THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

Ex Parte:

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

In Re:

The Harbour Cove Condominium Association, Plaintiff,

v.

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

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

Appellate Case No. 2017- 002146

FINAL BRIEF OF APPELLANT NATIONAL FIRE & MARINE INSURANCE COMPANY

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STATEMENT OF ISSUE ON APPEAL

DID THE CIRCUIT COURT ERR IN NOT ALLOWING LIMITED INTERVENTION BY NATIONAL FIRE & MARINE INSURANCE COMPANY WHEN BINDING CASE LAW COMPELS INTERVENTION?

STATEMENT OF THE CASE

This is an appeal from the circuit court's Order Denying Motion of Insurers for Limited Intervention dated October 12, 2017 and filed on October 13, 2017. (R. pp. 1-5). Respondent Harbour Cove Condominium Association ("Harbour Cove Association") commenced Civil Action 2014-CP-26-7634 on November 13, 2014 in the Court of Common Pleas for Horry County, SC, against numerous contractors, including Defendant Coastal Plaster Systems, Inc., ("Coastal Plaster"), complaining about the construction of the buildings in the Harbour Cove condominium development in Myrtle Beach, SC. The Civil Action was scheduled for trial to commence on October 16, 2017. Appellant National Fire & Marine Insurance Company ("National Fire") issued insurance policies with commercial general liability coverage ("CGL") to Coastal Plaster.[1] National Fire filed its 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, on July 27, 2017. (R. pp. 24-40). Other insurers for Defendants in the Civil Action filed motions seeking the same relief as National Fire. National Fire's and the other insurers' motions came before the circuit court for a hearing on September 28, 2017. The Honorable Clifton Newman heard oral arguments by counsel and received written memoranda; and thereafter issued his Order Denying Motion of Insurers for Limited Intervention dated, October 12, 2017. (R. pp. 1-5).

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[1] National Fire issued CGL insurance policies to Coastal Plaster for the following periods: 1) March 14, 2002 to March 14, 2003; 2) March 14, 2003 to March 14, 2004; and 3) March 14, 2004 to March 14, 2005. National Fire is providing a defense to Coastal Plaster for the Civil Action by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC, pursuant to a reservation of rights to contest whether damages being sought against Coastal Plaster are insured by the insurance policies. (R. pp. 25-26).

National Fire filed and served a Notice of Appeal on October 13, 2017, to appeal the Order Denying Motion of Insurers for Limited Intervention. (R. pp. 130-156). Other insurers filed Notices of Appeal as well. (R. pp 111-129, 157-240). On October 26, 2017, Harbour Cove Association filed its Motion to Dismiss the Appeal. (R. pp. 100-104). On November 13, 2017, National Fire moved to have the case transferred to the South Carolina Supreme Court. Appellants Hartford Fire Insurance Company, Hartford Casualty Company, Hartford Underwriters Insurance Company, and BITCO General Insurance Corporation made the same motion. On January 24, 2018, the South Carolina Court of Appeals denied Harbour Cove Asssociation's Motion to Dismiss. (R. pp. 12-16). On February 1, 2018, the Supreme Court granted the insurers' motions to transfer the case to the Supreme Court.

STATEMENT OF FACTS

Defendant Centex Homes ("Centex Homes") developed and constructed the Harbour Cove condominium development. (R. p. 244) (¶ 2 of Third Amended Complaint). The development consists of five residential buildings and a clubhouse. (R. p. 253) (¶ 34 of Third Amended Complaint). For part of the construction, Centex Homes subcontracted with Coastal Plaster for Coastal Plaster to install the exterior stucco cladding for the construction of Building 1; and Centex Homes then subcontracted with Coastal Plaster a second time to install the exterior stucco cladding for the construction of Building 5. (R. p. 25, lines 3-4). Coastal Plaster did not install the stucco cladding on the other three buildings or the clubhouse. (R. p. 25, lines 2-4). Building 1 was substantially completed on or about March 19, 2003. (R. p. 25, lines 4-5). Building 5 was substantially completed on or about December 5, 2002. (R. p. 25, line 5).

Harbour Cove Association commenced the Civil Action alleging that the exterior cladding on each of the five buildings and clubhouse, including the roofs, brick, stucco, and windows, were constructed incorrectly, which then led to progressive weather related moisture damages to framing and sheathing behind the cladding of each building. (R. pp. 258-259, 263) (See e.g., Third Amended Complaint ¶¶ 45, 46, 52). Harbour Cove Association seeks damages from the numerous contractor Defendants, including Coastal Plaster, based on an estimated cost to repair the five buildings and clubhouse. (R. pp. 769-774).

