499.

Similar as the Fifth Circuit in Duke, the Tenth Circuit revisited the general verdict to discern whether the punitive damages in the verdict were covered by the subject CGL policy. Magnum

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6 Harleysville Group Insurance v. Heritage Communities, Inc. Op. No. 27698 (S.C. Sup. Ct. refiled July 26, 2017 (Shearouse Adv. Sh. No. 28 at 32).

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Foods, Inc. v. Cont'l Cas. Co., 36 F.3d at 1499. The Tenth Circuit recognized that there may be situations where a party may not be able to revisit the verdict for to do so would be impracticable. Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d at 1499.

Special Verdict Form/General Verdict Accompanied by Written Special Interrogatories

There is one way to solve the conundrum created by a general verdict and that is to have the jury allocate damages in a special verdict form and/or general verdict form accompanied by special interrogatories. The South Carolina Rules of Civil Procedure do not require a general verdict. There is a civil procedure rule that allows a trial court to require the jury to explain the basis for a jury's verdict and thus avoid a general verdict. The procedure is not intrusive or prejudicial to any party to the civil action; and National Fire submits that not doing so prejudices National Fire – particularly if the legal consequences are that which the insurers faced in Newman and Harleysville. Rule 49, SCRCP states in parts as follows:

> **(a) Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
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> **(b) General Verdict Accompanied by Answer to Interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written

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> answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

For the purposes of this civil action, the verdict form and/or special interrogatories would be tailored for the jury to allocate damages between those which are the cost to repair or remove and replace the stucco installed by Coastal Plaster versus damages which are the cost to repair physical injury (water damage) to tangible property that is not Coastal Plaster's work. See Bennett and Bennett Construction, 405 S.C. 1, 8, 747 S.E.2d 426, 430. Loss of use or special damages, if any, would also be separately identified by the jury.

Intervention

Rule 24, SCRCP states in part as follows:

> **(a) 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.
>
> **(b) 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

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> exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24(a)(2), SCRCP permits intervention as of right where the party seeking intervention submits a timely application, the party claims an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and the interest of the party may not be adequately represented by the existing parties. *See also Ken's Cabana, LLC v. Flemington Props., LLC (Exhibit parte Horry County State Bank)*, 604 S.E.2d 723 (S.C. Ct. App. 2004). Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. *Ken's Cabana, LLC* 604 S.E.2d at 725. The burden of demonstrating inadequacy of representation is on the applicant. (Citation Omitted). This burden may be satisfied by a showing that the representation of the applicant's interest "may be" inadequate. *Ken's Cabana, LLC* 604 S.E.2d at 725. Intervention should be liberally granted by a court. *Ken's Cabana, LLC* 604 S.E.2d at 725.

National Fire's application is timely. National Fire is merely seeking to intervene for the limited purpose of participating in the preparation of the verdict form or a general verdict form accompanied by answers to interrogatories for the submission to the jury during trial. Such involvement necessarily depends on the evidence introduced at trial so what may be submitted to a jury is not imminent. Further, the trial in the civil action will not be delayed by intervention.

The next requirement is whether National Fire claims an interest relating to the property or transaction that is the subject of the civil action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest. Based on the law discussed above, National Fire submits that it satisfies the requirement. Based on Newman and

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Harleysville, National Fire submits that the prejudice to National Fire is obvious if the legal consequence is that National Fire may be bound by a general verdict.

The next requirement is whether the interest of the party moving for intervention is adequately represented by the existing parties in the civil action. In addressing this requirement, the courts consider the following factors:

> (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

(quoted case omitted) *Ken's Cabana*, 604 S.E.2d at 726. It is doubtful that the existing parties in the case at bar will *undoubtedly* seek an allocated verdict for the purposes of allocating damages on behalf of National Fire. Notwithstanding, National Fire submits that the Plaintiff and Coastal Plaster are proponents of insurance and must themselves have the jury allocate damages if any of these parties seeks insurance coverage for a verdict or judgment. In fact, to the extent these parties do not do so and oppose National Fire doing so, such party should be estopped from later contending that National Fire should be bound by a general verdict. The utilization of a special verdict form or interrogatories will permit the jury to allocate damages with respect to damages that may be covered and damages that are not covered under the National Fire Policies.

The parties to the civil action will not be prejudiced by National Fire's intervention. As stated above, this intervention is for a limited purpose. National Fire will not be involved in any other issues that arise in the civil action. Further, the adjudication of the parties' rights will not be unduly delayed, and National Fire's involvement will not occur until it is time to formulate the verdict form or written interrogatories. Thus, the intervention will not cause any undue delay in the Civil Action. If this Court finds that National Fire is not entitled to intervention as of right

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under Rule 24(a)(2), SCRCP, National Fire respectfully requests that it be entitled to permissive intervention under Rule 24(b), SCRCP for the above reasons.

Intervention by an insurer for the limited purposes of participating in the drafting of a special verdict form or written interrogatories has been allowed by courts in civil cases where insurance coverage for the damages sought is an issue. In Plough v. International Flavors & Fragrances, Inc., 96 F.R.D 136 (W.D. Tenn. 1982), the United States District Court permitted an insurer to "to intervene [FRCP 24(a)] for the limited purpose of requesting that if the action is tried, written questions and interrogatories be submitted to the jury pursuant to Rule 49(a) of the Federal Rules of Civil Procedure." In Fidelity Bankers Life Ins. Co. v. Wedco, Inc., 102 F.R.D. 41 (D. Nev. 1984), the United States District Court permitted an insurer to intervene to propose special interrogatories or verdicts. In doing so, the District Court reserved the right for all parties and the court to review and object to the submissions presented during the trial. Id. at 45-46. In Thomas v. Henderson, 297 F. Supp. 2d 1311 (S.D. Ala 2003), the United States District Court permitted an insurer to intervene to propose special interrogatories or verdicts. Among other things, the District Court was mindful that, "[a]bsent an itemized jury verdict in this case, resolution of coverage issues at stake in the declaratory judgment action could be complicated considerably, as there would be no way to distinguish among the types of claims and damages embraced by any damages award the jury might render." Id. at 1327. Like in Fidelity Bankers Life Ins., the District Court reserved the right for all parties and the court to review and object to the submissions presented during the trial. Id. at 1327.

To avoid any potential prejudice to the parties in the civil action, National Fire requests that the Court submit a special verdict form and/or general verdict accompanied by written interrogatories to the jury without disclosing to the jury about National Fire or that the submission

is being done for the purposes of insurance coverage. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962)("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it"). Doing so can be easily accomplished by the court. As stated by the Fifth Circuit, "[t]he 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. Duke v. Hoch, 468 F.2d at 979.

WHEREFORE, National Fire requests the court permit National Fire to intervene for the limited purpose of participating in the preparation and the court's submission of a special verdict form or general verdict form accompanied by answers to interrogatories to the jury pursuant to Rule 49, SCRCP so that the jury can allocate damages as discussed herein that are being sought against Coastal Plaster.

(*Signature On Next Page*)

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Respectfully Submitted,

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July 27, 2017

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
	)	**HARTFORD FIRE INSURANCE**
Plaintiffs,	)	**COMPANY'S AND HARTFORD**
	)	**CASUALTY INSURANCE COMPANY'S**
v.	)	**NOTICE OF MOTION AND MOTION**
	)	**TO INTERVENE**
Centex Homes, et al.,	)	
	)	
Defendants.	)	
	)	

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively "Hartford") by and through its undersigned attorneys, will move before the Court on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, to intervene in this action 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.

Hartford hereby files this Motion to Intervene, pursuant to South Carolina Rule of Civil Procedure 24, and states as follows:

1. Hartford issued primary and umbrella general liability insurance policies to defendant Coastal Plaster Systems, Inc. ("Coastal") for the policy period in effect March 14, 2008 to March 14, 2009 (collectively "the Hartford Policies") pursuant to which

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Coastal is seeking coverage for the claims asserted against it in this action. Hartford is currently participating in the defense of Coastal in this action under the primary general liability policy issued to Coastal, subject to a full and complete reservation of its rights.

2. Hartford seeks an order permitting it to intervene in this action 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, if any, afforded to Coastal for the claims asserted against it in this action.

3. Such special interrogatories and/or special jury verdict will require the jury to identify: (1) the count(s) for which liability is found as to Coastal and (2) the breakdown of damages attributable to Coastal, including allocating between damages for repair costs, damages for property damage, damages related to mold, and, to the extent they are awarded, punitive damages.

4. Should the Court permit Hartford to intervene in this action, Hartford requests that its limited participation and the existence of possible insurance coverage for Coastal not be revealed to the jury, as any reference to insurance coverage would be improper and prejudicial. *See 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).

5. Hartford's limited intervention in this action is proper, and is necessary as Hartford's failure to obtain special interrogatories and/or a special verdict form could result in a subsequent finding that it is estopped from contending, or has waived its right to contend, that the Hartford Policies do not provide coverage for some or all of a general

verdict entered against Coastal. *See, e.g., Harleysville Grp. Ins. v. Heritage Communities, Inc.*, --- S.E. 2d ---, No. 2013-001281, 2017 WL 3220558 (S.C. July 26, 2017).[1]

6. Hartford's motion for limited intervention is timely, will not cause a delay of the trial, and will not prejudice the rights of any party to this action. Moreover, the special interrogatories and/or special verdict forms contemplated are not beyond the scope of the claims asserted against Coastal in this action, and will decrease the likelihood of the need for subsequent coverage litigation.

7. Should the Court deny Hartford's request for limited intervention, Hartford respectfully requests that it be allowed to attend all discussions held in chambers between the parties and the trial judge, and have the right to request and submit special interrogatories to the jury in the event that a verdict is entered against Coastal.

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1 Hartford does in any way not concede that there are issues of fact for the jury in this action or that Hartford cannot adjudicate these issues (including all allocation issues) in a separate declaratory judgment action, filed either before or after a verdict is rendered. Indeed, the duty to indemnify does not even arise until a judgment is rendered against the insured. *Capitol Specialty Ins. Corp. v. Ellis Wise Landscaping, Inc.*, 2015 WL 6408128 (D.S.C. Oct. 20, 2015) (noting there is "no obligation to indemnify until a judgment against the insured is obtained."). Hartford also notes that the burden is on the insured-not Hartford -to establish coverage in the first instance. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523, 525 (1968); *see also Auto-Owners Ins. Co. v. Madison at Park West Prop. Owners Ass'n, Inc.*, 834 F. Supp.2d 437, 443 (D.S.C. 2011). Thus, it is the insured's burden to establish "covered" damages in order to establish any right to indemnity under the policy. *UFP Eastern Division, Inc. v. Selective Ins. Co.*, 2017 WL 499083, *5 (D.S.C. Feb. 6, 2017) (holding that at the trial of the separately filed declaratory judgment action the insured "must prove its claim for indemnity falls within the scope of insurance-i.e., prove consequential damages resulting from the work performed by [the insured's subcontractor]."). Hartford seeks to intervene to ask the jury special interrogatories based on the uncertainty of South Carolina law in this area, particularly in the face of the South Carolina Supreme Court's opinion in *Harleysville Group Insurance v. Heritage Communities, Inc.*, No. 2013-001281, 2017 WL 3220558 (S.C. July 26, 2017), as discussed in more detail in its Memorandum of Law in Support of Its Motion to Intervene.

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8. Alternatively, should the Court deny the Motion to Intervene and Hartford's request to submit special interrogatories to the jury, without conceding it would be bound, Hartford respectfully requests that this Court find that Hartford will not be bound by any judgment entered in this action against Coastal, and that it can litigate all facts relevant to the determination of the coverage afforded, if any, to Coastal under the Hartford Policies for the claims asserted against them in this action.

9. Intervention as of right is warranted because Hartford has an interest relating to the subject matter of this case and is so situated that the disposition of the action may, as a practical matter, impair or impede Hartford's ability to protect that interest. Moreover, Hartford's interest is not adequately represented by the existing parties, in that defense counsel retained to represent Coastal may not advocate any coverage position that would be against their respective client's interests.

10. Alternatively, Hartford is entitled to permissive intervention because Hartford's policy defenses and this action have common questions of fact relating to the damages, if any, that may be awardable to the Plaintiff. As noted, the intervention sought will not unduly delay or prejudice the adjudication of the rights of the original parties, as it will be handled solely through the submission of a special verdict form or special interrogatories to the jury after the close of evidence in this action.

WHEREFORE, for the reasons set forth above and the accompanying Memorandum of Law, which is incorporated herein by reference, Hartford respectfully requests that the Court grant this Motion and permit it to intervene in this action for the limited purposes set forth above. Alternatively, Hartford requests that the Court enter an

order stating that Hartford will not be bound by any judgment entered against Coastal in this action, and that Hartford reserves its rights to, and can, re-litigate the facts and issues relevant to the insurance coverage, if any, afforded to Coastal under the Hartford Policies for the claims asserted against it in this action.

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, Counsel certifies that consultation would serve no useful purpose.

SWEENY, WINGATE & BARROW, P.A.

s/Christy Mahon
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Columbia, South Carolina

August 7, 2017

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
Plaintiffs,	)	**HARTFORD FIRE INSURANCE COMPANY'S AND HARTFORD CASUALTY INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE**
	)	
v.	)	
	)	
Centex Homes, et al.,	)	
	)	
Defendants.	)	
	)	

Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively "Hartford") hereby files this Memorandum of Law in Support of its Motion to Intervene.

In the present action ("the Lawsuit"), Harbour Cove Condominium Association ("the Plaintiff") seeks damages for various construction defects and related consequential damage arising out of the construction of the Harbour Cove Condominiums and pool house in North Myrtle Beach, South Carolina ("the Project").

The Plaintiff alleges that it recently became aware of defects and deficiencies at the Project and that as a result of such defects and deficiencies, it will be required to expend large sums of money to repair, correct and replace various parts and components of the condominiums and buildings.

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Plaintiff filed this action against Centex Homes and various related entities ("the Centex Entities"), which it alleges developed, constructed, and repaired the condominiums, buildings and pool house, as well as various Project subcontractors, including but not limited to Coastal Plaster, Inc. ("Coastal").

Plaintiff contends that Coastal was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of stucco and related flashings installed and/or applied on and to the condominiums and buildings at the Project.

Plaintiff avers three counts as to Coastal, including a count for Negligence, Gross Negligence, Carelessness, Recklessness, Willfulness and Wantonness, a count for Breach of Warranty of Habitability, Breach of Warranty Against Latent Defects, Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness of a Particular Purpose, Breach of Warranty of Merchantability and Serviceability and Breach of Express Warranty, and a count for Unfair Trade Practices.

Hartford issued primary and umbrella general liability insurance policies to Coastal for the policy period in effect March 14, 2008 to March 14, 2009 ("the Hartford Policies"). The Hartford Policies insure Coastal for certain risks under the insuring agreement and exclude certain risks through policy exclusions.

Coastal tendered the claims asserted against it by the Association in the Lawsuit to Hartford. Hartford agreed to participate in the defense of Coastal in the Lawsuit subject to a full and complete reservation of its rights. Hartford specifically reserved its right to

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disclaim indemnity coverage for damages awarded against Coastal if those damages are not covered by the terms and conditions of the Hartford Policies.

Hartford's reservation of rights letters to Coastal set forth in detail the several grounds upon which Hartford may deny indemnity coverage, including for damages awarded for damage to property that had to be restored, repaired or replaced because of any improperly performed work by Coastal, for damages awarded that arise out of the presence of, suspected presence of, or exposure to mold, or for punitive damages. Hartford has advised Coastal in writing that because of the potential for a general verdict, Coastal may itself submit a special verdict form or special interrogatories seeking an allocation of damages between covered and uncovered damages. *See Harleysville Group Insurance v. Heritage Communities, Inc.,* --- S.E. 2d ---, No. 2013-001281, 2017 WL 3220558 (S.C. July 26, 2017).

Notwithstanding Hartford specifically advising Coastal concerning the coverage issues and the potential that some or all damages awarded against either party may not be covered, in light of the South Carolina Supreme Court's recent decision in *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, --- S.E. 2d ---, No. 2013-001281, 2017 WL 3220558, Hartford is concerned that it could be prohibited from enforcing the terms of the Hartford Policies if a jury awards damages in a general, unallocated verdict.[1]

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[1] The opinion in *Harleysville* has created uncertainty surrounding this issue, even though case law indicates that the burden is on the insured – not Hartford – to establish coverage in the first instance. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E. 2d 523, 525 (1968); *see also Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass'n Inc.*, 834 F. Supp. 2d 437, 443 (D.S.C. 2011). Hartford maintains that it is the insured's burden to establish "covered" damages in order to establish any right to indemnity under the policies. *UFP Eastern Division, Inc. v. Selective Ins. Co.*, 2017 WL 499083, *5 (D.S.C. Feb. 6, 2017) (holding that at the trial of the separately filed declaratory judgment action the

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Accordingly, Hartford seeks leave pursuant to South Carolina Rule of Civil Procedure 24 to intervene in the Lawsuit for the limited purpose of requesting special interrogatories in the event a general verdict is entered against Coastal.[2]

Rule 24 of the South Carolina Rules of Civil Procedure provides that an applicant can intervene as a matter of right if "the applicant claims an interest related to the property or transaction which is the subject of the action and [it] is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 24(a)(2), SCRCP. Rule 24 also provides that an applicant can intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24(b)(2), SCRCP.

Moreover, the Supreme Court of South Carolina has stated that "[w]e interpret the rules to permit liberal intervention particularly where, as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected." *Berkeley Elec. Coop. Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990).

Hartford, as insurer for Coastal, has an interest in the subject matter of this litigation. Hartford issued the Hartford Policies to provide coverage for certain damages and to exclude coverage for those damages not within a risk underwritten by the policy.

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insured "must prove its claim for indemnity falls within the scope of insurance- i.e. prove consequential damages resulting from work performed by [the insured's subcontract].").

[2]Hartford does not concede that it has the duty, under the Hartford policies or at law, to request special interrogatories or a special verdict to clarify coverage. Hartford also does not concede that it in any way waives the right to contest coverage issues in a declaratory judgment, whether filed before or after a verdict is rendered.

Hartford charged a premium, which Coastal agreed to pay, commensurate with the scope of coverage it agreed to provide. Hartford has an interest because its indemnity coverage may be implicated if a jury enters a general verdict against Coastal.

Hartford's interest in its indemnity exposure, however, is not adequately represented by existing parties, who are incentivized to maximize coverage and not necessarily allocate damages among different categories of loss or damage. Counsel for Coastal, even though retained by Hartford, must act in the interests of Coastal and follow its instructions, not Hartford's, with respect to the proffer of a verdict form or special interrogatories. As a result, Hartford's interests are not fully protected in the litigation.

In light of *Harleysville* and other recent case law, in the event both covered and non-covered elements of damages are submitted to the jury and if the jury returns only a general verdict, Hartford could be compelled to indemnify Coastal for what would be, in whole or in part, a non-covered loss, unless Hartford takes action, as it is attempting to do by moving to intervene, to make certain that the jury's verdict, if any, is allocated between covered and non-covered claims or elements of damages.

In *Harleysville*, the court stated "[t]he 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." 2017 WL 3220558, *7 (S.C. July 26, 2017) (internal quotations and citations omitted). The Court additionally explained that when a general verdict is awarded, "the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict." *Id.* at *8.

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In *Harleysville*, the Court determined Harleysville's reservation of rights letters failed to give its insured an express reservation or other indication that Harleysville disputed coverage for any specific portion or type of damages, and similarly failed to advise its insured "that a conflict of interest may have existed or that [the insured] should protect [its] interests by requesting an appropriate verdict." *Id.* at *7. The Court thus concluded that it would not "engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making," *Id.* at *8 n11 (quoting from opinion of Special Referee), and affirmed the Special Referee's holding that Harleysville had a duty to indemnify the full amount of the general verdict, even though it included elements of damages that were not covered under the policies. *Id.*

Similarly, in *Auto Owners Insurance Co. v. Newman,* the Court acknowledged an arbitrator's award included both covered and non-covered damages but held that the insurer had a duty to indemnify the entire award because the Court could not determine from the record which costs were solely attributable to the non-covered faulty workmanship. 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). The court specifically remarked that "Auto-Owners did not seek review of or otherwise contest the damages awarded," even though "it had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator." *Id.*

As suggested in both *Harleysville* and *Newman*, if Hartford fails to act, disposition of the action by general verdict may hamper Hartford's ability to protect its interest in covering only those damages for which Hartford has underwritten its policy and for

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which Coastal paid a premium. Hartford therefore seeks to avoid this result and avoid creating the same "dilemma" the insurers faced by being proactive and moving to intervene before a general verdict is entered against Coastal.

Hartford seeks to intervene for a limited purpose – it seeks only the ability to request that the trial court submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury's verdict against Coastal, if a verdict is returned in favor of Plaintiff. Hartford does not seek to actively participate in the trial of this action outside of this limited exception, does not seek to participate in discovery, does not seek to delay the trial of this action, and does not seek from this Court any declaratory relief or rulings concerning coverage issues. There is thus no prejudice to any party by this proposed intervention.

Moreover, if Hartford's motion for intervention is denied, Hartford will be prejudiced. Hartford's interests will be impaired because it may ultimately be compelled to pay an entire judgment against Coastal (if one is rendered), despite the fact that a portion of such a judgment may not be a covered risk for which a premium was paid. *See Newman*, *supra*; *see also* Order Granting Motion to Intervene in *Beresford Commons Homeowners Ass'n Inc. v. Portrait Homes-S. Carolina LLC*, 2013-CP-08-0179, 6 (Jan. 17, 2017) (recognizing prejudice suffered by insurer in *Newman* and granting insurer's motion to intervene to prevent same detrimental result) (attached as Exhibit A).

Hartford also moves under Rule 24(b) for permissive intervention. There are questions of law and fact which are common to this litigation and the related coverage dispute. This litigation concerns alleged property damage as a result of alleged

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construction defects. If these issues go to the jury and the jury finds that Coastal is liable for damages in connection with any or all of these claims, it is possible, and likely, that such liability would extend to both covered and non-covered claims. If this occurs, it may be necessary to apportion damages among covered and non-covered claims in order to determine the extent of Coastal's rights, if any, to coverage in connection with damages awarded against them. Therefore, Hartford should be allowed to submit and participate 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.

Finally, granting Hartford's motion to intervene will promote judicial economy. If a general verdict is rendered against Coastal, Hartford would likely bring a declaratory judgment action to determine covered versus non-covered damages. If so, these same parties would have to engage in discovery (including fact and expert witness depositions), brief and argue dispositive motions, and, if the case does not resolve on motions, go to trial to ask the jury the same questions Hartford intends to ask the jury in this case. This would not promote judicial economy, and would be an unnecessary expenditure of the resources of the judicial system and these litigants.

Should the Court permit Hartford to intervene in this action, Hartford requests that its limited participation and the existence of possible insurance coverage for Coastal not be revealed to the jury, as any reference to insurance coverage would be improper and prejudicial. *See 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).

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As Hartford has timely filed its Motion, has an interest in the subject matter of the action which interest may be impaired by the disposition of the action, and its interest is not adequately represented by existing parties, Hartford respectfully requests that this Court grant its motion for limited intervention of right pursuant to Rule 24(a)(2), SCRCP, or Rule 24(b), SCRCP, and provide any other relief that may be consistent with protecting Hartford's interests in the outcome of the Lawsuit.

SWEENY, WINGATE & BARROW, P.A.

s/Christy Mahon
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Columbia, South Carolina

August 7, 2017

ELECTRONICALLY FILED - 2017 Nov 08 3:27 PM - HORRY - COMMON PLEAS - CASE#2014CP2606573

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTHEENTH CIRCUIT
)
) Civil Action No. 2014-CP-26-6573
BEACH VILLAS AT OCEAN KEYES)
PROPERTY OWNERS ASSOCIATION,)
INC.,)
)
Plaintiff,) **DEFENDANT OCEAN KEYES**
) **DEVELOPMENT, LLC'S**
vs.) **MEMORANDUM IN OPPOSITION TO**
) **PLAINTIFF'S MOTION TO LIFT**
OCEAN KEYES DEVELOPMENT, LLC,) **STAY**
KEYE CONSTRUCTION CO., INC.,)
RUSSELL P. BALTZER, FIRST)
EXTERIORS, LLC, CAREFREE)
EXTERIORS, INC., COASTAL STUCCO,)
INC.RICHARD H. CONSTRUCTION,)
LLC A/K/A RICARDO HERNANDEZ)
D/B/A RICHARD FRAMING CON.,INC.,)
BUILDERS FIRSTSOURCE-)
SOUTHEAST GROUP, LLC, STEEL)
HOMES INTERNATIONAL, INC.,)
RENAISSANCE STEEL)
INSTALLATION, LLC N/K/A)
RENAISSANCE STEEL, LLC,)
BENCHMARK STEEL SERVICE, LLC)
AND DIETRICH BUILDING SYSTEMS)
N/K/A CLARKWESTERN DIETRICH)
BUILDING SYSTEMS, LLC,)
)
Defendants.)
)
OCEAN KEYES DEVELOPMENT, LLC)
Third-Party Plaintiffs,)
)
vs.)
)
RENAISSANCE STEEL)
INSTALLATION, LLC N/K/A)
RENAISSANCE STEEL, LLC AND)
BENCHMARK STEEL ERECTORS,)
TOTAL CONSTRUCTION, LLC)
Third-Party Defendants)

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COMES NOW Ocean Keyes Developments, LLC (hereinafter "Ocean Keyes"), by and through its undersigned counsel, and hereby submits this memorandum in opposition to the Motion to Lift Automatic Stay filed by Beach Villas at Ocean Keyes Property Owners Association, Inc. ("Plaintiff").

BACKGROUND

This appeal arises from a construction defect case commenced by Beach Villas at Ocean Keyes Property Owners Association (hereinafter "Beach Villas") against various defendants, including Ocean Keyes. As Insurers of the various defendants, Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company (collectively "Hartford"), Canopius US Insurance Inc. (hereinafter "Canopius"), and Selective Insurance Company of South Carolina's (hereinafter "Selective") (collectively "Insurers") filed Motions to Intervene in the underlying action. The Insurers sought to intervene for the limited purpose of submitting special interrogatories to the jury regarding issues related to insurance coverage and the amount of damages award that is for defective work as opposed to resulting damage to building components outside their insureds' scope of work.

Oral arguments pertaining to the above Motions, as well as others in the underlying action, were heard on September 28, 2017. The court entered an Order denying the Insurers' Motions to Intervene on October 12, 2017 finding that (1) The Insurers lacked the necessary standing to intervene and did not meet the requirements for intervention under Rule 24, SCRCP; (2) The insurers could satisfactorily protect any purported interests they may have in a separate declaratory judgment action; (3) The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 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

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avoid impermissible conflict determining coverage issues, this state requires a separate claim; and (5) The special interrogatories and/or special verdict forms requested by the Insurers would likely be confusing to the jury and could unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issue into an already complex construction defect case. Subsequently, Hartford filed its Notice of Appeal on October 13, 2017.[1] The underlying action was set for trial to begin on October 16, 2017, however, on the eve of trial the case was continued. At a pre-trial motions hearing on October 16, 2017, this Court heard the parties' arguments regarding the impact of the appeal on the underlying action. On October 27, 2017, Plaintiff filed a Motion to Lift Automatic Stay imposed by the Notice of Appeal.

ARGUMENT

1. Insurers have been aggrieved by the order denying their Motions to Intervene in the underlying proceeding.

Beach Villas relies on Ex Parte Condon in arguing that Insurers are barred from filing Notices of Appeal because the Insurers are not parties to the action. However, this reliance is misplaced. Ocean Keyes does not dispute that pursuant to SCACR 201(b), "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." Ex Parte Condon, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003). However, in Ex Parte Condon, the party attempting to appeal had never moved to intervene in the underlying case. The Court in Ex Parte Condon found this to be a distinguishing factor in its determination of whether to allow the party to appeal stating, "[t]he Attorney General is required, like everyone else to formally intervene and become a named party by he can file an appeal." See id. Likewise, the Plaintiff's citation to the Court of Appeals order in Teseniar v. Professional Plastering & Stucco, Inc. (S.C. Court of

[1]Canopius and Selective and filed their Notices of Appeal on October 27 and 30, 2017, respectively.

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Appeals Order filed April 9, 2014) is inapposite because the appellant in that case had not moved to intervene in the underlying action as noted by the Court. *See* Order attached as Exhibit 1.

In the present case, Insurers have moved to intervene in the underlying case. The very issue on appeal is the denial of the Insurers' Motions to Intervene. If Plaintiff's argument is accepted, the denial of a motion to intervene would never be appealable. *See* Rutledge v. Tunno, 63 S.C. 205, 41 S.E. 308, 309 (1902) Thus, a determination of the issue pending on appeal prior to commencement of the underlying case is imperative to judicial economy and protection of the rights of all interested parties.

2. The Insurers' appeal of the order denying their Motions to Intervene was appropriate.

Under South Carolina law, a party seeking intervention under Rule 24(a)(2), SCRCP, must: (1) establish timely intervention; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App: 2004).

It has long been the rule in South Carolina that orders denying a motion to intervene are immediately appealable. Rutledge v. Tunno, 63 S.C. 205, 41 S.E. 308, 309 (1902); *see also* Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707 (2005) (Generally, appeals may be taken from final judgments only, however certain types of interlocutory orders are subject to immediate appeal.) The grounds for an interlocutory appeal are set forth in Section 14-3-330 of the South Carolina Code. Id. An order affecting a substantial right is immediately appealable when such order (a) in effect determines the action and prevents a judgment from which an

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appeal might be taken; or (c) strikes out an answer or any part thereof or any pleading in any action. S.C. Code Ann. § 14-3-330(2).

Appellate courts in South Carolina have decided cases appealed from denials of motions to intervene on a number of occasions. See Ex Parte Horry County State Bank, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004); Ex Parte Gov't Employees Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). Additionally, the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right. Hagood, 362 S.C. at 196, 607 S.E.2d at 709. Orders denying a right to a particular mode of trial must be immediately appealed or any later objection in a subsequent appeal will be waived. Hagood, 362 S.C. at 198, 607 S.E.2d at 710; *see also* Lester v. Dawson, 327 S.C. 236, 266, 491 S.E.2d 240, 241 (1997). An order that effectively deprives a litigant of a trial is also included within this rule. Salmonsen v. CGD, Inc., et al., 377 S.C. 442, 452-53, 661 S.E.2d 81, 87. (2008).

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 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

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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.

Further, the relief requested by the Insurers in their Motions to Intervene affects a mode of trial – jury findings that can now only be obtained in the proceeding establishing liability. *See* Harleysville. Because the trial court's denial of the Motions to Intervene affects a substantial right such as mode of trial, the immediate appeal was appropriate. Denial of the Insurers' Motions to Intervene may severely prejudice their rights due to the Harleysville court's holding that failure to intervene waives an insurer's coverage defenses. Id. The trial court's denial of the Insurers' motions to intervene effectively denies Insurers a trial with respect to issues the Supreme Court now holds may not be considered in separate coverage actions. *See* Harleysville.

The Insurers are in a position such that, without intervention, disposition of the underlying action will impair or impede their ability to protect their interest, as none of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the Plaintiff and Ocean Keyes, as well as other Defendants, are aligned against the interest of the Insurers, therefore "there is an obvious lack of adequate representation. In re Horry County State Bank, 261 S.C. at 509, 604 S.E.2d at 726. Accordingly, the Insurers satisfied all of the elements for intervention of right under Rule 42(a)(2), SCRCP. The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to a court's discretion, thus the Insurers' appeal was appropriate.

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3. A stay in the underlying proceedings is necessary to effectuate the purpose of Rule 24, and to preserve legally protectable interests of all parties.

Whether to stay a case is a decision made in the exercise of discretion by the court as part of its inherent power to control its own docket. Landis v. North American Co., 299 U.S. 248, 254 (1936). Economy of time and effort for the court, counsel, and litigants is taken into consideration in this decision, "which must weigh competing interests and maintain an even balance." Id. at 254-55; *see also* United States v. Ga. Pac. Corp., 562 F.2d 294, 296 (4th Cir. 1977) ("The determination by a judge in granting or denying a motion to stay proceedings calls for an exercise of judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket."). A party seeking a stay must demonstrate a pressing need for one, id. at 255, and that the need for a stay outweighs any possible harm to the non-movant. Mike's Train House v. Broadway Ltd., 2011 U.S. Dist. LEXIS 22224 at *1 (D. Md. Mar. 3, 2011). Courts consider three factors in weighing a motion to stay: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." Davis v. Biomet Orthopedics, LLC, 2013 U.S. Dist. LEXIS 24529 (D. Md. Feb. 22, 2013). Sound administrative procedure favors the disposition of all claims or defenses in a single action. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 72 (Ct. App. 1988). As discussed above, the underlying action represents the only forum in which an allocation of covered versus non-covered damages can be made. Thus, a stay of the underlying proceedings is necessary to avert the prospect of a decision on the merits before the question of intervention is resolved, which would be contrary to the very purpose of Rule 24.

The Insurers' Motions to Intervene were for the limited purpose of presenting the jury with special interrogatories, instructions or a special verdict form for finding as to allocation

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between covered and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991).

Ocean Keyes is in a position such that, without a final a determination on the intervention appeal, there is a strong likelihood that the case may need to be tried twice, which is an incredible waste of judicial resources. Although the proposed limited intervention has no impact on the ability of the original parties to present their claims and/or defenses at trial, the final determination on whether the Insurers are able to participate will undoubtedly impact the original parties' posture and the framing of their arguments. For example, if it is determined that the coverage issues will be addressed, counsel for Ocean Keyes will have to reframe their arguments and evidence to address those charges to the benefit their client.

As stated above, Ocean Keyes respectfully requests that the Court stay the trial of the underlying proceedings pending resolution of the Insurers' appeal. Staying the case would be more efficient and less costly than proceeding while Insurers', the proposed intervenors, appeal remains pending. "It would indeed be a questionable rule that would require prospective intervenors to wait on the sidelines until after a court has already decided enough issues contrary to their interests. The very purpose of intervention is to allow interested parties to air their view so that a court may consider them before making potentially adverse decisions." Brumfield v. Dodd, 749 F.3d 339, 345–46 (5th Cir. 2014).

If the court were to move forward with the trial of the underlying proceedings and the Insurers' appeal concurrently, any judgment in the trial could be negatively affected if the denial of intervention is reversed. *See* Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 136 (1967) (concluding that "the entire merits of the case must be reopened to give [proposed intervenors] an opportunity to be heard as of right as intervenors"); Edwards v. City of Houston,

78 F.3d 983, 1006 (5th Cir. 1996) (en banc) (reversing denial of intervention as of right and vacating judgment entered at fairness hearing in which intervenors could not fully participate); *see also* In re PaineWebber Inc. Ltd. P'ships Litig., 94 F.3d 49, 52 (2d Cir. 1996) ("If the intervenor prevailed on appeal, the entire matter might have to be relitigated.").

CONCLUSION

Based upon the foregoing, in the interests of justice, fairness, and judicial economy, Ocean Keyes respectfully requests this Court to deny Beach Villas' Motion to Lift Automatic Stay in the trial of the underlying proceedings and to affirm a Stay pending the resolution of the Insurers' appeal. Orders denying motions to intervene are immediately appealable. The trial court's ruling of Insurers' Motions to Intervene effectively denied a mode of trial to which the Insurers claim as entitlement as of right. Thus, the ruling was immediately appealable. Comity and efficiency support resolution of the appeal of the proposed intervenors prior to the trial of the underlying proceedings. Absent an order of this Court staying further proceedings, many parties would be required to concurrently litigate this matter in both courts. Such a concurrent litigation process is unnecessarily duplicative and costly. Similarly, the final determination on the participation of the Insurers in the underlying proceedings is necessary for the original parties' trial framework. Accordingly, the Court should affirm the stay of the trial in the underlying proceeding pending the resolution of the Insurers' appeal regarding their intervention and deny Beach Villas' Motion to Lift Stay.

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Respectfully submitted,

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November 8, 2017
Charleston, South Carolina

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ELECTRONICALLY FILED - 2017 Aug 02 6:11 PM - HORRY - COMMON PLEAS - CASE#2014CP2607634

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
The Harbour Cove Condominium Association, Plaintiff, v. Centex Homes, a Nevada General Partnership, et al., Defendants.	Civil Action No.: 2014-CP-26-7634 **NOTICE OF MOTION AND MOTION TO INTERVENE BY BITCO GENERAL INSURANCE CORPORATION**

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that BITCO General Insurance Corporation (hereinafter "BITCO"), by and through their undersigned attorneys, will move before the Court of Common Pleas, County of Horry, South Carolina, on such day and at such time as the Court may appoint, for an Order granting BITCO's right to intervene in this matter as of right pursuant to Rule 24 (a) of the South Carolina rules of Civil Procedure follows:

1. BITCO General Insurance Corporation, hereinafter referred to as "BITCO", is a corporation organized and existing under the laws of the state of Illinois and authorized to transact business and write insurance policies in the state of South Carolina.

2. BITCO's predecessor company, Bituminous Casualty Corporation, issued three policies of general liability insurance to Martin Masonry, Inc. (hereinafter "Martin Masonry") potentially relevant to this case, with said polices in effect from July 10, 2000, to July 10, 2003.

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3. Martin Masonry is a defendant in this case, with claims brought against it arising from allegations of defective construction work in regard to brick veneer and masonry.

4. BITCO is currently participating in the defense of Martin Masonry in this action subject to a full reservation of rights under the policies. The BITCO policies may or may not be applicable to indemnify Martin Masonry for some or all of the claims made in this action depending on the facts to be determined in this case.

5. BITCO maintains that under the law governing construction defect litigation in South Carolina, including but not limited to the Supreme Court decision in the case of *Harleysville Group Insurance v. Heritage Communities, et al.*, Opinion 27698 dated July 26, 2017, certain causes of action and claims for damages as asserted against Martin Masonry constitute claims that are not covered losses or are excluded by the terms and conditions of the BITCO policies. BITCO's reservations of rights include but are not limited to the right not to indemnify damages which arose outside a BITCO policy period, the right not to indemnify damages which do not qualify as "bodily injury" or "property damage" caused by an "occurrence;" the right not to indemnify damages which in whole or part constitute faulty workmanship or economic losses for which there is no coverage; the right not to indemnify damages which are excluded by work product exclusions such as Exclusions (k), (l), (m), and (n) in the policies; and the right not to indemnify damages which are barred by the "known injury or damage" terms and conditions of the policies.

6. BITCO hereby moves to intervene in this action so as to protect its rights and interests to indemnify Martin Masonry only for those damages which are covered

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under the policies. This motion is limited in scope so as to pursue the ability to request that to the extent that any verdict or judgment is rendered against Martin Masonry in this matter, the trial court reach a determination, whether by means of a special verdict form, special interrogatories to the jury, or by means of a detailed order, specifying the basis of any said verdict and/or judgment of law, with the result itemized, apportioned, and categorized so that the various causes of action and various elements of damages may thereafter be interpreted as covered, not covered, or excluded under the terms of the relevant insurance policies.

7. BITCO does not seek to participate actively in the trial of this action except as to making such motions at appropriate stages of the trial to submit a special verdict form or special interrogatories to the jury. BITCO does not seek to participate in discovery or to delay the trial of the case. BITCO does not seek declaratory relief from this Court as to any insurance coverage issue involved in this action. BITCO does not seek that its participation be disclosed to the jury, and in fact BITCO asks that its participation not be mentioned to the jury.

8. BITCO's interests are not adequately protected or represented by other parties to this action because, as discussed above, BITCO's interests in enforcing the terms and conditions of the insurance policies are separate and distinct from those involved in the direct defense of Martin Masonry.

9. BITCO's purpose in filing this motion to intervene on a limited basis is supported by the considerations stated in Rule 49, SCRCP, as to special verdicts (Rule 49(a)) and as to a general verdict accompanied by answers to interrogatories (Rule 49(b). For purposes of its motion in this case, BITCO incorporates by reference the

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requests as made by other insurers in a similar position in this matter, specifically including but not limited to the request for special interrogatories referenced in part B of the motion filed by intervener Selective Insurance Company of South Carolina in its motion filed on July 28, 2017.

10. The granting of the motion for relief will not prejudice the rights of any party nor delay the trial or other proceedings in this action.

WHEREFORE, BITCO prays that this Court permit it to intervene in this action pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, and to otherwise protect its interests at the trial of this action, and for such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

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Attorney for Defendant BITCO General Insurance Corporation

Dated: 8/02/17
Greenville, South Carolina

ELECTRONICALLY FILED - 2017 Sep 21 11:38 AM - HORRY - COMMON PLEAS - CASE#2014CP2607634

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
The Harbour Cove Condominium Association, Plaintiff, v. Centex Homes, a Nevada General Partnership, et al., Defendants.	Civil Action No.: 2014-CP-26-7634 **MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY BITCO GENERAL INSURANCE CORPORATION**

BITCO General Insurance Corporation (hereinafter "BITCO") files this memorandum in supplemental support of its motion filed August 2, 2017, in which it moved under South Carolina Rule of Civil Procedure 24(a) to intervene in the above-captioned action for the limited purposes explained in that motion and below:

This action arises from claims brought by the Harbour Cove Condominium Association ("Harbour Cove") seeking damages for alleged defects in the construction of its condominium complex by Centex Homes ("Centex"). Centex has in turn brought third-party claims against numerous contractors, including BITCO insured Martin Masonry, Inc. ("Martin Masonry"). Martin Masonry was in the business of providing brick and masonry services. Centex seeks indemnity for those damages and associated costs, expenses, and attorney fees associated with defense of claims arising from that work.

BITCO provided three policies of insurance to Martin Masonry which may be

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relevant to this matter, covering periods from July 10, 2000, to July 10, 2003.

Centex has also brought a separate declaratory judgment action (under C.A. 2016-CP-26-6670) seeking determination of its rights to additional insured coverage under various insurance policies issued to its subcontractors, including the BITCO policies issued to Martin Masonry, related in part to matters being adjudicated in this action.

BITCO has provided a defense to Martin Masonry under its policies while specifically reserving all rights to disclaim coverage for damages awarded against Martin Masonry which are not covered or are excluded by the various terms and conditions of the policies. Centex has tendered its defense to BITCO as well, in response to which BITCO has reserved its rights while investigating to determine whether the claim would be covered by the additional insured provisions.

BITCO's reservations of rights in this matter include but are not limited to the right not to indemnify damages which arose outside a BITCO policy period, the right not to indemnify damages which do not qualify as "bodily injury" or "property damage" caused by an "occurrence;" the right not to indemnify damages which in whole or part constitute faulty workmanship or economic losses for which there is no coverage; the right not to indemnify damages which are excluded by work product exclusions such as Exclusions (k), (l), (m), and (n) in the policies; and the right not to indemnify damages which are barred by the "known injury or damage" terms and conditions of the policies. In regard to Centex's claim for additional insured coverage, BITCO's reservation of rights includes also, but is not limited to, the right not to defend or indemnify for damages which do not arise from the work or the ongoing operations of Martin Masonry.

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Although it is the established law in South Carolina that an insured must prove that its claims under an insurance policy fall within the scope of insurance, an insurer must also act to protect its rights. Under the recent Supreme Court decision in *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, --- S.E. 2d ---, No. 2013-001281 (S.C. Jan. 11, 2017), our Supreme Court held that an insurer's right to apply and enforce the terms and conditions of policies may be jeopardized in a matter such as this unless the insurer requests intervention and the rendering of verdicts and/or orders of judgment in detail.

This jeopardy arises from the difficulty involved in applying the terms and conditions of the policies to a general verdict for damages which is not itemized by responsible party, nature/description of damage, date on which the damage arose, as well as other categories which may become relevant during the course of trial. The court in *Heritage* emphasized this problem by citing the federal Tenth Circuit case of *Mangum Foods, Inc., v. Cont'l Cas. Co.* (cite omitted), for the proposition 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."

The holding in the *Harleysville* decision comes in light of concerns noted previously in *Auto Owners Insurance Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). In that case, the Supreme Court held that an insurer was responsible to pay non-covered portions of damages because:

> [I]t is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages.

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> Auto-Owners 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.

684 S.E.2d at 547. Even though Auto-Owners was not a party to the underlying litigation, the Supreme Court held that "Auto-Owners represented Trinity in binding arbitration, 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 separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award." 684 S.E.2d at 547, n.5.