To support its claims for damages, Harbour Cove Association produced in the Civil Action an itemized estimate for repairs that includes the removal and replacement of the (allegedly defectively installed) roofs, windows, brick, and stucco on each building and repairs to moisture damaged framing and sheathing. (R. pp. 769-774). The itemized estimate states that the total cost

to repair each building is $1,385,258.30 for a total sum of $6,926,291.49 to repair all five buildings and the clubhouse. (R. p. 774). The estimate segregates and itemizes the cost to remove and replace the stucco separately from the cost to repair weather damaged sheathing and framing and segregates the cost to remove and replace the other claddings on the buildings. (R. pp. 769-774).

STANDARD OF REVIEW

The decision to grant or deny a Rule 24(a)(2), SCRCP, motion is reviewed under an abuse of discretion standard. Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990). An appellate court exercises de novo review of questions of law. Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009).

ARGUMENT

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

(A) Intervention Should be Liberally Granted, Analyzed For The Pragmatic Consequences, and a Circuit Court Should Avoid Rigid Applications of Rule 24, SCRCP.

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. Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990). Intervention may be of right or permissive; intervention of right is governed by Rule 24(a), SCRCP.[2] In analyzing intervention for a particular case, the South Carolina Supreme Court has recognized that intervention controversies arise in a myriad of contexts. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714. The Supreme Court has stated the following about intervention:

> [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. Accordingly, [the Supreme Court] must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2).

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

"Each case will be examined in the context of its unique facts and circumstances." Berkely Elec., 302 S.C. at 189, 394 S.E.2d at 714.

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[2] National Fire moved to intervene pursuant to Rule 24(b), SCRCP as well and maintains that the Supreme Court should allow permissive intervention in the alternative if intervention pursuant to Rule 24(a)(2), SCRCP is disallowed. (R. pp. 36-38).

Rule 24(a)(2), SCRCP, permits intervention as of right based on the following criteria: (1) there is a timely application; (2) movant asserts an interest relating to the property or transaction which is the subject of the action; (3) movant demonstrates 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) movant demonstrates that its interest is inadequately represented by other parties. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714 (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)).

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

National Fire's application was timely, in compliance with Rule 24(a)(2), SCRCP. National Fire is only seeking to intervene for the limited purpose of participating in the preparation of a special verdict form or written interrogatories (in accordance with Rule 49, SCRCP) for the jury to answer concerning damages. (R. p. 39). The other insurers are similarly seeking this same limited intervention. Such involvement necessarily depends on the evidence introduced at a trial so the task of preparing interrogatories is one that is done late in the trial, much like jury charges and preparing the verdict form.

National Fire will be represented by counsel different than the counsel National Fire retained to defend Coastal Plaster. National Fire's counsel will not be involved in any other aspects of the trial or the Civil Action. National Fire's counsel will not participate in the selection of a jury; nor will it present witnesses or introduce evidence. National Fire's counsel will not appear before the jury during the trial. National Fire's counsel should not be involved until it is time to prepare a verdict form and/or written interrogatories. National Fire's counsel's involvement will be limited to its counsel's communications with the court and other counsel and will occur outside the presence of the jury as a trial judge does in conducting a jury charge

conference with counsel. Subject to any objections, and based on the submissions of all counsel and evidence that is in the record, the trial judge will determine what interrogatories, if any, may go to the jury.

Harbour Cove Association has argued that National Fire, and other insurers seeking intervention, should be named as parties to the civil action. National Fire, however, submits that naming an insurer as a party or disclosing that Coastal Plaster is insured is not persmissble under South Carolina law and is thus not a viable solution. See Major v. Nat'l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976); see also Trancik v. USAA Ins. Co., 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003).[3]

(C) The Circuit Court Erred in Finding that National Fire Did Not Claim an Interest Relating to the Property or Transaction That is the Subject of the Action and Is Not So Situated That the Disposition of the Action May As a Practical Matter Impair or Impede its Ability to Protect That Interest.

The circuit court found that National Fire's interest in this matter is not sufficient for intervention. (R. p. 3, lines 11-21). The circuit court relied on Gov't Employee's Ins. Co., Ex parte, 373 S.C. 132, 644 S.E.2d 699 (2007) to reach its conclusion. (R. p. 3, lines 11-18). In Gov't Employee's Ins. Co., the insurer GEICO brought a declaratory judgment action against an individual to determine the parties' rights pursuant to an automobile insurance policy issued to an insured third person. Gov't Employee's Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700. The individual claimed that he was entitled to stack underinsured motorist coverage provided by the insured's policy on the grounds that the individual was a Class I insured. Gov't Employee's Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700. GEICO denied the individual's claim, alleging that he was not a Class I insured because the individual was neither the spouse nor resident relative of

[3] For instance, a jury may render a verdict under the assumption that Coastal Plaster's work is fully insured. This assumption would be wrong under South Carolina law.

the third person insured. Gov't Employee's Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700. After GEICO denied the individual's claim to stack coverage, the individual filed an action in family court seeking an order validating his common law marriage to the insured. Gov't Employee's Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700. GEICO petitioned the family court to permit it to join the family court action pursuant to Rule 19, SCRCP, or to intervene pursuant to Rule 24, SCRCP. Gov't Employee's Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700. The family court denied the motion to join and motion to intervene. Gov't Employee's Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700.

The South Carolina Supreme Court affirmed the decision of the family court. Gov't Employee's Ins. Co., 373 S.C. 132 at 139, 644 S.E.2d at 703. The Supreme Court stated that a party must have standing in order to intervene. Gov't Employee's Ins. Co., 373 S.C. at 138, 644 S.E.2d at 702 (citing Bailey v. Bailey, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). "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'." Gov't Employee's Ins. Co., 373 S.C. at 138, 644 S.E.2d at 702. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinquished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Gov't Employee's Ins. Co., 373 S.C. at 138, 644 S.E.2d at 702.

In Gov't Employee's Ins. Co., the Supreme Court found that GEICO's interest in the financial implications of the family court decision was peripheral to the subject matter and did not warrant intervention. Gov't Employee's Ins. Co., 373 S.C. at 138, 644 S.E.2d at 702. The Supreme Court found that the subject matter of the family court action was the validty of a common law marriage, which did not involve a determination of insurance benefits. Gov't Employee's Ins. Co., 373 S.C. at 139, 644 S.E.2d at 703.

National Fire submits that based on two South Carolina Supreme Court decisions to be discussed herein, the circuit court's reliance upon Gov't Employee's Ins. Co. is legally erroneous, as National Fire will be deprived of its legal rights and insurance benefits will be determined in the construction defect case if National Fire is not allowed to intervene. National Fire respectually submits that the Supreme Court should consider the pragmatic consequences of the circuit court's ruling in this matter, avoid a rigid application of Rule 24(a)(2), SCRCP, and examine the appeal in the context of the facts and circumstances. See Berkely Elec., 302 S.C. at 189, 394 S.E.2d at 714. The appeal concerns a construction defect case that is like numerous other ones filed in South Carolina each year. National Fire submits that the present appeal impacts numerous pending construction defect cases and ones that will be filed in the future. As do the other insurers, National Fire seeks a solution, a procedure for what is a common issue in the circuit courts for construction defect cases – specifically the legal consequences of a general verdict and insurance coverage.

(1) South Carolina Insurance Coverage Law For Construction Defect Claims Is Well Established On What Damages Are Insured Versus Uninsured.

Under established South Carolina law, a standard CGL insurance policy does not insure all of the damages that Harbour Cove Association seeks to recover against Coastal Plaster. A CGL insurance policy does not insure Coastal Plaster's defective construction itself or the defective installation of the stucco. Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 8, 747 S.E.2d 426, 430 (2013); Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011); Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546 (2009). A CGL insurance 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 insurance policy. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546. A CGL insurance policy does not insure the costs to replace Coastal Plastering's defective work. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546-47.

A CGL insurance policy does not insure an insured's work itself but rather consequential risks that stem from an insured's work. Bennett & Bennett Constr., 405 S.C. at 8, 747 S.E.2d at 430. "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 & Bennett Constr., 405 S.C. at 8, 747 S.E.2d at 430 (emphasis in original). For example, the Supreme Court found that continuous water intrusion resulting from the defective installation of the stucco cladding on a home that caused water damage to wood sheathing and framing behind the stucco triggered an insured loss under the CGL insurance policy. Newman, 385 S.C. at 194, 684 S.E.2d at 545. The results in Newman and Crossmann Communities have subsequently been codified in S.C. Code § 38-61-70(B)(2). The insurance coverage principles discussed above were reiterated by the Supreme Court in the recent decision Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017).