BITCO's motion is limited in scope to that which is necessary to pursue the ability to request a special verdict form, special interrogatories to the jury, or a detailed order, as appropriate pending developments at trial. BITCO's motion is limited to requesting specificity in any said verdict and/or judgment arising from the work of Martin Masonry, such that it is itemized, apportioned, and categorized so that the various causes of action and various elements of damages may thereafter be interpreted as covered, not covered, or excluded under the terms of the relevant insurance policies.

BITCO's motion for relief is timely in that it will not prejudice the rights of any party nor delay the trial or other proceedings in this action. BITCO does not seek to participate actively in the trial of this action except as to making such motions at appropriate stages of the trial to submit a special verdict form or special interrogatories to the jury. BITCO does not seek to participate in discovery or to delay the trial of the case. BITCO does not seek declaratory relief from this Court as to any insurance coverage issue involved in this action.

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Further, BITCO's interests are not adequately protected or represented by other parties to this action. BITCO's interests in enforcing the terms and conditions of the insurance policies are not identical with Martin Masonry's interests, but are separate and distinct from those involved in the direct defense of Martin Masonry. Some or all of these interests cannot be adequately represented by existing counsel representing Martin Masonry in this action.

For all of the reasons stated above, BITCO requests permission to intervene in this action pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, to otherwise protect its interests in regard to the form of verdict / judgment at the trial of this action, and for such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

HUNTER & FOSTER, P.A.

s/Lawrence M Hunter, Jr. Esq. Esquire
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S.C. Bar No. 011808

Attorney for Defendant BITCO General Insurance Corporation

Dated: 9/21/17
Greenville, South Carolina

ELECTRONICALLY FILED - 2017 Jul 25 2:23 PM - HORRY - COMMON PLEAS - CASE#2014CP2606573

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
Beach Villas at Ocean Keyes Property Owners Association, Inc.,	)	Civil Action No. 2014-CP-26-06573
Plaintiff,	)	MOTION TO INTERVENE
vs.	)	OR
Ocean Keyes Development, LLC, Keye Construction Co., Inc., Russell P. Baltzer, First Exteriors, LLC, Carefree Exteriors, Inc., Coastal Stucco Inc., Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Con. Inc., Builders FirstSource-Southeast Group, LLC, Steel Homes International, Inc., Renaissance Steel Installation, LLC n/k/a Renaissance Steel, LLC, Benchmark Steel Service, LLC and Dietrich Building System n/k/a Clarkwestern Dietrich Building Systems, LLC,	)	MOTION FOR PROTECTION
Defendants.	)	
Ocean Keyes Development, LLC and Keye Construction Co., Inc.,	)	
Third-Party Plaintiffs,	)	
vs.	)	
Renaissance Steel Installation, LLC n/k/a Renaissance Steel, LLC and Benchmark Steel Erectors,	)	
Third-Party Defendants.	)	

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YOU WILL PLEASE TAKE NOTICE that Selective Insurance Company of South Carolina, (herein "Selective") on the tenth (10th) day following service of this Motion or as soon as possible prior to the start of the jury trial of this matter at the Court's discretion, will move before this Honorable Court for an Order Granting its Motion for Limited Intervention or, in the alternative, for an Order Protecting its rights to raise any and all issues relating to insurance coverage in a subsequent action.

This Motion is made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the facts of this matter showing that Selective has an insurance coverage interest in this matter. Selective seeks relief as set forth in Sections A, B and C of this Motion.

A. Basis for Motion to Intervene

Selective issued policies of insurance to Carefree Exteriors, LLC. (hereafter "Carefree Exteriors") and Coastal Stucco, Inc. (hereafter "Coastal Stucco") as follows:

1. S1620803 policy period 10/16/06 to 10/16/10 (Carefree Exteriors)
2. S1611628 policy period 5/14/06 to 5/14/10 (Coastal Stucco)

The above policies are hereafter identified as the "Selective Policies" and are incorporated fully herein by reference.

This lawsuit involves claims by Beach Villas at Ocean Keyes Property Owners Association (hereafter collectively "Beach Villas HOA") against the above-captioned defendants. The project is the Beach Villas Condominium project. Carefree Exteriors and Coastal Stucco claim status as insureds under the respective Selective Policies and allege that the duties of defense and indemnity have been triggered by the lawsuit.

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It is anticipated that the jury verdict could result from damage estimates presented to the jury that are a mixture of (1) the cost to repair defective work; and (2) the cost to repair damage to the buildings resulting from the defective work. If so, the verdict would be a mixture of different categories of damages that would need to be separated for insurance coverage purposes. In addition, the character of the damages could implicate the applicability of exclusions, endorsements or other policy provisions. Selective should be afforded the right to protect its ability to raise all insurance coverage issues. The insureds should be afforded the right to protect each's ability to raise all insurance coverage issues.

The insureds carry the burden of proof to show that damages fall within the respective insuring agreements. Costs to repair and replace improper work are not damages that fall within the insuring agreement. In addition to the insuring agreement, certain policy exclusions and endorsements are applicable that could affect whether damages within the insuring agreement are covered or not covered by the Selective Policies. Many of the insurance related questions involve factual issues. If the jury issues a verdict without addressing those factual issues, the parties might later claim that such factual issues cannot be litigated in a subsequent insurance coverage action. Those factual issues should be addressed through the granting of this motion, or alternatively, those issues should be preserved for future determination in a subsequent action where all rights are preserved to offer evidence and find facts sufficient for insurance policy coverage determinations.

Selective therefore moves that this Honorable Court should issue an Order allowing for special interrogatories and corresponding verdict forms, with examples set forth below, to be submitted to the jury for purposes of attempting to identify and preserve certain factual findings for insurance coverage issues.

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Selective does not desire to intervene as a named party defendant. Selective does not desire to intervene in any way that negatively affects the rights of any party claiming to be an insured under the policies.

The purpose of this Motion is to make the best effort to comply with the directives of the South Carolina Supreme Court's recent Opinion No. 27698, issued January 11, 2017 titled *Harleysville Group Insurance, a Pennsylvania Corporation v. Heritage Communities, Inc. a South Carolina Corporation, et. al., rehearing pending* (hereafter "*Heritage*"). The South Carolina Supreme Court, in *Heritage*, indicated that an insurance carrier should make an effort to have the trial court issue special interrogatories or a special verdict form. (*See, Heritage Opinion, Section III Coverage Issues, A. Reservation of Rights to Contest Coverage* wherein the Court cited law stating "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 insurance issues."). By this motion, Selective desires to comply with the Supreme Court's ruling in *Heritage*.

Alternatively, to avoid the interjection of insurance issues into the trial of the underlying matter, Selective seeks an Order that all insurance coverage issues of any kind are preserved and are to be litigated in a subsequent action with an evidentiary hearing, including the finding of facts, to enable the court to make a ruling on each and every insurance coverage issue raised by any party.

B. <u>Motion for Intervention as a Non-Party to Compel Evidence and Submit Special Interrogatories to the Jury:</u>

Selective requests that it be permitted to intervene as a non-party for the purpose of submitting special interrogatories to the jury and that the parties submitting evidence on damages

ELECTRONICALLY FILED - 2017 Jul 25 2:23 PM - HORRY - COMMON PLEAS - CASE#2014CP260573

each be required to submit the damages evidence in a manner that permits the jury to objectively and accurately answer the special interrogatories. Selective seeks an Order from this Honorable Court as follows:

1. An Order requiring a special interrogatory to be submitted to the jury to determine whether progressive damage has occurred at Ocean Keyes;

2. An Order requiring that an instruction be given to the jury on the definition of progressive damage;

3. An Order requiring that an instruction be given to the jury explaining the definitions of proper work, defective work and the damage that results from defective work such that the jury can categorize damages.

4. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairing defective work;

5. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairing portions of the buildings damaged by the defective work but not including the repair cost of the defective work;

6. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the verdict that is the result of improper supervision, inspection, direction and control by the general contractor;

7. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award that relates to the repair costs for the work performed by Carefree Exteriors;

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8. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award that relates to the repair costs for the work performed by Coastal Stucco;

9. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award relating to the work of Carefree Exteriors that is to repair the defective work of Carefree Exteriors;

10. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award relating to the work of Coastal Stucco that is to repair the defective work of Coastal Stucco;

11. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award relating to the work of Carefree Exteriors that is to repair the other portions of the building damaged by the defective work of Carefree Exteriors but not including Carefree Exteriors' work;

12. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award relating to the work of Coastal Stucco that is to repair the other portions of the building damaged by the defective work of Coastal Stucco but not including Coastal Stucco's work;

13. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairs for damaged portions of the buildings that are the result of expected or intended damages;

14. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of any portion of the award of damages, if any, that arises out of an exterior insulation and finish, synthetic stucco or EIFS system.

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15. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairs for damaged portions of the buildings from Coastal Stucco's work that are the result of expected or intended damages;

16. An Order requiring a special interrogatory to be submitted to the jury to determine the date on which progressive damage from the Carefree Exteriors work started and the date on which it concluded;

17. An Order requiring a special interrogatory to be submitted to the jury to determine the date on which progressive damage from the Coastal Stucco work started and the date on which it concluded;

18. An Order requiring a special interrogatory to be submitted to the jury to determine repair costs, if any, relating to the work of Carefree Exteriors or Coastal Stucco are necessitated by fungus, dry rot or decay and, if so, the dollar amount of the repair relating to those damages;

19. An Order requiring a special interrogatory to be submitted to the jury to determine repair costs, if any, relating to each of Carefree Exteriors or Coastal Stucco work are necessitated by fungi or bacteria and, if so, the dollar amount of the repair relating to those damages;

20. An Order requiring a special interrogatory to be submitted to the jury to determine the repair cost relating to each of Carefree Exteriors or Coastal Stucco work relating to damage to buildings that occurred during the time period of each Selective policy period;

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21. An Order requiring a special interrogatory to be submitted to the jury to determine the date or dates of manifestation of damage to each building relating to Carefree Exteriors or Coastal Stucco work;

22. An Order requiring all parties submitting evidence of repair cost estimates to fairly and objectively present evidence in a manner that allows the jury to answer the interrogatories set forth herein;

23. An Order requiring all parties to submit such other special interrogatories to the jury that are deemed necessary to preserve information that could be useful in a subsequent action to determine insurance coverage issues;

24. An Order that intervention does not prejudice the rights of any party in this action;

25. An Order that the defense obligation of any insurance carrier involved in this action has not been harmed, limited or compromised by its involvement in this action as a limited intervening party;

26. An Order that no evidence of insurance may be offered during the trial of this matter;

27. An Order finding that that Carefree Exteriors and Coastal Stucco are not prejudiced by any action taken by Selective by this limited intervention;

28. An Order that no party is permitted to infer, suggest, explain or otherwise reveal in any manner to the jury that these interrogatories are being submitted for the purpose of preserving evidence that might be used in a subsequent declaratory judgment action regarding insurance coverage issues;

ELECTRONICALLY FILED - 2017 Jul 25 2:23 PM - HORRY - COMMON PLEAS - CASE#2014CP2606573

29. An Order barring any party from suggesting figures that it believes should be placed by the jury into certain categories;

30. An Order requiring a special interrogatory to the jury that if the jury cannot determine the answer to any of the special interrogatories that it so states by checking a box indicating that the evidence in the underlying action is not sufficient to answer the special interrogatories; and

31. An Order allowing participation by Selective at the close of evidence to determine which interrogatories are to be submitted to the jury based on issues, rulings, evidence and claims that are presented during trial.

Selective would show that this Motion meets the requirements of Rule 24 in that: (1) it is timely made; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's claims or defenses and this action have questions of law or fact in common. Intervention is appropriate under Rule 24(a) as a right and/or Rule 24(b) as permissive by the court. While Rule 24 does not address partial intervention, Selective seeks to intervene for a limited purpose. Limited intervention shall not unduly delay or prejudice the adjudication of the rights of the original parties.

C. Motion For Protective Order

Selective, in the alternative to the relief requested in Section B of this Motion, seeks an Order from this Honorable Court that all insurance coverage issues, of any kind, are preserved and shall be addressed in a subsequent action where Selective and all other parties

shall have the full right to offer evidence and seek rulings on any and all factual and legal issues relating to insurance coverage matters and are not bound by the evidence, findings, verdicts or rulings in this action.

And We So Move.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:/s/Robert C. Calamari

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Attorneys for Selective Insurance Company of South Carolina

Myrtle Beach, South Carolina
July 25, 2017

ELECTRONICALLY FILED - 2017 Jul 25 2:23 PM - HORRY - COMMON PLEAS - CASE#2014CP2606573

ELECTRONICALLY FILED - 2017 Jul 28 4:43 PM - HORRY - COMMON PLEAS - CASE#2014CP2607634

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
The Harbour Cove Condominium Association,	)	Civil Action No. 2014-CP-26-07634
Plaintiff,	)	
vs.	)	MOTION FOR LIMITED INTERVENTION OR ALTERNATIVELY FOR ORDER OF PROTECTION OF RIGHTS (SCRCP 24)
Centex Homes, a Nevada General Partnership, et al.	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that Selective Insurance Company of South Carolina, (herein "Selective") on the tenth (10th) day following service of this Motion or as soon as possible prior to the start of the jury trial of this matter at the Court's discretion, pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the South Carolina Supreme Court's Opinion in *Harleysville Group Insurance v. Heritage Communities,* et. al., Opinion 27698, dated July 26, 2017, will move before this Honorable Court for an Order Granting its Motion for Limited Intervention or, in the alternative, for an Order Protecting its rights to raise any and all issues relating to insurance coverage in a subsequent action.

This Motion is made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the facts of this matter showing that Selective has an insurance coverage interest in this matter. Selective seeks relief as set forth in Sections A, B and C of this Motion.

A. Basis for Motion to Intervene

Selective issued one or more policies of insurance to subcontractors identified as defendants herein including Martin Masonry, Inc. (hereafter "Martin Masonry") and Dunn

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Plumbing, Inc. (hereafter "Dunn Plumbing"). Centex has asserted that it is owed insurance obligations from Selective.

The policies issued by Selective are hereafter identified as the "Selective Policies" and incorporated fully herein by reference.

This lawsuit involves claims by The Harbor Cove Condominium Association and The Harbor Cove Horizontal Property Regime (hereafter collectively "Harbor Cove HOA") against the above-captioned defendants. The project is the Harbor Cove Condominium project. Martin Masonry and Dunn Plumbing claim status as primary insureds under the Selective Policies and that the duties of defense and indemnity have been triggered by the lawsuit. Centex claims status as an additional insured under the policy.

It is anticipated that the jury verdict, if any, could result from damage estimates presented to the jury that are a mixture of (1) the cost to repair defective work; and (2) the cost to repair damage to the buildings resulting from the defective work. If so, the verdict would be a mixture of different categories of damages that would need to be separated for insurance coverage purposes. In addition, the character of the damages could implicate the applicability of exclusions, endorsements or other policy provisions. Selective should be afforded the right to protect its ability to raise all insurance coverage issues. The insureds should be afforded the right to protect their ability to raise all insurance coverage issues.

The insureds carry the burden of proof to show that damages fall within the insuring agreement. Costs to repair and replace improper work are not damages that fall within the insuring agreement. In addition to the insuring agreement, certain policy exclusions and endorsements are applicable that could affect whether damages within the insuring agreement are covered or not covered by the policy. Many of the insurance related questions involve factual

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issues. If the jury issues a verdict without addressing those factual issues, the parties might later claim that such factual issues cannot be litigated in a subsequent insurance coverage action. Those factual issues should be addressed through the grant of this motion, or alternatively, those issues should be preserved for future determination in a subsequent action where all rights are preserved to offer evidence and find facts sufficient for insurance policy coverage determinations.

Selective therefore moves that this Honorable Court should issue an Order allowing for special interrogatories and corresponding verdict forms, with examples set forth below, to be submitted to the jury for purposes of attempting to identify and preserve certain factual findings for insurance coverage issues.

Selective does not desire to intervene as a named party defendant. Selective does not desire to intervene in any way that negatively affects the rights of any party claiming to be an insured under the policies.

The purpose of this Motion is to make the best effort to comply with the directives of the South Carolina Supreme Court's recent Opinion No. 27698, issued July 27, 2017 titled *Harleysville Group Insurance, a Pennsylvania Corporation v. Heritage Communities, Inc. a South Carolina Corporation, et. al., rehearing pending* (hereafter "*Heritage*"). The South Carolina Supreme Court, in *Heritage*, indicated that an insurance carrier should make an effort to have the trial court issue special interrogatories or a special verdict form. (*See, Heritage Opinion, Section III Coverage Issues, A. Reservation of Rights to Contest Coverage* wherein the Court cited law stating "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

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special verdict in order to clarify insurance issues."). By this motion, Selective desires to comply with the Supreme Court's ruling in *Heritage*.

Alternatively, to avoid the interjection of insurance issues into the trial of the underlying matter, Selective seeks an Order that all insurance coverage issues of any kind are preserved and are to be litigated in a subsequent action with an evidentiary hearing, including the finding of facts, to enable the court to make a ruling on each and every insurance coverage issue raised by any party.

B. Motion for Intervention as a Non-Party to Compel Evidence and Submit Special Interrogatories to the Jury:

Selective requests that it be permitted to intervene as a non-party for the purpose of submitting special interrogatories to the jury and that the parties submitting evidence on damages each be required to submit the damages evidence in a manner that permits the jury to objectively and accurately answer the special interrogatories. Selective seeks an Order from this Honorable Court as follows:

1. An Order requiring a special interrogatory to be submitted to the jury to determine whether progressive damage has occurred at Harbor Cove;

2. An Order requiring that an instruction be given to the jury on the definition of progressive damage;

3. An Order requiring that an instruction be given to the jury explaining the definitions of proper work, defective work and the damage that results from defective work such that the jury can categorize damages;

4. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairing defective work;

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5. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairing portions of the buildings damaged by the defective work but not including the repair cost of the defective work;

6. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the verdict that is the result of improper supervision, inspection, direction and control by the general contractor;

7. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award that relates to the repair costs for the work performed by each subcontractor;

8. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award relating to the work of each subcontractor that is to repair the defective work of each subcontractor;

9. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award relating to the work of each subcontractor that is to repair the other portions of the building damaged by the defective work of each subcontractor but not including each subcontractor's work;

10. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairs for damaged portions of the buildings from each subcontractor's work that are the result of expected or intended damages;

11. An Order requiring a special interrogatory to be submitted to the jury to determine the date on which progressive damage from each subcontractor's work started and the date on which it concluded;

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12. An Order requiring a special interrogatory to be submitted to the jury to determine if any repair costs relating to each subcontractor's work are necessitated by fungus, dry rot or decay and, if so, the dollar amount of the repair relating to those damages;

13. An Order requiring a special interrogatory to be submitted to the jury to determine if any repair costs relating to each subcontractor's work are necessitated by fungi or bacteria and, if so, the dollar amount of the repair relating to those damages;

14. An Order requiring a special interrogatory to be submitted to the jury to determine the repair cost relating to each subcontractor's work relating to damage to buildings that occurred during the time period of each Selective policy period;

15. An Order requiring a special interrogatory to be submitted to the jury to determine the date or dates of manifestation of damage to each building relating to each subcontractor's work;

16. An Order requiring all parties submitting evidence of repair cost estimates to fairly and objectively present evidence in a manner that allows the jury to answer the interrogatories set forth herein;

17. An Order requiring all parties to submit such other special interrogatories to the jury that are deemed necessary to preserve information that could be useful in a subsequent action to determine insurance coverage issues;

18. An Order that intervention does not prejudice the rights of any party in this action;

19. An Order that the defense obligation of any insurance carrier involved in this action has not been harmed, limited or compromised by its involvement in this action as a limited intervening party;

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20. An Order that no evidence of insurance may be offered during the trial of this matter;

21. An Order finding that Martin Masonry, Dunn Plumbing, Centex and every other party in this action are not prejudiced by any action taken by Selective by this limited intervention;

22. An Order that no party is permitted to infer, suggest, explain or otherwise reveal in any manner to the jury that these interrogatories are being submitted for the purpose of preserving evidence that might be used in a subsequent declaratory judgment action regarding insurance coverage issues;

23. An Order barring any party from suggesting figures that it believes should be placed by the jury into certain categories;

24. An Order requiring a special interrogatory to the jury that if the jury cannot determine the answer to any of the special interrogatories that it so states by checking a box indicating that the evidence in the underlying action is not sufficient to answer the special interrogatory; and

25. An Order allowing participation by Selective at the close of evidence to determine which interrogatories are to be submitted to the jury based on issues, rulings, evidence and claims that are presented during trial.

Selective would show that this Motion meets the requirements of Rule 24 in that: (1) it is timely made; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest; and (4) the applicant's claims or defenses and this action have questions of law or fact in common. Intervention is

ELECTRONICALLY FILED - 2017 Jul 28 4:43 PM - HORRY - COMMON PLEAS - CASE#2014CP2607634

appropriate under Rule 24(a) as a right and/or Rule 24(b) as permissive by the court. While Rule 24 does not address partial intervention, Selective seeks to intervene for a limited purpose. Limited intervention shall not unduly delay or prejudice the adjudication of the rights of the original parties.

C. Motion For Protective Order

Selective, in the alternative to the relief requested in Section B of this Motion, seeks an Order from this Honorable Court that all insurance coverage issues, of any kind, are preserved and shall be addressed in a subsequent action where Selective, Martin Masonry, Dunn Plumbing, Centex and all other parties shall have the full right to offer evidence and seek rulings on any and all factual and legal issues relating to insurance coverage matters and are not bound by the evidence, findings, verdicts or rulings in this action.

And We So Move.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/Robert C. Calamari

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Attorneys for Selective Insurance Company of South Carolina

Myrtle Beach, South Carolina
July 28, 2017

ELECTRONICALLY FILED - 2017 Sep 13 3:39 PM - HORRY - COMMON PLEAS - CASE#2014CP2607634

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
The Harbour Cove Condominium Association,	)	Civil Action No. 2014-CP-26-07634
Plaintiff,	)	
vs.	)	MOTION FOR LIMITED INTERVENTION OR ALTERNATIVELY FOR ORDER OF PROTECTION OF RIGHTS (SCRCP 24)
Centex Homes, a Nevada General Partnership, et al.	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that Harleysville Insurance Company n/k/a Nationwide Insurance Company, (herein "Nationwide") on the tenth (10th) day following service of this Motion or as soon as possible prior to the start of the jury trial of this matter at the Court's discretion, pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the South Carolina Supreme Court's Opinion in *Harleysville Group Insurance v. Heritage Communities,* et. al., Opinion 27698, dated July 26, 2017, will move before this Honorable Court for an Order Granting its Motion for Limited Intervention or, in the alternative, for an Order Protecting its rights to raise any and all issues relating to insurance coverage in a subsequent action.

This Motion is made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the facts of this matter showing that Nationwide has an insurance coverage interest in this matter. Nationwide seeks relief as set forth in Sections A, B and C of this Motion.

A. Basis for Motion to Intervene

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Nationwide issued one or more policies of insurance to subcontractors identified as defendant herein Martin Masonry, Inc. (hereafter "Martin Masonry"). Centex has asserted that it is owed insurance obligations from Nationwide.

The policy issued by Nationwide, hereafter identified as the "Nationwide Policy" and incorporated fully herein by reference.

This lawsuit involves claims by The Harbor Cove Condominium Association and The Harbor Cove Horizontal Property Regime (hereafter collectively "Harbor Cove HOA") against the above-captioned defendants. The project is the Harbor Cove Condominium project. Martin Masonry claims status as a primary insured under the Nationwide Policy and that the duties of defense and indemnity have been triggered by the lawsuit. Centex claims status as an additional insured under the policy.

It is anticipated that the jury verdict, if any, could result from damage estimates presented to the jury that are a mixture of (1) the cost to repair defective work; and (2) the cost to repair damage to the buildings resulting from the defective work. If so, the verdict would be a mixture of different categories of damages that would need to be separated for insurance coverage purposes. In addition, the character of the damages could implicate the applicability of exclusions, endorsements or other policy provisions. Nationwide should be afforded the right to protect its ability to raise all insurance coverage issues. The insureds should be afforded the right to protect their ability to raise all insurance coverage issues.

The insureds carry the burden of proof to show that damages fall within the insuring agreement. Costs to repair and replace improper work are not damages that fall within the insuring agreement. In addition to the insuring agreement, certain policy exclusions and endorsements are applicable that could affect whether damages within the insuring agreement

ELECTRONICALLY FILED - 2017 Sep 13 3:39 PM - HORRY - COMMON PLEAS - CASE#2014CP2607634

are covered or not covered by the policy. Many of the insurance related questions involve factual issues. If the jury issues a verdict without addressing those factual issues, the parties might later claim that such factual issues cannot be litigated in a subsequent insurance coverage action. Those factual issues should be addressed through the grant of this motion, or alternatively, those issues should be preserved for future determination in a subsequent action where all rights are preserved to offer evidence and find facts sufficient for insurance policy coverage determinations.

Nationwide therefore moves that this Honorable Court should issue an Order allowing for special interrogatories and corresponding verdict forms, with examples set forth below, to be submitted to the jury for purposes of attempting to identify and preserve certain factual findings for insurance coverage issues.

Nationwide does not desire to intervene as a named party defendant. Nationwide does not desire to intervene in any way that negatively affects the rights of any party claiming to be an insured under the policies.

The purpose of this Motion is to make the best effort to comply with the directives of the South Carolina Supreme Court's recent Opinion No. 27698, issued July 27, 2017 titled *Harleysville Group Insurance, a Pennsylvania Corporation v. Heritage Communities, Inc. a South Carolina Corporation, et. al., rehearing pending* (hereafter "*Heritage*"). The South Carolina Supreme Court, in *Heritage*, indicated that an insurance carrier should make an effort to have the trial court issue special interrogatories or a special verdict form. (*See, Heritage Opinion, Section III Coverage Issues, A. Reservation of Rights to Contest Coverage* wherein the Court cited law stating "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 insurance issues."). By this motion, Nationwide desires to comply with the Supreme Court's ruling in *Heritage*.

Alternatively, to avoid the interjection of insurance issues into the trial of the underlying matter, Nationwide seeks an Order that all insurance coverage issues of any kind are preserved and are to be litigated in a subsequent action with an evidentiary hearing, including the finding of facts, to enable the court to make a ruling on each and every insurance coverage issue raised by any party.

B. Motion for Intervention as a Non-Party to Compel Evidence and Submit Special Interrogatories to the Jury:

Nationwide requests that it be permitted to intervene as a non-party for the purpose of submitting special interrogatories to the jury and that the parties submitting evidence on damages each be required to submit the damages evidence in a manner that permits the jury to objectively and accurately answer the special interrogatories. Nationwide seeks an Order from this Honorable Court as follows:

1. An Order requiring a special interrogatory to be submitted to the jury to determine whether progressive damage has occurred at Harbor Cove;

2. An Order requiring that an instruction be given to the jury on the definition of progressive damage;

3. An Order requiring that an instruction be given to the jury explaining the definitions of proper work, defective work and the damage that results from defective work such that the jury can categorize damages;

4. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairing defective work;

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5. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairing portions of the buildings damaged by the defective work but not including the repair cost of the defective work;

6. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the verdict that is the result of improper supervision, inspection, direction and control by the general contractor;

7. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award that relates to the repair costs for the work performed by each subcontractor;

8. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award relating to the work of each subcontractor that is to repair the defective work of each subcontractor;

9. An Order requiring a special interrogatory to be submitted to the jury to determine the portion of the jury's damage award relating to the work of each subcontractor that is to repair the other portions of the building damaged by the defective work of each subcontractor but not including each subcontractor's work;

10. An Order requiring a special interrogatory to be submitted to the jury to determine the cost of repairs for damaged portions of the buildings from each subcontractor's work that are the result of expected or intended damages;

11. An Order requiring a special interrogatory to be submitted to the jury to determine the date on which progressive damage from each subcontractor's work started and the date on which it concluded;

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12. An Order requiring a special interrogatory to be submitted to the jury to determine if any repair costs relating to each subcontractor's work are necessitated by fungus, dry rot or decay and, if so, the dollar amount of the repair relating to those damages;

13. An Order requiring a special interrogatory to be submitted to the jury to determine if any repair costs relating to each subcontractor's work are necessitated by fungi or bacteria and, if so, the dollar amount of the repair relating to those damages;

14. An Order requiring a special interrogatory to be submitted to the jury to determine the repair cost relating to each subcontractor's work relating to damage to buildings that occurred during the time period of the Nationwide Policy;

15. An Order requiring a special interrogatory to be submitted to the jury to determine the date or dates of manifestation of damage to each building relating to each subcontractor's work;

16. An Order requiring all parties submitting evidence of repair cost estimates to fairly and objectively present evidence in a manner that allows the jury to answer the interrogatories set forth herein;

17. An Order requiring all parties to submit such other special interrogatories to the jury that are deemed necessary to preserve information that could be useful in a subsequent action to determine insurance coverage issues;

18. An Order that intervention does not prejudice the rights of any party in this action;

19. An Order that the defense obligation of any insurance carrier involved in this action has not been harmed, limited or compromised by its involvement in this action as a limited intervening party;

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20. An Order that no evidence of insurance may be offered during the trial of this matter;

21. An Order finding that Martin Masonry, Centex and every other party in this action are not prejudiced by any action taken by Nationwide by this limited intervention;

22. An Order that no party is permitted to infer, suggest, explain or otherwise reveal in any manner to the jury that these interrogatories are being submitted for the purpose of preserving evidence that might be used in a subsequent declaratory judgment action regarding insurance coverage issues;

23. An Order barring any party from suggesting figures that it believes should be placed by the jury into certain categories;

24. An Order requiring a special interrogatory to the jury that if the jury cannot determine the answer to any of the special interrogatories that it so states by checking a box indicating that the evidence in the underlying action is not sufficient to answer the special interrogatory; and

25. An Order allowing participation by Nationwide at the close of evidence to determine which interrogatories are to be submitted to the jury based on issues, rulings, evidence and claims that are presented during trial.

Nationwide would show that this Motion meets the requirements of Rule 24 in that: (1) it is timely made; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest; and (4) the applicant's claims or defenses and this action have questions of law or fact in common. Intervention is appropriate under Rule 24(a) as a right and/or Rule 24(b) as permissive by the

court. While Rule 24 does not address partial intervention, Nationwide seeks to intervene for a limited purpose. Limited intervention shall not unduly delay or prejudice the adjudication of the rights of the original parties.

C. Motion For Protective Order

Nationwide, in the alternative to the relief requested in Section B of this Motion, seeks an Order from this Honorable Court that all insurance coverage issues, of any kind, are preserved and shall be addressed in a subsequent action where Nationwide, Martin Masonry, Centex and all other parties shall have the full right to offer evidence and seek rulings on any and all factual and legal issues relating to insurance coverage matters and are not bound by the evidence, findings, verdicts or rulings in this action.

And We So Move.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

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SC Court of Appeals

Case No. 2014-CP-26-7634

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company, and National Fire & Marine Insurance Company.....Appellants,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiots, 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., ...Respondents,

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MOTION TO DISMISS APPEAL

COMES NOW the above-named Respondent Harbour Cove Condominium Association (hereinafter "Respondent Harbour Cove"), by and through its undersigned counsel, and herewith moves this Court for an Order dismissing the appeal filed by Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company (hereinafter collectively "Appellant Hartford").

BACKGROUND

This appeal arises from a construction defect case commenced by Respondent Harbour Cove against various defendants. Appellant Hartford is an insurer of defendant Coastal Plaster Systems, Inc. Appellant Hartford filed a Motion to Intervene in the underlying action on August 7, 2017. By Order entered October 13, 2017, the Court ruled that Appellant Hartford's Motion to Intervene was denied. Appellant Hartford filed its Notice of Appeal immediately thereafter. This action was set for trial to begin on October 16, 2017.

To better understand the improper nature of Appellant's appeal, it is important at the outset to note certain indisputable facts. Prior to trial, Appellant filed a written motion requesting a special verdict form or special interrogatories. However, Appellant is not a party to the litigation. Respondent Harbour Cove asserted no claims whatsoever against Appellant, and Appellant does not appear as a party in the caption of its own motion from which this appeal arises. This appeal follows.

LAW AND ANALYSIS

The South Carolina Court of Appeals may only entertain appeals of final orders. S.C. Code Ann. § 14-3-330 (1991). If there is some further act of the court which must be done in order to determine the rights of the parties, an order is interlocutory. *Mid-State*

Distribts. V. Century Imps., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993) (citing *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884)) (a ruling on a Motion to Dismiss under Rule 12(b)(2) has no real finality because it leaves open issues for trial and is interlocutory and therefore not appealable). An order that determines issues of law while leaving open questions of fact is not a final order. *Bone v. United States Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012) (citing *Good v. Hartford Accident and Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)) (an order containing provisions where the court remanded a matter for further proceedings was not a final order and not appealable). Specifically, the South Carolina Supreme Court has analyzed the issue of whether an appeal of a ruling on a Motion to Intervene was permissible, and concluded it was an improper interlocutory appeal. *Dorn v. Cohen*, 418 S.C. 126, 139, 791 S.E.2d 313, 319-20 (*See Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 485, 449, S.E.2d 580, 580 (1994).) (holding an appeal from an order of the circuit court granting a guardian ad litem's motion to intervene was interlocutory and was therefore not immediately appealable).

The Court's ruling on Appellant's Motion to Intervene is not an appealable final order as the entirety of the trial on the facts of the case has yet to commence and several factual issues remain. Respondent, the Harbour Cove Condominium Association, and its residents have been waiting since 2014 to bring this case to a resolution, which may be jeopardized with Appellant's attempts to appeal a decision by the Court that is interlocutory and not appealable.

On these grounds, the Court's denial of Appellant's Motion is not a final judgment as to all the claims or parties and furthermore, is not an immediately appealable interlocutory order.

As applied to this case, the foregoing authorities are clear and unambiguous in their message: The Court of Appeals does not have jurisdiction to hear this interlocutory appeal.

As such, Appellant's appeal must be dismissed.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondent Harbour Cove respectfully requests an Order of this Honorable Court dismissing Appellant Hartford's appeal in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party(s) with a copy of the within and foregoing pleading by ***electronic mail*** properly addressed to the following, to insure proper delivery to the following:

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This 11 day of October, 2017

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October 16, 2017

RECEIVED
OCT 17 2017
SC Court of Appeals

Via Federal Express
The Honorable Jenny Abbott Kitchings
Clerk of Court
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RE: The Harbour Cove Condominium Association v. Centex Homes, a Nevada General Partnership, et al.
Case No.: 2014-CP-26-7634

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of Respondent Harbour Cove Condominium Association's Motion to Dismiss Appeal of Hartford Fire Insurance Company and Hartford Casualty Insurance Company, as well as this firm's check in the amount of $25.00 for the applicable filing fee. If you would, please file this motion with the Court and return a file-stamped copy thereof to my office in the enclosed self-addressed, stamped envelope.

Should you have any questions or require any additional information, please do not hesitate to contact me.

Sincerely,

Amanda M. Blundy

AMB/ay
Enclosures
cc: John T. Chakeris, Esquire (w/enclosure) - via electronic mail only
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All Counsel of Record (w/enclosure) - via electronic mail only

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company, and National Fire & Marine Insurance Company..... Appellants,

Of whom Catalina London LTD .....is an Intervenor,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc.....Respondents.

NOTICE OF APPEAL

Hartford Fire Insurance Company and Hartford Casualty Insurance Company appeal the Honorable Clifton Newman's Order Denying Motion of Insurers For Limited Intervention, dated October 12, 2017. Appellants received written notice of entry of the order on October 12, 2017.

October 13, 2017

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
	)	**ORDER DENYING MOTION OF**
Plaintiffs,	)	**INSURERS FOR LIMITED**
	)	**INTERVENTION**
v.	)	
	)	
Centex Homes, et al.,	)	
	)	
Defendants.	)	

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OCT 13 2017
SC Court of Appeals

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek 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.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

(1) definition of progressive damages;

(2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

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(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (*citing* South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. *Ex parte* Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." Id. A party has standing if the party has a personal stake in the

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subject matter of a lawsuit and is a "real party in interest." Id. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Id.

BACKGROUND

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

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 Harbour Cove Condominium 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 Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not

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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.E2d 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.

cnl

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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SC Court of Appeals

Case No. 2014-CP-26-7634

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Liberty Mutual Fire Insurance Company, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company, and National Fire & Marine Insurance Company ..... Appellants,

Of whom Catalina London LTD .....is an Intervenor,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc. ..... Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 13, 2017 addressed to their attorneys of record, listed as follows:

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October 13, 2017

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post ffice Box 11629
1015 Sumter Street
Columbia, South Carolina 29202

Re: Harbour Cove Condominium Association, et al., v. Centex Homes, et al.,
Circuit Court Case No.: 2014-CP-26-07634

Dear Ms. Kitchings:

Enclosed for filing is the original Notice of Appeal along with one (1) copy of the notice of Appeal to be stamped and returned with the Courier. Also enclosed are the following:

(1) Original Proof of Service for the Notice of Appeal and one (1) copy to be stamped and returned with the courier;
(2) A copy of the Order which is to be challenged on appeal;
(3) A filing fee of $100.00

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Sincerely,

John L. McCants

cc: Other Counsel of Record:
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Harbour Cove Condominium Association, et al., v. Centex Homes, et al.,
Circuit Court Case No.: 2014-CP-26-07634

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

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Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, and National Fire & Marine Insurance Company ..... Appellants,

Of whom Catalina London LTD .....is an Intervenor,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and
Morningstar Consultants, Inc. ....Respondents.

NOTICE OF APPEAL

National Fire & Marine Insurance Company appeals the Honorable Clifton Newman's Order Denying Motion of Insurers For Limited Intervention, dated October 12, 2017. Appellants received written notice of entry of the order on October 12, 2017.

October 13, 2017

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
	)	**ORDER DENYING MOTION OF**
Plaintiffs,	)	**INSURERS FOR LIMITED**
	)	**INTERVENTION**
v.	)	
	)	
Centex Homes, et al.,	)	
	)	
Defendants.	)	

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SC Court of Appeals

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek 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.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

(1) definition of progressive damages;

(2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

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(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (*citing* South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. *Ex parte* Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." Id. A party has standing if the party has a personal stake in the

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subject matter of a lawsuit and is a "real party in interest." Id. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Id.

BACKGROUND

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

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 Harbour Cove Condominium 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 Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not

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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.E2d 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.

cwl

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

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APPEAL FROM HORRY COUNTY
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Clifton Newman, Circuit Court Judge

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Case No. 2014-CP-26-7634

Hartford Fire Insurance Company; Hartford Casualty Insurance Company; Selective Insurance Company of South Carolina, Liberty Mutual Fire Insurance Company, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, and National Fire & Marine Insurance Company ..... Appellants,

Of whom Catalina London LTD .....is an Intervenor,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc.
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 13, 2017 addressed to their attorneys of record, listed as follows:

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(*Signature Page to Follow*)

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Certitificate of Service
National Fire & Marine Insurance Company Notice of Appeal
Case No. 2014-CP-26-7634

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October 13, 2017

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October 13, 2017

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
PO BO 11629
Columbia, SC 29211

RE: The Harbour Cove Condominium Association v. Centex Homes, a Nevada General Partnership, et al.
Civil Action No.: 2014-CP-26-07634
NRMS File No. 18813.01548-1

Dear Ms. Kitchings:

Enclosed please find the original and one copy of a Notice of Appeal in regard to the above referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our check in the amount of $100.00 as the required filing fee.

By copy of this letter to counsel of record, we are serving them with a copy of this notice. Please contact me should you have any questions.

Very truly yours,

Bob Calamari

By MEC with express written consent

Robert C. Calamari

RCC:dp
Enclosures
cc: All Counsel of Record

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

RECEIVED
OCT 13 2017
SC Court of Appeals

Case No. 2014-CP-26-07634

Ex Parte: Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company,..... Appellant,

In re: The Harbour Cove Condominium Association,..... Respondent,

v.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., In.; Centex-Rogers, Inc.; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC; Right Way Construction, Inc.; Right Way Group, Inc.; RWG, Inc., RWGR, Inc.; South Carolina State Plastering, LLC; Georgia State Plastering, LLC; Florida State Plastering, LLC; Coastal Drywall, Inc., d/b/a Coastal Plaster Systems; Lundy Dowell d/b/a Coastal Plaster Systems; Martin Masonry, Inc.; Richard Blackwell d/b/a Synthetic Designs; Ferst Plastering, Inc. a/k/a Ferst Exteriors, Inc.; BR Brick & Masonry, 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.; Morningstar Consultants, Inc., A&A Stucco Inc.; Coastal Plaster Systems, Inc.,; Coastal Plastering Systems, Inc.; and Mike Phillips, ... Respondents,

v.

Centex Homes, a Nevada General Partnership,..... Respondent,

ELECTRONICALLY FILED - 2017 Oct 13 5:17 PM - HORRY - COMMON PLEAS - CASE#2014CP260763

v.

American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.; American Residential Services, Inc.; Builders FirstSource — Atlantic Group, LLC; Stock Building Supply, LLC f/k/a Carolina Builders Corporation; Cohen's Drywall Company, Inc.; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc., Carolina Drywall Contractors, Inc.; Tri-City Insulation and Building Products of Myrtle Beach, Inc.; Blue Ribbon Cleaning Service, Inc.; Overhead Door Company, Inc.; Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.; John Doe; Cox Millwork & Supply, Inc.; Top Notch Painters; AO Hardee & Son, Inc.; Sunland Fire Protection, Inc.; Grand Strand Roofing & Siding; Vance Johnson Plumbing Co., Inc.; Ferreira Drywall; Frank Harris Construction; Setzer & Sons; Bond Group. Inc.; South Carolina State Plastering, LLC a/k/a Georgia State Plastering, LLC a/k/a Florida State Plastering, LLC; Jerry's Concrete a/k/a Jerry McRae Construction; Coastal Enclosures & Construction, Inc.; Williamson Construction & Waterproofing; ITP, Inc.; Vereen Concrete Co., Inc.; Weather Protection Systems, Inc.; Dunn Plumbing, Inc.; CEMS, Engineering, Inc., The Martin Architectural Group, P.C., The Harman Group, Inc. f/k/a Cagley Harman & Associates, Inc.; Azimuth Consultants, and Risk Tech, LLC a/k/a or f/k/a Azimuth Consultants, BCI, Inc., Com Tech, Model Home Interiors, Inc., Crescent Architects, LLC, Taylor Made Builders, Inc. ..... Respondents.

Notice of Appeal

Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company ("Appellant") hereby appeals the Order Denying the Motion of Insurers for Limited Intervention in the above captioned action dated October 12, 2017, and filed October 13, 2017 attached as Exhibit A.

[*SIGNATURE PAGE ATTACHED*]

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By MEC w/ express written consent

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Myrtle Beach, South Carolina
October 13, 2017

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EXHIBIT A

ELECTRONICALLY FILED - 2017 Oct 13 5:17 PM - HORRY - COMMON PLEAS - CASE#2014CP2607634
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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
	)	**ORDER DENYING MOTION OF**
Plaintiffs,	)	**INSURERS FOR LIMITED**
	)	**INTERVENTION**
v.	)	
	)	
Centex Homes, et al.,	)	
	)	
Defendants.	)	

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek 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.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

(1) definition of progressive damages;

(2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

cw

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(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (*citing* South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. *Ex parte* Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." Id. A party has standing if the party has a personal stake in the

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subject matter of a lawsuit and is a "real party in interest." Id. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Id.

BACKGROUND

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

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 Harbour Cove Condominium 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 Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not

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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.E2d 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.

cw

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 13 2017
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-07634

Ex Parte: Selective Insurance Company of South Carolina, ... Appellant,

In re: The Harbour Cove Condominium Association, ... Respondent,

v.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., In.; Centex-Rogers, Inc.; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC; Right Way Construction, Inc.; Right Way Group, Inc.; RWG, Inc., RWGR, Inc.; South Carolina State Plastering, LLC; Georgia State Plastering, LLC; Florida State Plastering, LLC; Coastal Drywall, Inc., d/b/a Coastal Plaster Systems; Lundy Dowell d/b/a Coastal Plaster Systems; Martin Masonry, Inc.; Richard Blackwell d/b/a Synthetic Designs; Ferst Plastering, Inc. a/k/a Ferst Exteriors, Inc.; BR Brick & Masonry, 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.; Morningstar Consultants, Inc., A&A Stucco Inc.; Coastal Plaster Systems, Inc.; Coastal Plastering Systems, Inc.; and Mike Phillips, ... Respondents,

v.

Centex Homes, a Nevada General Partnership, ... Respondent,

v.