As evidenced by the pleadings and discovery produced in the Civil Action, Harbour Cove Association seeks to recover the total cost to repair all construction defects and that which is "physical injury to tangible [other] property". (R. pp. 258-259, 263) (Third Amended Complaint ¶¶ 42, 52). Some of the damages are potentially covered and some are not covered. National Fire seeks no more than a solution or a procedure that allows National Fire to pay what the Supreme Court has repeatedly found to be the *insured* damages rather than being forced to pay the uninsured damages.

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

In two published decisions, the South Carolina Supreme Court has required the insurer in each appeal to pay a general verdict arising in a construction defect civil action where the Supreme Court believed that one could not discern what parts of the verdict were covered and not covered by the applicable CGL insurance policies. Newman, 385 S.C. at 198, 684 S.E.2d at 547; Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017).

In Newman, a construction defect claim was brought by the owner against the builder of a house. Newman, 385 S.C. at 190, 684 S.E.2d at 542.[4] The builder and the owner submitted the owner's claims to binding arbitration. Newman, 385 S.C. at 190, 684 S.E.2d at 542. 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 behind the stucco. Newman, 385 S.C. at 190, 684 S.E.2d at 542. The Supreme Court held that the cost to remove and replace the stucco was not covered by a CGL insurance policy, but the cost to repair the water damaged framing and sheathing behind the stucco was covered by the CGL insurance policy. Newman, 385 S.C. at 197-98, 684 S.E.2d at 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

[4] In Newman, Auto-Owners Insurance Company retained defense counsel for the builder to defend the arbitration. Counsel retained to defend the builder was different than the counsel retained by Auto-Owners Insurance Company to bring a declaratory judgment action to determine insurance coverage for the arbitration award.

cost to repair water damaged sheathing and framing (insured). Newman, 385 S.C. at 198, 684 S.E.2d at 547. The Supreme Court stated the following:

> [W]e hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.
>
> Nevertheless, it is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto–Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. See Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.").

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

In Heritage Communities, the Supreme Court again addressed this same issue. Heritage Communities, 420 S.C. at 331, 803 S.E.2d at 293-94. In Heritage Communities, the facts in the underlying construction defect claim were similar to the facts in Newman. 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. Heritage Communities, Inc., 420 S.C. at 332, 803 S.E.2d at 294. 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. Heritage Communities, Inc., 420 S.C. at 331, 803 S.E.2d at 294.

In the declaratory judgment action to determine insurance coverage for the verdict, the Supreme Court affirmed the Special Referee who held that Harleysville Insurance Group was obligated to pay its time-on-risk share of the general verdict. Heritage Communities, Inc., 420 S.C. at 332, 803 S.E.2d at 294. The Supreme Court also affirmed the Special Referee who held that Harleysville Insurance Group could not allocate the damages between insured and uninsured

damages in the declaratory judgment action.[5] Heritage Communities, Inc., 420 S.C. at 332, 803 S.E.2d at 294 ("Although the Special Referee found that the costs to remove and replace the faulty workmanship were not covered under the policies, the Special Referee concluded that it would be improper and purely speculative to attempt to allocate the juries' general verdicts between covered and non-covered damages. Accordingly, the Special Referee ordered the full amount of the actual damages in the construction-defect suits would be subject to Harleysville's duty to indemnify in proportion with its time on the risk.").

In light of Newman and Heritage Communities, CGL insurers, including National Fire, are left with no alternative but to ask a circuit court to allow them to intervene on a case by case basis every time this issue arises.[6] The circuit court found that Heritage Communities does not mandate that the insurers have a right to intervene to ask special interrogatories or request a special verdict form. (R. p. 4, lines 7-9). National Fire submits this finding is legally erroneous. Heritage Communities does in effect mandate or compel that an insurer do so. The fact is Heritage Communities (and Newman) leaves no alternative for an insurer but to request intervention or suffer the consequences of a general verdict; and thereby being required to pay both insured and uninsured damages, contrary to South Carolina law and contrary to CGL insurance policies.

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[5] The Supreme Court held that Harleysville Insurance Group was obligated to pay its time-on-risk share of the general verdict. Heritage Communities, Inc., 420 S.C. at 358, 803 S.E.2d at 309.

[6] An immediate question is whether the insurer can instruct or require counsel retained by the insurer to defend an insured (e.g., Coastal Plaster) to submit special interrogatories. That way, an insurer does not need to intervene. As discussed further herein, in the Harbour Cove Association case, the answer is "no". The answer is "no" because the circuit court found that defense counsel has a conflict of interest in seeking special interrogatories. (R. p. 4, lines 10-17) (Order Denying Motion of Insurers for Limited Intervention ¶ 4, pg. 4).

In another construction defect civil action, the Honorable J.C. Nicholson, Jr. ruled contrary to the Honorable Clifton Newman. Judge Nicholson ruled in favor of Selective Insurance Company ("Selective") being able to intervene on a limited basis in a construction defect case not unlike this case or the underlying actions in Newman and Heritage Communities.[7] (R. pp. 17-23). In contrast to Judge Newman, Judge Nicholson found that Selective did have an interest in the subject matter of the litigation and that the disposition of the action may impede Selective's ability to protect its interest. (R. p. 19). Judge Nicholson found that Selective sufficiently showed prejudice if intervention were denied. (R. p. 22). Judge Nicholson stated the following:

> A denial would result in the impairment of [Selective's] interest in that 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 occured 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.

(R. p. 22).

Judge Nicholson correctly reserved further action on the actual implementation of special interrogatories for the trial judge who would make decisions on whether and what interrogatories may go to the jury based upon the evidence introduced at trial. (R. pp. 22-23).[8]

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

[8] 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 federal courts in civil cases where insurance coverage for the damages is an issue. In Plough, Inc. v. Int'l Flavors & Fragrances, Inc., 96 F.R.D 136, 137 (W.D. Tenn. 1982), the United States District Court permitted an insurer "to intervene [FRCP 24(b)] 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

The Supreme Court in Newman and Heritage Communities did not provide definitive instructions on what actions must be taken to avoid the consequences of a general verdict. In Newman and Heritage Communities, the majority decision did not mention intervention or Rule 49, SCRCP. Heritage Communities, 420 S.C. at 363, 803 S.E.2d at 310 (Pleicones, J. dissenting) ("Moreover, there is no suggestion how Harleysville could have intervened in these lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law."). The Supreme Court also did not hold that a general verdict is the only option; and that insurers must bear the consequences under any circumstance. The 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.

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.

(3) A Federal Decision Relied on by the Supreme Court in Heritage Communities Supports Intervention and Does Not Penalize An Insurer For a General Verdict.

In Heritage Communities, the Supreme Court relied on Duke v. Hoch, 468 F.2d 973 (5th Cir. 1972), which discusses burdens of proof, general verdicts, and the allocation of damages. Heritage Communities, 420 S.C. at 341, 803 S.E.2d at 299. The facts in Duke involved a judgment creditor seeking insurance from the CGL insurer for the insured judgment debtor. Duke, 468 F.2d at 974. In Duke, the verdict on the merits was a general verdict for a single sum and included covered and non-covered damages. Duke, 468 F.2d at 974. The Fifth Circuit Court of Appeals affirmed the lower court's finding that the insurer discharged the initial burden which was to show that the verdict included noncovered damages. Duke, 468 F.2d at 976. Once the insurer established that part of the verdict was for noncovered damages, the burden was then on the judgment creditor to prove the precise portion of the unallocated verdict that was insured. Duke, 468 F.2d at 977 (citing Universal Underwriters Ins. Corp. v. Reynolds, 129 So.2d 689, 691 (Fla. Dist. Ct. App. 1961)).

The Fifth Circuit found that the judgment creditor did not meet his burden. Duke, 468 F.2d at 978. The Fifth Circuit concluded that unless the judgment creditor was relieved of the burden, the Fifth Circuit must affirm the lower court decision in favor of the insurer. Duke, 468 F.2d at 977-78. The Fifth Circuit then found that the judgment creditor was relieved of his burden because the record was unclear whether the insurer's defense counsel had advised the insured of the availability of special interrogatories and the divergence of interest between the insured and insurer "springing from whether damages were or were not allocated." Duke, 468 F.2d at 979.[9] The Fifth Circuit expressed the need for allocating damages: "[t]he consequence to

[9] Harbour Cove Association did not challenge National Fire's reservation of rights letters.

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." Duke, 468 F.2d at 979.