American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.; American

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Residential Services, Inc.; Builders FirstSource — Atlantic Group, LLC; Stock Building Supply, LLC f/k/a Carolina Builders Corporation; Cohen's Drywall Company, Inc.; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc., Carolina Drywall Contractors, Inc.; Tri-City Insulation and Building Products of Myrtle Beach, Inc.; Blue Ribbon Cleaning Service, Inc.; Overhead Door Company, Inc.; Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.; John Doe; Cox Millwork & Supply, Inc.; Top Notch Painters; AO Hardee & Son, Inc.; Sunland Fire Protection, Inc.; Grand Strand Roofing & Siding; Vance Johnson Plumbing Co., Inc.; Ferreira Drywall; Frank Harris Construction; Setzer & Sons; Bond Group. Inc.; South Carolina State Plastering, LLC a/k/a Georgia State Plastering, LLC a/k/a Florida State Plastering, LLC; Jerry's Concrete a/k/a Jerry McRae Construction; Coastal Enclosures & Construction, Inc.; Williamson Construction & Waterproofing; ITP, Inc.; Vereen Concrete Co., Inc.; Weather Protection Systems, Inc.; Dunn Plumbing, Inc.; CEMS, Engineering, Inc., The Martin Architectural Group, P.C., The Harman Group, Inc. f/k/a Cagley Harman & Associates, Inc.; Azimuth Consultants, and Risk Tech, LLC a/k/a or f/k/a Azimuth Consultants, BCI, Inc., Com Tech, Model Home Interiors, Inc., Crescent Architects, LLC, Taylor Made Builders, Inc. ..... Respondents.

Proof of Service

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, do hereby certify that I have ensured the service on all counsel in this action with copies of Appellant Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company's Notice of Appeal to the following address(es) via electronic mail:

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Myrtle Beach, South Carolina
October 13, 2017

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October 13, 2017

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
PO BO 11629
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RE: The Harbour Cove Condominium Association v. Centex Homes, a Nevada General Partnership, et al.
Civil Action No.: 2014-CP-26-07634
NRMS File No. 32161.01512

Dear Ms. Kitchings:

Enclosed please find the original and one copy of a Notice of Appeal in regard to the above referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our check in the amount of $100.00 as the required filing fee.

By copy of this letter to counsel of record, we are serving them with a copy of this notice. Please contact me should you have any questions.

Very truly yours,

Bob Calamari

By MEC with express written consent

Robert C. Calamari

RCC:dp
Enclosures
cc: All Counsel of Record

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
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The Honorable Clifton Newman, Circuit Court Judge

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Ex Parte: Selective Insurance Company of South Carolina, ... Appellant,

In re: The Harbour Cove Condominium Association, ... Respondent,

v.

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Notice of Appeal

Selective Insurance Company of South Carolina ("Appellant") hereby appeals the Order Denying the Motion of Insurers for Limited Intervention in the above captioned action dated October 12, 2017, and filed October 13, 2017 attached as Exhibit A.

[*SIGNATURE PAGE ATTACHED*]

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EXHIBIT A

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
	)	**ORDER DENYING MOTION OF**
Plaintiffs,	)	**INSURERS FOR LIMITED**
	)	**INTERVENTION**
v.	)	
	)	
Centex Homes, et al.,	)	
	)	
Defendants.	)	

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek 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.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

(1) definition of progressive damages;

(2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

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(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (*citing* South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. *Ex parte* Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." Id. A party has standing if the party has a personal stake in the

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subject matter of a lawsuit and is a "real party in interest." Id. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Id.

BACKGROUND

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

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 Harbour Cove Condominium 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 Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not

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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.E2d 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.

cw

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 13 2017
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-07634

Ex Parte: Selective Insurance Company of South Carolina, ... Appellant,

In re: The Harbour Cove Condominium Association, ... Respondent,

v.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., In.; Centex-Rogers, Inc.; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC; Right Way Construction, Inc.; Right Way Group, Inc.; RWG, Inc., RWGR, Inc.; South Carolina State Plastering, LLC; Georgia State Plastering, LLC; Florida State Plastering, LLC; Coastal Drywall, Inc., d/b/a Coastal Plaster Systems; Lundy Dowell d/b/a Coastal Plaster Systems; Martin Masonry, Inc.; Richard Blackwell d/b/a Synthetic Designs; Ferst Plastering, Inc. a/k/a Ferst Exteriors, Inc.; BR Brick & Masonry, 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.; Morningstar Consultants, Inc., A&A Stucco Inc.; Coastal Plaster Systems, Inc.; Coastal Plastering Systems, Inc.; and Mike Phillips, ... Respondents,

v.

Centex Homes, a Nevada General Partnership, ... Respondent,

v.

American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.; American

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Proof of Service

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for Selective Insurance Company of South Carolina, do hereby certify that I have ensured the service on all counsel in this action with copies of Appellant Selective Insurance Company of South Carolina's Notice of Appeal to the following address(es) via electronic mail:

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October 13, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: ***The Harbour Cove Condominium Association v. Centex Homes, a Nevada General Partnerhip et al.***
C.A. No.: 2014-CP-26-7634

Dear Ms. Kitchings:

Please find enclosed the original and one copy of a Notice of Appeal in regard to the above-referenced matter. We would ask that you file the original and return a clocked copy to us in the self-addressed, stamped envelope enclosed. Also enclosed is our check for the filing fee in the amount of $100.00.

By copy of this letter to counsel of record, we are serving them with a copy of this notice.

With highest regards,

HUNTER & FOSTER, P.A.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company, and National Fire & Marine Insurance Company..... Appellants,

Of whom Catalina London LTD .....is an Intervenor,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc..... Respondents.

NOTICE OF APPEAL

Bitco General Insurance Corporation hereby appeals the Honorable Clifton Newman's Order Denying Motion of Insurers For Limited Intervention, dated October 12, 2017. Appellants received written notice of entry of the order on October 12, 2017.

October 13, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
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Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Liberty Mutual Fire Insurance Company, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company, and National Fire & Marine Insurance Company ..... Appellants,

Of whom Catalina London LTD .....is an Intervenor,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc. ..... Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 13, 2017 addressed to their attorneys of record, listed as follows:

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October 13, 2017

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
	)	**ORDER DENYING MOTION OF**
Plaintiffs,	)	**INSURERS FOR LIMITED**
	)	**INTERVENTION**
v.	)	
	)	
Centex Homes, et al.,	)	
	)	
Defendants.	)	

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek 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.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

(1) definition of progressive damages;

(2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

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(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (*citing* South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. *Ex parte* Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." Id. A party has standing if the party has a personal stake in the

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subject matter of a lawsuit and is a "real party in interest." Id. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Id.

BACKGROUND

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

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 Harbour Cove Condominium 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 Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not

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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.E2d 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.

CW

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

THE HARBOUR COVE CONDOMINIUM ASSOCIATION,

Plaintiffs,

vs.

CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, CENTEX CONSTRUCTION COMPANY, INC., CENTEX CONSTRUCTION, LLC, CENTEX-ROONEY CONSTRUCTION, CO., INC., CENTEX-RODGERS, INC., BALFOUR BEATTY CONSTRUCTION, LLC F/K/A CENTEX CONSTRUCTION, LLC, RIGHT WAY CONSTRUCTION, INC., RIGHT WAY GROUP, INC., RWG, INC., RWGR, INC., SOUTH CAROLINA STATE PLASTERING, LLC, GEORGIA STATE PLASTERING, LLC, FLORIDA STATE PLASTERING, LLC, COASTAL DRYWALL, INC. D/B/A COASTAL PLASTER SYSEMS, 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., &A STUCCO, INC., **COASTAL PLASTER SYSTEMS, INC., COASTAL PLASTERING SYSTEMS, INC., AND MIKE PHILLIPS,**

Defendants.

COURT OF COMMON PLEAS

CASE NO. 2014-CP-26-7634

THIRD AMENDED SUMMONS (JURY TRIAL REQUESTED)

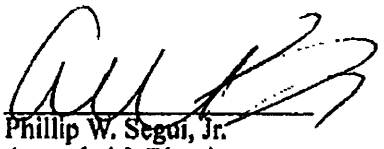
FILED
HORRY COUNTY
2016 NOV 10 AM 9:41
PAMELA HUGGINS-WARD
CLERK OF COURT

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and are required to answer the Third Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers at 864 Lowcountry Blvd., Ste. A, Mount Pleasant, South Carolina 29464, within thirty (30) days after the service thereof, exclusive of the day of such service, and if

you fail to answer the Third Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Third Amended Complaint.

SEGUI LAW FIRM PC



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Attorneys for Plaintiff

Mt. Pleasant, South Carolina
Dated: November 7, 2016

STATE OF SOUTH CAROLINA COUNTY OF HORRY THE HARBOUR COVE CONDOMINIUM ASSOCIATION, Plaintiff, vs. CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, CENTEX CONSTRUCTION COMPANY, INC., CENTEX CONSTRUCTION, LLC, CENTEX-ROONEY CONSTRUCTION, CO., INC., CENTEX-RODGERS, INC., BALFOUR BEATTY CONSTRUCTION, LLC F/K/A CENTEX CONSTRUCTION, LLC, RIGHT WAY CONSTRUCTION, INC., RIGHT WAY GROUP, INC., RWG, INC., RWGR, INC., SOUTH CAROLINA STATE PLASTERING, LLC, GEORGIA STATE PLASTERING, LLC, FLORIDA STATE PLASTERING, LLC, COASTAL DRYWALL, INC. D/B/A COASTAL PLASTER SYSEMS, 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., A&A STUCCO, INC., **COASTAL PLASTER SYSTEMS, INC., COASTAL PLASTERING SYSTEMS, INC., AND MIKE PHILLIPS,** Defendants.	COURT OF COMMON PLEAS CASE NO. 2014-CP-26-7634 **THIRD AMENDED COMPLAINT (JURY TRIAL REQUESTED)**

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CLERK OF COURT

The Plaintiff, above named, complaining of the Defendants above named, would allege and show as follows:

PARTIES

1. The Plaintiff, The Harbour Cove Condominium Association, is a South Carolina nonprofit corporation and by virtue of the Master Deed filed with the Register of Mesne and Conveyence for Horry County at Book 2355 Page 511, is charged amongst other things with 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.

2. That, upon information and belief, the Defendant, Centex Homes, a Nevada General Partnership, Nevada general partnership having its principle place of business in Horry County, South Carolina, and conducted business in Horry County at all relevant times herein and was engaged in the development, construction and/or repair of condominiums and buildings know as Harbour Cove. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

3. That, upon information and belief, the Defendant, Centex Construction Company, Inc., is a corporation organized and existing under the laws of the State of Nevada, and conducted business in Horry County and at all relevant times herein was engaged in the building, construction and/or repair of condominiums and buildings know as Harbour Cove. The Defendant, Centex Construction Company, Inc., is the agent and/or alter ego of Defendants, Centex Construction, LLC, Centex-Rooney Construction, Co., Inc., Centex-Rodgers, Inc., and Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

4. That, upon information and belief, the Defendant, Centex Construction, LLC, is a limited liability company organized under the laws of another state and conducted business in Horry County and at all relevant times herein was engaged in the building, construction and/or repair of the condominiums and buildings known as Harbour Cove. The Defendant, Centex Construction, LLC, is the agent and/or alter ego of Centex Construction, Company, Inc., Centex- Rooney Construction, Co., Inc., Centex-Rodgers, Inc., and Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC, and the corporate interests of these defendants were amalgamated so they in effect operated as the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

5. That, upon information and belief, the Defendant, Centex-Rooney Construction, Co., Inc., is a corporation organized and existing under the laws of the State of Florida, and conducted business in Horry County and at all relevant times herein was engaged in the building, construction and/or repair of condominiums and buildings know as Harbour Cove. The Defendant, Centex-Rooney Construction, Co., Inc., is the agent and/or alter ego of Defendants, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rodgers, Inc., and Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

6. That, upon information and belief, the Defendant, Centex-Rodgers Inc., is a corporation organized and existing under the laws of the State of Nevada, and conducted business in Horry County at all relevant times herein and was engaged in the building, construction and/or repair of condominiums and buildings know as Harbour Cove. The Defendant, Centex-Rodgers, Inc., is the agent and/or alter ego of Defendants, Centex Construction, LLC, Centex-Rooney Construction, Co., Inc. ,Centex Construction Company, Inc., and Balfour Beatty Construction, LLC, f/k/a Centex

Construction, LLC and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

7. That, upon information and belief, the Defendant, Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, is a limited liability corporation organized and existing under the laws of the State of Delaware, and conducted business in Horry County at all relevant times herein and was engaged in the building, construction and/or repair of condominiums and buildings know as Harbour Cove. The Defendant, Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, is the agent and/or alter ego of Defendants, Centex-Rooney Construction, Co., Inc., and Centex-Rodgers, Inc., Centex Construction Company, Inc., Centex Construction, LLC, and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

8. That, upon information and belief, the Defendant, Right Way Construction, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the framing, windows and related flashings on and to the condominiums and buildings know as Harbour Cove.

9. That, upon information and belief, the Defendant, Right Way Group, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the framing, windows and related flashings on and to the condominiums and buildings know as Harbour Cove. The Defendant, Right Way Group, Inc., is the agent and/or alter ego of Defendants, Right Way

Construction, Inc., RWG, Inc., and RWGR, Inc., and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

10. That, upon information and belief, the Defendant, RWG, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the framing, windows and related flashings on and to the condominiums and buildings know as Harbour Cove. The Defendant, RWG, Inc., is the agent and/or alter ego of Defendants, Right Way Construction, Inc., Right Way Group, Inc., and RWGR, Inc., and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

11. That, upon information and belief, the Defendant, RWGR, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the framing, windows and related flashings on and to the condominiums and buildings know as Harbour Cove. The Defendant, RWGR, Inc., is the agent and/or alter ego of Defendants, Right Way Construction, Inc., Right Way Group, Inc., and RWG, Inc., and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

12. That upon information and belief, the Defendant, South Carolina State Plastering, LLC, is a limited liability company organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein and was engaged

in the supervision, building and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings know as Harbour Cove. The Defendant, South Carolina State Plastering, LLC, is the agent and/or alter-ego of Defendants, Georgia State Plastering, LLC, and Florida State Plastering, LLC, and the corporate interests of these Defendants were amalgamated so they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

13. That upon information and belief, the Defendant, Georgia State Plastering, LLC, is a limited liability company organized and existing under the laws of the State of Georgia, and conducted business in Horry County and at all relevant times herein and was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings know as Harbour Cove. The Defendant, Georgia State Plastering, LLC, is the agent and/or alter-ego of Defendants, South Carolina State Plastering, LLC, and Florida State Plastering, LLC, and the corporate interests of these Defendants were amalgamated so they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

14. That upon information and belief, the Defendant, Florida State Plastering, LLC, is a limited liability company organized and existing under the laws of the State of Florida, and conducted business in Horry County and at all relevant times herein and was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings know as Harbour Cove. The Defendant, Florida State Plastering, LLC, is the agent and/or alter-ego of Defendants, South Carolina State Plastering, LLC, and Georgia State Plastering, LLC, and the

corporate interests of these Defendants were amalgamated so they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendant is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

15. That, upon information and belief, the Defendant, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings known as Harbour Cove.

16. That upon information and belief, the Defendant, Lundy Dowell d/b/a Costal Plaster Systems is a citizen and resident of Horry County, State of South Carolina conducting business in Horry County and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings known as Harbour Cove.

17. That, upon information and belief, the Defendant, Martin Masonry, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the masonry, brick and related flashings that were installed on and to the condominiums and buildings known as Harbour Cove.

18. That, upon information and belief, the Defendant, Roof Doctor of the Carolinas, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building

and construction and specifically installed and/or supervised the installation of the roofing and related roofing flashings that were installed on and to the condominiums and buildings known as Harbour Cove.

19. That upon information and belief, the Defendant, Richard Blackwell d/b/a Synthetic Designs, is a citizen and resident of Horry County, State of South Carolina conducting business in Horry County and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings known as Harbour Cove.

20. That, upon information and belief, the Defendant, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings known as Harbour Cove.

21. That upon information and belief, the Defendant, Coastal Tinting, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings known as Harbour Cove.

22. That, upon information and belief, the Defendant, BR Brick & Masonry, Inc., is a corporation organized and existing under the laws of the State of North Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building,

and construction and specifically installed and/or supervised the installation of the masonry, brick and related flashings that were installed on and to the condominiums and buildings known as Harbour Cove.

23. That, upon information and belief, the Defendant, Model Home Interiors, Inc., is a corporation organized and existing under the laws of the State of Maryland, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the stucco, masonry, brick and related flashings that were installed on and to the condominiums and buildings known as Harbour Cove.

24. That, upon information and belief, the Defendant, Gary Hunnell d/b/a Grand Strand Roofing & Siding, is a citizen and resident of Horry County, State of South Carolina conducting business in Horry County and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the roofing and related roofing flashings that were installed on and to the condominiums and buildings known as Harbour Cove.

25. That upon information and belief, the Defendant, Steven Bosch d/b/a The Roofer Man, is a citizen and resident of Horry County, State of South Carolina conducting business in Horry County and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the roofing and related roofing flashings that were installed on and to the condominiums and buildings known as Harbour Cove.

26. That, upon information and belief, the Defendant, Frank Harris d/b/a Frank Harris Construction, is a citizen and resident of Horry County, State of South Carolina conducting business in Horry County and at all relevant times herein was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the roofing and related

roofing flashings that were installed on and to the condominiums and buildings known as Harbour Cove.

27. That, upon information and belief, the Defendant, Carl Williamson Construction d/b/a Williamson Construction & Waterproofing, is a citizen and resident of Horry County, State of South Carolina conducting business in Horry County and at all relevant times herein was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the exterior waterproofings on and to the condominiums and buildings known as Harbour Cove.

28. That, upon information and belief, the Defendant, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the windows and related flashings that were installed on and to the condominiums and buildings know as Harbour Cove.

29. That, upon information and belief, the Defendant, Morningstar Consultants, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County and at all relevant and at all times relevant was engaged in inspecting the construction including the installation of the stucco, brick veneer, flashings, roofing, and other building components on and to the condominiums and buildings known as Harbour Cove.

30. That, upon information and belief, the Defendant, A&A Stucco, Inc., is a corporation organized and existing under the laws of the State of Texas, and conducted business in Horry County at all relevant times herein and was engaged in the supervision, building and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings known as Harbour Cove.

31. That, upon information and belief, the Defendant, Coastal Plaster Systems, Inc. is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County at all relevant times herein and was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings known as Harbour Cove.

32. That, upon information and belief, the Defendant, Coastal Plastering Systems, Inc. is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Horry County at all relevant times herein and was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the stucco and related flashings installed and/or applied on and to the condominiums and buildings known as Harbour Cove.

33. That, upon information and belief, the Defendant, Mike Phillips, is a citizen of the State of Texas and conducted business in Horry County, and at all relevant times herein was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the masonry, brick and related flashings that were installed on and to the condominiums and buildings known as Harbour Cove.

JURISDICTION

34. The Court has jurisdiction over the parties and subject matter hereto in that the allegations involve the development and construction of the (5) five stucco and brick and clad buildings containing a total of (90) ninety units, and a pool house at the condominium project known as Harbour Cove located in Horry County, South Carolina.

FACTUAL BACKGROUND

35. The Defendants are under a duty to develop, construct and/or repair the condominiums, buildings and pool house known as Harbour Cove in accordance with the building code and construction industry standards.

36. That the Plaintiff recently became aware of defects and deficiencies at the project.

37. This project was substantially completed within the past (13) thirteen years, for buildings substantially completed prior to July 1, 2005 and substantially completed within the past (8) years for those substantially completed after July 1, 2005, but to the extent any building was not substantially completed within the respective (13) thirteen or (8) eight year periods, this action is not subject to the limitations set forth in Section 15-3-640, Code of Laws of South Carolina, 1976. as amended, because including not limited to, *inter alia*:

a. Defendants are guilty of fraud, gross negligence, or recklessness in providing components, in furnishing and manufacturing materials, in performing or furnishing the supervision testing, or observation of construction, and/or in construction and/or development of the project, and/or

b. The damages claimed herein were by their nature not discoverable in the exercise of reasonable diligence at the time of their occurrence; and were the result of exposure to a harmful or injury producing substance, element or particle over a period of time.

38. That as a result of the various defects and deficiencies relative to the development, construction and repair of this project, the Plaintiff has been damaged and will be required to expend large sums of money to repair, correct and replace various parts and components of the condominiums and buildings.

FOR A FIRST CAUSE OF ACTION
(Negligence, Gross Negligence, Carelessness, Recklessness, Willfulness and Wantonness)
(AS TO ALL DEFENDANTS)

39. Plaintiff repeats and re-allege Paragraphs 1 through 38 above as if fully set forth verbatim.

40. The Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex-Rooney Construction, Co., Inc., Centex Construction, LLC, Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 & Siding, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Carl Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** by and through their agents, servants and employees undertook and were under a duty to develop, construct and repair condominiums and buildings in accordance with the building code, construction industry standards and practices and in accordance with all requirements imposed by the laws and statutes of the State of South Carolina.

41. The Defendant, Centex Homes, A Nevada General Partnership, was negligent, grossly negligent, careless, reckless, willful and wanton, in developing, constructing and repairing of the condominiums and buildings. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in development, construction and repair of the condominiums and buildings at issue;
b. In improperly installing and constructing the exterior wall and roof systems and related flashings and weatherproofings;
c. In developing and constructing 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;

d. In failing to select proper building materials and building materials free from defect;
e. In developing, constructing and repairing the condominiums and buildings in violation of the applicable building codes, standard building practices and accepted construction industry standards and practices;
f. In failing to properly coordinate trades including subcontractors;
g. In improperly installing the stucco and brick in violation of the building code, standard building practices and accepted construction industry standards and practices;
h. In improper installation of the stucco and brick cladding that has resulted in water intrusions;
i. In improper installation of the masonry;
j. In failing to select proper building materials and building materials free from defect;
k. In failing to properly supervise construction;
l. In failing to act as a reasonable person would in circumstances then and there prevailing;
m. In failing to recognize and disclose the deficiencies, and failing to construct an adequate exterior building envelope free from defect;
n. In failing to make proper repairs;
o. Other deficiencies or failures as will be proven at trial.

42. These Defendants, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, CO., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, were negligent, grossly negligent, careless, reckless, willful and wanton, in developing, constructing and repairing of the condominiums, buildings, common areas and units at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in development, construction and repair of the condominiums and buildings at issue;
b. In improperly installing and constructing the exterior wall and roof systems and related flashings and weatherproofings;
c. In developing and constructing 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;
d. In failing to select proper building materials and building materials free from defect;

e. In developing, constructing and repairing the condominiums and buildings in violation of the applicable building codes, standard building practices and accepted construction industry standards and practices;
f. In failing to properly coordinate trades including subcontractors;
g. In improperly installing the stucco and brick in violation of the building code, standard building practices and accepted construction industry standards and practices;
h. In improper installation of the stucco and brick cladding that has resulted in water intrusions;
i. In improper installation of the masonry;
j. In failing to select proper building materials and building materials free from defect;
k. In failing to properly supervise construction;
l. In failing to act as a reasonable person would in circumstances then and there prevailing;
m. In failing to recognize and disclose the deficiencies, and failing to construct an adequate exterior building envelope free from defect;
n. In failing to make proper repairs;
o. Other deficiencies or failures as will be proven at trial.

43. The Defendants, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and RWGR, Inc., were negligent, grossly negligent, careless, reckless, willful and wanton, in constructing and repairing of the condominiums and buildings at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in construction, and repair of the condominiums and buildings at issue;
b. 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;
c. In failing to select proper building materials and building materials free from defect;
d. In constructing and repairing the condominiums and buildings in violation of the applicable building codes, standard building practices and accepted construction industry standards and practices;
e. In failing to properly frame, install windows, flashings and weatherproofings in the construction of the condominiums and buildings;
f. In failing to properly supervise;
g. In failing to act as a reasonable person would in circumstances then and there prevailing;

h. Other deficiencies or failures as will be proven at trial.

44. The Defendants, South Carolina State Plastering, LLC, Georgia State Plastering, LLC, and Florida State Plastering, LLC, were negligent, grossly negligent, careless, reckless, willful and wanton, in constructing and repairing of the condominiums and buildings at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in the building and construction of the condominiums and buildings at issue;
b. In failing to adequately supervise the building and construction of the condominiums and buildings at issue;
c. In failing to hire, supervise and train competent subcontractors and specialty subcontractors;
d. In building and constructing the condominiums and buildings in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
e. In improperly installing the stucco façade in violation of the building code, standard building practices and accepted construction industry standards and practices;
f. 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;
i. In failing to properly install the stucco system; and
j. Other deficiencies or failures will be proved at trial.

45. The Defendants, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., Model Home Interiors, Inc., **Coastal Plaster Systems, Inc., and Coastal Plastering Systems, Inc.,** were negligent, grossly negligent, careless, reckless, willful and wanton, in constructing and repairing of the condominiums and buildings, at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in the building and construction of the condominiums and buildings at issue;

b. In failing to adequately supervise the building and construction of the condominiums and buildings at issue;
c. In failing to hire, supervise and train competent subcontractors and specialty subcontractors;
d. In building and constructing the condominiums and buildings in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
e. In improperly installing the stucco façade in violation of the building code, standard building practices and accepted construction industry standards and practices;
f. 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;
i. In failing to properly install the stucco system; and
j. Other deficiencies or failures will be proved at trial.

46. The Defendants, Martin Masonry, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., and Mike Phillips were negligent, grossly negligent, careless, reckless, willful and wanton, in constructing and repairing of the condominiums and buildings at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness include but are not limited to the following particulars, to wit:

a. In failing to use due care in the construction, building of the condominiums and buildings at issue;
b. In failing to adequately supervise the building and construction of the condominiums and buildings at issue.
c. In failing to hire competent subcontractors or supervise and/or train said subcontractors, specialty contractors and employees;
d. In failing to properly supervise;
e. In failing to act as a reasonable person would in circumstances then and there prevailing;
f. In improperly installing the brick veneer and flashing;
g. In failing to properly construct the brick veneer which resulted in excessive moisture and water intrusion causing damage to the sheathing, structural framing and damage to other building components;
h. Other deficiencies as will be proven at trial.

47. The Defendants, Roof Doctor of the Carolinas, Inc., Gary Hunnell d/b/a Grand Strand Roofing & Siding, Steven Bosch d/b/a The Roofer Man, and Frank Harris d/b/a Frank Harris Construction, were negligent, grossly negligent, careless, reckless, willful and wanton, in willful and

wanton in constructing the condominiums and buildings at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness include but are not limited to the following particulars, to wit:

a. In failing to use due care in the building and construction of the condominiums and buildings at issue;
b. In failing to adequately supervise the building and construction of the condominiums and buildings at issue;
c. In failing to hire competent subcontractors or supervise and/or train said subcontractors, specialty, subcontractors and employees;
d. In failing to properly nail and install the roof shingles and the flashings;
e. In failing to properly install the roofing system to include proper roof flashings and failing to correct any other flashings that could cause leaks;
f. In failing to properly install the roofing and related flashings which has resulted in water damage to the sheathing, framing, and damage to other building components;
g. Other deficiencies or failures as will be proven at trial.

48. The Defendant, Carl Williamson d/b/a Carl Williamson Construction & Waterproofing, was negligent, grossly negligent, careless, reckless, willful and wanton, in willful and wanton in constructing the condominiums and buildings at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness include but are not limited to the following particulars, to wit:

a. In failing to use due care in the building and construction of the condominiums and buildings at issue;
b. In failing to adequately supervise the building and construction of the condominiums and buildings at issue;
c. In failing to hire competent subcontractors or supervise and/or train said subcontractors, specialty, subcontractors and employees;
d. In failing to properly apply the exterior waterproofings that resulted in water intrusion and damage to the buildings;
e. Other deficiencies or failures as will be proven at trial.

49. The Defendant, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., has directly and proximately caused defects and deficiencies in the condominiums and buildings at issue, which will need to be or have been corrected, repaired and replaced. Such negligence, gross

negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in the construction, repair, remodeling, and framing of the subject condominiums and buildings;
b. In failing to adequately supervise the work and construction, repair, remodeling, framing and/or siding installation of the subject condominiums and buildings;
c. In failing to hire competent subcontractors, specialty contractors, and/or employees;
d. In failing to adequately and competently supervise and/or train said subcontractors, specialty contractors and/or employees;
e. In constructing, repairing and/or remodeling subject condominiums and buildings in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices.
f. In improperly installing windows
g. In failing to properly frame the condominiums and buildings;
h. In failing to properly install flashings;
i. In installing the framing, flashings and installation of windows to the condominiums and buildings which failed to provide a sufficient barrier against the intrusion of water;
j. In improperly installing the weather barrier;
k. In constructing, repairing and/or remodeling the subject condominiums and buildings in such a manner that water entered the dwelling;
l. In failing to use due care in constructing, repairing and/or remodeling of the condominiums and buildings in such a fashion as to permit excessive moisture to enter subject condominiums and buildings;
m. In other deficiencies as will be proven at trial.

50. The Defendant, Morningstar Consultants, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton, in designing, contract administration, inspecting, observing, authorizing payments and approving construction of the project. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in the inspection, and observation, for the project;
b. In inspecting, and observing buildings that were constructed in a manner which it was inevitable that water would intrude into the buildings and condominiums at issue causing damage and decay to the wall system;

c. In inspecting and observing buildings that failed to provide sufficient barriers against water intrusion into the wall system and an adequate avenue for the exit of water that gets into the wall system resulting in water damage;
d. In inspecting and observing buildings that were constructed violation of the building code, standard building practices, relevant product specifications, that were constructed in violation of the building code, standard building practices, relevant product specifications, and accepted construction industry standards and practices;
e. In failing to perform contract administration to insure the buildings and building components were constructed and/or installed in accordance with the building codes, standard building practices, relevant product specifications and accepted;
f. In allowing the stucco, roofing, window and door installation, secondary weather barrier, flashings and sealants to be constructed and/or installed in violation of the building codes, product specifications and accepted construction industry standards and practices;
g. Other deficiencies or failures as will be proven at trial

51. The Defendant, A&A Stucco, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton, in constructing and repairing of the condominiums and buildings at issue. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, includes but is not limited to the following particulars, to-wit:

a. In failing to use due care in the building and construction of the condominiums and buildings at issue;
b. In failing to adequately supervise the building and construction of the condominiums and buildings at issue;
c. In failing to hire, supervise and train competent subcontractors and specialty subcontractors;
d. In building and constructing the condominiums and buildings in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
e. In improperly installing the stucco façade in violation of the building code, standard building practices and accepted construction industry standards and practices;
f. 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;
i. In failing to properly install the stucco system; and
j. Other deficiencies or failures will be proved at trial.

52. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness, wantonness of these Defendants, the Plaintiff has suffered actual, incidental, consequential, and special damages and the expense of having to hire experts to investigate the causes of the water intrusion and construction defects and failures set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the condominiums and buildings at issue to make them safe and habitable. Additionally, the Plaintiff has been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that intruded and continues to intrude into the subject condominiums and buildings causing and resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the condominiums and buildings. Each year since completion new areas of damage have occurred, separate and apart from any damage already in progress of occurring. All of which has or will require the Plaintiff to expend great amounts of money to correct and repair as well as suffer the loss of use and enjoyment of their property by virtue of the defects and damages aforesaid.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty of Habitability, Breach of Warranty Against Latent Defects, Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a Particular Purpose and Breach of Warranty of Merchantability and Serviceability and Breach of Express Warranty)
(AS TO ALL DEFENDANTS)

53. Each and every allegation contained in Paragraphs 1 through 52 above are incorporated herein by express reference as though fully set forth.

54. That the Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, Co., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 & Siding, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Carl Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** implicitly and/or expressly warranted and provided warranties that the subject condominiums and buildings and common areas would be habitable and fit for its intended uses, and that said condominiums and buildings would be developed, constructed, and repaired in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, and accepted construction industry standards applicable thereto and that the subject condominiums and buildings would be merchantable, free from latent defects and fit for the particular purpose for which the condominiums and buildings were developed, constructed, built and sold.

55. That the Defendants, Centex Homes, A Nevada General Partnership, Centex Construction, Inc., Centex Construction, LLC, Centex-Rooney Construction, Co., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 & Siding, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Carl Williamson Construction

& Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., Morningstar Consultants, Inc., and A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** breached said warranties by developing, constructing, supervising and/or failing to supervise, repairing and selling the subject condominiums and buildings in such manner as to be in violation of applicable building codes, not in conformance with accepted construction and industry standards.

56. As a direct and proximate result of the Defendants, breach of these warranties, the Plaintiff has suffered actual, direct, incidental, consequential and special damages, including but not limited to the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the condominiums and buildings to make them safe and habitable. Additionally, the Plaintiff has been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that intruded and continues to intrude into the subject condominiums and buildings causing and resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the condominiums and buildings. Each year since completion new areas of damage have occurred, separate and apart from any damage already in progress of occurring. All of which has or will require the Plaintiff to expend great amounts of money to correct and repair as well as suffer the loss of use and enjoyment of their property by virtue of the defects and damages aforesaid.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices)
(AS TO ALL DEFENDANTS)

57. Each and every allegation contained in Paragraphs 1 through 56 above are incorporated herein by express reference as though fully set forth.

58. The Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, CO., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 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 & Siding, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Carl Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** are "persons" within the meaning of South Carolina Code § 39-5-10(a).

59. The Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, CO., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 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., Model Home Interiors, Inc., BR Brick & Masonry, Inc., Gary Hunnell d/b/a Grand Strand Roofing & Siding, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Car; Williamson

Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** by their actions in developing, constructing, repairing, supervising and overseeing construction activities are engaged in commerce within the meaning of South Carolina Code §39-5-10(b).

60. The Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, CO., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 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 & Siding, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Carl Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** by their action(s) described hereinabove, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

61. The Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, CO., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 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., Model Home Interiors, Inc., BR Brick & Masonry, Inc., Gary Hunnell d/b/a Grand Strand Roofing & Siding, 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., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** act(s) are capable of repetition and, upon information and belief and in accord with the allegations herein, have been repeated.

62. The Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, Co., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 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 & Siding, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Carl Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** conduct affects the public interest of the people of South Carolina.

63. The Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, CO., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., and 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 & Siding, 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., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mile Phillips,** knew or should have reasonably known, that their conduct violated the Unfair Trade Practices Act.

64. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiff has suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the condominiums and buildings to make them safe and habitable. Additionally, the Plaintiff has been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that intruded and continues to intrude into the subject condominiums and buildings causing and resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the condominiums and buildings. Each year since completion new areas of damage occurred, separate and apart from any damage already in progress

of occurring. All of which has or will require the Plaintiff to expend great amounts of money to correct and repair as well as suffer the loss of use and enjoyment of their property by virtue of the defects and damages aforesaid.

FOR A FOURTH CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY)
(AS TO CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP)

65. Each and every allegation contained in Paragraphs 1 through 64 above are incorporated herein by express reference as though fully set forth.

66. The Defendant in their capacity as developer and seller of Harbour Cove owed fiduciary and fiduciary-like duties to the Plaintiff.

67. The Defendant was bound to act honestly and in good faith and with full disclosure with regards to all matters relating to the development and sale of the condominiums and buildings.

68. Given the existence of the Fiduciary and Fiduciary- like duties, the burden is on the Defendant to prove the appropriateness of their actions with and to the Association.

69. The Defendant attempted to circumvent their legal obligations and duties to the Plaintiff and to benefit themselves at the Plaintiff's expense by, among other things, inserting and anti-suit and warranty disclaimer and waiver provisions in the Harbour Cove governing documents.

70. The Defendant breached their fiduciary duty owned to the Plaintiff by the following:

a. In failing to act in good faith and with due regard to the interests of the Plaintiff;
b. In failing to ensure that the buildings from which they profited complied with the applicable building code, industry standards, and state law;
c. In failing to disclose that the buildings from which they profited were not constructed in compliance with the applicable building code, industry standards, and state law;
d. In attempting to circumvent their legal duties through an anti-suit and warranty disclaimer and waiver provision;
e. In failing to provide the monies necessary to repair the common areas and limited common areas;
f. In failing to adequately perform its duties and responsibilities set forth in The Harbour Cove Covenants and Bylaws;

g. In making decisions for the Plaintiff that benefited their interests at the expense of the Plaintiffs;
h. In negligently performing their duties; and
i. In such other acts which will be shown through the course of discovery and trial.

71. The Defendant, further breached their fiduciary duties to the Plaintiff by failing to take steps to remedy the foregoing wrongs while controlling the Association.

72. Plaintiff is informed and believes it is entitled to a judgment against the Defendant for actual, consequential, incidental and punitive damages and the costs of this action in an amount of to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(DECLARATION ACTION/REFORMATION AS TO
(CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP)

73. Each and every allegation contained in Paragraphs 1 through 72 above are incorporated herein by express reference as though fully set forth.

74. The anti-suit and warranty disclaimers and waiver provisions of the Master Deed for Harbour Cove are in violation of public policy, laws of this State and/or provisions of the Constitution, and these Defendants fiduciary duties.

75. The Plaintiff is entitled to a declaration by this Court that the anti-suit and warranty disclaimer and waiver provisions included within the Master Deed by this Defendant are in violation of the laws of this State and/or provisions in the Constitution and therefore void and/or require reformation to eliminate the subject provisions.

76. As provisions in the Master Deed are severable, the Plaintiff is entitled to a declaration by this Court that the anti-suit and warranty disclaimer and waiver provisions are severable from the other terms of the Master Deed.

77. The Plaintiff is also entitled to have ambiguous and contradictory provisions, as well as the anti-suit and warranty disclaimer and waiver provisions in the Master Deed and other

governing documents construed against the Defendant and/or reformed by the Court to more accurately reflect the reasonable expectations of the Association and Homeowners.

RELIEF REQUESTED

WHEREFORE, the Plaintiff respectfully prays that hold the Defendants, Centex Homes, A Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, Co., Inc,. Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., and 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 & Siding, 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., Morningstar Consultants, Inc., A&A Stucco, Inc., **Coastal Plaster Systems, Inc., Coastal Plastering Systems, Inc., and Mike Phillips,** jointly and severally liable for the conduct complained of herein, enter a Judgment against the Defendants and in favor of the Plaintiff for the relief as requested in this Complaint, and award the Plaintiff their costs and attorneys' fees, and for such other and further relief as may be deemed appropriate.

Plaintiff further demands a jury trial with respect to all issues so triable.

SIGNATURE PAGE TO FOLLOW

Mt. Pleasant, South Carolina
Dated: November 7, 2016

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Attorneys for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

The Harbour Cove Condominium Association,

Plaintiff,

vs.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., Inc.; Centex-Rodgers, Inc.; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC; Right Way Construction, Inc.; Right Way Group, Inc.; RWG, Inc., RWGR, Inc.; South Carolina State Plastering, LLC; Georgia State Plastering, LLC; Florida State Plastering, LLC; Coastal Drywall, Inc., d/b/a Coastal Plaster Systems; Lundy Dowell d/b/a Coastal Plaster Systems; Martin Masonry, Inc.; Richard Blackwell d/b/a Synthetic Designs; Ferst Plastering, Inc. a/k/a Ferst Exteriors, Inc.; BR Brick & Masonry, 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.; Morningstar Consultants, Inc.; A&A Stucco, Inc.; Coastal Plaster Systems, Inc.; Coastal Plastering Systems, Inc.; and Mike Phillips,

Defendants.

Centex Homes, a Nevada General Partnership,

Third-Party Plaintiffs,

vs.

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL DISTRICT

Case No.: 2014-CP-26-7634

FILED
2015 DEC -8 PM 1:08

ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT, CROSSCLAIMS AND THIRD-PARTY COMPLAINT

OF CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, CENTEX CONSTRUCTION COMPANY, INC., CENTEX CONSTRUCTION, LLC, CENTEX-ROONEY CONSTRUCTION, CO., INC., CENTEX-RODGERS, INC. AND BALFOUR BEATTY CONSTRUCTION, LLC F/K/A CENTEX CONSTRUCTION, LLC

COPY

American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.; American Residential Services, Inc.; Builders FirstSource – Atlantic Group, LLC; Builders FirstSource – Southeast Group, LLC; Stock Building Supply, LLC f/k/a Carolina Builders Corporation; Cohen's Drywall Company, Inc.; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc., Carolina Drywall Contractors, Inc.; Tri-City Insulation and Building Products of Myrtle Beach, Inc.; Blue Ribbon Cleaning Service, Inc.; Overhead Door Company, Inc.; Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a/ Right Way Group, Inc. a/k/a RWGR, Inc.; John Doe; Cox Millwork & Supply, Inc.; Top Notch Painters; AO Hardee & Son, Inc.; Sunland Fire Protection, Inc.; Grand Strand Roofing & Siding; Vance Johnson Plumbing Co., Inc.; Ferreira Drywall; Frank Harris Construction; Setzer & Sons; South Carolina State Plastering, LLC a/k/a Georgia State Plastering, LLC a/k/a Florida State Plastering, LLC; Jerry's Concrete a/k/a Jerry McRae Construction; Coastal Enclosures & Construction, Inc.; Williamson Construction & Waterproofing; ITP, Inc.; Vereen Concrete Co., Inc.; Weather Protection Systems, Inc.; Dunn Plumbing, Inc.; CEMS, Engineering, Inc.; The Martin Architectural Group, P.C.; The Harman Group, Inc. f/k/a Cagley Harman & Associates, Inc.; Azimuth Consultants; and Risk Tech, LLC a/k/a or f/k/a Azimuth Consultants,

Third-Party Defendants.

The Defendants Centex Homes, a Nevada General Partnership ("Centex Homes"), Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC, f/k/a

Centex Construction, LLC (collectively, "Centex") answering the Third Amended Complaint of Plaintiff The Harbour Cove Condominium Association ("Plaintiff") and by way of Crossclaims and Third-Party Claims, allege as follows:

1. Answering the allegations of Paragraph 1, Centex admits the allegations regarding the legal makeup of Plaintiff but denies the remaining allegations.

2. Answering the allegations of Paragraph 2, Centex admits that Centex Homes is a Nevada General Partnership and admits that it was the developer of the property, and further admits that it was in part responsible for the planning, development and construction of the Project. Centex otherwise denies all allegations of Paragraph 2 not admitted.

3. Answering the allegations of Paragraph 3, Centex craves reference to the pertinent legal documents on file and corporate materials for their exact terms and contents and denies each and every allegation inconsistent therewith. Centex admits that Centex Homes acted as the general contractor for the Project and contracted with and hired the subcontractors that performed work on the Project. Centex otherwise denies all allegations of this paragraph not admitted, and Centex specifically denies any and all joint venture and amalgamation allegations and legal conclusions regarding the jurisdiction of this Court.

4. Answering the allegations of Paragraph 4, Centex craves reference to the pertinent legal documents on file and corporate materials for their exact terms and contents and denies each and every allegation inconsistent therewith. Centex admits that Centex Homes acted as the general contractor for the Project and contracted with and hired the subcontractors that performed work on the Project. Centex otherwise

denies all allegations of this paragraph not admitted, and Centex specifically denies any and all joint venture and amalgamation allegations and legal conclusions regarding the jurisdiction of this Court.

5. Answering the allegations of Paragraph 5, Centex craves reference to the pertinent legal documents on file and corporate materials for their exact terms and contents and denies each and every allegation inconsistent therewith. Centex admits that Centex Homes acted as the general contractor for the Project and contracted with and hired the subcontractors that performed work on the Project. Centex otherwise denies all allegations of this paragraph not admitted, and Centex specifically denies any and all joint venture and amalgamation allegations and legal conclusions regarding the jurisdiction of this Court.

6. Answering the allegations of Paragraph 6, Centex craves reference to the pertinent legal documents on file and corporate materials for their exact terms and contents and denies each and every allegation inconsistent therewith. Centex admits that Centex Homes acted as the general contractor for the Project and contracted with and hired the subcontractors that performed work on the Project. Centex otherwise denies all allegations of this paragraph not admitted, and Centex specifically denies any and all joint venture and amalgamation allegations and legal conclusions regarding the jurisdiction of this Court.

7. Answering the allegations of Paragraph 7, Centex craves reference to the pertinent legal documents on file and corporate materials for their exact terms and contents and denies each and every allegation inconsistent therewith. Centex admits that Centex Homes acted as the general contractor for the Project and contracted with

and hired the subcontractors that performed work on the Project. Centex otherwise denies all allegations of this paragraph not admitted, and Centex specifically denies any and all joint venture and amalgamation allegations and legal conclusions regarding the jurisdiction of this Court.

8. Centex generally admits the allegations of Paragraphs 8 through 33, but craves reference to the contracts, as amended, and applicable case law and statutes and regulations regarding the obligations of those Defendants.

9. The allegations of Paragraph 34 state legal conclusions which require no responsive pleading from Centex. To the extent a response is required, Centex denies the allegations of Paragraph 34 and refers Plaintiff to the applicable provisions of the Master Deed.

AS TO THE FACTUAL ALLEGATIONS

10. Centex denies the allegations of Paragraphs 35 through 38.

AS TO THE FIRST CAUSE OF ACTION

11. Answering the allegations of Paragraph 39, Centex realleges its responses to the above paragraphs as if repeated herein verbatim.

12. Centex denies the allegations of Paragraphs 40 through 42, including all subparts.

13. The allegations of Paragraphs 43 through 51, including all subparts, of the First Cause of Action relate to Defendants other than Centex and therefore require no responsive pleading from Centex. To the extent, however, that any of those allegations allege any breaches, errors, omissions, negligence, recklessness or wrongful acts on behalf of Centex, they are denied.

14. Centex denies the allegations of Paragraph 52.

AS TO THE SECOND CAUSE OF ACTION

15. Answering the allegations of Paragraph 53, Centex realleges its responses to the above paragraphs as if repeated herein verbatim.

16. Centex denies the allegations of Paragraphs 54 through 56.

AS TO THE THIRD CAUSE OF ACTION

17. Answering the allegations of Paragraph 57, Centex realleges its responses to the above paragraphs as if repeated herein verbatim.

18. Centex denies the allegations of Paragraphs 58 through 64.

AS TO THE FOURTH CAUSE OF ACTION

19. Answering the allegations of Paragraph 65, Centex realleges its responses to the above paragraphs as if repeated herein verbatim.

20. Centex denies the allegations of Paragraphs 66 through 72, including all subparts, and demands strict proof thereof.

AS TO THE FIFTH CAUSE OF ACTION

21. Answering the allegations of Paragraph 73, Centex realleges its responses to the above paragraphs as if repeated herein verbatim.

22. Centex denies the allegations of Paragraphs 74 through 77, and craves reference to the cited documents for their exact terms and contents and denies each and every allegation inconsistent therewith.

23. Centex denies each and every allegation of Plaintiff's Third Amended Complaint not specifically admitted above.

24. Centex denies the allegations of the "Wherefore" clause and the relief and remedies sought therein.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

25. Plaintiff lacks standing to make the claims asserted against Centex in this action.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

26. That all claims asserted against Centex are barred by the applicable statute of limitations and/or the applicable statute of repose.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

27. Plaintiff's claims, if any, are barred, or should be reduced, by Plaintiff's own comparative negligence and recklessness by Plaintiff's failure to properly maintain the property and to mitigate its damages.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

28. Plaintiff's claims, if any, are the result of acts and omissions of other entities over whom Centex has no control, barring Plaintiff's claims against Centex.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

29. That all claims are barred by the doctrine of Laches, Waiver and Estoppel.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

30. That the final completion and acceptance of the work undertaken by Centex pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiff.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

31. Plaintiff's claims are, upon information and belief, barred as it has failed to make a claim against Centex within any applicable warranty period.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

32. That all claims asserted by Plaintiff are barred by the doctrine of unclean hands.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

33. That Plaintiff failed to give Centex reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide Centex a reasonable opportunity to correct any such alleged defects.

34. That Plaintiff's failure to give Centex notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

35. Upon information and belief, any express or implied warranties were limited in duration from the date of completion and acceptance of the Project.

36. That the failure of Plaintiff within the warranty period from the date of the completion and acceptance of the Project by Plaintiff, to give notice of or make any

claim for alleged deficiencies in the workmanship and/or materials provided by Centex constitutes a complete defense to all claims asserted by Plaintiff.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

37. Plaintiff's Third Amended Complaint is barred by payment and/or release.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

38. Plaintiff has waived and/or are estopped from asserting the claims set forth in its Third Amended Complaint.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

39. If Plaintiff sustained injuries and damages in the manner alleged in the Third Amended Complaint, which injuries and damages are specifically denied by Centex, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Centex nor of anyone for whose conduct Centex is anyway responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiff, all of which will be shown at the trial of this case, and for which Plaintiff can have no recovery against Centex or, in the alternative, for which Plaintiff's recovery should be appropriately reduced. Plaintiff's comparative negligence includes, but is not limited to failing to exercise reasonable care in maintaining the structure.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

40. Plaintiff's claims are barred as the court lacks jurisdiction over the subject matter of the case.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

41. Plaintiff's claims fail to state facts sufficient to constitute causes of action against Centex.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

42. Centex has contractually limited its warranty and non-warranty obligations and exposure to Plaintiff, excluding liability for many claims Plaintiff is making, barring Plaintiff's claims and/or Plaintiff's claimed damages, including Plaintiff's claim for consequential damages, in whole or in part, against Centex.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

43. Venue in this action is improper.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

44. Plaintiff's claims should be dismissed as Plaintiff failed to effect proper service of process on Centex.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

45. Plaintiff's claims should be dismissed as there is a lack of appropriate personal jurisdiction against this Centex in this action.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

46. Plaintiff's claim are barred or would be reduced as Centex provided a limited warranty to Plaintiff which was in lieu of all other warranties or obligations, express or implied, including the warranty of habitability, warranty of suitability for

residential purposes, any warranties of marketability or fitness for particular purposes. Plaintiff's claims and remedies are limited to claims and remedies under the limited warranty that was provided, and any other claims are barred.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

47. Plaintiff's claims are barred or should be dismissed by virtue of the doctrine of spoliation of evidence, to the extent Plaintiff spoiled evidence and repaired alleged deficiencies without notice to Centex and without giving Centex an opportunity to observe the alleged deficiencies.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

48. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of Plaintiff's failure to comply with the Master Deed and other governing documents.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

49. Plaintiff's claims are barred by the economic loss rule.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

50. Plaintiff's claims should be dismissed or stayed by virtue of Plaintiff's failure to abide by and comply with express conditions precedent to initiation of arbitration and/or litigation; applicable conditions precedent include but are not limited to mandatory pre-suit mediation/settlement/negotiation requirements and approval for the claim by 75% of the vote of the Association and/or other requirements of Plaintiff's governing provisions.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

51. Plaintiff's claims are barred or should be stayed as Plaintiff's actions are contrary to law and Plaintiff's governing documents and are otherwise constitute Ultra Vires and unlawful acts of the Association.

FURTHER ANSWERING AND BY WAY OF CROSSCLAIMS AND THIRD-PARTY CLAIMS AGAINST THE ABOVE-NAMED CO-DEFENDANTS AND THIRD-PARTY DEFENDANTS, CENTEX HOMES ALLEGES AS FOLLOWS:

SUBCONTRACTOR DEFENDANTS

52. Centex realleges the Paragraphs above as if repeated herein verbatim.

53. Plaintiff has sued Centex claiming damages caused by alleged deficient construction services provided by Subcontractor Defendants on the Project. See Plaintiff's Third Amended Complaint mailed for filing with the Court on November 7, 2016.

54. Centex contracted with the following persons and entities (herein collectively referred to as "Subcontractor Defendants") to perform work and provide materials as subcontractors and materialmen for the Project. Those persons and entities are as follows:

(a) framing, to include but not limited to installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings

- Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.[1]

[1] Upon information and belief, Right Way Construction, Inc., RWG, Inc., Right Way Group, Inc. and RWGR, Inc. are successors in interest; are subsidiaries, are instrumentalities and/or alter egos, are amalgamated, and/or fail to respect the corporate form such that the actions, obligations, and liabilities of one apply to the others. Among other things, upon information and belief, the entities share or shared offices, shareholders, officers, directors, employees, equipment, suppliers, dealers, and/or customers, the entities perform or performed substantially the same work, and the delineation between the entities is blurred.

(b) roofing, together with all associated and related waterproofings and flashings and inspections

- Steven Bosch d/b/a The Roofer Man
- Grand Strand Roofing & Siding
- Gary Hunnell d/b/a Grand Strand Roofing & Siding
- Frank Harris Construction
- Frank Harris d/b/a Frank Harris Construction

(c) truss manufacturer, designer, supplier and/or installer

- Builders FirstSource – Atlantic Group, LLC
- Builders FirstSource – Southeast Group, LLC
- Stock Building Supply, LLC f/k/a Carolina Builders Corporation
- Stock Building Supply, LLC f/k/a Stock Building Supply, Inc.

(d) window manufacturer and retailer

- John Doe
- Builders FirstSource – Atlantic Group, LLC
- Builders FirstSource – Southeast Group, LLC
- Stock Building Supply, LLC f/k/a Carolina Builders Corporation
- Stock Building Supply, LLC f/k/a Stock Building Supply, Inc.

(e) brick veneer and masonry installer, together with all associated and related waterproofings and flashings

- Martin Masonry, Inc.
- BR Brick & Masonry, Inc.

(f) stucco system and/or exterior cladding system and related components, together with all related waterproofings and flashings

- Coastal Plaster Systems, Inc.
- Lundy Dowell d/b/a Coastal Plaster Systems, Inc.

- Coastal Plastering Systems, Inc.
- BR Brick & Masonry, Inc.
- South Carolina State Plastering, LLC
- South Carolina State Plastering, LLC a/k/a Georgia State Plastering, LLC a/k/a Florida State Plastering, LLC[2]
- Richard Blackwell d/b/a Synthetic Designs
- Ferst Plastering, Inc. a/k/a Ferst Exteriors, Inc.

(g) siding installer, together with all associated and related waterproofings and flashings

- Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.[3]

(h) trim, soffits, and vinyl railings, together with all associated and related waterproofings and flashings

- Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.[4]

(i) drywall and fireproofing installer, together with all associated and related waterproofings and flashings

- Cohen's Drywall Company, Inc.
- Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc.[5]

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[2] Upon information and belief, South Carolina State Plastering, LLC, Georgia State Plastering, LLC and Florida State Plastering, LLC are successors in interest; are subsidiaries, are instrumentalities and/or alter egos, are amalgamated, and/or fail to respect the corporate form such that the actions, obligations, and liabilities of one apply to the others. Among other things, upon information and belief, the entities share or shared offices, shareholders, officers, directors, employees, equipment, suppliers, dealers, and/or customers, the entities perform or performed substantially the same work, and the delineation between the entities is blurred.

[3] See footnote 1.

[4] See footnote 1.

[5] Upon information and belief, Carolina Drywall Contractors, Inc. and Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc. are successors in interest; are subsidiaries, are instrumentalities and/or alter egos, are amalgamated, and/or fail to respect the corporate form such that the actions, obligations, and liabilities of one apply

- Carolina Drywall Contractors, Inc. [6]
- Ferreira's Drywall

(j) plumbing to include all associated waterproofings, flashings, fireproofings and freeze protection

- Vance Johnson Plumbing Co., Inc.
- American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.
- American Residential Services, Inc.
- Dunn Plumbing, Inc.

(k) insulation and related components

- Cohen's Drywall Company, Inc.
- Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc.[7]
- Carolina Drywall Contractors, Inc.[8]
- Blue Ribbon Cleaning Service, Inc.
- Tri-City Insulation and Building Products of Myrtle Beach, Inc.

(l) gutter system, together with all related components

- Tri-City Insulation and Building Products of Myrtle Beach, Inc.

(m) deck waterproofing, together with the membrane systems and related components

- Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc.[9]

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to the others. Among other things, upon information and belief, the entities share or shared offices, shareholders, officers, directors, employees, equipment, suppliers, dealers, and/or customers, the entities perform or performed substantially the same work, and the delineation between the entities is blurred.

[6] See footnote 5.
[7] See footnote 5.
[8] See footnote 5.
[9] See footnote 5.

- Carolina Drywall Contractors, Inc.[10]
- Top Notch Painters

(n) fire sprinkler systems, together with the related components

- Sunland Fire Protection, Inc.
- Setzer & Sons

(o) independent third-party inspections of buildings during construction

- Morningstar Consultants, Inc.

(p) screen enclosures, together with all related components

- Weather Protection Systems, Inc.
- Coastal Enclosures & Construction, Inc.

(q) garage doors, together with all related components and waterproofings

- Tri-City Insulation and Building Products of Myrtle Beach, Inc.
- Overhead Door Company, Inc.

(r) HVAC system, together with all related components

- American Residential Services, Inc.
- American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc.

(s) foundation/slab/grading, together with all related components

- Martin Masonry, Inc.
- Jerry's Concrete a/k/a Jerry McRae Construction
- Vereen Concrete Co., Inc.
- ITP, Inc.
- AO Hardee & Son, Inc.

(t) external waterproofings, together with all related components

[10] See footnote 5.

- Williamson Construction & Waterproofing

(u) doors, together with all associated and related waterproofings and flashings and inspections

- Stock Building Supply, LLC f/k/a Carolina Builders Corporation
- Stock Building Supply, LLC f/k/a Stock Building Supply, Inc.
- Builders FirstSource – Atlantic Group, LLC
- Builders FirstSource – Southeast Group, LLC
- Cox Millwork & Supply, Inc.

FURTHER ANSWERING AND AS A FIRST CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST SUBCONTRACTOR DEFENDANTS, CENTEX ALLEGES AS FOLLOWS:
(Indemnity)

55. Centex realleges the Paragraphs above as if repeated herein verbatim.

56. Plaintiff has sued Centex claiming damages caused by alleged deficient construction services provided by Subcontractor Defendants on the Project.

57. Centex has denied all of the substantive allegations against it that were made by Plaintiff.

58. A special relationship existed between Centex and Subcontractor Defendants.

59. To the extent, if any, that Centex is held liable to Plaintiff in this action, such liability would be because the wrongful acts, omissions, negligence, gross negligence, recklessness, breaches and/or representations of Subcontractor Defendants were imputed to Centex.

60. A right of indemnity exists in favor of Centex as the relation between Centex and Subcontractor Defendants is such that in law or equity there is an obligation for Subcontractor Defendants to indemnify Centex, as Centex is required to defend itself

in this action and exposed to liability due to the wrongful acts, omissions, negligence, gross negligence, recklessness, breaches and/or representations of Subcontractor Defendants.

61. To the extent, if any, that Centex is held liable to Plaintiff in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, recklessness, and/or representations of Subcontractor Defendants, which has damaged Centex as Centex has been subjected to liability, and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

62. To the extent, if any, that the construction was defective or deficient in workmanship, installation, materials, and/or were not merchantable or fit for their particular purposes, such defects and deficiencies would be the result of the breach of the express and implied contractual obligations and warranties that Subcontractor Defendants provided, damaging Centex as Centex has been subjected to liability, and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

63. Centex is entitled to full indemnification from Subcontractor Defendants for any liability Centex is found to have to Plaintiff in this action, and Centex would be entitled to damages for Subcontractor Defendants' negligence, gross negligence, and recklessness as aforedescribed and for Subcontractor Defendants' breach of its implied and express warranties, entitling Centex to recover from Subcontractor Defendants its attorney's fees, costs and other expenses incurred in defending this action, and entitling

Centex to recover from Subcontractor Defendants any sums for which it may be held liable to Plaintiff.

64. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent construction and faulty work of Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions and wrongful acts of Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

AS A SECOND CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST SUBCONTRACTOR DEFENDANTS
(Negligence)

65. Centex realleges the Paragraphs above as if repeated herein verbatim.

66. Subcontractor Defendants were negligent, grossly negligent, careless and reckless in the construction, supervision, inspection and/or supplying of the work or materials outlined above and incorporated into the Project.

67. As a direct and proximate result of such negligence, gross negligence, carelessness and recklessness, Centex has been damaged in the amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, plus the cost of investigating and defending this claim.

68. Upon information and belief, Centex is entitled to judgment for actual damages collectively or individually against Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

69. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent construction and faulty work of Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions and wrongful acts of Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

70. Further, Centex has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of Subcontractor Defendants' negligence and for which Subcontractor Defendants are also liable to Centex.

AS A THIRD CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST SUBCONTRACTOR DEFENDANTS
(Breach of Warranty)

71. Centex realleges the Paragraphs above as if repeated herein verbatim.

72. Subcontractor Defendants expressly or impliedly warranted to Centex that all work performed by them would be performed in a careful, diligent and workmanlike manner, and that any materials and/or services designed, supplied or sold by them for use on the Project would be merchantable and fit for their intended or specific purpose. Subcontractor Defendants breached their implied and/or express warranties of merchantability, workmanlike service, and/or fitness for a particular or intended purpose in the construction of the Project.

73. As a result of these breaches of warranties, Centex has incurred damage in the amount of any money it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, plus the cost of investigating and defending this claim.

74. Upon information and belief, Centex is entitled to judgment against Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

75. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent construction and faulty work of Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions and wrongful acts of Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

76. Further, Centex has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of Subcontractor Defendants' breach of warranty and for which Subcontractor Defendants are also liable to Centex.

AS A FOURTH CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST SUBCONTRACTOR DEFENDANTS
(Breach of Contract)

77. Centex realleges the Paragraphs above as if repeated herein verbatim.

78. Centex entered into a contract(s) with Subcontractor Defendants. Subcontractor Defendants contracted to and were paid to provide work and materials to the Project in question as described above.

79. The terms of the contract(s) required Subcontractor Defendants to provide construction goods and services for the Project that, among other things, would produce a quality building free from defects and otherwise in conformance of all contract documents, including all building codes and industry standards. The contract(s) further required Subcontractor Defendants to supervise and direct their work, using the best skill and attention.

80. Subcontractor Defendants breached their contract(s) by failing to provide appropriate construction goods and services to the Project, by failing to perform their work in a careful, diligent and workmanlike manner, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all contract documents, and failing to provide goods and services that were in conformity with all appropriate building codes and industry standards.

81. As a result of these breaches of contract(s) by Subcontractor Defendants, Centex has incurred damage in the amount of any money it is adjudged to owe Plaintiff, or which it paid Plaintiff in settlement of Plaintiff's claims, plus its actual costs, consequential costs, and the costs of investigating and defending this claim.

82. Upon information and belief, Centex is entitled to judgment against Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiff, or which it paid Plaintiff in settlement of Plaintiff's claims, as well as its actual costs,

consequential costs, and the costs and fees incurred in the investigation, defense and settlement of this claim.

83. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent construction and faulty work of Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions and wrongful acts of Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

84. Further, Centex has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of Subcontractor Defendants' breaches of contract(s) and for which Subcontractor Defendants are also liable to Centex.

85. Centex's contracts with Subcontractor Defendants required that they procure and maintain specific insurance (as a primary insured) with specific coverages, provisions, endorsements and limits. Centex's contracts with Subcontractor Defendants also required that they ensure that Centex is and was named and maintained as an additional insured on any and all denoted polities (and that the additional insured coverage complies with the denoted specific coverages, provisions, endorsements and limits), to thereby provide Centex with additional insured coverage, including a defense

and indemnity, for all claims, damages and liability of Centex, arising out of or related to the Project.

86. To the extent Subcontractor Defendants failed to procure and maintain all required insurance referenced above (to include all primary and additional insured coverages), Subcontractor Defendants breached its contract(s) with Centex. Centex has suffered and will suffer damages as a result of the breach including the amount of any monies it is adjudged to owe Plaintiff, or which it pays or has paid Plaintiff in settlement of Plaintiff's claims, as well as its actual costs, attorney's and legal fees and costs, expert fees and costs, consequential costs, and the costs and fees incurred in the investigation, defense, and settlement of this claim, and Centex is entitled to recover all such damages from Subcontractor Defendants.

FURTHER ANSWERING AND BY WAY OF THIRD-PARTY CLAIMS, CENTEX HOMES ALLEGES AS FOLLOWS:

DESIGN AND ENGINEERING DEFENDANTS

87. Centex realleges the Paragraphs above as if repeated herein verbatim.

88. Centex entered into contracts with CEMS, Engineering, Inc., The Martin Architectural Group, P.C., The Harman Group, Inc. f/k/a Cagley Harman & Associates, Inc., and Azimuth Consultants (collectively, "Design and Engineering Defendants") for design and engineering services at the Project. Design and Engineering Defendants were responsible for the land planning, schematic design, preliminary design phase services, preparation of all design and construction documents, review of shop drawings and construction/contract administration. Design and Engineering Defendants, in turn, upon information and belief, subcontracted with other design professionals, and Centex was and is a third-party beneficiary of those contracts.

FURTHER ANSWERING AND AS A FIRST CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS, CENTEX HOMES ALLEGES AS FOLLOWS:
(Indemnity)

89. Centex realleges the Paragraphs above as if repeated herein verbatim.

90. Plaintiff has sued Centex claiming damages caused by alleged deficient design, engineering and construction services provided by Design and Engineering Defendants on the Project. A copy of Plaintiff's Third Amended Complaint is on file with this Court.

91. Centex has denied all of the substantive allegations against it that were made by Plaintiff.

92. Design and Engineering Defendants provided the design and engineering for the Project that is alleged to have caused Plaintiff's damages.

93. Design and Engineering Defendants owed Centex a duty to perform and provide their architectural and engineering services in accordance with their contract and applicable rules, regulations and ethical requirements that relate to architects and engineers practicing in South Carolina, and with the appropriate standard of professional care and generally accepted architectural and engineering standards. Design and Engineering Defendants breached their duty in designing, drawing and submitting plans for the Project that resulted in the defects and damages described herein and in Plaintiff's Third Amended Complaint and in failing to properly perform their required contract administration responsibilities for the Project that resulted in the defects and damages described herein.

94. A special relationship existed between Centex and Design and Engineering Defendants.

95. To the extent, if any, that Centex is held liable to Plaintiff in this action, such liability would be because the wrongful acts, omissions, negligence, gross negligence, recklessness, breaches and/or representations of Design and Engineering Defendants were imputed to Centex.

96. A right of indemnity exists in favor of Centex as the relation between Centex and Design and Engineering Defendants is such that in law or in equity there is an obligation for Design and Engineering Defendants to indemnify Centex, as Centex is required to defend itself in this action and exposed to liability due to the wrongful acts, omissions, negligence, gross negligence, recklessness and/or representations of Design and Engineering Defendants.

97. To the extent, if any, that Centex is held liable to Plaintiff in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, recklessness and/or representations of Design and Engineering Defendants, which has damaged Centex as Centex has been subjected to liability, and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

98. To the extent, if any, that the services and design supplied by Design and Engineering Defendants were defective or deficient in design, engineering, materials, installation, installation instructions, and/or were not merchantable or fit for their particular purposes, such defects and deficiencies would be the result of the breach of the express and implied contractual obligations and warranties that Design and Engineering Defendants provided, damaging Centex as Centex has been subjected to

liability, and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

99. Centex is entitled to full indemnification from Design and Engineering Defendants for any liability Centex is found to have to Plaintiff in this action, and Centex would be entitled to damages for Design and Engineering Defendants' negligence, gross negligence, and recklessness as aforedescribed and for Design and Engineering Defendants' breach of its implied and express warranties, entitling Centex to recover from Design and Engineering Defendants its attorney's fees, costs and other expenses incurred in defending this action, and entitling Centex to recover from Design and Engineering Defendants any sums for which it may be held liable to Plaintiff.

100. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent design/engineering and faulty work of Design and Engineering Defendants resulting in property damage which is not the work product of each of these Design and Engineering Defendants. In addition, the faulty design/engineering, breaches, errors, omissions and wrongful acts of Design and Engineering Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

AS A SECOND CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Negligence)

101. Centex realleges the Paragraphs above as if repeated herein verbatim.

102. Design and Engineering Defendants were negligent, grossly negligent, careless and reckless in the design, engineering, supervision, construction, inspection

or supplying of the work, services and/or materials outlined above and incorporated into the Project.

103. To the extent that an affidavit is required pursuant to S.C. Code § 15-36-100, which Centex does not admit or concede, Centex specifically incorporates herein by reference the Affidavit of Robert L. Carter, P.E., which is attached hereto as Exhibit A, whose opinions are further detailed in the investigative report of H2L Consulting Engineers.

104. Design and Engineering Defendants owed Centex a duty to perform and provide their architectural and engineering services in accordance with their contract and applicable rules, regulations and ethical requirements that relate to architects and engineers practicing in South Carolina, and with the appropriate standard of professional care and generally accepted architectural and engineering standards. Design and Engineering Defendants breached their duty in designing, drawing and submitting plans for the Project that resulted in the defects and damages described herein and in Plaintiff's Third Amended Complaint and in failing to properly perform their required contract administration responsibilities for the Project that resulted in the defects and damages described herein.

105. As a direct and proximate result of such negligence, gross negligence, carelessness and recklessness, Centex has been damaged in the amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, plus the cost of investigating and defending this claim.

106. Upon information and belief, Centex is entitled to judgment for actual damages collectively or individually against Design and Engineering Defendants in the

amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

107. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent design/engineering and faulty work of Design and Engineering Defendants resulting in property damage which is not the work product of each of these Design and Engineering Defendants. In addition, the faulty design/engineering, breaches, errors, omissions and wrongful acts of Design and Engineering Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

108. Further, Centex has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of Design and Engineering Defendants' negligence and for which Design and Engineering Defendants are also liable to Centex.

AS A THIRD CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Breach of Warranty)

109. Centex realleges the Paragraphs above as if repeated herein verbatim.

110. Design and Engineering Defendants expressly or impliedly warranted to Centex that all work performed by them would be performed in a careful, diligent and workmanlike manner, and that any materials and/or services designed, provided, supplied or sold by them for use on the Project would be merchantable and fit for their

intended or specific purpose. Design and Engineering Defendants breached their implied and/or express warranties of merchantability, workmanlike service, and/or fitness for a particular or intended purpose in the construction of the Project.

111. Design and Engineering Defendants owed Centex an implied duty of workmanlike service to undertake their architectural and engineering tasks with appropriate skill and expertise, and in accordance with its contract and applicable rules, regulations and ethical requirements that relate to architects and engineers practicing in South Carolina, and with the appropriate standard of professional care and generally accepted architectural and engineering standards.

112. Design and Engineering Defendants also had an implied warranty obligation to provide architectural and engineering services and designs which were reasonably fit for their intended use, which was not done by Design and Engineering Defendants for the reasons set forth herein.

113. As a result of these breaches of warranties, Centex has incurred damage in the amount of any money it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, plus the cost of investigating and defending this claim.

114. Upon information and belief, Centex is entitled to judgment against Design and Engineering Defendants in the amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

115. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent design/engineering and faulty work of Design and Engineering Defendants resulting in property damage which is not the

work product of each of these Design and Engineering Defendants. In addition, the faulty design/engineering, breaches, errors, omissions and wrongful acts of Design and Engineering Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

116. Further, Centex has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of Design and Engineering Defendants' breach of warranty and for which Design and Engineering Defendants are also liable to Centex.

AS A FOURTH CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS:
(Breach of Contract)

117. Centex realleges the Paragraphs above as if repeated herein verbatim.

118. Centex contracted with Design and Engineering Defendants and/or Centex was a third-party beneficiary of the contracts entered into among Design and Engineering Defendants. Design and Engineering Defendants were paid to provide work and materials to the Project in question as described above.

119. The terms of the contracts required Design and Engineering Defendants to provide design, engineering and construction goods and services for the Project that, among other things, would produce a quality Project free from defects and otherwise in conformance of all contract documents, including all building codes and industry standards. The contracts further required Design and Engineering Defendants to supervise and direct their work using their best skill and attention.

120. Design and Engineering Defendants breached their contracts by failing to provide appropriate design, engineering and construction goods and services to the Project, by failing to perform their work in a careful, diligent and workmanlike manner, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all contract documents, and failing to provide goods and services that were in conformity with all appropriate building codes and industry standards.

121. As a result of these breaches of contracts by Design and Engineering Defendants, Centex has incurred damage in the amount of any money it is adjudged to owe Plaintiff, or which it paid Plaintiff in settlement of Plaintiff's claims, plus its actual costs, consequential costs, and the costs of investigating and defending this claim.

122. Upon information and belief, Centex is entitled to judgment against Design and Engineering Defendants in the amount of any monies it is adjudged to owe Plaintiff, or which it paid Plaintiff in settlement of Plaintiff's claims, as well as its actual costs, consequential costs, and the costs and fees incurred in the investigation, defense and settlement of this claim.

123. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent construction and faulty work of Design and Engineering Defendants resulting in property damage which is not the work product of each of these Design and Engineering Defendants. In addition, the alleged faulty construction, breaches, errors, omissions and wrongful acts of Design and Engineering Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

124. Further, Centex has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of Design and Engineering Defendants' breach of contract and for which Design and Engineering Defendants are also liable to Centex.

AS A FIFTH CROSSCLAIM AND/OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS:
(Non-Delegable Duty/Vicarious Liability)

125. Centex realleges the Paragraphs above as if repeated herein verbatim.

126. Design and Engineering Defendants had a non-delegable duty to provide their services in accordance with applicable rules, regulations and ethical requirements that relate to architects and engineers practicing in South Carolina, and in accordance with appropriate and generally accepted architectural and engineering standards.

127. Design and Engineering Defendants breached their non-delegable duty for the reasons stated herein, directly and proximately causing Plaintiff's damage as described herein.

128. Design and Engineering Defendants are further vicariously liable for any and all errors, omissions, breaches and wrongful acts of any of its consultants and agents, which directly and proximately caused Plaintiff's damage as described herein.

WHEREFORE, Centex prays that the claims of Plaintiff be dismissed, and that Centex be given judgment against Subcontractor Defendants and Design and Engineering Defendants in the amount of any liability Centex is found to have to Plaintiff in this action, and Centex demands judgment requiring Subcontractor Defendants and

Design and Engineering Defendants to defend and indemnify Centex against any liability which Centex may suffer to Plaintiff in this action, to include Centex's attorney's fees, costs and other expenses incurred in defending this action. Centex further demands judgment for actual and punitive damages against Subcontractor Defendants and Design and Engineering Defendants and to reimburse it fully for all costs, expenses, and attorney's fees associated with the deficiencies described herein, in an amount to be determined by the trier of fact, and for such other and further relief as this Court may deem just and proper.

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December 5, 2016

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL DISTRICT

Case No.: 2014-CP-26-7634

The Harbour Cove Condominium Association,

Plaintiff,

vs.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., Inc.; Centex-Rogers, Inc.; ; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC; Right Way Construction, Inc.; Right Way Group, Inc.; RWG, Inc., RWGR, Inc.; South Carolina State Plastering, LLC; Georgia State Plastering, LLC; Florida State Plastering, LLC; Coastal Drywall, Inc., d/b/a Coastal Plaster Systems; Lundy Dowell d/b/a Coastal Plaster Systems; Martin Masonry, Inc.; Roof Doctor of the Carolinas, Inc.; Richard Blackwell d/b/a Synthetic Designs; Ferst Plastering, Inc. a/k/a Ferst Exteriors, Inc.; BR Brick & Masonry, 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., Morningstar Consultants, Inc. and A&A Stucco, Inc.

Defendants.

Centex Homes, a Nevada General Partnership,

Third-Party Plaintiffs,

vs.

American Residential Services, LLC d/b/a American Residential Services of South

AFFIDAVIT OF ROBERT L. CARTER

Carolina, Inc.; Builders FirstSource – Atlantic Group, LLC; Stock Building Supply, LLC f/k/a Carolina Builders Corporation; Cohen's Drywall Company, Inc.; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc., Carolina Drywall Contractors, Inc.; Tri-City Insulation and Building Products of Myrtle Beach, Inc.; Blue Ribbon Cleaning Service, Inc.; Overhead Door Company, Inc.; Right Way Construction, Inc. a/k/a RWG, Inc. a/ka/ Right Way Group, Inc. a/k/a RWGR, Inc.; John Doe; Cox Millwork & Supply, Inc.; Jayco, Inc.; Top Notch Painters; Air Mechanical, Inc.; AO Hardee & Son, Inc.; Sunland Fire Protection, Inc.; Grand Strand Roofing & Siding; Vance Johnson Plumbing Co., Inc.; Ferreira Drywall; Frank Harris Construction; Setzer & Sons; South Carolina State Plastering, LLC a/k/a Georgia State Plastering, LLC a/k/a Florida State Plastering, LLC; Jerry's Concrete a/k/a Jerry McRae Construction; Coastal Enclosures & Construction, Inc.; Williamson Construction & Waterproofing; ITP, Inc.; Vereen Concrete Co., Inc.; BCI, Inc.; Weather Protection Systems, Inc.; Dunn Plumbing, Inc.; CEMS, Engineering, Inc., The Martin Architectural Group, P.C., The Harman Group, Inc. f/k/a Cagley Harman & Associates, Inc., Roy Larry Schlein & Associates, P.A. a/k/a Roy Larry Schlein & Associates Corporation, Azimuth Consultants, and Risk Tech, LLC a/k/a or f/k/a Azimuth Consultants,

Third-Party Defendants.

PERSONALLY APPEARED before me, Robert L. Carter, P.E., after being first duly sworn, deposes and says as follows:

1. This affidavit is given of my own personal knowledge, all of the statements herein are true and correct, and I am competent to provide this affidavit.

2. I am an engineer licensed by the South Carolina State Board of Registration for Professional Engineers and Surveyors. For decades, I have practiced as a professional engineer in design and construction and have knowledge and experience in forensic engineering and investigations. A copy of my curriculum vitae is attached as Exhibit A.

3. I was retained by Parker Poe Adams & Bernstein, LLP, on behalf of Centex Homes, to review and investigate certain documents and conduct an onsite review of the Harbour Cove at Barefoot Landing project, located in North Myrtle Beach, South Carolina (the "Project"). As part of our investigation, H2L has reviewed and evaluated various documents and I performed a visual examination of the Project on October 21, 2016.

4. Among other things, I have reviewed certain architectural drawings prepared by The Martin Architectural Group (TMAG), 242 N. 22nd Street. Philadelphia, PA. TMAG developed two sets of drawings. One set is dated April 30, 1999 with Revision O, dated May 2, 2001 (Permit Set) and Revision 1, dated June 11, 2001 (As Built). The other set is dated February 2, 2001 with Revision O (Permit Set). The two sets of plans prepared by TMAG are hereinafter collectively referred to as the "Plans".

5. Based upon my investigation to date, specifically including a review of the Plans, and my inspection of the Project, it is my professional opinion to a reasonable degree of engineering certainty, that the Plans include details which are contrary to the applicable building codes, industry standards, and/or good design practices. Certain aspects of the Plans are insufficient and may have contributed to claims asserted by the Plaintiff in the pending action.

6. Without limitation and by way of example, Detail 12, Typical Window Head at Exterior Walls with Stucco, on Drawing D-1, shows the weep system at the heads of windows to be caulked/sealed. In accordance with the Plans, the aluminum head flashing at the headers of windows beneath the stucco at the Project has been sealed in most, if not all,

locations. In addition, Details 12 and 22 on Drawing D-1 show a trim board around the windows to be applied to the WRB and the stucco system applied around and over the trim board. Further, Detail 12, Detail at Second Floor Cant/Brick Veneer, on Drawing D-2 lacks a required weep system and prevents water from weeping at the base of the stucco system. These details prevent water to weep at certain locations and have contributed to damages claimed by Plaintiff.

7. The above-referenced details are by no means exhaustive, but are intended to demonstrate examples of specific areas where the Plans are deficient and have led to damages claimed by Plaintiff. As further investigation is conducted, or after reviewing additional drawings, specifications, reports, correspondence or other documents, additional conditions associated with the design may be discovered and I reserve the right to supplement or amend this Affidavit and/or my professional opinions.

Further, AFFIANT SAYETH NOT.

Robert L. Carter, P.E.

ROBERT L. CARTER CERTIFICATE NO. 4061 STATE OF SOUTH CAROLINA REGISTERED ENGINEER

SOUTH CAROLINA H2L CONSULTING ENGINEERS No. C00001 CERTIFICATE OF AUTHORIZATION

The forgoing statement was sworn to and
Acknowledged before me this 5th
Day of December 2016

Carla S. Powell
Notary Public for South Carolina
My Commission expires: 01-09-2025

CARLA S. POWELL NOTARY PUBLIC SOUTH CAROLINA

EXHIBIT A

Professional Qualifications
Robert L. Carter, P.E.

H2L
CONSULTING ENGINEERS

Name: **Robert L. Carter, P.E.**
President

Profession: Professional Mechanical Engineer

Registration: Registered Professional Engineer in South Carolina, Georgia, North Carolina and Virginia; Registered in 29 additional States (Inactive Status); Registered Mechanical Contractor, North Carolina (Inactive Status)

Education: B.S. in Mechanical Engineering, Clemson University, 1957
University of Virginia, Darden School, TEP Graduate, 1980
Post Graduate Studies, Harvard University
American Arbitration Association Advance Alternate Dispute Resolution Training, 1991 and 1997 through 2013.

Qualifications: Mr. Carter has over 50 years experience in the design and construction management industry. Sixty percent of this practice has been in construction management and forty percent in the design industry related to industrial, commercial and institutional projects. Projects have been for regional, national and international clients with approximately ninety percent being for private industry and ten percent for public agencies. The projects ranged in value from $50 thousand to $5 Billion.

Acted as mediator between Architects/Engineers and Owners; Contractors and Owners; Contractors and Sub-Contractors in contract negotiations, contract disputes, change orders, claims and counterclaims.

Key Professional Experiences:
President and Chief Operating Officer for H2L Consulting Engineers
President, RLC Management Services, Inc. Company
Executive Vice President, Ballenger Group, Inc.
Fluor Daniel, Executive Managements in Design, Construction Management, Program Management and Marketing/Sales. Positions included Project Manager, V-P Sales, Group V-P A/E Division, Group V-P Support Services and Group V-P Construction.

Community and Professional:
Board Chairman, Goodwill Industries of Upper South Carolina
Board Chairman, Interfaith Care Givers
President, Community Planning Council, United Way of Greenville
Board Chairman, Opportunity Greenville
Board Member, United Way of Greenville County
Board of Regents, Leadership Greenville
Alumnus, Leadership South Carolina and Leadership Greenville
Business Delegate to Peoples Republic of China with Federal Government
Community Development Board, Chamber of Commerce
Elder, First Presbyterian Church, Greenville, SC

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	**2014-CP-26-07634**
THE HARBOUR COVE CONDOMINIUM ASSOCIATION, Plaintiff, vs. CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, ET AL. Defendant.	)	**Transcript of Record** September 28, 2017
CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, Third-Party Plaintiff, vs. AMERICAN RESIDENTIAL SERVICES, LLC, D/B/A AMERICAN RESIDENTIAL SERVICES OF SOUTH CAROLINA, INC., ET AL. Third-Party Defendants.	)	

B E F O R E:

Honorable Clifton Newman
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Phillip W. Segui, Esquire
Amanda M. Blundy, Esquire
John T. Chakeris, Esquire
M. Abigail Young, Esquire
Attorneys for Harbour Cove

Robert M. Kennedy, Esquire
Attorney for Catalina London

John L. McCants, Esquire
Attorney for National First Mortgage

Neil S. Haldrup, Esquire
Attorney for Clarendon National Insurance

Lawrence M. Hunter, Esquire
Attorney for BITCO

Ross A. Appel, Esquire
Attorney for American Empire

Christy Mahon, Esquire
Sue Hogan, Esquire
Attorney for Hartford

Robert C. Calamari, Esquire
Attorney for Nationwide and Selective

Emily Ruth Gifford, Esquire
Attorney for Martin Architectural Group

Chris Clark, Esquire
Attorney for Sunland Fire Protection

Theodore L. Manus, Esquire
Attorney for South Caroling State Plastering

Jeffrey A. Ross, Esquire
Attorney for Martin Masonry

Thomas C. Hildebrand, Esquire
Attorney for Centex

A P E A R A N C E S:

Jonathon J. Anderson, Esquire
Attorney for Costal Drywall and Coastal Plaster Systems

G. Michael Smith, Sr., Esquire
Attorney for Dunn Plumbing

TAKEN BY:

Dixie C. Eubank
Circuit Court Reporter

PREPARED BY:

Kay H. Richardson
Circuit Court Reporter

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No. ID EV

(No exhibits were marked or admitted.)

(SEPTEMBER 28, 2017)

BY THE COURT:

MS. MAHON: If I may, I have one more Pro Hac Vice for this one. I also have talked to the Plaintiffs first and they have no objection.

THE COURT: Okay. All right.

MS. MAHON: Thank you.

MR. CALAMARI: Your Honor, we didn't know if we were incorporating our prior argument and you just wanted to hear Ms. Blundy's argument in response. I don't know how long they were here. We do definitely want to, with everyone's permission, incorporate all the arguments in all these cases from everybody because you're gonna consider them all anyway.

THE COURT: Yes, sir.

MR. CALAMARI: But I don't know how much of my argument they heard. I'd be happy to summarize as long as we can incorporate the other arguments into the transcript of all three of these cases.

MR. SEGUI: Good morning, Your Honor, Phillip Segui.

THE COURT: Good morning.

MR. SEGUI: We heard the last part -- well, I don't know how big it was, but the last part of Mr. Wylie's. We came in during his argument, which I thought was great. The point that I heard, but I don't know if we heard the last 10 percent of it or we heard 90 percent of it, but we didn't hear

anything before that, so I, I certainly don't want to re-plow the same ground.

THE COURT: I think Mr. Calamari has a -- can give us a condensed version.

MR. CALAMARI: Yes, sir, Your Honor.

THE COURT: All right.

MR. SEGUI: Thank you. And, Your Honor, I don't know if we need to get everybody on the record?

THE COURT: Yes, I think we do. The name of the case and everyone on the record.

MS. BLUNDY: Your Honor, Amanda Blundy on behalf of the Harbour Cove Condominium Association. There's also on behalf of the Association, Abby Young, John Chakeris, and Phillip Segui.

THE COURT: All right. Any -- anyone else who is here, who came in who wants to have the record show that you're here?

MR. KENNEDY: Your Honor, Robert Kennedy. I'm taking off my defense hat and putting on my coverage hat here for Catalina London.

THE COURT: Okay. Thank you.

MR. MCCANTS: Your Honor, I'm John McCants. I'm here on behalf of National Fire & Marine Insurance Company, and I have filed a motion to intervene on the Harbour Cove case, and I'm gonna join in the remarks of Mr. Calamari -- and may make some

additional remarks if necessary.

THE COURT: All right. Any other counsel here on this case?

Yes, sir?

MR. HALDRUP: Your Honor, I've announced in the prior case, but I was here just to observe. I'm Neil Haldrup for Clarendon National and we are joining in the motion to intervene for limited intervention for the reasons that have been put on the record in the other two cases, and we would ask that you incorporate those arguments as well as any that are included in the Harbour Cove case in our motion for intervention.

THE COURT: All right.

MR. HUNTER: And, Your Honor, I'm Lawrence Hunter for BITCO General. I would say exactly what he just said. We're here to move for limited intervention in Harbour Cove and we also incorporate the same issues and arguments.

MR. APPEL: Your Honor, Ross Appel for American Empire in the Harbour Cove case. I want to adopt the Neil Haldrup and Bob Calamari plan for limited intervention. Thank you.

THE COURT: All right.

MS. HOGAN: Your Honor, Sue Hogan for the Hartford entities also in Harbour Cove and we filed a motion for intervention.

MR. SEGUI: And just before I forget, Ms. Blundy may give

us also somewhat of an abbreviated version because she heard Mr. Wylie's wonderful argument. I want to make sure that's incorporated on our behalf in this case since everybody else is incorporating that side for symmetry.

THE COURT: All right.

MOTION TO INTERVENE:

MR. CALAMARI: I think that's what we're asking, incorporate everything that people have said in the last two days because it is an interesting issue. So we'd like to make them all part of our arguments.

Your Honor, Bob Calamari ---

THE COURT: If anyone orders the transcript of what's been said, email me a copy, please.

MR. CALAMARI: We plan to order a transcript for all three, so I'll get with you afterwards and we'll -- I'll give you a card.

THE COURT: All right. So Dixie can send me a copy. Thank you.

MR. CALAMARI: Thank you, Your Honor. Bob Calamari here on behalf of Nationwide and Selective Insurance Companies, our insureds in the Harbour Cove case, Martin Masonry and Dunn Plumbing. Again I'm speaking on behalf of the carriers of who will incorporate my argument into theirs. We've argued this three times, so I will give an abbreviated motion and we're incorporating all the prior motions or all the arguments into

this one as well.

This is a motion to intervene as the non-party for the purpose of submitting special interrogatories so the jury can allocate damages. If you're inclined to deny that, and only if you deny that, that we would like an order from you protecting the parties in the subsequent action saying that there is no denial of any party to offer evidence and obtain a ruling on allocation issues and coverage issues of any kind and that the matter is not completed until that is done.

THE COURT: That would be not until that is done in this action or the DJ action.

MR. CALAMARI: Well, that's an interesting question. See if we -- if you grant the first part, a lot of these items are gonna be done. We might say, well, we know this part is gonna be a covered damage and we'd pay it, we don't have any post-judgment interest. If you deny it and we have a general verdict, we have no earthly idea what part of it is. So, we don't think this action is done until such time as the, the other action allocates those damages, and we don't think it would be fair to award post-judgment interest. Now, whether we pay it in, reach an agreement, something with the Plaintiffs, these are all issues that have been discussed outside of, of, of this forum. But that's what we would be asking that this action is not done until that takes place.

Your Honor, the argument is based on *Newman v. Auto*

Owners, Crossman v. Harleysville and the *Heritage* case. Where all of those cases talked about allocating damages in this underlying action. Heritage made very clear, Newman made very clear, and Crossman made very clear that the supreme court's idea of when damages should be allocated are in this particular action. And, we talked a little bit about it earlier for the reason -- and the example we gave was a $21,000,000 Plaintiff's claim, a $3,000,000 defense claim, $7,000,000 awarded, and items of damages could have been totally excluded, it could've been included in that verdict, we don't know. So, we think it's important that the parties in this case allocate those damages. As we've said before, it is not the insurance companies' obligation, because at this day and time, everyone knows that allocation issues are necessary and that the supreme court's preference that they be done in this action, so we're asking that that happen. We're gonna submit a special interrogatory to you in a few minutes. We are asking that it takes place, that anyone here that prevents that from happening later may be barred from asking the Court to allocate damages. They might not be able to and they might say you don't get any coverage. So, that would be our position if they waive that right, if by arguing today they prevent this from happening.

This is -- the reasons for this are evidence preservation. We believe that's what the supreme court is

looking for. They want us to preserve the evidence so it can be apportioned appropriately in the coverage action. We are looking to pay for the damages that are covered and not pay for damages that are not covered. The opposition seems to be that they want everything together so they can argue later that we not only have to pay for damages that are covered, but also for damages that are not covered. We don't think that's fair. We want to be fair, we want to abide by the terms of the policy, and we'd like to do that.

As in the other cases, I have a sample interrogatory that I'd like to hand up. And this one is very similar to the interrogatory and I just used by way of example, Martin Masonry, one of the insureds for Nationwide and Selective. And Number 1, answer only if you found damages against Martin Masonry. If you found no damages against Martin Masonry, stop and do not proceed. Number 2, if you found damages against Martin Masonry, list the total amount of the damages on the following line. Number 3, this is where we ask them to divide. If you found damages, divide -- tell us the costs of removing and replacing the work of Martin Masonry. And, Item B, tell us the costs of repairing the portions of the building damaged by the work of Martin Masonry.

THE COURT: Just as an aside, the -- in this case, how many of these forms will the jury be given as it relates to how many parties, like 20 different forms or ---

MR. CALAMARI: I think there's about nine.

THE COURT: Nine.

MR. CALAMARI: There's been nine motions and I think nine motions to intervene; I think that's about the number of subcontractors. And then in Item 4, for the damages in line 3B, identify whether those damages are progressive and continuing; they just circle yes. If no, identify the date on which the progressive damage stopped. That would give us some evidence of a damage period for a time-on-risk analysis.

Now within this, we're not asking for the Court to say these are for insurance purposes, this deals with insurance. We believe this is already evidence that is being offered in this case. And so I have a copy of one of the expert reports in the case and I've highlighted one small area. There would be others that maybe the jury would decide.

Thank you, Your Honor.

THE COURT: Yes, sir.

MR. CALAMARI: And, you know, I highlighted, you know, replace exterior wall sheathing allowance, replace wood framing allowance, exterior OSB, wood framing members. You know, if they're going to say, well, there's damages in this case, that was something brought up yesterday. Well, you know, I, I -- on that one I highlighted the number for removing and replacing the brick. Here I highlighted replacing wall sheathing allowance, wood framing allowance.

Maybe the evidence in the case says that was damaged from one of the subcontractors, maybe Martin Masonry, maybe someone else, just by illustration of showing you that this is already done. So, we don't think this is a very difficult position.

The -- I do want to talk a little bit about notice. There may be some issues raised about reservation of rights letters, whether we've communicated with the parties. I don't think there's anybody in the courtroom that can reasonably argue that they don't know this issue exists. We've talked about this in every single construction case we've worked on. We've talked about it with our insureds, with the lawyers in this case. We filed a motion to intervene. This motion we've argued it now three times. Everyone has chimed in with discussions, comments. And in this case in particular, just like the others, we have a pending declaratory judgment action to allocate all of these issues as part of the global additional insured action filed by the general contractor in this case.

THE COURT: Is that pending here or ---

MR. CALAMARI: It's pending -- yes, it's pending in Court of Common Pleas Fifteenth Judicial Circuit. It's the Centex vs. Cypress Bay and Condominium Association. It was -- they filed a cross claim saying that we think the policy should be reformed to cover everything and we filed a counterclaim to that, a claim saying we don't think so, and we think

everything should be allocated into categories for covered, non-covered, you know, all those various issues.

Just an aside, electronic filing, I see them commenting, oh, what did they file? I'm not sure everyone has paid attention to all the electronic filing, but that's no harm, no foul. Don't worry. So, we think it would be disingenuous for someone to stand up and say we can't do this, we didn't know about this issue, this'll change the way we try the case. We're just talking about evidence preservation. The reason, I'm trying to hurry through this. So, the reason we're doing this is the insured typically carries the burden of proving damages within the insuring agreement. They have to show occurrence, property damage that took place during the policy period. That is their burden. There is some case law across the country that says that burden can shift if the case is being completely controlled by the insurance carrier. After I'm gonna say five hours of arguing, it's pretty clear that the insurance companies are not controlling this litigation because everyone in the case have said get out, don't bother us, we've got this, we're doing this ourselves. So, I don't know that anyone can say that burden has shifted particularly when our supreme court in Heritage has said you have an obligation to allocate these damages. They all know about it through direct notice, through reservation of rights letters, through everything. We don't think that that burden has

shifted but, if it has shifted, we are satisfying our obligation of asking the Court to allocate these damages to preserve the evidence so we can make the determination in a subsequent action.

As far as why we are filing motion to intervene, as we've said before, we don't think there's any other avenue that allows us to speak. Insurance companies have two duties: the duty of defense, duty of indemnity. Indemnity is not triggered until settlement or a judgment is rendered. We only have the duty of defense right now. As Mr. Smith pointed out earlier, he is defending the claims against the insured. Our insurance companies only have the ability to interject any suggestions or anything we believe through this motion to intervene. It was the substance of the Heritage opinion arguments. Maybe not of the opinion, but it was the arguments that took place as to whether or not there should or should not have been intervention. I understand the *Simms v. Nationwide* case. We've argued that before when we did not intervene but here that was rejected, and here we are asking that the Court allow us to intervene so we can preserve the evidence so it can be used. We're not asking to participate, we're not asking to come in as a party, we just would like to participate in the jury charge on progressive damages, explanation of the work of the insureds and then ask for the breakdown in the special interrogatories.

There's one thing I did leave out is they might say, well, this is a very complex issue as argued in the other cases. This jury is gonna have to talk about a lot. They are gonna learn so much from all these experts. These experts are going to talk about building codes, manufacturers, shop drawings, architectural plans, flashings, roof wall intersections, mullions, window components, stucco issues, brick issues, weep holes, backer rod, all sorts of things that they've probably never heard of. They're gonna hear that from experts who are offered in this case as the top scholars in their area and, if they can do all those wonderful things, then they certainly should be able to say we think that removing and replacing the brick is this much cost and we think replacing any damage from that improper brick will cost this amount. The expert report we handed up already has it on there. We're not asking to change the tone, we're not asking to make them try the case differently. We think those experts can in fact do that and give us an instructive preserved evidence so we can use that in the subsequent DJ action.

And I'm sure that I may have left something out, but we are incorporating everything from the other actions and I think I made this argument much shorter than the others.

So, thank you.

THE COURT: Yes, sir.

MS. HOGAN: Thank you. I'll make it very quick.

Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. HOGAN: Sue Hogan for Hartford Fire Insurance Company and Hartford Casualty Insurance Company. I'm just gonna address two quick points anticipating arguments that I believe are gonna be made by counsel for Harbour Cove and those are first of all, the carriers, Hartford -- Hartford and on behalf of the other carriers that filed motions to intervene, I do believe that the case law supports a limited intervention by the carriers in the underlying action.

I've cited to these cases before, so unless someone needs the cite, I'm talking about *Davis v. Jennings* and *Stoney v. Stoney*. I think that the Davis case is more directly on point. In that particular case, the court recognized limited intervention and allowed the intervenor to intervene as a non-party. *Stoney v. Stoney* highlights and reinforces the fact that the trial court has complete discretion on the nature of the intervention. In that case I think the appellant court was critical of the trial court for, for letting the intervenor go beyond the scope of his role.

Our second argument is -- well, before I get to that, I want it very clear for the record that none of the carriers, to my knowledge, and certainly not Hartford, is asking to intervene as a party. And in fact, we don't believe we can be a party. I just gave the basis for a limited intervention as

a non-party. The concerns the insurers have about being -- intervening as a party is that it will inject the existence of liability coverage into the underlying action, which will prejudice the insurers and potentially the insureds.

I think that's all I have unless Your Honor has any further questions.

THE COURT: Thank you.

MS. HOGAN: All right. Thank you.

THE COURT: Yes, sir?

MR. MCCANTS: Briefly, Your Honor, again I'm John McCants on behalf of National Fire & Marine Insurance Company and I filed a motion to intervene on the company's behalf filed on July 27th.

THE COURT: Do you have a copy of your motion?

MR. MCCANTS: I can give you my copy, Your Honor. If I can find it. I think most of my arguments have already been made by Mr. Calamari and Ms. Hogan are contained in the brief. I have an extended brief which addressed the arguments which have been made this morning in this case and the one prior this morning which I would like to incorporate by reference and without belaboring the Court and repeating these arguments. But, I'd like the opportunity to rebuttal if something new and different is said by the Plaintiff's counsel in this case.

THE COURT: All right. You hand it up to me, also, a

motion to quash and motion for protective order.

MR. MCCANTS: I'm sorry. It's the first -- I'll take that back and I think that's the intervention motion.

THE COURT: Okay. Good. Thanks.

MR. MCCANTS: All right. Thank you, Your Honor.

THE COURT: All right. Ms. Blundy?

MS. BLUNDY: Thank you, Your Honor. I certainly do not want to rehash all the arguments that were presented by Mr. Wylie and certainly we want to adopt them. There's several points that I wanted to point out to the Court on behalf of Harbour Cove as far as the intervention.

Obviously, we feel that it is all the points you've probably heard before, confusing the jury, there is no limited intervention. We certainly disagree with the insurance bars interpretation of Davis and Stoney and certainly would adopt Mr. Wylie's take on the case is as they are as clear cut and like the situation we have today.

But, a couple of points that, Your Honor, I'm not sure if have been pointed out to you is that Mr. Calamari has once again said to you, it is not confusing, this is gonna be very simple. However, in this situation, there are eight different motions to intervene in front of you today for Harbour Cove and two of the carriers, American Empire and Clarendon, have asked for full intervention and they've asked to be parties. So, now we have insurance companies that are asking to be

partially involved in the case and be secret insurance companies, and then we have the two carriers that want to have deponents and witnesses and representatives from the insurance company on the stand. So, I think that is confusing.

We have nine different sets of special interrogatories and orders for the juries to, to look at and grapple with and then we have the insurance companies now pitting themselves against each other of whose damages are covered and not covered.

THE COURT: Do you agree with Mr. -- you're adopting Mr. Wylie's lack of objection to full intervention?

MS. BLUNDY: Yes, Your Honor, we would absolutely agree that American -- and we would consent to American Empire's and Clarendon's motion to come in. And as far as Selective, Catalina, BITCO, National Fire, Hartford, Harleysville, and Nationwide, we would ask that you order the same for them; that they are full parties. And in fact, Your Honor, something that has come up in the Harbour Cove case is, upon the intervention of these insurance companies, we feel that we should be able to ask them questions, interrogatories, requests for production, and I would like the opportunity to depose a representative. So, we went ahead and sent those to the carriers, and there are sets that I'd be happy to hand up to Your Court. In fact, Your Honor, before I forget, I have a memorandum for the Court. These were electronically filed.

May I approach?

THE COURT: Yes.

MS. BLUNDY: Thank you, Your Honor.

Your Honor, so ---

THE COURT: Tell me what you just gave me.

MS. BLUNDY: I gave you a memorandum in opposition to all of the carriers motions to intervene. They are identical with the exception of American Empire and Clarendon, who asked for full intervention. So, obviously we've noted that in that memorandum.

But, Your Honor, it really sums up the arguments you've heard already.

THE COURT: Let me just ask you while we're passing through this part of it ---

MS. BLUNDY: Yes, Your Honor.

THE COURT: If Clarendon asked for full intervention and you consent to their motion, does anyone else have standing to contest it?

MS. BLUNDY: Your Honor, I think that's a good question. Then does the non-parties who are in the case, can they contest that? I mean, that's really a question for the Court.

MR. HALDRUP: Your Honor, Neil Haldrup for Clarendon.

THE COURT: Yes, sir.

MR. HALDRUP: And she you prefaced this that we adopt and incorporate the arguments for limited intervention and that

Clarendon, and I think I speak on behalf of American Empire, are not seeking full intervention and ---

THE COURT: So you're retreating somewhat?

MR. HALDRUP: Tactically.

THE COURT: Okay.

MS. BLUNDY: Well, and Your Honor, I think the key point that we would like to add to previous arguments is first of all, the insured should have the ability to contest the carriers' intervention. That's one thing. The insureds need to be notified that their insurance company may be a party to this action. Secondly, the biggest obstacle, I believe, here for the Court and for the homeowner's association is due process. I think it is a violation of due process rights that we do not have the ability to question a witness, to find out information about their interrogatories. Where are they getting the information to place in special interrogatories? I think it's something interesting that Mr. Calamari said that it is evidence preservation. This is not evidence. They are -- it is fake evidence. I mean, where -- who is putting in the evidence of the highlighted spreadsheet? Is it the insured's attorney? They can't do that. So, Mr. Calamari would like to preserve evidence that does not exist. It is the insurance companies' evidence. So, if they would like to present evidence, they come in. We should be able to cross examine them. Who is deciding who highlights -- why are these

highlighted? And so I think the evidence preservation is an interesting point because there is no evidence going to be presented.

It is a violation inherently of due process if we cannot confront a witness. I mean, I think that's very key in a criminal case but we should have the ability to confront a witness on the stand or depose them. Tied into that issue is when we did serve these insurance companies with interrogatories and requests for production and a deposition notice, the phones in our office have rung off the hook.

THE COURT: You did it in relation to their motion to intervene?

MR. BLUNDY: Yes, Your Honor.

THE COURT: Okay.

MS. BLUNDY: In the anticipation should you ---

THE COURT: In anticipation.

MS. BLUNDY: --- allow them, I would like them to go ahead and answer the interrogatories and the request for production and present a deponent, a 30(b)(6) of the company. They have moved to quash those. And I think another trial court grappled with this and said to the carriers' attorney, okay, well, so now you don't want to answer questions and now you ---

THE COURT: Which Judge was that?

MS. BLUNDY: Judge Harrington.

THE COURT: Okay.

MS. BLUNDY: So ---

THE COURT: Is that the one someone was mentioning yesterday, she had a case that's on appeal; is that ---

MS. HOGAN: That is not the same case.

THE COURT: Not the same case. She just has a few of them, huh?

MR. SEGUI: We did have one where that was appealed and we just settled the underlying case. So, I don't know what was said, but I want to make sure the record is clear. We had -- somebody tried to intervene on the eve of trial, she did not allow it. I think that appeal ---

MR. BLUNDY: That appeal ---

MR. SEGUI: --- immediately appealed because we were getting ready to pick a jury. So we had to call time out.

THE COURT: Delayed the case.

MR. SEGUI: And then ultimately we settled ---

MS. BLUNDY: Just recently so it is not a currently pending appeal.

THE COURT: Okay.

MS. BLUNDY: But, Your Honor, and then the last point that I did not hear addressed, and I'm sorry if it's already been addressed, is that Harleysville's counsel said when you presented them with the question of, well, then does this not -- is there not a need for the DJ? So why are we going

through this exercise of having them come in this case, monkeying up all the evidence, presenting or not presenting evidence -- I'm not sure if we know that answer. They said they are not bound. So, if they do not like the result of the trial, they then get to do something different in the DJ. It is inconsistent results. I think that alone should allow this Court to be able to deny their motions outright. That they now don't like the decision in the trial court. If the allocation is not quite right, they get to contest it in the DJ and change -- is there gonna be new evidence presented.

So overall, Your Honor, we would either request -- and I just want to simplify this for you. On the grounds really of due process, we should be able to ask them questions and have them come in as a full party as there's no partial intervention and, in the alternative, just have them continue to have their action heard in the DJ which is currently pending. There's nothing that prevents any of these questions to be answered in the DJ.

So, Your Honor, on behalf of Harbour Cove, we would request motions be denied and, in the alternative, full intervention.

THE COURT: All right.

MS. BLUNDY: Thank you.

THE COURT: Anyone else on the -- want to be heard on this before I come back to Ms. Hogan, Mr. Calamari?

All right. Movant?

MS. CALAMARI: I have nothing in response, Your Honor. I think those issues were all raised before when we discussed them.

THE COURT: All right.

MS. HOGAN: Nothing, Your Honor. We have a motion to quash as well.

THE COURT: Mr. Segui, you have ---

MR. SEGUI: Yes, Your Honor, just, just briefly and this may go to some of the incorporated arguments. Rule 411 evidence, doesn't, doesn't say no one ever gets to hear about insurance companies and they're some phantom. I feel like we're marionettes in the underlying trial and there's a puppet master called the insurance company that has what they want is this partial intervention and they're just gonna pull the strings and we can't do anything we want to do because there's strings attached to us and I think Mr. Wylie was eluding to that. Because we're adding an element of time, we're adding an element of allocations and things that are very complicated and it's an overlay on what is already a very complicated thing. It reminds me of the joke where the mechanic says, working on my heart surgeon's BMW, that we do the same thing, Doctor. You know I can replace the pistons in this engine and you can replace valves in a heart. He goes, well, the difference is I'm doing it while the engine is running. And

that really to me sums up the issue of having this marionette thing because the element of time, when do damages stop, when did they begin to occur? And all of that element of time, there's no way naturally that that's gonna ever come into the case. It's got to be through an external factor. In the confrontation clause, I know it's criminal, but I think in the civil setting, it is a due process situation. If there's somebody pulling the strings, we have the right under the constitution to examine how those strings are being pulled and the jury certainly has the right to consider who's pulling the strings. In this whole concept is gonna be a secret phantom party that's controlling the litigation that the jury is supposed to pretend it doesn't exist. Rule 411 simply says that existence of insurance cannot be used to establish liability. I don't think at the point that we make this underlying case a DJ, which is what happens when we start getting into these issues, it becomes a declaratory judgment action that's merged with a liability case. Once that happens, the whole -- the whole 411 just doesn't fit anymore. No one is gonna be saying that because the defendant has insurance and because they want these special interrogatories answered, that they're liable. No one is gonna say that. And it's so complicated the jury could get past any confusion on that. But the, the rule is to prevent unfair bias in saying because he had insurance, he must've been at fault. This

whole issue is about insurance. The jury is gonna know there's something weird going on, and I think under due process they need to know, and they're required to know what it is that's actually going on, which is why we have to have the full intervention.

THE COURT: Do you ever get a jury in a DJ action?

MS. HALDRUP: Yes, sir, I ask for one every time I do because there's always factual issues that have to be determined that are a foundational element to the overlay of the coverage determination.

THE COURT: And juries deal with ---

MR. HALDRUP: I've never gotten that far. I've asked every time and no one has ever stopped me on a dispositive motion kind of thing. I say I always ask, I meant to, if we messed up and didn't put jury trial demanded or something, that could've happened. But, I always want a jury, even in my DJs to the extent the judge will let me. I know in federal court, they put the brakes on the jury on the factual side a little bit more maybe than we get in state court. But even there, I've asked for it.

THE COURT: All right.

MR. CALAMARI: I did a few points now.

THE COURT: Yes, sir.

MR. CALAMARI: Okay. So, just to summarize globally what we're looking for here is -- and we're not a puppet master

doing anything like that. We want to pay the covered amounts and no more. The rest of the room wants us to pay non-covered amounts and covered amounts. They want us to pay the whole thing. The supreme court has said in Heritage, how do you go about allocating evidence preservation in this particular trial? They told us we have to do it. I don't think we're the only ones who have to do it. I think everybody in the room has to do it. And if anybody prevents this from happening -- it's interesting to hear Ms. Blundy's comment of, well, who's gonna put that evidence into the record. They may not offer that sheet and I use those sheets to illustrate to you that these experts have already done this. So, they can -- when they are on the stand and they say this is a problem, this is a problem, here's the damage from it, here's the damage from it. And the person gets up to testify, does he just get up to testify and say, I looked at this, it's gonna cost $11,000,000. How about have him say go through his itemization and say, you know when you get your car fixed -- I don't have many stories. I need to get a book or something of sayings and stories, because everyone has outmatched me with that today. So, but when you go to get your car fixed and you come out and he say -- you went in for an oil change and he said there were a lot of other problems; here's a bill for $495. You say, okay, thanks or you say wait, what was that for? Can the mechanic not tell you? Can he not tell you what

that's for? Can the experts in this case not tell you? I think they can. I don't think we're asking for anything difficult. I think we're doing exactly what the supreme court said for us to do. It's evidence preservation. It's gonna allow something happen -- we're not gonna argue against things in the other action as Ms. Blundy suggests, but I imagine lawyers typically argue. Here we are arguing over what the supreme court said to do. When there are numbers and other things and exclusions in that, those will all be raised in the other action, that was the point.

But, I think it's easy to do. We just want to pay what's covered and we don't want to pay what's not covered and we think the obstacle is the opposite. They want us to pay what's not covered.

THE COURT: Okay. I know we have Stoney and GEICO and Simms. Are there any cases where limited intervention has been granted in this state in a construction case?

MR. CALAMARI: I'll let Ms. Hogan and Mr. McCants can answer that.

MR. MCCANTS: Yes, Your Honor.

THE COURT: All right. And I believe it's attached to the Hartford's memorandum.

THE COURT: Hartford's. All right. Tell me about that; who did it and why?

MR. MCCANTS: I believe Plaintiff's counsel; did y'all do

MS. HOGAN: Yes, Your Honor.

MR. MCCANTS: Okay. They were granted the motion to intervene, and I think it's Judge Nicholson.

THE COURT: Buddy Nicholson.

MS. BLUNDY: Your Honor, since that was our case, I would be happy to clarify where that ---

THE COURT: All right. We'll come to you after he gets --

MR. MCCANTS: It's basically a grant of what the insurers are asking for in this case. It's much the same, a construction defect case, allocation of damages to the Plaintiff.

THE COURT: And he granted them limited intervention?

MR. MCCANTS: I believe so; yes, Your Honor.

THE COURT: And are there any appellant decisions where -- any place in the country that you're aware of where limited intervention was granted in a construction case.

MR. MCCANTS: I have cited three or four federal district court decisions where limited intervention was allowed. But there's not a, that I'm aware of, a South Carolina Supreme Court decision. It's been contained mostly in the Newman case you've heard about today.

THE COURT: And the district court cases are from other states?

MR. MCCANTS: Yes, Your Honor.

THE COURT: All right. Ms. Blundy?

MS. BLUNDY: Your Honor, I think what we need to clarify for the record is Judge Nicholson allowed Selective Insurance Company to have the ability to ask the trial judge. That is all that Judge Nicholson allowed. She said -- he said, you have the ability to present this to the trial judge. Well, then you see what the trial judge did, it did not allow them to -- it did not -- he did rule on whether we could take interrogatories, request for production, take depositions, he did not rule on whether they were allowed to ask special interrogatories. He gave it to the trial judge, and Judge Harrington denied it. So that is a -- that is not what it is and that -- this is the same exact case that was brought up earlier that Nationwide also tried to intervene and it was denied on the eve of trial and it was not denied on grounds. She denied it because it was presented two days before we were picking a jury. It was untimely and Judge Harrington said, it's untimely, I'm not even ruling, and then we ended up in the court of appeals for six months. So, that in fact is not -- I normally would not be able to speak on that, but since we lived through it.

Thank you, Your Honor.

THE COURT: All right.

MR. MCCANTS: Your Honor, I'll let the order speak for

itself.

THE COURT: I think on this issue, I'll give anyone who wants to submit a proposed order an opportunity to submit one, pro or con, on either side. Everyone has an interest in it, so anyone who wants to submit a proposed order may submit one on any of the cases. Hopefully, I won't get too many of them.

So, who is like -- who are likely to submit proposed Orders.

MR. CALAMARI: Your Honor, the carriers have talked about submitting one joint order to you.

MR. MCCANTS: Yes.

THE COURT: Okay. One joint order, Ms. Blundy?

MS. BLUNDY: Yes, Your Honor.

THE COURT: And Mr. Wylie?

Anyone else? Okay.

MR. SEGUI: We may be able to agree on behalf of the owner's side of it and we may submit two, one that just denies it and one that says full intervention. We'll have to work that out.

THE COURT: And I didn't mention that to the lawyers yesterday, so I'll mention that to them.

MR. CALAMARI: Thank you, Your Honor.

THE COURT: Well, Mr. Hildebrand was here a little bit earlier. There he is. So, from yesterday, pass it on, anyone who wants to submit a proposal they can.

MR. HILDEBRAND: I'll be happy to.

THE COURT: What kind of time frame are y'all going to submit them?

MR. CALAMARI: We were thinking about the middle of next week we should be able because with the trial approaching -- but you did say yesterday for people to submit proposed orders?

THE COURT: Oh, I did. Okay. Sorry. By the middle of next week. Okay. I'll be ready to rule then.

(RECESS.)

*******OFF THE RECORD*******

(On the Record.)

THE COURT: All right. Thank you. All right. Harbour Cove.

What do we have, Ms. Blundy?

MS. BLUNDY: Good afternoon, Your Honor. I hope you had a nice lunch.

THE COURT: Very good.

MS. BLUNDY: There are several motions and I believe that we can probably take care of a few of them, they're some smaller housekeeping type motions.

THE COURT: Okay.

MS. BLUNDY: A lot of them are tied together. I'm sure like you're used to as far as related to settlements and I know that this isn't a status conference, but I think the

Court will be please to know we -- we've settled with several parties in the case.

THE COURT: Okay.

MS. BLUNDY: So that takes care of several of the motions. I'm sure your court has gotten updates on those. We've sent some emails. There's some motions for summary Judgment, there's some motions to compel that are all related to our settlement with Centex. So if it's all right with you, I think that the motions to compel possibly can be handled first.

THE COURT: Okay.

MS. BLUNDY: I don't know who has them pending against us, but I'll put it this way, Your Honor, several people have moved to compel the Plaintiffs and Centex for settlement documents and we really defer to Centex. We're still working out the big release. I know they've done some things with you in the past where they put things under seal. We kind of leave it up to the Court and Centex, whatever they want us to do.

THE COURT: All right. Mr. Hildebrand?

MOTION TO SEAL:

MR. HILDEBRAND: I thought I could avoid this table by having settled out, but here I am. Your Honor, Tom Hildebrand here for Centex. To give you a little bit of perspective, this case is just a little bit different than some of the

others in that we have settled out with the Plaintiffs directly and early. It was somewhat similar to Edgewater though because we had done the same thing with them. One thing with -- for Centex, Your Honor, was the developer and general contractor for this project, and we filed claims against our subcontractors and the Plaintiff filed direct claims against those subcontractors. We entered into a settlement agreement with the Plaintiffs at a mediation and one of the critical parts of that -- that settlement document was a really strongly worded provision that its extremely important to Centex that the settlement amounts or the settlement terms, the ones that substantive, remain confidential and Plaintiff signed off on that saying that they would jointly ask the Court to entertain a motion to seal the settlement as confidential, similar to what happened in Edgewtaer.

The Plaintiffs have settled with a number of the subcontractors, as I understand it, they still have several more that they plan to proceed to trial against. Those subcontractors have asked for the settlement provisions or a copy of the settlement documents between the Plaintiffs and Centex. And I would argue, as I did yesterday, Your Honor, that if, at the appropriate time, this case is not settled, then I think they're probably -- probably a good chance that it will, given the, the historical percentages of construction

cases that do settle -- if at the appropriate time the Defendants want to make a motion to introduce the amount that was paid, then I think that that's appropriate because I think that they would be entitled to a setoff and potentially at least we would have the Court consider that and we would agree to produce that to the Court but introduce it with appropriate safeguards.

The other terms of the settlement, I think that's the most -- the one that's the most critical to Centex and the reason is that we have several other cases right behind this that we have not yet settled. We want to be able to settle these cases if it's known what we paid or has been paid, then I think it's going to chill settlement negotiations because it will thwart Centex's -- or what could likely happen is word would get out and embolden other -- there are a whole bunch of condominium projects on this one piece of land, there are about twenty of them and about seven of them have been in litigation. Our concern is that other -- if word got out that monies had been paid, then other associations will be emboldened. So, we would very pretty not want the Court to disclose that and only with appropriate safeguards, we'd ask that be done at trial.

One little twist with this settlement is that we agreed that we would assign Centex's rights under our contract against subcontractors to the Plaintiffs. I don't know that

that really does much, because I think the Plaintiffs have direct claims against all or most of those subcontractors and they have strong claims against them, but I would certainly stipulate right here on the record that there are certain subcontractors that we have assigned to the -- our -- any and all rights that Centex has in this litigation to the Plaintiffs.

So, I think that's it. Thank you, Your Honor.

THE COURT: All right.

MS. GIFFORD: Good afternoon, Your Honor, Emily Gifford with Richardson, Plowden, and I represent a Third-party Defendant, The Martin Architectural Group. Centex asserted a direct claim against my client. The Plaintiffs have not asserted a claim, but during this process, all of the Third-party Defendants were advised that Centex had indeed assigned its rights to the Plaintiff. So, to the extent Mr. Hildebrand has not explicitly done so, as it relates to my client, I would appreciate it if Mr. Hildebrand would state that Centex has indeed assigned all of its claims against my client, Martin Architectural, to the Plaintiff because I need to assure my client that I am entering into a settlement agreement with the appropriate party and that Centex has in fact assigned all its claims to the Plaintiffs and that's who -- the party with whom I need to negotiate my final settlement.

THE COURT: Mr. Hildebrand?

MR. HILDEBRAND: I don't have the document in front of me. Is that one that was assigned ---

MS. BLUNDY: Your Honor, Martin Architectural was assigned and it is all of the claims because the -- so Centex assigned all of their claims with regard to Martin Architectural. And, Emily, I don't want to -- Emily and I have worked something out; we're just finalizing some documents.

MS. GIFFORD: Yes. And that goes to another issue, Your Honor. I currently have a pending motion for summary judgment. Martin Architectural filed and Centex had filed its claim, so I would just ask that that motion be continued because Ms. Blundy is correct. We are very close to reaching a settlement, but part of that was me being able to confirm that I was in fact negotiating with the correct party and not paying my money to a party and then having Centex come back and ask me for more.

THE COURT: All right. And you, you can pretty well confirm that, can't you, Mr. Hildebrand?

MR. HILDEBRAND: Yes. Your Honor.

EMILY: Thank you.

THE COURT: All right. And the summary judgment will be continued.

MS. GIFFORD: Thank you, Your Honor.

THE COURT: All right.

MR. MANUS: Your Honor, Teddy Manus for ---

THE COURT: Let me hear from Mr. Clark first.

Yes, sir?

MR. MANUS: I apologize.

MR. CLARK: Thank you, Your Honor. Just to follow it up, Chris Clark for Sunland Fire Protection System. We have the same issue. We have a summary judgment against the third party, clams signed by Centex. We understand those have been signed, wo we'd simply ask that motion for summary judgment be continued until such time as assignment can be finalized.

THE COURT: Ms. Blundy?

MS. BLUNDY: Yes, Your Honor. We also have conceptually settled with Sunland, but just finalizing the documents as well. So, I have advised all the third parties that that absolutely, we'd agree to continue it until they get everything with ink on it.

THE COURT: All right. That one is continued as well.

All right. Mr. Manus

MR. MANUS: Your Honor, Teddy Manus, for State Plastering and to start with State Plastering's motion to compel to the Plaintiffs was not simply for Centex's settlement; it was for any and all settlements. And I think some of the other subs will have, that are still in the case, will have some of the same arguments. Mr. Hildebrand raised the issue of the twist

of the assignment, which is more than a twist, I think it's a critical part of this case as to why this is important. Many, many, months ago, it wasn't last week, Centex settled with the Plaintiffs and did not disclose what that settlement was for. They are the general contractor, seller, developer of this project. As you heard, the architect is also settling, a number of other parties have settled. There are five buildings involved in this project and there are different subcontractors that worked on different buildings. And in fact, one of the buildings, Building 2, most of, I believe, maybe not all, but I think the general contractor, the architect, the brick mason, the stucco sub, the roofer, are all out on Building 2. The settlement amounts, who has settled, the terms, what's been assigned, are gonna be critical in preparing our defense in this case because there's arguments from Plaintiffs that this is a joint and several case that's going to be argued because it was before 2005 and there are gonna be numerous arguments by the Defendants that if I only worked on Building 1 or Building 3, that I'm not subject to the entire judgment. So, it's not a simple matter to waiting till the day of trial and hearing that Centex paid X and that we get a setoff for X; it's a lot more complicated than that. Additionally, this assignment issue is important because Centex has pled a reputational damage. We don't really know what the terms of the assignment are, but if

Plaintiffs are gonna be contending to assert claims against a Third-party Defendants, I mean against the direct Defendants that were actually Centex claims, we need to know what we're being sued for. We're sitting here two weeks away potentially from trial, we have no idea exactly what we're being sued for. We know in negotiations there's been claims that the Plaintiffs are suing us for Centex's claims and their own direct claims, but we don't even know what they're for. There's no evidence in the record as to what Centex's independent damages were and what they actually assigned, but those are all critical issues. This is not like Cypress Bend where it's simply a matter of setoff. It goes directly how we are going to defend our cases, how we're gonna to put up our evidence in this case, Your Honor.

Oh, and if I could, one other point, Mr. Hildebrand has raised the issues of not wanting this information to get out and what effect it may have. What I would say to that is Plaintiff's counsel in this case is Plaintiff's counsel in the other six cases that are under negotiation so they know Centex has paid. Bobbie Wylie who had the Edgewater case knows what Centex paid. So, I'm not sure exactly by allowing the Defendants that are directly implicated to know exactly what was paid and the terms, how that somehow would affect third parties. Your Honor, could easily issue a confidentiality order, allowing us to use that information and not disclose

it. I don't know why disclosing it to us would somehow cause problems to other boards out there that haven't potentially brought cases. That doesn't make sense to me logically and maybe I'm misunderstanding the argument.

THE COURT: Yes, sir?

MR. ROSS: Your Honor, Jeff Ross, for Martin Masonry. I'd reiterate the arguments already made. I had one additional point that, pursuant to rumor, Centex has assigned their claims over, but there's some question about whether attorneys' fees and -- remain. I had heard that AI had covered the attorneys' fees, but I don't know if the attorneys' fees are still a viable claim being presented over against the subcontractors for the Plaintiffs. So, we too would like to see the terms of the settlement so we know what claims we are defending.

THE COURT: All right.

Ms. Blundy?

MS. BLUNDY: Your Honor, I would simply defer to we've agreed to enter into a confidentiality agreement with Centex and we also agreed to join in their motion to put under seal. So, Your Honor, we would just defer to whatever Centex and this Court would like us to with regard to the settlement. We obviously will disclose whatever Your Honor tells us to disclose.

THE COURT: All right. Mr. Hildebrand?

MR. HILDEBRAND: Your Honor, on that issue, addressing Mr. Manus' points that they don't know what the claims are and what has -- what claim Centex might have. I think that they do because this case was -- went on for a long period of time, I think a couple of years before we settled, and all of Centex's claims against those subcontractors were fully discovered. And I'll be happy to stipulate again that whatever claims we had, I'll have to look at the settlement document, but I believe I speak correctly that it's very simple, any claims that Centex had relative to the parties that have spoken here today, have been assigned to Plaintiffs. So it's simply the Plaintiff stepped into the shoes of whatever claims Centex had.

So, it's important to us also for the subcontractors -- the confidentiality provision is most important to us relative to third parties and members of the public and members of these other condominium associations that they not know what Centex paid, but it's also important because a lot of these subcontractors are involved in some of these other cases and we would prefer that they not know what, what we paid. We stepped out and, and settled these cases and, and I don't know what reason they would need to know what we paid except for an argument for a setoff, which would be at trial. They know what their exposure is, they know what the damages are that have been claimed against them and they know that they're

gonna get the benefit of a setoff at some point in the future.

So, in response, my, my -- ask that we not be required to disclose it. I've already stipulated what about the assignments. If we are required that it be done at trial and that in any event, if it's -- when and if it's required that the settlement amount be subject to appropriate confidentiality order.

MR. MANUS: Your Honor?

THE COURT: Yes, sir.

MR. MANUS: It's one thing to say that we know that Plaintiff stepped into the shoes of Centex. That's fine. I know a complaint was filed, I know the general allegations of contractual indemnity, breach of contract, negligence and breach of warranty have been pled, but there is no evidence in the three years of what Centex's reputational damage was. There is no damage claim that has been testified by any Centex witness as to what their damages are and what has been assigned and what is seeking to be recovered at trial by the Plaintiff stepping into the shoes of Centex. So how do I know two weeks before trial as to what I'm gonna be defending, Your Honor. That, that's -- therein lies the problem.

MR. HILDEBRAND: Your Honor, if there's no evidence that's been introduced, if they have not pursued that through discovery previously, then that's not something that I don't see how on earth that can been established at trial. But to

argue that no evidence has been produced, all we would still simply say is, okay, we assigned whatever rights we had. Maybe we didn't have reputational rights, I don't know. But whatever we had, we assigned to the Plaintiffs and then it would be the Plaintiffs to figure out whether they've got any evidence, and Mr. Manus can talk to Ms. Blundy about whether -- what those rights would be.

MR. SEGUI: And to the extent Mr. Hildebrand doesn't have an issue with this because I have not -- we have not discussed this with him, but I would be willing to stipulate on the record if it will help things, that we would abandon any claim for reputational harm to Centex as part of the side claims that we would be proceeding moving forward if that would help.

MR. MANUS: That's a good start.

MR. SEGUI: It hits the conditional offer.

MR. ROSS: Your Honor, the whole point of discovery is to level the playing field and we're not going to trial by ambush. In this situation, the Plaintiffs have knowledge, the subcontractors do not with regard to the settlements and the amounts, who paid what and the various agreements. Now we're trying to, from the simple standpoint, to try to level the playing field here. It still doesn't answer -- Mr. Hildebrand stood up earlier and said a few things. It doesn't answer my question about the attorneys' fees. Are we defending against the attorneys' fees or has that been taken care of by the AI

claims, which is in theory not part of this case. And we need to know the answer whether we're defending against that or not so that we can properly evaluate it.

THE COURT: The, the issue of attorney fees is -- what's the status of that or assignment of attorney fees ---

MR. HILDEBRAND: Your Honor, there are -- on some aspects of the -- this gets a little more complicated, but we have separate coverage counsel that has filed a declaratory judgment action over all these cases that is pending that where Centex has additional insured rights against various subcontractors because we were named as an additional insured under its policies. So, for those defense costs that we -- Centex has as an additional insured, that's something that Mark Boyle and Amanda Blundy in the dec action have retained to argue against those insurance companies. So I, I know that in this action, we are -- we are out, we've settled with the Plaintiffs, and we're not pursuing any claims, we're not -- we do not intend to be a party any further. But there are certain matters where we have -- where Centex has retained its additional insured rights, which would include the -- those attorneys' fees that have been expended in the defense and that's something that I -- again, that I would be happy to disclose to, in agreement with their motion, that I'd be happy to tell them which of the claims Centex has retained its additional insured rights against them.

THE COURT: All right.

MR. ROSS: I'm not sure I follow. Are they pursuing claims for attorneys' fees in this lawsuit or not, that's really what I'm trying to get to and I'm not sure I got an answer there.

MR. HILDEBRAND: I can tell you that Centex is not, Your Honor. We, we are out -- from our perspective, we're out of the case. We have no -- we are not planning to attend trial and have no further involvement with this Court in the trial that's coming up in two weeks.

MR. MANUS: If I may, Your Honor?

THE COURT: Yes, sir.

MR. MANUS: The other question that comes to mind from the remaining subcontractor Defendants that may be trying it, is I don't know what the status of Centex and Plaintiff's settlement documents are, but typically, we will see allocations within those documents, Centex's amount. And I understand that they can do that under the law, but the question of whether those allocations are bonafide are important and those are things that we should know about prior to trial in order to prepare our case. If they intend to, for instance, take 70 percent of Centex's settlement funds and put it all in the Building 2 bucket, so there's more damages for the remaining four buildings, those are things that the remaining active Defendants should be entitled to and it'd be

prejudicial not for us to have that information and for us to just get a simple number at trial, doesn't allow us to do what the Court allows us to do to determine if it's a bonafide allocation. That can't be something that's done afterwards. There's just a number of reasons as to why all of this information is relevant to the active Defendants trying to defend this case and it's prejudicial if we don't get it, compared to the fact that Centex just has some reasons why they don't want to give it. And this also Your Honor goes to the other subcontractors' settlements, not just Centex's settlement; we want the subcontractors' settlements as well.

MR. HILDEBRAND: Your Honor, what I've just talked to Mr. Chakeris about is that -- and I don't intend to waive our -- by agreeing to trying to move the proceedings forward and divulge what I think is really not confidential by waiving our rights under the entire agreement, but I -- I tell you that the agreement was not to have allocations and I've just talked to Mr. Chakeris and there are not allocations; it's just a general lump sum that's being paid to the Plaintiffs.

MR. CHAKERIS: Your Honor, Johnny Chakeris. That's correct. And, to touch on one of Mr. Manus' issues, we are being assigned Centex contractual indemnity claims, which we will be pursuing at trial that do not include attorneys' fees.

THE COURT: All right. So, with regard to -- that leaves, Mr. Manus, your argument that you are entitled to this

for setoff purposes based on what's been conceded here and what's left as an issue.

MR. MANUS: I still think it goes to how the case is gonna be tried because different -- because of the evidence that's gonna come in as to the different buildings, different subcontractors on different buildings, because it's not a matter where every remaining subcontractor was on every building and everybody's gonna be jointly and severally liable. So, it is going to matter as to what other subcontractors, architects, paid for certain buildings and I think that's all going to be relevant.

THE COURT: You want the jury to know what was paid or you just want ---

MR. MANUS: We may want to put -- we may want to put that in.

THE COURT: What type settlements were paid?

MR. MANUS: I hope, yes, sir. And it's certainly -- it was done in the St. Francis Hospital case and it's just a strategic decision, whether it will be a good one or a bad one, I don't know, but I'd like to have the opportunity to think about it, if it makes sense.

THE COURT: Anything else?

MS. BLUNDY: Your Honor, the only thing ---

THE COURT: On this issue?

MS. BLUNDY: --- well the only thing on this issue is

obviously Plaintiffs -- I think a lot of these issues are pretty much can be decided on the eve of trial as far as setoffs and how the case is gonna be tried and that's the only thing from the Plaintiff's perspectives of ---

THE COURT: He said he needs to know it to prepare for trial or to strategically decide how he might want to try it.

MS. BLUNDY: I don't -- I certainly don't think the defendants are entitled to know the trial strategy of setoffs and -- four weeks before trial. I think that's really something a little bit closer.

MR. ROSS: Your Honor, one last thing. By way of example, if they put up $7,000,000 at trial and they've collected 6.5 already, that exposure is a lot smaller, $500,000 than say three-and-a-half million and we would evaluate our case a lot differently if that is the case versus we've got a 3.5 or 4' or $5,000,000 exposure.

THE COURT: So, you have a right to know for settlement purposes?

MR. ROSS: Yes, sir, and it's at the Court's discretion. We're just asking the Court to grant that to us.

THE COURT: All right. Well, we heard this issue yesterday with Mr. Steven Brown seeking the same thing and that was taken under advisement. I'll take this one under advisement as well.

MR. ROSS: Thank you, Your Honor.

THE COURT: And you all are welcome to submit anything additional that you might want me to consider, submit it in writing.

MR. MANUS: Thank you, Your Honor.

THE COURT: All right.

MR. ROSS: Your Honor?

THE COURT: Yes, sir.

MOTIONS:

MR. ROSS: Jeff Ross again for Martin Masonry. Centex, Mr. Hildebrand and I have a couple of outstanding motions. I thought if the Court would indulge us, it may be worth getting out of the way since we're both sitting up here right now.

THE COURT: Okay.

MR. ROSS: In short ---

THE COURT: Is this in the case he settled on or ---

MR. ROSS: Yes, Your Honor.

THE COURT: Okay.

MR. ROSS: It is.

THE COURT: He said he's out of it. He said he's through.

MR. ROSS: He's still in the case, Your Honor. He's not out of the case yet.

THE COURT: Okay.

MR. ROSS: But, Your Honor, here's what it comes down to. Centex has retained two experts; one is the liability expert

and the other is a repair contractor. Both of these experts have issued reports in the case. The liability expert has been deposed for a day already. I did not get to ask questions. In fact, most of the other parties did not got to ask questions. I've asked to be able to depose these two experts. I've served the notice. Mr. Hildebrand and his crew have filed a Motion to Quash. And given the breadth of discovery, I would like to be able to get the opportunity to be able to depose them to see what they say about their reports. And it does not necessarily have to be admissible at trial, but at a bare minimum, I'd like to understand why they're issuing reports, why they chose to make the test cuts where they did, and then I can give that information to my experts to further evaluate. So I'd like the opportunity to depose them and I'm not quite sure why I'm not allowed to do just that.

THE COURT: All right. Mr. Hildebrand?

MR. HILDEBRAND: Your Honor, what happened was, while we were actively defending the case and we were in the cross hairs as a Defendant, we hired our own defense experts to defend against the claims of the Plaintiff. We had a liability expert and we had a damages expert. We paid them a lot of money and spent a lot of time and effort to getting them ready for trial. Those same experts are working with Centex in these other matters. The -- now that we've settled,

we have no intention, obviously, of calling those witnesses; we're out of the case. We're not gonna call them. So, I would withdraw them as testifying witnesses because we're not gonna have them testify. At most, they were consulting witnesses at this point. I think that under Rule 26, in this instance, all the -- all other parties would be able -- would be entitled to get would be the facts that consulting experts have. And in this case, Your Honor, the -- all the Defendants and the Plaintiffs have subpoenaed the records of our experts and we've given them all the documents, they've got all the photographs that we've taken. All of the investigations that we had, we gave all the other parties notice of and they had their experts there at the same time ours were. So I -- what I think -- what, what Mr. Ross is actually trying to do, is he wants to use the experts that we paid for and the time and effort to -- he wants to get them for free, and I'm saying, no, you can't have them. It's not appropriate for you to call our retained experts. You got all the facts; use your own experts.

THE COURT: Mr. Ross?

MR. ROSS: Your Honor, Centex got the benefit of having paid their experts and we're not asking to get them for free, we're willing to pay them their expert rate. Alternatively, they are still fact witnesses here. You know, why they chose to cut the buildings where they chose to cut them. I'm not

even gonna ask them to allocate liability among the subcontractors. I just want to know their positions, and I can read the documents just like everybody else can, but that's why you depose these people, so you understand what their position is.

The other side of this would be what typically happens in these cases, is the general contractor goes ahead and hires a liability expert and hires a repair contractor to kind of spearhead the defense and all the subcontractors fall in line behind and everybody sort of joins together behind the defense expert and the defense repair contractor and that's sort of what's trying to happen here. To go the other way and make every Defendant in the case hire their own liability expert and their own defense contractor, well, sure, it could be done, it doesn't make a lot of sense to do that and that's not what has happened historically. So, this is a case where we would like to continue to rely on the opinions that have been created and these guys have put reports into evidence. At least one of them has submitted as a -- as a document deposition. They've opened the door to allow us to question them. As part of my motion, Your Honor, I've asked to amend the scheduling order and the purpose of that was in the event the Court rules against me, I'd like the opportunity to amend the scheduling order so I can name my own expert and we have, in fact, already done that. We've identified another expert

and in the case that if does rule against me here and I'd like the Court's permission to use that expert if it rules against me on the first issue.

THE COURT: All right. What's the defense's position as to his alternative?

MS. BLUNDY: Your Honor ---

THE COURT: The Plaintiff's position ---

MS. BLUNDY: The Plaintiff, there's several things Mr. Ross said that I just want to -- Martin Masonry has named three experts. One of the experts was named timely and when you decided to set this case for trial a couple of months ago, last week Mr. Ross named a new expert. So, obviously as part of our trial motions, we are gonna have to grapple with what we do with that.

Defense -- all the defense team had opportunity to go out there and so Mr. Ross has kind of hung his hat on the fact that they want to find out about where Centex's expert did cuts. Centex's expert did not do destructive testing. So, all Centex's expert has done is the same thing all the rest of the experts have done, which is to go out to the project and visually look around.

I mean, we don't really have a dog in this fight, but we would absolutely -- I mean, this case is up for trial in three weeks and we were gonna be up the day after Labor Day but, Your Honor, I believe there was some scheduling issues with

the Court.

THE COURT: Yeah. Well, I was assigned in two places.

MS. BLUNDY: Well, I know. No, we appreciate ---

THE COURT: I wasn't assigned here; I was assigned there.

MS. BLUNDY: We appreciate you even getting us on the schedule as a backup. So, I think that that is what -- we just don't want the scheduling order amended because we're really far down the line and the case has been going on for a couple of years.

Thank you.

MR. ROSS: Your Honor, I'm not asking for an -- I'm just asking for the right to name the expert. We've already named him, and by the way, Plaintiffs have served deposition notice on this particular expert already. So one way or the other, Plaintiffs have noticed both of these experts, there's no prejudice to anybody. We'd like to be able to go forward with at least one of them.

THE COURT: All right. Well, what's your preference, Mr. Ross; which one do you want?

MR. MANUS: I can't -- Your Honor, I can't speak for Mr. Ross. The reason he's hesitating is because there are a number of Third-party Defendants that are in this same circumstance and we may not all agree. So, I've also named -- I'm sorry for sitting down as I'm talking to you, Your Honor. I've also named an expert who is the same expert that Mr. Ross

has named. So, it's going to impact I think either three or four parties that are in this same circumstances.

THE COURT: Many folks want to name more experts.

MR. ROSS: Have already. They've already issued their reports. And what it is, Your Honor, is our liability expert that was named a long time ago, there was never a notice for a deposition, has not been deposed by Plaintiffs, issued a amended report, which has a scope of repair, and then there's also a repair contractor, Justin McCormick of Bearden & Associates that has issued a repair estimate for that repair scope. That has all been produced to Plaintiffs and those were the deposition notices that Mr. Ross and Ms. Blundy were talking about that are pending.

I intend, if Your Honor allows me to go forward with my liability expert, Mr. Barber, and Mr. McCormick as my repair estimator and we'll try this case assuming you will allow that.

THE COURT: All right.

Sir?

MR. ANDERSON: Your Honor, excuse me for standing up in the back. I did not -- I also have named the same experts and really what we've done is Mr. Barber was named a long time ago. But the contractor and repair estimator is the newest. And I, I think that he's timely, so I would dispute their claim that he may not be timely.

THE COURT: Mr. Anderson?

MR. ANDERSON: I'm sorry. J.J. Anderson representing Coastal Plaster. I apologize Your Honor.

THE COURT: How is Danielle doing by the way?

MR. ANDERSON: She is doing great. She's at home full-time now.

THE COURT: Oh, she's not --=

MR. ANDERSON: Unfortunately for us, she decided to become a fulltime mom for a while. And once you see the kids and how cute they are, I can understand.

THE COURT: He hired my ex-law clerk, Danielle Wigginer. Danielle Beck, whose dad was the sports editor or the tennis editor and the Post & Courier.

MR. ANDERSON: That's correct.

THE COURT: Very great. She was my clerk during the year that I was dealing with all the multi-week things and ended up with Mr. Anderson.

Mr. Anderson says the witness is timely already based on someone else naming him.

MS. BLUNDY: Your Honor, I -- just for the record, I mean I don't -- I don't believe we're here today on the issue of all the untimely named experts. I mean, I just -- the expert deadline was January. It's September, so I'll leave it up the Court whether that's timely.

THE COURT: Yeah.

MS. BLUDY: I mean, it was very untimely, not just -- I'm not calling him on time. I'm fine with the experts and we noticed it, we sent the deposition notice out today completely unrelated to any motion that we're today. I think Mr. Ross just brought all this fact up as he's kind of tying together this Centex expert but, in the alternative -- so, I don't really know what that's about. I mean, I think we're here on Centex's expert, whether Mr. Ross can depose Centex's expert. So if Your Honor would be okay, we'd love to take up the issue of all the untimely experts at a later date or right before trial.

MR. ROSS: Your Honor, my motion says specifically I'd like to be able to use or talk to or depose Centex's expert or in the alternative, amend the scheduling order. And the sole purpose of the language to amend the scheduling order is so I can get a ruling from the Court that we would be allowed to name our own expert, which we did out of an abundance of caution. And as I said before, there's no prejudice to anybody that got the notice out that they can take his deposition and get his position on the matter. It's just trying to get one or the other.

THE COURT: Well, Mr. Hildebrand says you want to get free use of his expert. You seem to, to say that you want him for a more limited basis; you seem to have said that.

MR. ROSS: That is correct, Your Honor. I'm not

interested. Mr. Hildebrand would use his forensics expert, Bob Carter, for example, to assign liability to the various subcontractors. I'm not interested in those opinions by Mr. Carter. Whether or not J.R. Watkins would do that, I do not know. I'm interested in J.R. Watkins' repair numbers. And I -- and as I said earlier, I'm happy to pay them for their time. I'm not trying to get free advice from them. I'm happy to pay for it.

THE COURT: You want his repair numbers. Is that something that's already been produced or ---

MR. ROSS: Yes, sir, it's already been produced.

THE COURT: You want to ask him about it? You want to ask him about what's been produced?

MR. ROSS: I'd like the opportunity to, Your Honor, and that's what it came down to is I'd like to talk to both these guys and see where they stand on the issue. That's the purpose of the deposition.

THE COURT: We're dealing with more than one person now, more than one expert you want to ---

MR. ROSS: I'm sorry, Your Honor?

THE COURT: --- you want to -- I thought we were talking about one expert. Now -- you're talking about two experts now?

MR. ROSS: Yes, Your Honor, from the beginning, the motion actually has three experts, one of which I don't care

about. But Mr. Hildebrand has named two. One is the liability expert and one is a repair contractor. So, the liability is Bob Carter out of Greenville. The repair contractor is J.R. Watkins. Bob Carter has given half a deposition already and it was agreed that the deposition would remain open. Both experts have issued reports and we have not yet talked to Mr. Watkins.

MS. BLUNDY: Your Honor, just real quick, I don't know if this will help ---

THE COURT: All right.

MS. BLUNDY: --- later motions. We'll go ahead and agree that the Defendant's experts are timely. They've been named as of today and as long as we don't have to have Centex's expert deposed -- I mean, they're not in the case anymore so then I think it gets complicated, whose expert are they, whose paying for it. So can we just go -- I mean, if it helps that the Plaintiffs go ahead and consent to all the other Defendant's experts that they've named these past couple of months.

MR. ROSS: That would be great, Your Honor.

THE COURT: All right. Well, the issue is resolved.

MR. ROSS: Thank you.

THE COURT: Very good. He will not take your experts, but the other experts retained.

MR. HILDEBRAND: Thank you, Your Honor.

THE COURT: All right. What else do we have?

MOTIONS FOR SUMMARY JUDGMENT:

MR. SMITH: Your Honor, I've got a short summary judgment motion.

THE COURT: Okay.

MR. SMITH: Short as they can be. Mike Smith for Dunn Plumbing.

THE COURT: Now, the order I got from the appellant court, is a speedy ---

MR. SMITH: Yes, sir, they denied the rehearing.

THE COURT: And that was -- is that the one Stacy Stanley was on?

MR. SMITH: Yes, sir.

THE COURT: And I granted summary judgment ---

MR. SMITH: You granted summary judgment in that ---sir.

THE COURT: --- and it was affirmed?

MR. SMITH: It was affirmed and then the court of appeals denied the motion for rehearing.

THE COURT: All right.

MR. SMITH: Your Honor, this is a case -- and I'm almost embarrassed to have to stand up here and talk to you about with all these millions of dollars. My client actually constructed the pool house or did the plumbing in the pool house for a grand total of $5,400. That's what he got paid. When the Plaintiffs brought this complaint in 2014, they did

not initially name Dunn Plumbing as a party. All of the Defendants that were named by the Plaintiff originally were for the building envelope or the exterior of the walls, the framing, things of that nature. When Centex got involved in it, they amended -- they answered the third amended complaint and filed cross claims and then a third-party claim bringing in all the subcontractors. That's when my client got involved.

I -- once I got involved, I sent interrogatories to both the Plaintiff and Centex, and a request for production of documents to each of those parties. And what they did was they provided me -- Centex provided me with their construction file, 30,000-plus pages. And going through that documentation, it was discovered, which -- and this document is attached as Exhibit 1 to my memorandum, it indicates that Dunn Plumbing did the Harbour Cove pool, pool house and it shows the contract price for $5,400. That's Exhibit 1 to my memorandum.

THE COURT: What date did you file the motion?

MR. SMITH: It's July 19th of 2017 and I've got the -- if you need it here?

THE COURT: She's getting good on this finding stuff. She doesn't have it yet.

MR. SMITH: If you thumb through the ---

THE COURT: Not yet. All right. Thank you.

MR. SMITH: You have to thumb through all that, I mean it's difficult to find it.

MR. SEGUI: Can I call time out for thirty seconds?

THE COURT: Yes, sir.

MR. SEGUI: Can I talk to you in the hall for a second?

MR. SMITH: Unless it's a zero, I've got nothing ---

MR. SEGUI: Yeah, that's what I want to talk about.

THE COURT: All right. I need time to find this anyway. We'll ---

MR. SMITH: I don't mind handing up the exhibits as I talk about them, Your Honor, I just need to refer to them.

THE COURT: Oh, okay. Thank you. I thought he wanted to talk to you in the hallway.

MR. SMITH: Well, he did, but he wants me to pay money.

THE COURT: Okay.

MR. SMITH: Your Honor, on the Exhibit 1 that I'm handing you is the document produced by Centex through their discovery. Their base numbers at the bottom. It indicates that we did the pool plumbing for $5,400. Exhibit 2, to my memorandum, is a series of documents from Centex's discovery responses, which indicate that Buildings 1, 3, and 4, and 5 of the five buildings -- so four of the five buildings were plumbed by Vance Johnson Plumbing. The Building Number 2, was plumbed by, and it may be attached to that, it was plumbed by ARS. So of the five buildings, Buildings 1, 3, 4, and 5 were

plumbed by Vance Johnson Plumbing. Building 2 was plumbed by ARS. Again, Dunn Plumbing plumbed the pool house. So, then I sent interrogatories to each of the parties. In the Plaintiff's answer to interrogatories, they essentially said when I asked about the different problems with Dunn Plumbing and tell me how they were negligent, so forth and so on. They said that, well, you're asking for improper expert opinions and essentially refer to our expert's report. Centex indicated pretty much the same thing in their answers to interrogatories. Again both of those, answers to interrogatories are attached to my memorandum. And nowhere did they say anything about the pool house and nowhere did they say anything about the plumbing. So, then we did the deposition of Russell T. Meese. Now, Russell T. Meese with RTM Engineering is the Plaintiff's expert. That's the expert that they say -- they refer to in their answers to interrogatories. I've got a 148-page report and, in that 148-page report, the pool house is never mentioned. In fact, in the beginning of his report, he only references we're talking about five matching buildings and none of my repair scope goes to the mechanical systems of which plumbing is a part of the mechanical. And he talks about there are intrusive observations performed on the five buildings. He never references the pool house.

Then in his deposition, we asked, did you observe or

investigate any issues related to the mechanical, electrical, plumbing aspects of Harbour Cove? Answer, no. He was re-deposed after I filed my summary judgment motion, he was re-deposed on August the 11th of 2017 and he was asked, did you investigate any of the plumbing since his first deposition? And his answer was, my opinions did not change. Do you have any opinions today regarding the plumbing? No, it hasn't changed. So those are their experts -- I don't necessarily think you need the report, but I'll provide you with his deposition testimony.

In the Plaintiff's expert damages repair estimates, there's no plumbing allocations. And when asked about the plumbing by the Rule 30(b)(6) designee for Centex, when he was deposed on August the 22nd of 2017, again, after my motion. So, they've got time now with my motion being filed, to go ahead and ask questions about the pool house. It says this is the 30(b)(6) designee for Centex. He said it looks like Dunn Plumbing just did the pool house. And when asked, do you have any reason to believe that they would have done any work or installed any plumbing in the other buildings other than the pool house? His answer is, I don't unless it's referenced in any of the documents, which I haven't reviewed every single document, but no, I haven't any additional knowledge. When he referenced his own internal documents, it references the buildings and it references the plumbers that did each

building and, lo and behold, the pool house has Dunn Plumbing and the other five buildings are the other two plumbers that I referenced, which are the same as the documents there.

The allocations of payment for Dunn Plumbing, those payments total the $5400 on the original document that I provided to the Court. And then last night, I got the document -- and I understand that Charleston counsel may not be familiar with the fact that we're under the pilot program and that any responsive memorandum or any reply memorandum has to be done within 30 days of the filing of the initial. Notwithstanding that, I went ahead and asked my client if he would be kind enough to talk to me about this. And what he did was, he said, Mike, all I did was the pool house. I said do me an affidavit to that effect. His affidavit states that he did just the pool house, that he did it according to the plans and specifications, that he did it in accordance with all the building codes and, and got approved by all the requisite governmental entities.

The only thing in the record is that my client did the pool house after three years. The only thing in the record that says pool house is anybody asking questions about it. There's nothing in this record that says there's anything wrong with the plumbing in the pool house, and I believe that my client is entitled to summary judgment for that reason.

THE COURT: All right.

Ms. Blundy?

MS. BLUNDY: Yes, Your Honor. Thank you. I think we can also make this really simple for you. We did not bring claims against Dunn Plumbing on behalf of the Plaintiffs. When we settled the case with Centex, they assigned us their claims against Dunn Plumbing. Obviously, we have not taken any effort to prosecute any claims against Dunn Plumbing until this summer. At that time -- and I didn't bring the email just because I'm sure Mr. Smith would agree with me -- end of July, early August, I went to go set Mr. Dunn's deposition. It was set for August 11th. On August 10th, Mr. Dunn or somebody from Mr. Smith's office cancelled the deposition and said that he was undergoing surgery. So, of course, we didn't, you know, press it. And it has been reset before Your Honor set these hearings for next Wednesday.

Now, obviously, and I just -- I'm seeing this affidavit right now. My question to Mr. Dunn was going to be, did you do anything -- I Mena, we've had some plumbing leaks out there, not at the pool house, on other buildings. Are there any -- have you done work? I mean, I think I have the right to ask. I mean, obviously, motion for summary judgment, discovery has to be fully and finally completed. With that being said, Your Honor, if you want to hold this motion in abeyance until after the deposition, if Mr. Dunn in fact confirms that, then we'll just go ahead and stipulate to their

dismissal and you don't even have to rule. I mean ---

MR. SMITH: That's why I had him do the affidavit.

MS. BLUNDY: Right ---

MR. SMITH: It says in the affidavit, all I did was the pool house.

THE COURT: She wants to be able to use her advocacy skills to really, really ---

MR. SMITH: All due respect, this case is three years old ---

THE COURT: --- twist and turn that question.

MR. SMITH: If they had even thought there was a plumbing issue, it could've been brought between now and 2014. I don't care what they did with Centex whenever they settled with Centex, but there were depositions that were done after I filed my motion where somebody could have said, there's a pool problem and the pool problem is the plumber. It's not been done in any expert report.

MS. BLUNDY: And, Your Honor, our point was, I'm sure Centex would not have brought a claim against Dunn Plumbing unless they thought there was an issue.

MR. SMITH: I beg ---

MS. BLUNDY: I mean, I'm certainly not -- I'm gonna defer to ---

MR. SMITH: --- if Hildebrand was here, I'd put him under oath.

MS. BLUNDY: I think that so much happened ---

MR. ANDERSON: I'll testify that we don't file spurious claims, Your Honor.

THE COURT: Guilty.

MS. BLUNDY: And, Your Honor, I think that that's what I'm saying. We'll go ahead and just dismiss them out. I mean, I -- if I would've seen this before today, it would've been -- but we've been trying to set his deposition. So, Your Honor, it's -- we don't want you to have to spend your time on this.

THE COURT: All right. So you agree with the motion?

MS. BLUNDY: Your Honor, may I confer to -- Your Honor, would you allow us to take his deposition?

THE COURT: Well, I think that -- if the deposition was already scheduled prior to my setting this hearing -- I think we set the hearing about 10 days ago.

MS. BLUNDY: Yes, Your Honor, it was set for August the 11th, the deposition was, and they cancelled it. And, I mean, obviously ---

MR. SMITH: Your Honor, they cancelled it because he was in the hospital.

MS. BLUNDY: And obviously, we're fine with that.

THE COURT: Well, I'll defer ruling until after the deposition and, if someone wants to submit something additionally based on that deposition, you can do so. If

nothing happens, then just remind me that it's nothing new --
-

MS. BLUNDY: Yes, Your Honor.

THE COURT: All right. Okay. What else do y'all have for me today? I'm not gonna wait around to hear from anyone.

All done, okay.

Yes, sir, Mr. Anderson?

MR. ANDERSON: Thank you, Your Honor. I have a motion for summary judgment, and if I may hand up a notebook.

THE COURT: Yes, sir.

MR. ANDERSON: It has the motions, the exhibits, and the cases in it. I don't know -- I wasn't sure exactly what your setup was gonna be screen-wise, so ---

THE COURT: All right. All right, Mr. Anderson?

MR. ANDERSON: May I proceed, Your Honor?

THE COURT: Yes, sir.

MR. ANDERSON: Okay. Your Honor, we, we have filed a number of summary judgment motions. The first one that we'd like to take up is the statute of limitations and, of course, if that is granted, then the others would fall by the wayside. But, the Plaintiffs originally filed this suit November of 2013, November 14th of 2013. And under our current statute, the, the trigger date by which they should have -- the trigger date for discovery would be 2010. Actually, they found out eight years prior to the filing of the complaint that there

were problems with these buildings. And in 2006, they -- the problems extended to window leaks, stucco, and leaks around the brick, and then also a kick-out flashing issue at one of the balconies. We have outlined for you or provided to you testimony of the HOA's 30(b)(6), the president, who identified in verified notes previous to her tenure, but her being the 30(b)(6) representative, could testify to the history of the corporation. The -- during the 2006 issues, which started with a termite infestation investigation, the HOA hired experts to investigate, and they investigated and found problems and actually performed work on Building 5 during that time period and that the HOA had knowledge of the water intrusion and stucco issues at Building 5 as well as Building 2. Building 5 repairs were done both to some of the interior work and then also to the -- to the stucco itself. And during, during that time period, they investigated -- they began investigation and they asked questions of Centex and basically went to the builder and said, we think that -- we need to know whether or not these problems are with the building or if it's just a maintenance issue. And Centex, of course, came back and said, well, it's a maintenance issue; we wouldn't give you a bad building. And then -- but then they went ahead and proceeded and got the, the expert.

In looking at the cases that we have cited, the exercise of due diligence and notification of a problem, tolls the

statute at that point. So the statute was tolled for them in 2006. And although we did not cite it specifically in our brief -- and you know, what a brief on the statute of limitations in -- without citing *Dean v. Ruscon* would be -- would be worth, but we omitted that. But in Ruscon it talked specifically about the issue indicates it's in -- speaking about the Graniteville case. The court of appeals held that when an injury requires an expert to determine its cause and an expert is retained, there is evidence that the injured party had exercised reasonable, reasonable diligence and the statute of limitations should be tolled. So, it's a nature trigger when you hire an expert. And, so they have taken conduct that would normally would have tolled the statute of limitations, but then did not follow through with it and just let it sit, and then waited eight years to file suit. And, you know, we believe that on that basis, that the -- a dismissal -- granting of the motion of summary judgment for the statute of limitations is the appropriate remedy.

In addition, in response, we got a response about, I think, 6:30 this morning from the -- from the Plaintiffs on our motion and in that, in their response, they talk about -- complained that the homeowners did not know that they were facing a problem with the buildings and they just thought it was, was routine maintenance. However, again, going back to Ruscon and the following cases that we have cited, that the

fact that they don't comprehend that the original problem would cause the damage that it has, is not relevant to the examination of the Court in that they don't need to know what the end result is going to be. But based on that, we would ask you to grant summary judgment to Coastal Plastering -- Plaster, excuse me, based on the statute of limitations and the other arguments that we have made in our brief.

Your Honor, I don't know if you want me to address the warranty issues or reserve that till ---

THE COURT: Let me get a response on the statute first.

MS. BLUNDY: Yes, Your Honor. Amanda Blundy, on behalf of the HOA. I wanted to obviously clear up some of the timeline. I know Your Honor knows case law and I'm sure you know Mr. Anderson's case law as well. I mean, basically, the question of whether a statute of limitations, especially on a discovery rule or inquiry notice, if there is a question of fact, and I think there's a lot of scintillas going on here, that it is for the jury to decide. And I'm just going to show you some of the exhibits Mr. Anderson is talking about.

First and foremost, Your Honor, may I hand up our brief? We filed it last night with the Court.

THE COURT: Yes.

MS. BLUNDY: Thank you. Mr. Anderson has a copy. Let's talk about the report that was allegedly obtained from an expert. Lightning Termite and Pest Control called an engineer

to investigate one unit's termite damage. Nobody from the HOA hired an expert. In fact, Your Honor, if I may show you, this is Exhibit H to my brief. There is a facsimile from Lightning Termite and Pest that hires CSC to look at one unit. In June 2006, CSC comes out there and evaluates one unit saying yes, there could be some water intrusion at this window. At that time, there is an email from the property management company, or Lightning gets in touch with the property management company and says, listen, you know, let's call Centex about this. Greg with Centex talked with the property manager and Lightning. There is -- I have a letter from Centex after the CSC report from June of 2006 that, in fact -- and this guy "is Centex's top quality inspector" that says, we have reviewed Unit 513 at Harbour Cove, we decline all responsibility as it is a maintenance on the exterior building. When a -- the homeowners are going to look. I mean, at this point, this is there esteemed builder that built these beautiful condominiums for them. This is, you know, one year after some of the certificates of occupancy. Are they supposed to not -- I mean, they felt it was maintenance and it's one unit, Your Honor. Does that leave -- and the question of fact here is, does that leave the entire homeowner's association when they have been told there is some maintenance issues on one building, that they should full fledge have a construction defect lawsuit? Absolutely not, Your Honor. That does not

impute that kind of knowledge, and I think that would go to the jury.

There has been some things brought up by Mr. Anderson and some of the other attorneys, and basically it all goes back to some isolated events over five buildings, this very large project, Your Honor, I touch on all the issues in my brief. But overall, Your Honor, it is not the property -- it's not the homeowner's association that hired an expert. Even if that -- if that were the case, we have Centex telling them it was maintenance on one unit. I certainly think, Your Honor, that is a question of fact for the jury. Your average homeowners in Horry County should not be -- that is not certainly when the statute is tolled, that they are supposed to bring a constructive defect lawsuit.

For Your Honor's knowledge, just so you know kind of when this project -- the CO's on these buildings were 2002 through 2005. So, so when Lightning is out there on this one isolated building, they're fairly new. So, Your Honor, I would just ask -- I certainly would like to address any additional points brought up by any other attorneys, but you know, just to address Mr. Anderson's argument, certainly this does not leave any homeowners association to have to bring a full fledge construction defect case or even investigate it. So, Your Honor, thank you.

THE COURT: Mr. Anderson?

MR. ANDERSON: Thank you, Your Honor. Your Honor, the report, the CSC report came out of the HOA's minutes and their file, and we got it from the HOA organization, not from an individual homeowner. And I believe that if I might, Your Honor, the, the concern of the HOA and I -- I will bring up that -- I have it in rebuttal an email from Wade McCauley. Now this appears in Mr. Manus' package. It was not in my package but she has brought that the HOA was not concerned about these issues. And in it, if I could just read a portion of it, this is from Wade McCauley and it goes to Dennis -- Dennis McCarby (spelled phonetically), left him a message on his cell phone and it was just basically -- or I'm sorry -- anyway -- I spoke with an architect and was advised that all openings should have been flashed at the Tyveks. Did Centex inspect the flashing before the stucco was applied? If so, and if it was installed properly, there should not be a water problem. You will not likely be able to inspect the flashing at this point without tearing off the stucco. Since the stucco is permeable, caulking will not do any good according to my source. The water will penetrate through the stucco from around the caulking. Therefore, we need to make sure that all of these are flashed properly, and it goes on with the additional questions concerning the -- the date of this email is April 5th, 2006. So it just -- it predates the report that we got but was during the same period of time.

And this is from their, their files, their documents.

And, Your Honor, so I think that catching the attention of the HOA, it did, and they went to the extent of not only was CSC hired, whether it was hired through a third party or not, I don't -- I do not think it's important, it's still reported on their property, and then having conversations with an architect who is undoubtedly in most cases, an expert or qualified as an expert. We believe that their knowledge that there were issues at the project is clear and that the motion for summary judgment should be granted. Thank you.

THE COURT: All right.

Ms. Blundy?

MS. BLUNDY: Your Honor, may I just briefly address, Mr. Anderson is talking an April 2006 email with some concerns from the HOA. And, Your Honor, we would obviously concede that Lightning Pest Company sent this to the HOA at some point. I mean, Lightning, when they -- they got this report back, they said it, you know, so there is an email, which Mr. Anderson is talking about from April 2006, that talks about these concerns. June 27th, 2006, the letter from Centex that says it is a maintenance issue and it's one -- I mean, this certainly is -- the HOA is gonna -- and this email they say let's talk to Centex about this. I mean, I think it's, should we talk to our builder about this, and we have the builder saying, it's just a maintenance issue.

Your Honor, this in fact is an issue as to -- I do not believe anybody would believe this would turn an entire HOA Unit 513, after a builder has told them it is simply a maintenance issue, that they should investigate every building.

With that, Your Honor, I certainly think it's a question of fact for the jury, if anything. Thank you.

THE COURT: Ruscon dealt with a building on King Street in Charleston?

MR. ANDERSON: Yes, sir, it did. It was argued by one of -- a member of, now a strong member of the construction bar, Mike Segui on the Plaintiff's side mostly.

THE COURT: I had a case in Calhoun County a few years ago and the -- involving a claim of termite problems and moisture and mold. The guy actually fell through the wall and about six or eight months after he bought a home and he's pushed in mold and moisture and he fell through the wall, and he got it repaired -- I'm sorry. When he bought the home, he had a concern about it and he called the termite folks. He got concerned because he had mold and moisture, and they came and they fixed it. And two years later, he fell through the wall and then so he filed the lawsuit when he fell through the wall. I granted a motion for summary judgment based on his problem that he had immediately after buying that house with mold -- moisture and mold and all that and calling and

complaining. But he didn't file the lawsuit until he actually got injured falling through the wall and, granted the summary judgment and I was reversed by the court of appeals stating that the question of what he knew or reasonably should have known is a question of fact for the jury.

Then the reason I asked about King Street, because over on Church Street, across from the Dock Street Theatre and next to the church, SC&G hired Anson Construction to do some work, and they did some work there and problems with the heavy equipment and the foundation supposedly caused some damage to the church and a lawsuit ensued, and Judge Buddy Nicholson granted summary judgment. And I was asked to sit on the supreme court on that case and we reversed Buddy Nicholson based on there being a material -- general -- a genuine issue in a factual dispute on some of the issues that prevented summary judgment.

And I'm almost convinced that you can't grant summary judgments on statutes of limitations. I'm sure you can, but that's just a small snippet of experience I've had dealing with that and dealing with the, the appellant court's general view that if there is anything tending to indicate genuine issue on these things, it should be dealt with by the jury and not by the Court. So I don't see where it's totally clear Mr. Anderson.

MR. ANDERSON: Your Honor, if I may, one of the motions

following directly behind is very closely akin to mine; it's by Mr. Manus and I didn't know if you made a decision, you wanted to hear from Mr. Manus first.

THE COURT: Well, it might cause him to be shorter, I don't know.

MR. MANUS: I just have a couple of comments, Your Honor.

THE COURT: Okay. Good.

MR. MANUS: I understand where your ruling is probably going, but I would like to hand up to you the email that was just discussed because I feel like it's getting a little bit short shrift of what it actually is.

THE COURT: Okay.

MR. MANUS: This email from April of '06, is an email that was written by the President of the Harbour Cove Board and he wrote it to all of the other board members and he talks about his discussion with Dennis McCarby of Centex, who actually built these things and he talks about himself, the board president, hiring an architect to discuss these issues of concern. And he goes so far as to prepare a proposed letter that he wants to send out that Mr. Anderson read a portion to you and one of the things that I think is very relevant that he didn't read to you is in the second paragraph, he says you can tell us that your company inspected the flashing before the stucco was applied. If there was not

any flashing installed, we need to be advised, so we can get the buildings flashed properly. If water is leaking behind the vapor barrier, then eventually it will show up in the form of mold on the sheetrock. We need to have a conversation about this, having been made aware of this problem by Centex. We all need to be educated as to exactly what was done by Centex, so we can determine what needs to be done. Please call me. This is the board president in 2006 telling all of the other board members that there was concern about water intrusion behind the stucco and improper flashing by Centex and knowing that the only way to determine what occurred during construction is to remove all the stucco. This occurred in 2006 and it's not until 2014 when Mr. Meese is hired that he goes out, does a few test cuts, and then says you got to tear off all the stucco, and that's the basis of their damage claim. But then on top of that, after 2006, there are numerous entries in the board minutes of stucco repairs being done, three years more before the complaint is filed. And in fact, numerous entries in the board minutes where the board members are talking about additional stucco repairs needing to be done, but we're gonna put them off, and they go so far as to get proposals from other contractors to do significant repairs in the six figures. So, they knew these stucco issues potentially were out there and these flashing issues were potentially out there back in 2006. They

talk about it, they put it in writing, they hire an architect, they then actually do some repairs in 2010, and they talk about the need for doing more repairs. And then eight years later, they hire Mr. Meese once the lawyers get involved and he says, you got to tear off all the stucco, you got to tear off -- take out the windows to do just for the same reason what they were talking about in 2006.

So, it is without a doubt that in 2006 they knew there was a question with the flashing. If all it takes in South Carolina to raise a question of fact is if you're going to sue your contractor and your contractor says, I did it right, your problem, and you get to then wait as long as you want, hire an expert and the expert says, no, Centex was lying to you, there were deficiencies all along. If that's all it takes to raise a fact, then I would agree with Your Honor, we don't have a statute of limitations in South Carolina.

THE COURT: When you said they knew, you mean the Plaintiff?

MR. MANUS: Yes, sir, the board members knew, they were talking about it '06, they're hiring vendors to actually do repairs. I cite to that in my brief. And then in their annual meeting minutes, they're talking about the need for doing more stucco repairs, and they we're gonna hold off from doing it well before they ever filed the complaint. In '06, '09, '10.

THE COURT: So, is the question though repairs versus defects or repairs and defects; is that the same thing?

MR. MANUS: I don't think they're repairing things that are not deficient.

THE COURT: All right.

MS. BLUNDY: Your Honor, I didn't think we have to get real bogged down into the documents, but I want to point out to Your Honor, once again, Mr. Manus is pointing to the email from April 2006 where they're gonna talk to Centex. At the point when Centex does write them back an email that says it's maintenance on one building, it does alleviate -- I mean, there is the question of fact for the Court. But Mr. Manus has risen, you know, brought up a couple different things. I think it's a complete mischaracterization of the record and my brief goes point for point of all of the -- there's an affidavit in there from the property management company, it's Exhibit L, that talks about all the various reasons for repairs. I think what the Defendants are hanging your hat on is if you live in a condominium, you can never have a repair. You can't do any maintenance, you can't do any repairs. If a golf ball hits -- I mean these are golf condominiums -- if a golf ball hits the stucco and they repair it, the statute of limitations tolled. There is the burden. They haven't put up any evidence -- and we talk about there needs to be a scintilla -- that these are repairs related to the building

envelope.

In fact, he talks about some stucco repairs and it's an exhibit, six figures -- by six figures, it's $2,200, there was a stucco repair in 2010. And, Your Honor, we actually sent that to the property management company to ask what the repair was made for, and they said, we don't know, but here's all the reasons that stucco repairs can be made. Golf balls, wood pecker damage, extensive wood pecker damage to these units, lawn care, people knocking their weed whacker into the stucco. I just think that they, the Defendants are seizing our repair -- and in fact, to go against that in that argument, I mean, that's to say that homeowner's associations essentially can't do any repairs until -- I mean, it's just an impossible burden that they're placing on a 10, 15 years of a record. There's isolated repairs here and there and, Your Honor, my brief lays out all of the parts of the deposition and the record.

This stucco repair, Your Honor, $2,200 from G.H. Homebuilders. It does not say why the repair was made. It is too -- that is just such a --- I mean, there's a 6.9 million dollar estimate on this project. When repairs are for $2,200, I think that Your Honor, the Court would agree that it just cannot lead a homeowner's association to think we need to have an engineer investigate all five buildings. There is a problem here.

I think absolutely it's a question of fact whether an HOA

can rely on a letter from their building. There are several parts of Mr. Manus' -- and I will put this just real quick on the record. This is a brief that was filed yesterday, Your Honor, that I'm arguing before you. So, Your Honor, there is parts of the record where they're saying the HOA president agreed that there is water damage. Well, she didn't get on the board until 2013, and she's saying yes, there's -- there's things that have gone on since 2013. I think that that's where, if Your Honor looks at the actual testimony and the documents, you will agree that there is certainly a question of fact. Letters from the builder who are talked about as the top Q & A person, spot repairs.

Your Honor, I'd be happy to answer any question the Court has, but I believe that the record is just filled with additional evidence for you to look at.

And lastly, just to satisfy the Court fully, this GH Homebuilders, I, I -- we would be curious why this stucco repair was made for $2,200. So, I went ahead and set up a notice of deposition for him. I sent it out when we got Mr. Manus' -- this has never been raised to my attention. So when we got this, I said let's depose GH Homebuilders and find out why that repair was made. So that is coming up here before trial, Your Honor.

Thank you very much.

THE COURT: All right. Yes, sir.

MR. MANUS: Your Honor, just real briefly. I'm certainly not meaning to focus my whole case on one $2200 invoice. That was one invoice in 2010 that just shows that there were four areas of stucco repaired, but three months after that, on September 24th of 2010, the board is talking about holding off from doing additional stucco repairs, and then a couple of months after that, the president is talking about the objectives of need for stucco repairs. So, I don't think that the board, as they're talking about this, were holding off on doing a golf ball repair. That's one thing but I don't want to focus simply on the stucco going all the way back to 2005 where we started and were talking about this email. The specific email talks about that all openings in the buildings needed to be flashed and they're concerned about the flashing in all of the buildings and that's their board president saying that in '05. They're concerned about water intrusion in all of the buildings, and that caused them to go and hire an architect and talk to an architect about it. Okay? And then after that is when they start doing these repairs, talking about stucco repairs and the one six-figure stucco that I was talking about, there is proposals after 2010 where Plaintiff's board and their property manager actually goes and hires Indigo, who gives a six-figure estimate to do bunches of repairs that are into six figures. So, they clearly knew about it; it's a cumulative, and there are -- I could've cited

20 different things of rotten overhangs, ceiling issues. But, for all the reasons that the statute of limitations are important under our law, Your Honor, when cases don't get filed until 10 and 11 and 12 years later, we don't have the witnesses. Had they brought the case in '06 when they had these concerns, we would've had the Centex witnesses that actually did the work. A lot of these subs would still have been in business, but since they slept on their rights and waited nine years to do it, none of that evidence is there that makes these cases so difficult, which is why the statute of limitations wasn't enacted to begin with Your Honor.

THE COURT: Yes, sir?

Mr. SEGUI: Can I ask for reference to the six-figure?

MR. MANUS: It's the Indigo Homes; there's about three or four ---

MR. MANUS: It's in your brief?

MR. MANUS: It's not in my brief, but it came up in your 30(b)(6) deposition.

MR. SEGUI: I did not see that in the brief.

MR. MANUS: It's not in my brief.

THE COURT: All right. I deny the motion for summary judgment.

MS. BLUNDY: Thank you, Your Honor. Would you like for us to prepare an order or a Form IV?

THE COURT: Form IV is all that is needed on a denial of

a summary judgment motion.

MS. BLUNDY: Thank you, Your Honor.

MR. MANUS: Thank you, Your Honor.

THE COURT: If you'll prepare the Form IV.

MR. ANDERSON: That's as to the statute? I've got some warranty.

THE COURT: Just as to the statute of limitations.

MR. SEGUI: We might be able to work out the warranty stuff. J.J., have you any conversation with anybody about that?

MR. ANDERSON: No.

MR. SEGUI: Just the warranty that -- habitability and all that kind of stuff?

MR. ANDERSON: Right.

MR. SEGUI: Your Honor, may we have a little time out? I might be able to save the Court some time.

THE COURT: All right.

MR. SEGUI: Maybe not; I don't know.

MR. MANUS: Your Honor, and we usually get a chance to -- but all these were kind of filed when you set that -- you know, they -- so, we'd be happy to try work them out now. We usually try to ahead of time of hearings ---

THE COURT: All right. We'll take a few minutes.

(RECESS.)

*******OFF THE RECORED*******

(On the Record.)

MR. SEGUI: Your Honor, I am pleased to announce that we have worked that out. There were four claims that we're gonna agree to withdraw or dismiss without prejudice that would be against Mr. Anderson's client, unfair trade practices act claims, the warranty of habitability, the warranty of merchantability, and the warranty of a particular purpose, fitness for a particular purpose. Your Honor, so ---

THE COURT: All right.

MR. MANUS: --- my client as well. I've got the same arguments.

MR. ANDERSON: We didn't discuss yours during the break, but assuming it's the same and I get no objection from my co-counsel. This is a surprise, but I -- we would agree with that, too.

THE COURT: All right. So who's gonna do -- who's gonna do that order?

MR. ANDERSON: We would be happy to do that.

THE COURT: All right. Mr. Anderson.

Okay. Who is last for the day?

MR. ANDERSON: Thank you, Your Honor.

THE COURT: Yes, sir, good to see you, Mr. Anderson.

MS. BLUNDY: Your Honor, I think that's it.

THE COURT: Oh, is it; okay. Good.

(ADJOURNED.)

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of The Harbour Cove Condominium Association v. Centex Homes, et al. held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on September 28, 2017, taken by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

_____

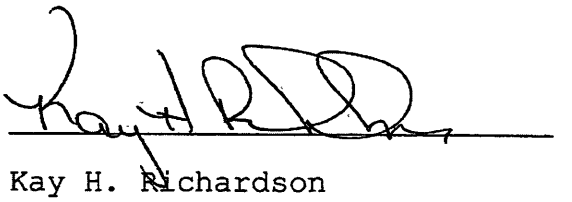
Kay H. Richardson
Official Court Reporter

October 19, 2017.

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of The Harbour Cove Condominium Association v. Centex Homes, et al. held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on September 28, 2017, taken by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson
Official Court Reporter

October 19, 2017.

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY)	**2014-CP-26-06573**
BEACH VILLAS AT OCEAN KEYES PROPERTY OWNERS ASSOCIATION, INC.,)	
Plaintiff,)	**Transcript of Record** (MOTION HEARING)
vs.)	September 28, 2017
OCEAN KEYES DEVELOPMENT, LLC, ET AL.)	
Defendants.)	
OCEAN KEYES DEVELOPMENT, LLC.)	
Third-Party Plaintiff,)	
vs.)	
RENAISSANCE STEEL INSTALLATION, LLC, ET AL.)	
Third-Party Defendants.)	

B E F O R E:

Honorable Clifton Newman
Horry County Courthouse
Conway, South Carolina

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James H. Elliott, Esquire
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John L. McCants, Esquire
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Lawrence M. Hunter, Esquire
BITCO

Robert C. Calamari, Esquire
Selective Insurance

N. Keith Emge, Jr., Esquire
Patrick McDonald, Esquire
David Miller, Esquire
Ocean Keyes Development

Joseph K. Cunningham, Esquire
Russ Baltzer

A P P E A R A N C E S:

Peter H. Dworjanyn, Esquire
Canopius U.S. Insurance

Christy Mahon, Esquire
Sue Hogan, Esquire
The Hartford

ALSO PRESENT:

Anna P. Cathcart, Esquire
Jennifer Sosa, Esquire

TAKEN BY:

Dixie C. Eubank
Circuit Court Reporter

PREPARED BY:

Kay H. Richardson
Circuit Court Reporter

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EXHIBITS

No. ID EV

(No exhibits were marked or admitted.)

(SEPTEMBER 28, 2017)

BY THE COURT:

THE COURT: Thank you. Good morning. Please be seated.

All right. Good morning. Beach Villa. Okay. We'll have everyone introduce themselves for the record and tell us who you represent.

MR. WYLIE: Robert Wylie representing the Plaintiff, Beach Villas Homeowners Association.

MR. LADY: Jim Lady, for the Plaintiffs.

MR. KENNEDY: Good morning, Your Honor.

THE COURT: Good morning.

MR. KENNEDY: Robert Kennedy here for Richard's Framing.

THE COURT: All right.

MS. CATHCART: Anna Cathcart of Phelps Dunbar just observing today.

MS. FOX: Carrie Fox, also here for Richard's Framing.

THE COURT: Is it Richard's Framing? All right.

MR. HOLDRUP: Neil Haldrup for Clarendon National. I'm here observing this hearing and really here for the 11 o'clock hearing in Harbour Cove.

THE COURT: All right.

MR. PELLA: Good morning, Your Honor.

THE COURT: Good morning.

MR. PELLA: Austin Pella here for American Empire, one of the carriers in the Harbour Cove case.

MR. CLARK: Chris Clark, Keye Construction.

MS. SOSA: Jennifer Sosa (spelled phonetically) here from The Hartford just observing.

MR. ELLIOTT: Good morning, Your Honor.

THE COURT: Good morning.

MR. ELLIOTT: James Elliott, I represent First Exteriors, LLC.

THE COURT: First Exteriors. Mr. Elliott, I saw David Anderson and I said I got an email from one of your lawyers, not it wasn't David, it was Les Cotter, and her name is -- well, as it turns out, she wasn't a lawyer, but she sends the emails. I was calling her a lawyer, and he said, I don't know that lawyer.

MR. ELLIOTT: Was it Carol Fore. I think his secretary is Carol Fore. He's in Columbia so I don't pay much attention to that.

THE COURT: Later on, he said no, that's a paralegal, that's a secretary. All right.

Yes, sir.

MR MCCANTS: Good morning, Your Honor. I'm John McCants and I'm here on behalf of National Fire and Marine Insurance for the Harbour Cove case.

MR. ROSS: Good morning, Your Honor. Jeff Ross here for Coastal Stucco for this case.

MR. SMITH: Mike Smith for Carefree Exteriors in Beach

Villas and for Dunn Plumbing in Harbour Cove.

MR. HUNTER: Lawrence Hunter for BITCO General Insurance. I'm here in the Harbour Cove case.

MR. CALAMARI: Bob Calamari for Selective Insurance Company in this case.

MR. EMGE: Your Honor, I'm Chip Emge. I'm here for Ocean Keyes Development in the Beach Villas case.

MR. MCDONALD: Good morning, Your Honor. Patrick McDonald here for Ocean Keyes Development in Beach Villas.

MR. MILLER: Good morning, I'm David Miller. I represent Ocean Keyes in the related coverage actions.

MR. CUNNINGHAM: Good morning. Joe Cunningham, I represent Russ Baltzer in his capacity as an architect in this case.

MR. DWORJANYN: Good morning, Judge Newman. I'm Pete Dworjanyn and I represent Canopius U.S. Insurance, Inc., the one that filed the motion to intervene.

MS. MAHON: Good morning, Your Honor. Christy Mahon here again for the Hartford. Sue Hogan also present for the Hartford.

MS. HOGAN: Good morning, Your Honor.

MS. MAHON: And we have another admission Pro Hac Vice. I asked the Plaintiffs and also Ocean Keyes and they have no objection and I haven't heard an objection from any other party.

THE COURT: Okay.

MS. MAHON: Thank you, Your Honor.

THE COURT: Do they have standing to object?

MS. MAHON: We will talk about that later, right, Your Honor.

THE COURT: All right.

MS. MAHON: We've read all the cases again last night.

THE COURT: She'll be admitted pro hac vice.

MS. MAHON: Thank you, Your Honor, I'll have it filed.

THE COURT: Okay. Who's first? The motion to intervene, is that first?

MR. CALAMARI: However you want to do it, Your Honor.

THE COURT: Okay. Very good.

MOTION TO INTERVENE:

MR. CALAMARI: Thank you, Your Honor. Bob Calamari for Selective Insurance. I'll talk a little bit about this motion to intervene. I know we argued it yesterday, a very similar motion in another case. This is a different case, different lawyer. So, forgive me if I repeat some of the things that I said yesterday.

Just like in the case yesterday, I'm speaking on behalf of Selective Insurance Company and our insureds in this case are ---

THE COURT: Let me ask you ---

MR. CALAMARI: Sure.

THE COURT: She's trying to get Mike Locklear up to speed on finding stuff on the -- through the E-filing System. Do you have a -- she has my computer -- do you have a copy of the motion? Does anyone have a copy of it?

MR. CALAMARI: Here's a copy of our motion.

THE COURT: All right. Thank you.

MR. CALAMARI: Here is the motion by Hartford and National Fire.

THE COURT: Okay. Yes, sir.

MR. CALAMARI: Oh, thank you, Your Honor. The -- this is a motion to intervene on behalf of Selective as a non-party to submit special interrogatories to the jury for the purpose of allowing the verdict in this case to be apportioned into categories that can later be used in an instructive manner in the coverage actions to determine what portion of this verdict is covered. And we're asking that we be allowed to intervene as a non-party. We don't want to come in and give the jury our name with insurance. We don't believe that would be proper. But we want to come in and participate and say -- present special interrogatories that the jury can use to allocate this verdict such that it can be used in the other action.

THE COURT: Would you be identified to the jury?

MR. CALAMARI: I don't believe so. I don't think that would be proper.

THE COURT: Okay.

MR. CALAMARI: I think ---

THE COURT: Then they will identify you as the insurance representative.

MR. CALAMARI: Exactly, Your Honor. We think that that would interject insurance into the case which would be improper.

As a second, if you deny the first portion of the motion and do not allow any intervention to the point where we're allowed to submit these special interrogatories, we are asking that you order, in a protective fashion to say that in the subsequent declaratory judgment action, that the carriers in this case be permitted to submit any evidence that is necessary or can be used by a trier of fact to break down a general verdict, if that's what happens, into categories of covered and non-covered damages and that no one would be allowed to claim a general verdict and the parties can't look behind the general verdict because we're making an effort now to somewhat eliminate that problem.

Now we're wondering why are we -- why are we here today, why are we asking this, why are we filing a motion to intervene. Well, it's abundantly clear that the supreme court in the *Newman v. Auto Owners, Harleysville v. Crossman* and most recently in the *Heritage v. Harleysville* case, that the supreme court wants allocation to take place in the underlying

action in a construction defect matter. They have made very clear in *Auto Owners v. Newman* that they would have been able to allocate, they would've been able to save the costs of removal and replacement of the insured as not a covered damage if there had been allocation in the underlying action. But they commented that the carrier did not make an effort to perform allocation. That was reiterated in the Crossman decision, where they talked about a general verdict and that in Newman, you need to allocate. But most recently in the Heritage opinion, the court addressed notice and understanding of whether these things should be allocated and they noted that there was no effort by Harleysville at that time to ask for special interrogatories to allocate the verdict. And in that case, in the Heritage case, we believe they said as long as the parties are on notice, if they're on notice of this issue, then they need to come in and they need to allocate. And it's not just the carriers. We believe that every party in this case from the Plaintiff's lawyer to the general contractor, to the architect, the subcontractors, product manufacturers, everyone -- we believe everyone in this case has an obligation and a duty to request coverage or request an allocated verdict that apportions damages into categories that can be used in a later coverage action.

Now some may oppose and we've heard some arguments yesterday, but we don't know about this. We don't know about

this. I don't think there's a lawyer that practices construction litigation in South Carolina that can stand up and say, we've never heard about allocation, or we don't know anything about this, and if they didn't send a reservation of rights letter five years ago when this all initiated saying that they were going to appear and ask us to allocate, we don't know about it. Likewise, I don't think they would say if they did send that letter that, of course, we would have to come in here and allocate, but they -- the key is in the Heritage decision that is there notice, is there notice to the insured, is there notice to the Plaintiff. Heritage gave the Plaintiff some third-party rights. Heritage said they have third party rights and they can rely on whether this notice was given. Well, if there's notice given in anything, there's notice given in South Carolina of this obligation to allocate damages. We also believe that anyone who opposes this and anyone who prevents the court from performing allocation is going to be estopped from later in the coverage action, coming back and saying, you're not allowed to allocate that verdict. I know you tried to allocate it. I know you tried to put it in categories, and I know I prevented you from doing it, and now, you're not allowed to allocate that, I get a hundred percent of the coverage. Because I think in listening to yesterday's arguments and reading the briefs for today's arguments and generally examining this issue, what the goal is

from the carrier side, is to fairly pay for what's covered under the policy. What the goal is from the insureds, the Plaintiff's side, is to make the carrier pay for things that are not covered under the policy. It's kind of a gotcha, you didn't send the right letter, you didn't file a motion at the right time. If you intervene you have to come in as a party, you didn't intervene right. The rule for intervention doesn't allow you to do this and, therefore, 100 percent is covered. All of the opposition to allocation, the ultimate goal is 100 percent of everything is covered, even things that are not specifically not covered by the policy. Those cases I mentioned, Newman, Crossman, Heritage, they all reiterate that the work of the insured that is defective and needs to be removed and replaced is not a covered damage.

What the Plaintiffs and what the other parties want in this case, is they want that to be covered because of a gotcha, because you didn't give us notice, you didn't tell us about it. Well, we're telling everyone about it now. There's a DJ action filed in this case. There's three DJ actions previously filed by the general contractor. We filed one on behalf of Selective for Carefree Exteriors and Coastal Stucco. We're not gonna burden anyone with answering it before this trial goes on, but it's out there, it's noticed. There were letters written, there were conversations with insureds. I don't know how many times the parties got together for

mediation in this matter, but a discussion has gone on frequently between insurance professionals, insurance lawyers, lawyers for the other parties in this case. It would be interesting for someone to say that they can't -- they didn't know about this, this was a shock, we didn't prepare our case this way.

They talk about in the cases that this is gonna be too difficult. It's gonna be very difficult to allocate a verdict in this case. So, let's think about these cases as we talked yesterday. And we heard some additional information yesterday that was even -- even more complex. This is a complex case. It's a two-week trial. There are no more complex cases in South Carolina than construction defect cases. The jury is gonna come in, they're gonna be selected, gonna put 12 in the box, an alternate, and they're gonna say to the jury, we're gonna talk to you about expansion joints and exterior insulated finishing systems for stucco, whatever that is, hard coat versus EIFS. We're gonna talk to you about mullions. Yesterday, we heard all about mullions. I represent some window manufacturers. I'm not sure what a mullion is. But, they not just talked about mullions, because mullion apparently is a noun, but mull is a verb and the jury is gonna learn all about these issues. They're gonna hear about fasteners, nail screws. They're gonna hear about weep screed. They're gonna hear about weep holes in brick. They're gonna

hear about vinyl siding. They're gonna have experts come in and talk about code violations. These experts can recite that code from front to back. They've been studying it for many years. Plaintiff's expert, Peter Sherrit has been doing this for 25, 30 years, hundreds of cases, and they're gonna explain everything to the jury. They're gonna talk about manufacturers guidelines, industry standards, everything. And that jury at the end of two weeks of hearing complicated issue after complicated issue and what needs to be repaired, what doesn't need to be repaired, what needs to be removed, the global 8', 9', $10,000,000 estimate, the counter of a $1,000,000 estimate, $2,000,000 dollars, whatever those numbers are, they're gonna get about an hour of the law of what the law is in this case, and then they're gonna have about three hours to go back in the room and say what on earth are we going to do. And so the argument that what I'm asking is way too difficult for that jury in comparison to what they're doing overall; that doesn't seem to mesh well with that argument.

The other point is that the Plaintiffs and the parties in this case, I anticipate are going to say, well, this changes everything. Our experts now are going to have to testify differently and we only have two-and-a-half weeks till the trial. Well this is actually number 2 on the roster. I know there's motions to stay and other things, so we might have six

months before this case goes to trial. But so the parties are gonna offer expert testimony in this case and they're gonna present an expert to you and they're gonna say this guy has got 25/30 in construction; he's built buildings left and right; he's got this structure, that structure; he's testified in court -- he's been sworn in as a construction expert; but good God, if he has to tell you how much it costs to repair -- to remove and replace the brick and how much it costs to pay for the damage that was caused that; that's way outside of anything he could do. That just doesn't seem very logical to me.

So just like in the other case yesterday, I put together a sample of a special interrogatory and I don't think it's very difficult for the jury in this case to perform this function. And again, the caption, the first question, answer only if you found damages -- for example, I used Coastal Stucco, that's one of the insureds that we have in this case -- answer only if you found damages against Coastal Stucco; if you found no damages against Coastal Stucco, stop and do not proceed further. Line two, if you found damages against Coastal Stucco, list the total amount of damages on the following line; this should be the damages only against Coastal Stucco. It should be fairly easy because at some point, the experts in this case have to say Coastal Stucco is wrong and this is what happened because Coastal Stucco was

wrong. And then an expert has to stand up and say, okay, let me tell you about the stucco problems. For me to fix that and to fix what's wrong is gonna cost X amount. That number has got to be in the overall general verdict if that's what it is. Then number three, here's where we come into play. We don't need any new evidence, we don't need anything different, all we do is say please divide the number into -- in Item 2 into the following categories: What's the costs of removing and replacing the stucco, the work of Coastal Stucco; and B, what is the costs of repairing the portions of the building damaged by the work of Coastal Stucco? It's already in evidence. They have to say that. They can't not come in and say that. And C, just a reminder, the total of A and B should be equal the damage found in Number 2. And then if, if need be, for the damages in Line B, if there are any, identify whether those damages are progressive and continuing today and we're gonna ask for a jury charge on progressive damages and they can circle yes or no. If they circle yes, then, you know, we have a time-on-risk period. Now we're not telling the jury that that's a time-on-risk period and this will be something that the jury identifies now, but there will be other arguments whether this is necessary or whether it's used as the time-on-risk argument in the coverage action. But that's it. That's it and how do I know or how do I think that they can do this and they've already done that. Well, I looked at

some of the estimates in the case and I'll hand up the one from Watkins Services and I highlighted an area -- and this is not to say this is the only item that they would consider, but it's spelled out. It's spelled out and this is Watkins Services' scope of repair and they have a general requirement section, they have a stucco section, they have a front stairway -- stair walk beam section, they have a front stair beam section, rear porches, interior, they've got a lot of detail on this that's already done. And I know J.R. Watkins and I've been in cases with him before and I, I would be shocked if J.R. Watkins would say I can do all these wonderful things. I can analyze this, I can tell you what it's gonna cost to repair, but I can't -- I can't break down the difference in costs between the removing and replacing the stucco and fixing the damage that happened. I am guessing, I don't know this for certain, but I'm sure J.R. Watkins has some sort of formula so he doesn't blindly go into projects and say I can do this repair for $2,000,000 with no earthly idea of what it's gonna cost to do it. I'm sure he has a breakdown of man hours, of sheets of plywood. He goes out and does his own inspection. He looks at the repair or the building envelope inspection done by the experts in the case, and he comes up with what he believes to price that scope, and gives that number. It would surprise me -- and the Plaintiffs also have an expert report in this case done by John Bearden

and it's got detail on it. I only highlighted one section. But, just on the first building, remove and replace stucco. So, that number has already been decided. And we're not asking -- we're not asking the Court to try the coverage action in this case and I don't think that's what the supreme court is asking either. I think what the supreme court is saying, hey, when you get a verdict in these cases, itemize the damages. Itemize the damages and they can fight over them all they want in a coverage action. It might actually eliminate some of the confusion in a future coverage action and let these cases be resolved. But you've got to do something. So ---

THE COURT: What portion or what in the case -- in those cases did the supreme court say that causes you to believe that this is essential? Specifically what did they say in the various cases?

MR. CALAMARI: I don't have the exact quotes.

THE COURT: You can paraphrase.

MR. CALAMARI: But, you know, essentially what they said ---

THE COURT: And then maybe who's coming after you will specify.

MR. CALAMARI: Yes, sir. In the Newman case, they talked about -- they talked about the allocation issues and they said the first Newman came out and said 100 percent of everything

is covered; removing and replacing, everything is covered. The second Newman came out and interestingly -- first Newman comes out and says 100 of everything is covered and then in 2009, we had the two Heritage trials which lead to the Heritage decision. So there was nothing to allocate in those cases. Newman two comes out, which is the opinion and they say, you know what, removing and replacing the stucco or whatever in the building, the work of the insured is not a covered damage. But they said, since there was nothing and -- and at my age, if I try to read that, I might pass out up here. It says, nevertheless, it is not possible from the record before this court to determine what portion of the arbitrators itemized list of damages may be attributed to the removal and replacement of the defective stucco and it is not the purpose of this declaratory judgment action to re-litigate the issue of damages. It says, homeowners 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. So, this is our opportunity to, to ask. And we don't think we're the only ones that are supposed to ask, but so in -- in these cases, and we talked a little bit about it yesterday, the insured typically carries the burden of proving damages within the insuring agreement. The insuring agreement is they have to show there's an occurrence, defective work; they have to show that there's property damage, damage from

that defective work; and, they have to show that it occurred during the policy period. So, initially the burden is on the insured and the other parties in the case to show that that is gonna meet coverage under the policy. The insurance company has the burden on exclusions. Those are typically handled later, but that initial burden is on the insured.

There is case law from the 70s and we talked about very old cases yesterday, whether they apply or not or how our court would treat them, we don't know. But, those cases seem to say that in a situation where the insurer completely controls the defense of the matter, that they are gonna have some obligation to ask the Court to allocate. They don't say who. They don't say who is supposed to this. They don't say if it's me on a motion to intervene. They don't say if it's the lawyers hired to defend the action. They don't say if it's the Plaintiff's lawyer, but I think some of that was cleared up in the Heritage decision because they gave rights to the Plaintiff, the gave some third-party rights and they talked about reservation of rights letters in the sense of whether they were on notice of coverage issues. Well, I think that's a little bit of a red herring now because there's not a lawyer in the State that practices in this arena that doesn't know exactly about allocation, coverage issues, motions to intervene, and they say you have to do that. So I'm not sure the burden has shifted, because in this case we have four

declaratory judgment actions pending. We have coverage counsel involved for a handful of the parties in this case. The Plaintiff's lawyers are excellent coverage counsel; they've been dealing with coverage issues for a very, very long time. We have the general contractor has three carriers and they each have separate coverage counsel that has appeared at the meetings, appeared at mediation, has talked coverage issues. So, it's difficult for someone to say that that burden has shifted, has shifted to the insured because the insureds are well aware of this, and all of the lawyers in this case, including the Court, has the opportunity to say, you know what, this verdict is gonna be -- we don't want just the general $3,000,000 or whatever the amount is. Go ahead and spell out, spell it out. You know everyone has a duty when you bring an action to the Court to prove wrongdoing, prove that there was some liability. You have to prove liability, you have to prove damages. So, the Plaintiff in this case has got to show that the stucco was improper, the stucco needs to be removed and replaced, and the stucco caused this damage, and they've got to say how much that is gonna cost. And if they're putting that number up anyway, and these reports itemize those as they are, shouldn't the jury be able to come up with that number? We believe that they do.

Lastly, I'm gonna talk why we filed the motion to intervene. We talked a little bit about it yesterday. The

supreme court made clear we have to do something. There is no other avenue. Typically, an insurance policy requires two obligations of the carrier: The duty of defense and the duty of indemnity. Indemnity is not triggered until there is a settlement or a judgment against the insured. Right now we have our duty of defense. Our duty of defense is to provide a defense to the insured for the claims brought against them. This is not a claim brought against the insured. So, the supreme court says we have to act. So, how do we do that? We can't come in here unless we have a rule or the court grants us this opportunity to come in and make these arguments unless there's some rule and we believe we meet the requirements of Rule 24. The supreme court has said, we have an interest in this action because they understand covered versus non-covered. They understand that, if it's not allocated, they're gonna hold that against somebody. We don't know who at this point. We know who they did in Heritage; we're sure who they will here. But it could be us; so we do have standing.

Timeliness of the motion. We have filed these motions day one when lawsuits have been filed and the courts have said get out of here, this is way too early. We're talking about -- we're talking about coverage issues for an interrogatory at the end of the trial. Yesterday, the general contractor in the case said, we're filing it too early, that we should wait until all the evidence is in, see what parties are in, and

then talk about what a verdict form is or what charges go to the jury. So, there's no perfect time, there's no perfect rule, but this is the only rule and the Court has wide discretion in handling this. So, we believe that we've done -- we've done what we're doing here.

And again, just to reiterate, our goal is to be fair and pay what is covered under the policy. We just don't want to pay for the cost of removal and replacing the defective work of the insured, which the supreme court said we don't have to. If there are exclusions that apply, we deal with those in a coverage action. If they want to talk about sufficiency of reservation of rights letters or other forms of notice that we've brought up today, that's all for the coverage action. But to pass up the opportunity to allocate the verdict here, can cause huge problems later and result in cases that last 15 years like Heritage. So, we think it's prudent; we think it's right to do this. We're not asking to mess up the trial. We're not asking for any additional evidence. We're asking for some jury charges, some interrogatories to the jury that let the jury make an effort to allocate those damages, and that's our motion. Thank you, Your Honor. Some of the other insurance attorneys might want to speak.

THE COURT: All right. Ms. Hogan?

MS. HOGAN: Good morning, Your Honor.

THE COURT: Good morning.

MS. HOGAN: This morning I'm representing three Hartford entities: Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriting Insurance Company. I only have a quick -- a few quick points to add to Mr. Calamari's presentation. But I want to say I think he got interrupted before he launched his argument. Mr. Calamari, like yesterday, is speaking for all the carriers. We all incorporate his arguments. We're gonna try not to be repetitive here. So, I have a few -- just a few quick things that I don't think Mr. Calamari covered.

We're anticipating today that the Plaintiff's bar will argue that -- that if we are to -- if we are permitted to intervene, we have to intervene as a party. We talked a little bit about this yesterday. I think there's case authority for the -- for the proposition and this is our position. Just to be clear, no carrier that I'm aware of has sought intervention as a party in this lawsuit. What we're all asking for is limited intervention. We do not want to be a party. We believe that the Court has very wide discretion as to the scope of intervention. I found two cases that talk about that, which I provided you with copies of those cases yesterday, Your Honor: *Davis v. Jennings*, 304 S.C. 503, 1991 and *Stoney v. Stoney*, 417 S.C. 345, 2016.

I think *Davis v. Jennings* is more directly on point. That's a case, Your Honor, where the court specifically found

that the trial court not only has wide discretion, but specifically found that the trial court could allow and did allow rightfully a party to intervene for a very limited purpose as a non-party.

In *Stoney v. Stoney*, it was sort of a reverse scenario, but it still makes the same point. A party was allowed to intervene and became a party and the court said that the trial court should not bring that party in because the intervenor started to litigate the case on behalf of the initial party. So, just the main point there, Your Honor, is we'd like to -- we're just anticipating this argument that we need to be a party and we don't believe that to be the case.

To that point, further we believe that under Rule 411, under case law interpreting the rule, if the carriers are required to, to intervene as a party, obviously that will interject the, the existence or lack thereof, coverage -- well, it'll interject coverage issues and a belief, I believe, that there's liability insurance and that will prejudice both the carriers and their named insureds. So, we believe that any argument made by the Plaintiff's bar that if we intervene, we have to be a party is incorrect.

That's all I have, Your Honor.

THE COURT: Okay. Thank you.

MS. HOGAN: All right. Thank you.

THE COURT: Yes, sir.

MR. DWORJANYN: Good morning, Your Honor. Pete Dworjanyn and I represent Canopius U.S. I'm only going to -- because we're joining in the other arguments, I'm just gonna add a couple of thoughts.

Number one, one of the issues that the Plaintiffs raised is there's a lot of complexity in, in interrogatories to the jury. There's one simple interrogatory that is going to become more and more relevant in a lot of your cases and that's, when did this damage begin? That's a question that we seek -- specifically sought in our motion to be asked. When did this property damage begin, because that has implication -- that has insurance coverage implications for some of these policies and it's an easy question to answer. Everyone assumes it began the first time it rained, and a jury will likely make that decision based on the evidence before it.

Number -- second, one of the issues that the HOA raised was that there's a condition precedent that we send a reservation of rights letter to our insured telling them what we intend to do. It's not a condition precedent to Rule 24. That's a condition that they made up. But we sent reservation of rights letters to our insured. We were notified late of this claim. Conopius U.S. was notified late and joined in the defense with two other insurance companies. And I've got reservations of rights letters to the insured telling them

this is exactly what we're gonna do, which I would submit to the Court in-camera for review if you want it. I don't think the Plaintiff is entitled to them and I don't think they really belong in the Court's file, but if necessary, I'm willing to do that.

Finally, just agreeing quickly with what Mr. Calamari said, the person seeking coverage has the burden of proving that it exists. Here, the HOA is trying to stop us from demonstrating what's covered and isn't covered and they're doing it -- they're kind of objecting to Conopius' attempt to determine with its insured, Richard H. Construction, LLC, what part of the verdict against him is covered and what isn't covered. They're trying to stop us and the Court from saying as to this defendant, the verdict is X. How much of it is resulting damage and how much of it is repairing and replacing your own work; and that's not that complicated of a question. They talk about our standing to intervene. I don't know that they really have the standing to object to that interrogatory as to our insured. They're not parties to that insurance contract. Now if they want to agree, if they stipulate that we agree that we're not gonna try to execute this verdict against Richard H. Framing, LLC, we're gonna hold him harmless from this verdict and we stipulate that after this trial if the Court -- we don't want you, Judge, we don't want you to submit these interrogatories, but after this trial, we

specifically hold that we'll have a coverage action with them to determine what's covered and isn't covered and we won't raise their failure to intervene in this action, the failure to get that issue determined here. If they want to do that and agree that we're not gonna have post-judgment interest accruing why that case pends for two years, then that would solve the problem. Outside of that, the court has told us, if you don't bring it up now, if you don't solve it now, you've waived your right and that's what Rule 24 provides. Is your failure to intervene going to impede our ability to protect our rights; that's what the court said in *Auto Owners v. Newman*. They filed an amicus brief in that case; they know what the case says.

Thank you, Your Honor.

THE COURT: Yes, sir. Anyone else in favor of intervention who might want to say something?

All right. Mr. Wylie?

MR. WYLIE: I wanted to -- you said you were having electronic difficulties, I'll give you a copy of our memo and also a copy of this case, the *Heritage v. Harleysville* case.

At the outset, Your Honor, I want to make it perfectly clear for the record, that we do not oppose these insurance companies intervening in this action, if they are willing to intervene as a party to the action. We are not gonna -- Mr. Calamari said we're waiving our rights and all this stuff.

They can intervene in this action as a party. Mr. Calamari says they don't want to inject insurance into the trial. The entire reason that we are here is because they want to inject insurance into our trial. They're relying on the *Harleysville v. Heritage* case and I read this case when it first came out. I think everybody did. What in the world is going on? I've read it numerous times and it appears to me that everybody, including myself, have been reading too much into the Harleysville/Heritage decision. Heritage case is an appeal from a DJ action and -- after general verdicts were awarded at the trial, Harleysville filed DJ actions to attempt to allocate the verdict. A special referee found that it was improper to attempt to allocate the general verdict and that's what they're all upset about.

Why did the Special Referee say it's improper to allocate the verdict? The court, the supreme court and the special referee found that Harleysville failed to properly reserve the right to contest coverage. That case goes on and on about reservation of rights letters. Why are they talking about the reservation of rights letter? The lynch-pin to that case is Harleysville did not notify its insured of what they were going to try to do in regards to the allocation of the verdict. So the insureds unaware that a conflict exists between itself and the insurer. In that case, the Heritage case, the court says the general rule that precludes an

insurer from raising new ground, contesting coverage in a subsequent action, a DJ action, is justified in this context. Now the general rule -- yesterday you heard about that Simms case and you said, oh my goodness, that's from 1965. That's the exact same general rule that was set forth in the Simms case. And in Simms, they said there's an exception to the general rule about you can't contest coverage in a subsequent action and that's when the insurance company's interest and the insured's interest are at odds. That's exactly what we have here. The insured wants stuff to be covered. The insurance companies do not want it to be covered. They have an inherit conflict of interest, which is addressed in the Simms case. The Heritage case does not mention the majority decision and the word intervention is not in it. It's like 49 pages long; the word intervention shows up in Justice Pleicones' descent, where he cites the 1965 Simms case that says they are -- you can't do this because you put the insured counsel in an impermissible conflict of interest. He cannot represent his client and represent the interest of this insurance company.

So, the holding in -- well, one other issue in the Heritage case in regards to the timing of the reservation of rights and Mr. Calamari says everybody knows about this, we all have known about it. This case came out at the end of July, but not one time, but two times on Page 31 and Page 33

of this decision, this supreme court says that they have to notify the insured prior to undertaking the defense. Now, he may have an issue there with that, these carriers have not presented this Court with any evidence whatsoever that they notified their insured prior to undertaking the defense that they were going to seek an allocation of damages. And if they did not do that, we stop the entire analysis right here and right now because you end up right back in the *Harleysville v. Heritage* position. You didn't notify your insured and as a result, the Court said in Harleysville, we find that there is evidence in the record to support the special referee's finding, Harleysville's reservation of rights letters were insufficient to reserve the right to contest coverage. That's why they didn't let them contest coverage in the DJ action, he didn't properly notify the insured. So, as a threshold issue, this Court's got to be satisfied that these insurance carriers properly notified their insured before, two times they said it, before they undertake the defense. So, we've got to clear that.

If they had properly done that, you've got to go and look at Rule 24. Rule 24 does not allow partial intervention. It doesn't mention it. That's why I say, they're welcome to come into this case as a party, be named as a party, they can sit at counsel table, they can ask all the questions they want about Mr. Calamari's short list or the long list of some 31

questions he has in his brief. They can ask all those questions to my expert. They can ask all the questions to their expert. They can be in this case. If they want to participate, they need to intervene as a party. But what they want to do is sit back and try to get me to change the way I present my case, the way that these insurance coverage or the insurance defense lawyers present their case, for one reason, to benefit the insurance companies. It doesn't benefit the Plaintiffs to change my trial strategy; it doesn't benefit their insurers to change the trial strategy. Remember in Simms, the impermissible conflict of interest, they can't make the parties to the case a non-party sitting in the back of the courtroom playing Minesweeper on his cell phone for two weeks while we try this case cannot dictate the manner in which this Court tells me to present my evidence or the Defendants to present their evidence.

The Stoney case that was referenced, that case is different than this case and I don't think that it stands for the proposition that has been set forth. In that case, the party was allowed to intervene in Stoney -- and I know Your Honor is familiar with it. He owned one of the marital assets. He was partial owner of the East Bay location of The Boathouse restaurant. He owned a marital asset at issue in the case. He owned -- he was -- he had a substantial interest in the subject matter of the action. That's why he was

allowed to intervene in Stoney. In this case, and we'll talk about it more, there is no interest in the subject matter of this litigation by the carriers. And what the Court in Stoney found was that the interest of the subject matter of the action was not adequately protected due to the husband's tenuous financial condition that the brother, who was allowed to intervene, part owner of marital property, co-obligor on marital debts, and made loans to the husband. He was all tied up in it, had a very substantial interest in the subject matter of that case, which makes it entirely different than this case.

The Davis case, I read that this morning. I was all worried about it. They intervened to object to a motion for a protective order sealing the record. They intervened to get copies. They wanted some copies, nothing to do with the trial, no special interrogatories, not changing the way the Plaintiffs tried their case, not changing the way their insureds tried the case, they wanted some copies, and the Court said you can intervene and get some copies. That's what that case says.

The standing issue, I kind of touched on it with my reference to the Stoney case, but they have to have a substantial interest or a material interest in the subject matter of the litigation or the transaction. The subject matter of this litigation is the Beach Villas Condominium

Project. None of those insurance companies have any interest whatsoever in the Beach Villas Condominium Project, so they don't meet that qualification or requirement. The transaction, do they have a substantial interest in the transaction? The transaction is the development, design, and construction of the Beach Villas Condominium Project. None of those insurance companies by any stretch of the imagination, have any interest whatsoever in the development, design, or construction of that project. They don't meet the qualifications for standing.

The GEICO case, which was discussed somewhat yesterday, which is cited, you worry about it being old, it's cited in the Stoney case, which is from 2016. So, they kind of re-upped the GEICO case. That was about does the insurance company have an interest in the subject matter of that case. And the GEICO case says if a party has a personal stake in the subject matter of the lawsuit and is a real party in interest, they can intervene. And it goes back to define real party in interest, you have a real actual, material, or substantial interest in the subject matter of the action. That case was the one where they were trying common law marriage in Family Court and GEICO said, we want to come in and say this because we don't want them to be able to stack our insurance. And what the Court said, you don't have an interest in the transaction or the subject matter, you have no interest in

whether this guy is common law married, your interest is only in the financial impact or financial aspects of the verdict. And they held, the supreme court cited again in Stoney that is not a substantial interest and it does not qualify you to be able to intervene in that case. And that's what these insurance companies have, no interest in the underlying subject matter, no interest in the transaction. All they have is an interest in the financial implications of the verdict. And our Supreme court has said in 1999 and again in 2016, that is not sufficient. So these insurance companies do not have standing to intervene in this case under Rule 24.

The next issue under Rule 24 is if they have standing, somehow have standing, they also must have to be able to show that without intervention, this position of this action may impair its ability to protect that interest. So they've still got to show that, even if they have standing.

The Simms case, that's -- remember the general rule that was referenced in the Heritage case that was filed in July? That was a car wreck case where they wanted to introduce evidence, the insurance company wanted to introduce evidence that their insured intentionally caused the accident, which obviously is bad for the insured because then the jury is gonna say he did it on purpose and hit him even harder. The question before the Court was whether an insurance company is bound to set up its defense of the intentional act or its

coverage issues in the tort action or can they assert that interest letter in a DJ action. And the Court addressed the ability of the insurance company to protect its interest in the subsequent action. They recognized that the general rule, the same one set forth in the Heritage case, is the insurance company is bound by the facts established by its insured. But they said that rule doesn't apply because the interests are diverse between the insured and the insurance company, same issue we have here. The interests are clearly antagonistic to one another. So, when the general rule doesn't apply, they can raise these issues in a coverage action and a DJ action which they've -- some of them have already been filed, they're filing them as we speak, there's gonna be more filed. We have no problem whatsoever with them having and I'll agree to it on the record, they do not waive -- if they meet the requirements under the reservation of rights letter for notice, we have no objection to them contesting coverage in a subsequent DJ action. They can call my experts, they can call their experts, they can get their own experts, they can do all of this at a subsequent DJ action rather than coming in here and hijacking my trial in front of Your Honor and in front of this jury by trying to get me to change the presentation of my evidence. Mr. Calamari said it's gonna be so easy. I don't know if Mr. Calamari has tried that many of these on the plaintiff's side. It's not as easy as he thinks. I've got to

change the manner -- and my trial strategy and tactics. I don't think that I should have to do that for a non-party insurance company where the lawyer is sitting in the back of the courtroom, that I -- he can change my two-week trial. I've got to prove duty, breach, causation, and damages. Nowhere does it say I've got to do my damages the way the insurance company wants me to do them and I don't know that the Court can require us or should require us to change the way we present our case to this jury. We need to benefit our client, not these insurance companies by trying to answer these questions.

So, we don't think that they have -- one other issue and it goes back to Judge Pleicones' descent in the Heritage case where he cites the Simms case. I, as the Plaintiff's attorney have no obligation nor will I likely present evidence that goes to the particular issues of coverage. It's gonna hurt my case; it's not to the benefit of my client. Those issues need to be addressed later on in a DJ action where the insurance company is a party to it, their lawyers are there and we're all talking about coverage but I'm not gonna present -- the insurance defense counsel is, I believe, ethically prohibited from introducing evidence that is going to harm its client. His client wants it to be covered. They can't have the insurance defense lawyer trying to introduce evidence to fit into Mr. Calamari's list of questions. That is an

impermissible conflict of interest. And if I don't do it and the defense lawyers don't do it, you're gonna send either 10 questions or his 51 questions to the jury and they're gonna not have any basis, no evidence whatsoever, to reach a decision on how to answer these questions. There's no evidence in the record. The evidence needs to go in the record in the DJ action. Newman was a DJ action appeal. There was no evidence in the DJ action record on appeal. I don't know what happened in the underlying case, but my guess is, nobody from that insurance company came in and tried to allocate the verdicts with the expert testimony and go into these categories. It's a DJ action appeal, not an underlying case appeal.

So, in summary, they didn't provide notice to the insureds prior to undertaking the defense. If they didn't do that, the analysis stops. Partial intervention is not allowed. If they want to come in, they need to come in as a party and participate in the trial.

THE COURT: As a party, Hartford is a party to the case and all the other ---

MR. WYLIE: Yes, sir.

THE COURT: --- carriers or would be parties, Conopius ---

MR. WYLIE: The only way we're getting evidence to the jury about these -- all these questions is for them to bring

it up because nobody else is going to, but they need to be in the case as a party. They want -- they said we don't want to bring in insurance, they don't want anybody to know they're an insurance company. Well, guess what? They're an insurance company, and they're trying to interject insurance coverage into my case. So, if they want to do that, come on, the water is fine; let's do it. But they need to -- they can ask their questions ---

THE COURT: They're going to intervene but not let the jury know about it?

MR. WYLIE: They want to have their cake and eat it, too. I've never seen a better example of whatever that old saying is that they want to have their cake and they want to eat it, too. They don't want anybody to know we're an insurance company. We've got all these insurance issues we want to bring up and we want you guys, whether you want to or not, to put evidence in about all these insurance issues, but don't let -- ssh, don't let anybody know there's insurance. They need to be -- if they want to be in the case, they need to be in the case. They can ask my experts all of Mr. Calamari's questions, but they need to be the ones to do it and the jury needs to know who they are. You can't submit these questions to this jury -- they're complicated questions. The damage to Coastal Stucco's work -- what Newman said is removal of the defective stucco is not covered. What if the stucco is not

defective? What if part of it is defective and another part of its not defective? If it's the flashings that are behind the stucco that are causing the water intrusion and not the defect -- and not the stucco itself, you got to tear the stucco off to get to the flashings. These extremely complicated issues that are gonna have to be addressed by this jury that need to be addressed in the DJ action. So, as far as them being a party, they're the ones that need to be in here asking this question. If they don't like the fact that they're an insurance company, that's really not the Court's problem. So, just for the record, the insurance carriers can protect their interest in a subsequent proceeding, the Simms case says do it. Heritage doesn't say you can't do it in a DJ action. It said they couldn't do it in this one because they didn't send the right reservation of rights letters.

Allowing intervention places the defense counsel in an impossible conflict of interest, it deprives the Plaintiffs of the right to present their case in the manner that best benefits them. There's not gonna be any evidence to allow this jury to even make, decide or answer these questions if they are not intervening as a complete and total party and for those reasons, we think that their motions to intervene should be denied.

Thank you.

THE COURT: All right. Anyone else -- you're on an

island on this or do you have -- is there someone else with the same response ---

MR. WYLIE: Me? As usual, Your Honor, I'm on the island.

THE COURT: All right. Yes, sir, Mr. Miller, yes, sir.

MR. WYLIE: Actually, Mr. Miller may ---

THE COURT: Mr. Miller, yes, sir?

MR. MILLER: Thank you, Your Honor. My name is David Miller. I represent Ocean Keyes in the underlying coverage action. I'm not a lawyer of record in this case. Because of that, I don't have notice of these proceedings. I wasn't here yesterday because I didn't know it went on yesterday; I would've been had I known. I heard about it ---

THE COURT: Well, yesterday was another case.

MR. MILLER: Yes, sir, and I'm coverage counsel in that one, also. That was Lakeside, was it not?

MR. WYLIE: That was Cypress Bend.

MR. MILLER: Okay. I stand corrected. I thought it was Lakeside yesterday. The problem, because of that posture is, is complex. As you heard Mr. Wylie saying, how does Patrick McDonald, who is my appointed insurance lawyer in this Beach Villas case for my client, the developer, how does he be hired by the insurance company and hire an expert to do allocations of damages that favor his insured versus the insurance company. How does he do that? That's a question everybody has been asking since the Heritage case came down. I think

the answer is, he can't. It is an inherit conflict. As Mr. Wylie pointed out that he can't do that. So who does? I guess I do. I guess I would need to go -- if I had been put on notice, which we have not -- had I been put on notice in reservation of rights letters, that we would need to go hire an expert witness to protect the position of the insured because the appointed counsel, I think, cannot. Now, this case is slated for trial on the 16th. Maybe it's Number 2 on the roster. I heard somebody say, I know that there's a debate about that and I think there's a motion to stay hanging out there about that.

THE COURT: It is Number 2 on the 16th.

MR. MILLER: Okay.

THE COURT: Yes.

MR. MILLER: The Heritage case has been out there a long time. We're standing here two weeks before trial talking about changing the way that the evidence is gonna be put in and I've got a lawyer representing my clients in the case, who I don't believe can ethically come in here and meet the challenge, and it's news to me. So that I would suggest, Your Honor, if you are of a mind to allow an intervention with or without becoming a party, that that would require a continuance of the underlying trial so that the insured, the primary defendant, the developer, my client, will have an opportunity to meet that evidence and I understand the

difference and the subtle differences between evidence as to costs versus evidence needed to repair, but how those costs are allocated becomes the bottom line. So, an expert who allocates costs to non-covered items versus an expert who allocates costs to covered items is gonna become an issue. It's gonna become an added complicator into the trial and it's gonna be one that I'm required to go investigate, I believe, hire my own expert independently and participate somehow in how that evidence comes in. I hadn't had any opportunity whatsoever to do any of that. The folks that are here making the motions to intervene are not even my insurance carriers. They're insurance carriers for sub-contractors. So, I don't have any notice to any of those things, yet make no doubt if it comes in favorably to the carriers, my carriers will be telling me this is what we've got and this is what you're gonna have to live with. So, that makes the whole thing complicated another level and I think precludes going forward in the fashion that's requested without affording all of the insureds in the case the opportunity to look at the way that the evidence is gonna come in, look at the interrogatories that are proposed, which I have not seen, propose their own interrogatories, et cetera, and participate in that level, if you're of a mind that the evidence that Heritage requires at the underlying case versus at the declaratory level, which Mr. Wylie has already developed and I won't go through that again.

So, Your Honor, it is -- it is my position as coverage counsel for the developer, that if Your Honor is of a mind to allow these allocation items to come into this trial one way or another, it, at a minimum, requires that the trial be continued until such time as I have an opportunity to look at and respond and participate in those matters.

Thank you.

THE COURT: Yes, sir.

MR. CUNNINGHAM: Your Honor, Joe Cunningham on behalf of Russ Baltzer as an architect. I've just got a couple of quick comments to make. I think Mr. Calamari takes great liberty to state how simple the process it will be to bifurcate the damages from the defective work as opposed to the damages caused by the defective work and our position is, I think Mr. Calamari is in that position to state how easy of a task that would be, just as I want an engineer or architect to argue to the Court how easy of a task it is for an attorney to argue a pleading or a motion. And it's easy for people on the outside to state how easy of a task it will be. A lot of people outside of the courtroom just think attorneys just put on suits and go to court and argue. A lot of people think that this Court will just put on a robe and sit in a chair and make decisions. But we're all informed enough to know that there's more to it than that. And, I would echo Mr. Miller's argument in that we've been running this ball down the field for quite

some time and here we are on the one yard line with the time ticking off the clock and if the -- Mr. Calamari and the counsel for the insurance companies want to come in at the last minute and change the field posts, then we just need some more time on the clock to analyze that. And so I'd echo Mr. Miller's concern as well.

Thank you.

THE COURT: All right. Anyone else before Mr. Calamari comes back?

MR. SMITH: Thank you, Your Honor.

THE COURT: And Mike Smith being quiet?

MR. SMITH: Your Honor, I'm gonna have to say something. Mike Smith for Carefree Exteriors. And, Your Honor, here's the problem that we have as insurance defense lawyers. Is when that insurance company selected who's filed the declaratory judgment action in this case against my client and, and one of the stucco manufacturers, they're gonna come in and try to say, well, this is not covered and this is not covered and this is not covered, but my duty is to protect my client to the fullest extent possible. What it's gonna do is not only change the way that I defend my case, but I'm actually now gonna have to try to target to protect my client. Those parts that are covered and funnel the evidence into what's covered versus what's not covered and, when you look at my client for example, there is one particular factual issue

that is, is -- causes considerable amount of damage out there. It's part of the sexy part of the case, if you will. I need all of that to be a covered item to properly defend my client and to protect my client, who is an ongoing business. To have the insurance company step in and now tell me that I've got to say, well, that may not be a covered item because of X, Y, and Z, I can't do that and adequately defend my client. That's the position I feel like I'm in and I think all of us defense lawyers are in the same position whether we say it on the record or not. But, I think that is a real conflict. It puts us in an untenable position of trying to satisfy who's paying our bill and, yet, do it at the risk of who we're trying to defend. I just want that on the record.

THE COURT: Very good.

Mr. Calamari?

MR. CALAMARI: You know, there have been a lot of discussion about the complexity and about reservation of rights letters and about all these other issues that will be issues discussed in the coverage actions. They are not gonna be discussed here. We are asking for something simple. We are asking for evidence preservation and that's all the supreme court has said needs to be done in the underlying action, evidence preservation.

If -- Heritage was my case, Mr. Henry, Mike's partner, Pat Henry, and Phil Thompson, we fought over for years whether

we were right not to intervene and we made all of the arguments that everyone's made today. I have talked *Simms v. Nationwide* until I'm blue in the face and said you can't do it, it's an adverse position, you've got divergent interest, all those reasons as to why we didn't intervene. The other reason we didn't intervene in that case is because the Newman decision, the first one came out prior to those trials, saying 100 percent of everything is covered. The second Newman decision, the supreme court said, no, not the work of the insured, that's not covered and you need to allocate that though. And in that case, they didn't allocate. Pat Henry's arguments repeatedly in that case were you failed to intervene. Had you intervened and asked these questions, we would've been able to do it. At the supreme court argument, we watched it on the internet -- you can watch them on the internet now -- Justice Hearn said, you know, the carrier can't sit on its rights. It's got an interest in this action; they should file a DJ. They should come in and ask for allocation and then the parties try the case a certain way so we have these issues resolved, evidence preservation. Justice Pleicones, in his descent, said you can't do this, you can't do this. The other justices all said, well, you should have, you should have. And they didn't -- reservation of rights letters in that case were discussed for about two seconds throughout the four or five years we talked about that case.

And then the decision comes out and it all addresses reservation of rights letters. You know, the, the -- and it's not a prerequisite to evidence preservation in this action. I am certain that when we get to the other actions, they will pick on whatever reservation of rights letter is out there. It could be the best reservation of rights letter ever; it will get picked on and they will say we waived our right. But the bottom line is, the argument here is we want to pay what's covered under the policy and everyone else in the courtroom says, I want to protect my person, whether it's the Plaintiff, whether it's the insured, whether it's the architect, anyone, I want to protect my person and make non-covered damages covered because I want to muddy the waters here. I don't want evidence preservation. I want a general verdict that no one can go behind and I can say if $1 is covered, everything is covered. That's what they're looking for in this case.

You know -- you know, the Supreme Court has said repeatedly that you have an obligation to prove your covered damages. We are the only ones here trying to preserve evidence to allow that to be possible in the subsequent action ---

THE COURT: As far as the mechanics of the DJ action, I notice Judge John Milling was appointed special referee in the case that I tried. Can he receive evidence, or did he receive evidence, or in a DJ action you do not present evidence; how

does that work?

MR. CALAMARI: We presented evidence. We actually had a two-day trial and then there was some petition for rehearing by the supreme court in the Crossman case. So, we waited until that final decision, we came back and had another day of trial. We offered a bunch of evidence. We had pretrial briefs and pretrial motions in which he said, it's a general verdict, I don't care whose fault it is, I'm not gonna let you look behind it. So, we proffered a lot of evidence on it. We proffered the experts who came in and said, this is how I would break it down. We proffered other, other things. But, the reservation of rights letters were always kind of a tag-on. And, it's interesting that the very document submitted in an effort to reserve one's rights, has now been used to say you actually waive those rights by trying to reserve those rights. It's almost like they would've been better off not sending anything at all.

But here we are, prior to the trial, so it's very difficult for anyone in this courtroom to say, you didn't reserve your rights, you didn't do this properly. There's DJ file; there's been discussions about this repeatedly; there's letters back and forth; there's coverage analysis that's been discussed between parties; there's a motion to intervene; we're talking about this now for an hour and a half. We've done it other cases. We've all had these motions. Everyone

knows the notice argument can't work. There's no one in this courtroom that can say we are not on notice of these issues.

Now, what Mr. Smith brought up is this conflict between the parties. It very well might be a conflict, but that's not what our supreme court justices seem to say during the arguments. They said no, that's not -- that's not -- we don't know that that's a conflict. Now, they were asking questions, so this is not part of the opinion, but my reading on it was, all we're doing is preserving evidence here in this case and you've got to prove your damages, that has to come out, and all we're doing is taking that and breaking that down further. We're not trying to pin our insured -- our insured is out -- one of them is out of business. A lot of times, when you get to these trials, the insured is out of business, there's no one to speak on behalf of the corporation. One of my insureds resides in Mexico now and we've only recently been able to find him and communicate with him. So, actually that's in -- that's in the other case that we had yesterday. It's starting to run a little bit in my mind here. But to say that, that there's a conflict, our supreme court has said no and I have argued *Simms v. Nationwide* repeatedly saying, if there's divergent interest, then all is forgiven, you try this in the subsequent action, and I've been told absolutely not. Mr. Henry argued against it, Mr. Thompson argued against it. I feel like in this case, I would almost want Mr. Henry to be my

expert witness and stand here and say, well that was kind of the reason we recovered in that case because Harleysville failed to intervene and ask the Court these questions.

Just finally, we're just looking to pay what's covered under the policy. We're looking for evidence preservation and we're the ones asking for it. If any other party in here is preventing this from happening, later on, we will argue that they prevented it ---

THE COURT: Is the goal to eliminate the necessity of the DJ action or to simplify the DJ action?

MR. CALAMARI: I don't know that we know. You know, we know what the insurance or what Heritage said and our current supreme court has said. I don't know that anyone is absolutely bound by these numbers. I think if they get numbers for repair costs for removing and replacing defective work and if there's repair costs for removing and replacing damaged work, I am sure in the DJ action there will be arguments by each side about whether that number is accurate or should be reduced or included. But the problem is, let's say -- let's say the Plaintiff won $10,000,000 and let's say the defense says $1,000,000 and the jury comes back with a general verdict of $4,000,000. So, you got $4,000,000 in this case. They may not have given anything for the stucco; we don't know. We don't know if anything at all was given for the stucco. They might -- they have a couple of million

dollars for stucco, a couple million dollars for vinyl siding, a couple of million dollars for the other trades; we don't know. A case that was tried earlier this year in Charleston, the Plaintiff wanted $21,000,000. The defense said it's gonna cost about three or four to fix it. The jury came back with $7,000, 000. A $10,000,000 item in that case was fastening, adding fasteners to the HardiePlank, the exterior of the buildings. It's hard to say whether any portion of that was given. Well, we moved to intervene there, the Judge denied it. General verdict, we don't know. So, you got to categorize. You got to categorize something. And what the Supreme court is telling us in Heritage is you have to categorize for that particular insured and divide costs of replacing defective work versus costs of repairing damaged work. We think that's not a difficult task. We are not asking to come in and ask questions to the witnesses and offer expert testimony. All of those issues, reservation of rights, arguing over those things, those are all for the coverage action. We are asking for evidence preservation in this by a simple interrogatory per subcontractor, per general contractor, that breaks these down and itemizes them so they can be useable ---

THE COURT: Well, considering Mr. Wylie says that, no, the jury will not receive any information or no testimony from either side who are now parties, for the jury to make that

decision on the allocation and that the only party -- the only one who can present that evidence would be you as a party, but not you as a limited party. So therefore, he has an objection to you coming in as a party, just intervening period.

MR. CALAMARI: You know, I don't think the supreme court gave us the right answer, but I'm fairly sure, that's not it. The -- you know, to allow the carriers to come and have me get up and say, well, okay, let's break this number down and argue back and forth and change the complexity of it, that is not an issue to be decided in the trial for this trial, for me to get up and ask those questions. But the, the Supreme court has said this is where we need to allocate these damages, so I don't think that's proper at all.

THE COURT: You're saying the parties must do this whether they want to or not?

MR. CALAMARI: Whether they want to or not seems to be what our supreme court is saying. Now, there's a couple of options. You know, the jury can say here's the costs of removal and replace defective work, here's the cost of this, or I don't know, I can't figure this out, no evidence was presented. Later on then we'll argue you should've presented that evidence. They'll argue you didn't tell us in time. They'll be an argument about that and the Supreme court will have to decide that issue.

THE COURT: All right.

MR. CALAMARI: Thank you, Your Honor.

THE COURT: Thank you, sir. Anyone else?

MR. HILDEBRAND: Your Honor?

THE COURT: Yes, sir.

MR. HILDEBRAND: I was involved in the case yesterday, I'm Tom Hildebrand.

THE COURT: Yes, sir.

MR. HILDEBRAND: --- a dog in the fight, but an example occurred to me listening to the arguments about what irreconcilable conflict there would be. If I'm representing a subcontractor, typically you want to, if I'm just representing him normally, I would say that there aren't consequential damages. If the Plaintiff points out under two windows that there is some rotted wood, I would say that's an isolated incident and doesn't occur anywhere else. That's what I would normally do. Consequential damages are what trigger coverage. We all know that. That's what the carriers look for, consequential damages. If, if the insurance company is able to use a finding, my finding where I'm trying to argue to the jury there aren't consequential damages to argue coverage, then I'm now in the inherit conflict of having to argue there are consequential damages and this is not an isolated incident, it's probably under all the windows. I just don't see how you would get out of that conflict. I would have -- one, I'm trying to help my insureds and defend the case that

there aren't consequential damages, but there's -- to try to initiate coverage, I've got to prove that there are and I've got to prove basically the Plaintiff's case. I just don't -- can't get my mind around that would not be a conflict. That's all I've got.

Thank you.

THE COURT: All right. Thank you. Mr. Wylie?

MR. WYLIE: Very briefly, Your Honor. Mr. Calamari said that the allocation of the damages in the case is not something that he could talk about. I submit he absolutely, positively can talk about it if his client is a party to the case. He just doesn't want to talk about it.

The DJ actions in Heritage, I was asking yesterday after I was here, Phillip Thompson, Did y'all call experts to discuss allocation and damages at the DJ action? He says everybody was ready to do that. Judge Milling wouldn't let us because he said we hadn't properly reserved the right to do it. So, you can do it in the DJ action, you just have to have properly reserve your rights.

MR. CALAMRI: Your Honor, I know that now he's bringing out and we have people not even in the case talking, talking about hearsay from Mr. Thompson in the hall. You know, that case, we presented evidence, we argued a motion in limine whether he would allow evidence on that issue. Mr. Henry and Mr. Thompson said from the beginning, we will not ever offer

any evidence of allocation. We did, they didn't, and Judge Milling never talked about reservation of rights letters. Pat Henry slid a line in the order and on the motion to reconsider -- we can get the transcripts if they're necessary for this particular trial, but the transcript on the motion to reconsider is -- that was never brought up. That was never raised during the trial, that's not in the testimony, that's not in the transcripts anywhere dealing with reservation of rights letters and that is not the reason he excluded it. He excluded it because he said I don't care who's right or wrong, I have a general verdict and I'm not gonna let you go behind it, but you can make that argument to the supreme court on conflict, on *Simms v. Nationwide*, on divergent interest, on everything else, but unless we're gonna put Mr. Thompson on the stand and ask him questions under oath about what he thinks happened in that case, I don't know that a conversation in the hall should support the ruling in this action.

Thank you.

MR. DWORJANYN: Judge, just briefly.

THE COURT: Yes, sir.

MR. DWORJANYN: I apologize. I don't -- I don't think that it's appropriate for us to have to submit our reservation of rights letters at this juncture just for the purposes of this motion to intervene. As Mr. Wylie suggested, we have to prove that we reserved our rights. However, I'd like to offer

in and proffer to the Court for in camera review, if the Court feels it necessary, letters of 4/20/17 and June 16, 2017 to Richard H. Construction, LLC.

THE COURT: Does this interject me into the coverage aspect of things?

MR. CALAMARI: Your Honor, which is why I think that's in the second action, not in this one.

MR. DWORJANYN: I agree that I think it's in the second action, but I don't want to hear three years from now that I waived my right.

MR. WYLIE: Judge, they're interjecting you into the coverage aspect of this thing as hard as they can.

THE COURT: Well, that's why I'm trying to draw the line between this action and other pending actions including the DJ action.

MR. DWORJANYN: Mr. Wylie, would you agree that any subsequent DJ, we would be -- we would not have waived our right to ---

MR. WYLIE: Here's what -- here's what I agree to and I think I said it before. If the reservation of rights letters properly notified the insured and satisfied what the court said in Heritage, I'm not gonna say anybody waived their rights to do all of this stuff in a DJ action. I don't think they ought to be able to do all of this in my case during my trial unless they are a party and come in and they ask the

questions to get the answers that they want because nobody else is gonna do it.

THE COURT: All right. And of course I'm happy to look at it. I don't know what affect it would really have on the issues before me.

MR. DWORJANYN: I don't think it probably does. Under those circumstances, I think we're all right, Your Honor, as long as it's not a condition precedent to you considering our motion to intervene.

Thank you, Your Honor.

THE COURT: Okay. All right. Well, when do you need to know?

MR. WYLIE: About four months ago.

THE COURT: Well, the motions were just -- the motions were just filed or deemed filed or motions to intervene, when was this one filed?

MR. LADY: July of 2017 was Selectives, Your Honor, and Conopius was September of 2017.

THE COURT: July?

MR. LADY: '17, and Hartford's was September of 2017 and then of course, I think ---

THE COURT: Okay. So, I mean, just being filed. So, it's a pretty timely hearing. And Mr. Dworjanyn's motion is dated September 8th.

Well, I need to review all of these cases again. Simms

and Stoney and the other one, Jennings, *Davis v Jennings*, and all the Harleyvilles, and Newman, Heritage. Is there anything else you all want to submit to me for consideration prior to ruling on it? Obviously I need to rule because we have a hearing in the weeks ahead. So, on this and the other and we have one more to hear. Is there a motion in the other one as well?

MR. CALAMARI: Yes, sir.

THE COURT: They've all been -- everything is merging together. So, maybe I need to hear that one as well, which was set for to come after -- I guess maybe we anticipated 11 o'clock or 11:30 or so.

Who is here to argue that? Same folks, okay.

MR. LADY: Ms. Blundy is going to have some dazzling new arguments, Your Honor.

THE COURT: Okay. Well, let's hear that one too. Mr. Wylie, you're not on that; who is the -- who sits in your chair on that one?

MR. WYLIE: Amanda.

MS. BLUNDY: Yes, Your Honor.

THE COURT: Well, just let's kind of skip to that and we'll take a few minutes break and then we'll hear that part of it so we will have all of the interventions on all of the cases heard that are currently before us today and then we'll take up the other stuff, whatever that may be. We'll take a

few minutes.

(RECESS.)

*******OFF THE RECORD*******

(On the Record.)

BY THE COURT:

MR. LADY: Your Honor, if I could ---

THE COURT: Mr. Lady, yes, sir.

MR. LADY: I think all of the intervention motions have been heard. There was a motion to amend. Did we hear that at the Status Conference; is that your position, Patrick? Because I know we debated about bringing in total or whatever, but I didn't know if you ---

MR. MCDONALD: We'll withdrawing that motion.

MR. LADY: Okay. So that's out. And then just for the Court's attention ---

THE COURT: As far as the Clerk's office, she has a long list. She told me there was -- how many did you say, a hundred and something motions pending and many of them have been resolved, addressed, things of that nature. So, I think on all of them that they're withdrawn, resolved, whatever, we need something submitted to the Clerk. So, I need something submitted to me to sign.

MR. LADY: I'll let Patrick do that.

THE COURT: To the extent y'all can -- okay.

MR. LADY: There were two motions -- one from Dietrich

Building Systems, that's Jim Warner, and I think he had written the Court and said he was arguing in the supreme court today and asked that not be heard today and have it postponed.

THE COURT: Right.

MR. LADY: And then there's sort of a companion motion for summary judgment by Builder's First Source. It frankly was not timely filed and it hasn't been 10 days, but they are sort of companion parties and he asked for that -- for his motion to be heard at the same time as Jim Warner's.

THE COURT: Okay.

MR. LADY: And I think -- I think those were the only other motions other than the one, that motion for summary judgment. Joe, were you ---

MR. CUNNINGHAM: Joe Cunningham for Russ Baltzer. We filed a motion to relieve to amend our answer to assert cross claims against certain defendants. We just filed that yesterday, though. So ---

THE COURT: All right. So, that's not pending today then?

MR. LADY: I didn't think so, which leaves, I think the only motion is the motion for summary judgment between Richard's Framing and ---

MR. MCDONALD: A motion to stay.

MR. LADY: --- a motion to stay.

THE COURT: All right.

MR. LADY: Do you want to hear the motion to stay first or the motion -- Patrick, they're both your motions, which ---

MR. MCDONALD: The motion for summary judgment can go first.

THE COURT: Okay.

MOTION FOR SUMMARY JUDGMENT:

MR. KENNEDY: Your Honor, again, Bob Kennedy, here on behalf of Richard H. Construction, d/b/a Richard Framing. I'm actually hear for my colleague, Kevin O'Brien, today. And, we are here on the motion for summary judgment against the cross claims that were filed by the -- I guess we'll call them the Ocean Keyes Defendants, Keye Construction, and Ocean Keyes.

There are four claims, four cross claims, that we are asking the Court to grant Summary Judgment in favor of Richard Framing on specifically breach of contract claim, breach of warranties claim, equitable indemnity claim, and a contractual indemnity claim. This is not as exciting an issue as the Court has been dealing with for the last several hours, but good news, it's probably an easier issue and one I can address much more briefly, so perhaps we can get some lunch.

I want to just briefly talk about the breach of contract and breach of warranties claims because I think those are the easiest to resolve. Simply put, they are not viable claims on their own, separate from the equitable indemnity claim. This is a case where the Ocean Keyes Defendants are simply trying

to shift liability, pass through liability on Richard H. Construction. The damages sought are wholly derivative, independent on a finding of liability of the Ocean Keyes Defendants. They are not seeking damages apart from that. There are no allegations of that in the complaint and there's no forecasted evidence of any damages beyond those derivative claims. And as the Court is well aware, breach of contract, negligence, breach of warranty claims, in that specific context are treated as equitable indemnity claims. And for that reason, we think the only issues really before the Court today, because we're simply talking about pass through liability are equitable indemnity and contractual liability claims.

As to the equitable indemnity claims, again there are two entities. Only one of those entities actually has a sufficient special relationship in order to assert an equitable indemnity claim. But regardless, it doesn't matter who has the right to bring that claim. Neither one can actually support such a claim because they cannot show that their hands are clean. They cannot show that they were not at least partially at fault. And the reason that they cannot show that they were at least partially at fault, is because their own expert has offered testimony under oath, that at least some portion of the damages is attributable to the Ocean Keyes Defendants. When some portion of the damages is

attributable to their own work, they cannot have an equitable indemnity claim. We think that's pretty simple and straightforward. We cited the testimony of the -- of their own expert, because we think it showed that absence any issue of fact. It was notable in the response that was filed last evening in opposition to the memorandum of law the argument against our argument was that, well, it's possible that there's still gonna be an issue of fact because the jury might not believe our own expert and the jury may choose to disregard our expert's testimony that we were at fault. That was the argument in opposition to our argument, pointing out that their own expert testified that we have to share some blame. Now, we could also offer testimony from all the other experts who have been deposed in this case saying, yes, the general contractor and developer share some of the fault, but we thought it was notable that their own expert testified to that.

As to their argument that, well, the jury might not believe our expert, we think that's a pretty laughable argument but, fortunately, the South Carolina Supreme Court has spoken on this issue specifically. A 2010 decision, *Hoard v. Roper Hospital*, the South Carolina Supreme Court said that you cannot argue that an issue of fact exists because a jury might not believe a witness. Specifically, the court said the plaintiff cannot argue that there's genuine issue of material

fact on the basis that the jury might not believe their own witness. So the argument that, well, our expert said that we were at fault, at least partially at fault but the jury might not believe it; that doesn't hold water. The fact is that their expert did testify that the Ocean Keyes Defendants were at least partially at fault, as did multiple other experts in this case and there's no forecast of evidence showing that they are not at fault. And for those reasons, we think that the issue of equitable indemnity is pretty clear and that issue should be resolved in our favor.

To the extent that the equitable indemnity claim is not just outright dismissed, we do note and we do argue on our motion that, at a minimum, it should be severed. As an equitable claim there is not right to a jury trial. So, to the extent that this claim remains on the table going forward, it should not be tried with the factual claims at issue in the main action. It should be severed and there should be a separate trial. But hopefully, we don't even reach that point.

The more interesting issue in regard to the cross claims is the contractual indemnity claim. As an initial matter, there is no contractual privity between our client, Richard Framing and Keye Construction. Again, we have two, two cross claim plaintiffs, Ocean Keyes and Keye Construction. The only entity with whom Richard Framing has a contract is Ocean

Keyes. So, with respect to Keye Construction, there is no contractual indemnity claim because there's no contract.

As to the contract between Ocean Keyes and Richard Framing, there were a number of them. They're attached to our motion. It is notable that in that contract, the word indemnity is not mentioned once. It is a standard AIA, A101 contract, and nowhere in any of those contracts is the word indemnity mentioned. The question that immediately springs to mind is, how can you have a contractual indemnity claim based on a contract that does not mention the word indemnity a single time. The argument from the Ocean Keyes Defendants is that within the A101 contract, there is a reference to the A201 contract, and it says that we adopt the general terms of the A201 contract. And within the A201 contract, they claim there is sufficient indemnity language to support a contractual indemnity claim. The issue is that the A201 contract, upon which they are relying to support their contractual indemnity claim, is not actually attached to the contract and there was never any time where they told our client where he could go get that A201 language. They never told our client what that A201 indemnity language was. All we have is a contract that has a number of other terms and conditions and it simply references the A201 contract. And the reason this is significant is because the South Carolina Court of Appeals has addressed this very issue as cited in our

motion in *Traynham v. Yeargin*, 403 S.E.2d 329, a 1991 decision from the court of appeals. The court says when an AIA contract is not attached, the terms are not described or instructions on where to locate those terms are not specifically given -- basically due process, giving the other side an opportunity to understand what they are actually agreeing to -- when that opportunity is not so provided, those terms are not incorporated into the agreement. And here we have an affidavit from the principal of Richard H Construction averring that he never saw the A201 contract, it was not attached to the agreement, it's not attached to any of the agreements that are part of the record evidence here, and he was never given the opportunity, never told where he could see this. He knows nothing about this indemnity language. Per Traynham v. Yeargin, based on that evidence, A201 language is not part of this agreement. There is no indemnity provision.

Now, Mr. McDonald will, will likely argue that the reference does suffice, and indeed in his brief in opposition to our motion submitted last evening, he does reference a transcript from a separate proceeding, a sister proceeding, the Beach Villas lawsuit that is just one of multiple lawsuits regarding, regarding the Ocean Keyes Development. And, there was another proceeding in which a representative of Ocean Keyes was deposed and he testified, as quoted in the response in opposition, that the A201 contract was supposed to be

provided to, to all the contracting parties. So, at some point -- and Richard H Construction is a party to -- in that sister proceeding. The testimony in that sister proceeding that is used in this case for the proposition that the -- that the contract was provided, was that it was supposed to be provided.

Now, there are several layers of problems with this. First of all, that separate proceeding, the testimony from that separate proceeding is not properly before the Court today. It was sworn testimony, and that is correct, but it was not submitted sufficiently in advance, it wasn't sufficiently proffered in order for the Court to properly consider that testimony. Moreover, if you actually look at the testimony that was provided, the testimony applies to the contracts that were issued in that separate proceeding, in the Seashore Villas lawsuit. There is no testimony whatsoever in the deposition transcript that was provided by the Ocean Keyes counsel about the contracts in this case.

And perhaps, most importantly, in addition to not being properly proffered, not talking about the contracts that were issued in this particular case, the testimony doesn't stand for the proposition that the, the A201 contract was actually provided to Richard H Construction. What is said is the contract should have been provided. And if you go further on in the testimony, it's actually attached to the opposition,

the question was asked, Well, do you know if it was actually provided? And the answer was, I don't know. So, here we have -- we have testimony on one side from this case saying the contract was never provided. I don't what that indemnity language was. And we have testimony that hasn't been properly proffered to this Court from another case involving different contracts where the testimony was, it should've been provided but we don't know if it was provided. That does not create an issue of fact. The only competent evidence before the Court today is that the indemnity language that they're relying on to support their contractual indemnity claim, the only concrete evidence before the Court is the affidavit from our client that says, it was not provided to him. And for that reason, in the absence of any actual contract language, showing that there was any indemnity language whatsoever, contractual indemnity language, the contractual indemnity claim must fail.

I think that it is notable that the 201 language, that Plaintiff's counsel is relying on in support of their contractual indemnity claim is nowhere in the record. It has never been proffered in this case properly. It hasn't been submitted with sworn testimony saying this is the actual 201 language that was attached to all of our contracts. No one has ever said this is the actual contract language. The first time that we saw this A201 contract was in the brief in

opposition that was emailed to us last evening. That was the first time that it was proffered at all in any way, shape, or form. So, we would submit that the A201 language that the Ocean Keyes Defendants are relying on in support of their contractual indemnity claim, is not even properly before the Court, and therefore, should not be considered. Because there's no indemnity language in any contract properly before the Court today, summary judgment is certainly appropriate.

The last point, Your Honor, is something that was not in our motion, but something that we came across subsequently and we have spoken with the counsel for the Ocean Keyes Defendants in this regard and we did want to bring it to the attention to the Court. Even if the Court were inclined to consider the A201 language, it does not provide shelter, it does not provide them a claim for contractual indemnity. If you look at the language that's cited in their brief in opposition, there is a large exception at the end, where it says that the contractor shall indemnify and hold harmless, blah, blah, blah, except it says other than the work itself, and that is the key language in the indemnity provision and the question, if the Court even considers the language, which we don't think you should, is what do the words other than the work itself mean. And if you look at the commentary to the AIA language as well as the case law that looks at this language, it's very clear that this indemnity provision is not intended to apply

to a claim that a contractor failed to construct a building according to the contract documents and that's the very claim that's at issue here.

All the AIA language, commentaries made clear that this does not apply to a construction defect claim like this. And we do have one case from New York; it's called *Porter Managers v. 125 North*, which I would like to hand up for the Court's consideration. Again, I don't think you need to consider this, but it's some of the icing on the cake in terms of the meaning of this A201 language. This is a New York decision, which of course is not binding on this Court, but it is instructive as to what the indemnity language that the Ocean Keyes Defendants are relying upon means. Again, a simple construction defect case, but the main holding on page 8, relevant to our argument today is that this first indemnity provision, which is referenced here in this agreement clearly was intended to cover structures where indemnities are sued by a third party for physical injury and property damage occurring as a result of a subcontractor's work, but not when the claim challenges the subcontractor's work itself. The issue here is the subcontractor's work itself and so even if you get to the point where you're considering this, this indemnity provision, which quite frankly, is not properly before the Court, we do not believe that it extends to cover this particular claim.

So, at the end of the day, the breach of contract, the breach of warranty claims, they are subsumed by the equitable indemnity claim. The equitable indemnity claim fails because as conceded by their own expert, they have -- their hands are not clean in this. They share some responsibility for the damages that are alleged, so they cannot move forward with their equitable indemnity claim. And their contractual indemnity claim fails because they cannot show any indemnity language in the contract between Richard H. Construction and the Ocean Keyes Defendants. In fact, the only evidence that they've put on is from another case where they say that, that contract language should have been provided but they don't even know if it's been provided. Our client has testified under oath that the contract language was not provided, that's the only competent evidence before the Court. Because it's the only evidence, the only possible conclusion, even taking the forecasted evidence in the light most favorable to the other side, is that the contract language was not provided. Because that contract language was not provided, summary judgment is appropriate in favor of Richard H. Construction.

Thank you, Your Honor.

THE COURT: Yes, sir.

MR. EMGE: Your Honor, may I argue from table? Is that acceptable?

THE COURT: Yes, sir.

MR. EMGE: I think I talk loud enough that that shouldn't be a problem. My name is Chip Emge. I represent Ocean Keyes Development, the developer. We do not represent Keye Construction with respect to this motion. What I'd like to do is take the arguments in the order that they were presented in the brief, and I have -- I know we filed yesterday -- I have extra copies of our motion or memorandum and exhibits if you would like. First, I would like to address the breach of contract and breach of warranty claims and the Richard Framings argument, essentially the Stoneledge decision that they're just merely disguised equitable indemnity claims.

First, this case is distinguishable from Stoneledge, because the developer itself suffered damages as a result of Richard Framings' breach of the contract. We are not claiming just that the defense of this suit is the damage in and of itself. We're saying that Richard's Framing does, was not up to par and, as a result of that, we did not get the building or the type of building that we contracted for. Also, unlike Stoneledge and I would get to this in a moment, we believe there is a contractual indemnity provision, and I'll discuss that in a moment as to why I believe the A201 was incorporated by reference into the contract with Richards Construction. The independent damages that were suffered by OKD, there's testimony that we cite in our brief from Mr. Baltzer on Page 113 of his brief, that there were beams that were originally

constructed by Richards Framing that the developer prior to the bringing of this lawsuit, had to repair at their costs. That is the part of the damages that we seek and therefore, that is independent. There is also evidence in the report of Mr. Donahoe or Donahue, which cites a number of engineering issues or he, as an engineer, he knows the number of issues which deal with the Richards Framing's work. Again, our client had to address those. It was prior to this case being sought, but the result of that was that those same issues are being presented again in this case.

And, Mr. Hernandez himself, noted that they had to do the repairs with respect to those beams. I believe we have cited that's on Page 159 of his testimony. And again, OKD as the developer, had to compensate Mr. Hernandez, Richard's Framing, for the remediation work that they did, which is again an issue in this case.

With respect to the equitable indemnity argument and Mr. Gregory's testimony, I think it's important to put it in context. Mr. Kennedy argues that Mr. Gregory was talking about responsibility, but that is not the case. What he was talking about as we set forth in our brief, is he was doing an allocation, an allocation of repairs strictly for mediation. And as part of that, he said, I think it's fair to assume that there should be some allocation to the GC. He's talking about an allocation of the costs of the repair. First it's an

assumption. Second, it's not a statement as to liability and, candidly, he said he had not even done that analysis. So I don't think that you can say as a matter of law, that Mr. Gregory is saying that Ocean Keyes Development is liable. Secondly, Mr. Gregory's testimony was general in nature; it was not specific to any one defendant. So to say that you can't extrapolate from the allocation to say that as to Richard's Framing, Ocean Keyes Development was negligent or at fault in some way.

In addition, I think there's some question of fact with respect to liability because in Mr. Hernandez own testimony, he, quite clearly, testifies that they never had any -- and I'll see if I can get the exact quote for you -- this is counsel asking Mr. Hernandez, did you ever go to anyone whether it was Russ Baltzer, Mark Hyman, John Maduir (spelled phonetically), or Brian Deal (spelled phonetically) and notify them of any problems you thought there were with the project? No. Did you ever, during the course of your work at the project, feel that the work was too much for your company with regard to how many people you needed to perform it? No. Did you ever feel like the work you were contracted to do is out the scope -- outside of the scope of what you had to do? No. And the importance of that testimony is that if there were no questions on the part of Mr. Hernandez with respect to the scope of his work and how it was to be done, then it is fair

for Ocean Keyes Development to assume that the work was done properly. That in and of itself creates an issue of fact as to whether Ocean Keyes Development was negligent for the purposes of the equitable indemnity argument.

With respect to the incorporation of the indemnity provision, the case -- the court of appeals case cited by the Plaintiff, the Traynham case, it was critical to their -- the court of appeals decision, that there was no enumeration or description of the conditions of the contract under Article VII as there was in the what I'll call the Timmonsville case, which is the prior supreme court case. And in Timmonsville, the court said, we think that in the absence of a showing of fraud, mistake, unfair dealing, or the like, a party shall contract, incorporating in arbitration provision, cannot escape the obligation of such a provision by simply declaring, but I did not read the whole agreement. As in the Timmonsville case -- and we've attached these documents to our brief -- the AIA contract signed by Mr. Hernandez has a very clear enumeration of the documents. In paragraph -- well, in Article VIII, the enumeration of contract documents, 8.1.1. the agreement as is executed, 1997 edition of the standard form of agreement between owner and contractor AIA 101. - 101-1997. The general conditions or the 1997 edition of the general conditions of the contract for construction AIA document A201, 1997. That is identical to the facts that were

presented to the Court in *First Baptist Church of Timmonsville v. Creed & Sons*, and the cite for that is 281 S.E.2d 121. So first, it does not matter whether Mr. Hernandez physically had a copy of the A201 attached to the contract or given to him. It was incorporated by reference in the contract that he signed. The -- Richard's Framing also makes an argument that Mr. Hernandez was not given any directions about where to find the A201. Nowhere in the Timmonsville case do they discuss directions. I will grant you that in the Traynham case, they state indicta that no description is given of the general conditions and no directions are given to the Traynhams about where they might find them. However, in this case, those documents were specifically enumerated and specially called out as the AIA contract documents, which like the Timmonsville case, the reference in the Timmonsville case which the court held was sufficient was a reference to the construction industry arbitration rules of the American Arbitration Association. That was the extent of the directions that the court upheld in Timmonsville, and we believe that that is applicable here.

As far as the proffer of the testimony of Mr. Baltzer, the record is replete that these sister cases, they were all essentially handled the same way. I don't -- I think it was properly proffered. I think that deposition testimony is, Your Honor, and those can be used for any purpose whatsoever.

It's not an affidavit that requires the 48-hour rule, but that being said, I think it does create an issue of fact, even if the Court is not inclined to accept the incorporation by reference, I think it creates an issue of fact as to whether or not this was the A201 was at least offered or available to Mr. Hernandez. Again, we don't think the Court needs to, to reach that, because we think the Timmonsville case clearly holds that the A201 was incorporated by reference in this case. And the importance of that reference is the terms of the indemnification in the A201, which the contractor shall indemnify and hold harmless, blah, blah, blah blah, blah from -- against claims, damages, losses of expenses, including but not limited to attorney's fees arising out of and resulting of performance of the work and provided other than the work itself. I mean, this is essentially a Crossman/Newman type of argument, but our argument is that we have suffered damages through the breach of their contract which has, in turn, affected other elements of the building that have had to be repaired. So the claim, our claim is not just limited to the breach of the contract with respect to their work, but also the effects that that breach had on other elements of the building.

The -- Richard's Framing raises an argument under the South Carolina Contribution Among Tortfeasors Act, we believe that that issue is not ripe yet. One, as far as we know,

Richard's Framing has not settled with the Plaintiff. And, two, we have Ocean Keyes Development has not been found to be a joint tortfeasor. With respect to severing the equitable indemnity claim, there is South Carolina case law, *Johnson v. South Carolina National Bank* case, 292 S.C. 51, which clearly holds that equitable and legal claims can be tried together with the judge deciding the equitable claims and jury deciding the factual issues.

So, Your Honor, for those reasons, we believe that we have sufficient grounds to proceed on our breach of contract and express warranties, our equitable indemnity claim, and our contractual indemnity claim. We believe there's sufficient facts and evidence to deny the motion for summary judgment. I'll be happy to answer any questions you have.

THE COURT: The distinction you said between this case and Stoneledge is?

MR. EMGE: Well, the distinction between this case -- there are a couple of distinctions. First, Stoneledge did not have a specific contractual indemnity provision. Whereas, we do in this case. Also, we would argue that as the developer, we have incurred independent damages separate from just the mere fact that we're here having to defend the Plaintiff's allegations. In that context, it's the beams, it's other work that Richard Framing did that,-- that give rise to our independent claims and therefore, it's not just an equitable

indemnity claim in sheep's clothing, if you will.

THE COURT: All right. Mr. Kennedy?

MR. KENNEDY: Your Honor, I'll be brief here and I'm somewhat in a unique position; somewhat like you. I'm a little newer to this case as I'm filling in for a colleague here, but that's why -- I think his first point is notable. In considering the arguments of counsel and considering how to respond, I just know, first, with regard to the discussion, the existence of independent damages. There's a lot of general discussion of, yes, we've suffered damages independent of this indemnification claim but -- and there are general allegations as noted in the response brief that was submitted last night on Page 5. There are allegations and cross claims that as a direct and proximate result of each of the subcontractor defendant's breach, the work performed caused resulting property damage to other construction work product on the project, that the Ocean Keyes Defendants suffered actual and consequential damages in an amount to be determined at trial. There are all these allegations and general statements on these independent damages, but we're beyond that here. We're at the point where there needs to be some sort of forecast of evidence, something in the record to actually establish that they have suffered those damages, and that has not occurred to what I've heard today. The only evidence in the record is that the damages that they are seeking is

completely derivative of, of the work that was performed by us and the damages that are being sought by Plaintiff.

As to the argument about Mr. Gregory's comments on allocation, I think it boils down to the fact that Plaintiffs again are arguing that the jury can simply ignore the plain meaning of his words that yes, a certain amount needs to be allocated to the Ocean Keyes Defendants. There is no forecast of evidence. We put evidence into the record, we could put additional evidence from multiple other experts saying, yes, Ocean Keyes Defendants share additional fault, but their own expert said it, said some of the -- some of the damages have to be allocated to us. There's no forecast of evidence from the other side that they actually have unclean hands. I submit that once we put the evidence before the Court that their own expert testified that they don't have clean hands, that burden is on them to actually show differently and they cannot do that.

As to the discussion about the incorporation of the indemnity provision, this is not a case where we're arguing that our client did not have or did not read the language, which I think is what the Timmonsville case talks about. This is a case where he never had the opportunity to read it because he's handed a contract that was 10 pages long and somewhere in there it makes reference to A201, but he was never shown what that A201 -- 201 language was, it was never

discussed with him, he was never told where to get it. In line with the -- with the case we talked about earlier, we think that under those circumstances, that provision is not properly treated as part of this agreement. And I note that this is not just South Carolina that goes through this process where as a matter of fundamental fairness, a party to a contract has to know what's in it, has to be given the opportunity to learn what's in it. This is something that court's across the country -- I pulled up Williston on contracts that makes clear an incorporation by reference is not effective unless the provisions to which the reference is made has a reasonably clear and ascertainable meaning. When you don't even have the opportunity to see the document, when you're told where it is, it can't have a reasonably clear meaning, you can't bind something to an indemnity provision where he or she has never had the opportunity to see it.

As to the deposition testimony from the companion case, I disagree with counsel. I think because it is from the companion case, although it is sworn testimony, it is essentially treated as an affidavit. It should've been submitted 48 hours in advance. And the last -- again, if the Court is not inclined to grant the motion, at a minimum, we would request that equitable claims be severed and be tried separately.

THE COURT: All right. Any ---

MR. EMGE: Your Honor, just very briefly in response. First, Richard's Framing had the opportunity to ask any of these questions with respect to the incorporation of the A201 and its availability to our client, Mr. Baltzer, and they did not avail themselves of that opportunity.

Finally, despite whatever Williston on Contracts may say, the fact of the matter is that the Timmonsville case remains the law of this state. And in the Timmonsville case, the only -- the reference to the incorporated document was merely the construction industry arbitration rules of the American Arbitration Association. Identical essentially to what have here, except in our case, its general conditions are the A201.

That's all I have, Your Honor.

THE COURT: All right. Mr. Clark?

MR. CLARK: Thank you, Your Honor. Chris Clark for Keye Construction. I just wanted to put myself on the record and joining in the arguments of Ocean Keyes Development. Also point out, as to Keye Construction, Keye Construction is not the signator on the contract with Richard's Framing. Our posture is one of equitable indemnity and, of course, we are in the quintessential position of being a party that's been named through the alleged misconduct another, Richard's Framing, in which we had no contribution. We are a sister company of Ocean Keyes Development, but in these buildings

concerning Beach Villas, we didn't actually sign the construction contracts. That was actually done by Ocean Keyes Development, our sister company. So we've been named nonetheless because the alleged misfeasance or malfeasance of Richard's Framing.

THE COURT: I believe there are genuine issues of fact and parties have made -- both make good arguments, but I do not believe summary judgment would be appropriate on any of the grounds argued and I deny the motion.

MR. LADY: Thank you, Your Honor.

MR. EMGE: Thank you, Your Honor.

MR. KENNEDY: Thank you, Your Honor.

THE COURT: Yes, sir.

MOTION TO STAY:

MR. MCDONALD: Your Honor, Patrick McDonald on behalf of Ocean Keyes Development. We had filed a motion to stay. A little background as far as Ocean Keyes Development. Ocean Keyes Development developed a community known as Ocean Keyes Communities there up in North Myrtle Beach. Within Ocean Keyes Communities, there are three separate projects, Beach Villas, we're here today on behalf of Beach Villas; Lakeside Townhomes, which is scheduled to be tried in November, November 13th, a date certain; and Seashore Villas Association, which is probably going to be tried in early 2018.

Beach Villas first filed its original complaint in 2014 and then their filed -- third amended complaint was filed in December of 2016 in this case against Ocean Keyes Development, my client and nine subcontractors, four material suppliers. It involves nine multi-unit luxury buildings. Lakeside Townhomes was subsequently filed in July of 2015 and then Seashore also in 2015, November 18th. They filed a suit on behalf of 24 luxury villa buildings.

During the time periods that the Plaintiffs for all three projects claimed that property damage occurred, Ocean Keyes was covered by various commercial general liability policies issued by three different insurers. State Auto Property & Casualty Company was one, Star Indemnity was the second one, and the third one is QBE Insurance Corporation. As you probably are aware of, in March of this year, Star filed a DJ action against Ocean Keyes. There is dispute as to Ocean Keyes representations in the insurance application itself. They've asked for a rescission and on June 20th, QBE filed a DJ action against Ocean Keyes and they're also asking for a rescission.

We have spent countless hours in all three suits, devoted to settling this matter. In -- we had five separate mediations in all the Ocean Keyes Development cases. We have not settled any of them and -- despite our best efforts. And really the elephant in the room has been the elephant in the

room all morning; it's the coverage action. Coverage has been a stumbling block. If the coverage issue gets settled, I guarantee you, all the rest of it will come into place. When the coverage dispute has been resolved, all these other issues, as far as the legal issues, will get resolved. Anybody associated with any of those settlement discussions, the mediations, the mediators would say, it was coverage stances by the various insurance companies. And where I'm only talking on behalf of the general contractor, as you know, there are several DJ actions that have been filed by the subcontractors in Beach Villas, Lakeside, and Seashore.

As far as our motion to stay, South Carolina courts have said -- have stated that whether to stay a case is a decision made in the exercise of discretion by the court as part of its inherit power to control its own docket. Court's consider three factors in weighing a motion to stay. The interest of judicial economy is the first one; secondly, hardship and equity to the moving party if the action is not stayed; and potential prejudice to the non-moving party. All three Ocean Keyes cases are expected to take, at the very least, two weeks, and involve several expensive experts, consume valuable time of 12 jurors, Your Honor, your staff and other Horry County Courthouse employees. Beach Villas, as you know, is number two, a date certain trial scheduled to begin October 16th and move and go through October 27th. If this case and