The Fifth Circuit remanded the appeal with instructions for the district court to determine whether the insured was advised to allocate damages at trial; and, if not advised, for the district court to re-hear parts of the action to allow the claimant an opportunity to allocate the damages for the purposes of insurance coverage. Duke, 468 F.2d at 984. The insurer was not held liable for the entire verdict comprised of insured and uninsured damages. Duke, 468 F.2d at 984. The Fifth Circuit found that the insurer had not waived and was not estopped from asserting coverage defenses because of the general verdict. Duke, 468 F.2d at 984.

(4) A Declaratory Judgment Action Does Not Protect an Insurer From a General Verdict and There Will Not be Inconsistent Results in the Two Proceedings.

The circuit court found that National Fire can protect its interest in a separate declaratory judgment, including the declaratory judgment action that is currently pending.[10] (R. p. 4, lines 3-6). The circuit court also found that addressing coverage issues in the construction defect case is likely to create inconsistent results between the construction defect case and the pending declaratory judgment action. (R. p. 4, lines 3-6). National Fire submits these findings are legally erroneous.

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[10] Defendant Centex Homes commenced Civil Action No. 2014-CP-26-1226 seeking additional insured coverage from numerous insurers for subcontractors involved in the construction of the buildings in Harbour Cove. National Fire and Harbour Cove Association are defendants in the Civil Action.

First, a pending declaratory judgment action does not protect an insurer from a general verdict or from the result in Newman and Heritage Communities. National Fire submits that no action can be taken in the declaratory judgment action that can allocate a verdict already rendered or avoid the result in Newman and Heritage Communities. Further, there will not be inconsistent results in the two actions. The purpose of the declaratory judgment action is to adjudicate whether damages found in the construction defect cases are insured. The declaratory judgment necessarily follows the disposition of the construction defect case. The declaratory judgment action in Newman followed the arbitration award in the construction defect case; and the declaratory judgment action in Heritage Communities followed the jury verdict in the construction defect case.

The construction defect case and the declaratory judgment action are related actions but have two distinct purposes. 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 pay a third party. Trancik v. USAA Ins. Co., 354 S.C. 549, 581 S.E.2d 858; Sloan Constr. Co., Inc. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 236 S.E.2d 818, (1977) (The duty to indemnify is one of two primary obligations in a CGL insurance policy). The duty to indemnify is based on the evidence found by a jury at trial and it is reversible error to find there is a duty before a jury renders a decision. Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 604, 748 S.E.2d 781, 791 (2013) ("We hold the declaratory judgment action was procedurally proper save for a ruling on the issues regarding property damages as there are related questions of fact that must be decided by a jury on retrial."); see also, Ellett Bros., v. U.S. Fidelity & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001) (citing Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 314, 476 S.E.2d 708, 711 (1996) ("Clearly the

right to recover, while it exists, does not ripen until decided by the finder of fact")).[11] Accordingly, the duty to indemnify is dependent on the liability and damages established in the construction defect case.

In a declaratory judgment action, parties may not relitigate material facts, such as whether an insured is liable, or not, or the amount of the verdict in the construction defect case. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 85, 145 S.E.2d 523, 524 (1965). These issues are final. However, parties may litigate whether such liability and damages (final as they are) are insured by a particular insurance policy; and insurers can assert defenses to coverage. Sims, 247 S.C. at 86, 145 S.E.2d at 525 ("The binding effect of a judgement against an insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy."). The Supreme Court in Sims noted as follows concerning the legal effect of a judgment on an insurer:

> In accord is Restatement of the Law of Judgment, Section 107(a), where the rights of indemnitee and indemnitor inter se after judgment against one of them are set out, and it is stated that if the third person has obtained a valid judgment against the indemnitee, both indemnitor and indemnitee are bound as to the existence and extent of the liability if the indemnitor has been given reasonable notice of the action and requested to defend; but in Comment (g) it is stated that this rule is binding only as to issues relevant to the proceeding; and that the judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the circumstances under which he was required to give indemnity do not exist.

Sims, 247 S.C. at 87, 145 S.E.2d at 525 (citing Restatement of Law of Judgment, § 107(a) cmt. g.

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[11] In Ellett Bros., Inc., the Fourth Circuit Court of Appeals affirmed the dismissal of the action on the basis that the indemnity claim was not ripe because there had not been findings of fact. Ellett Bros., Inc., 275 F.3d at 388.

Contrary to the circuit court's holding, given the timing and relation to one another, an insurer, such as National Fire, cannot protect its interest in the declaratory judgment action and must be permitted limited intervention in the construction defect case to do so. Allowing such would result in no inconsistent result.

(5) Special Interrogatories Will Not Confuse a Jury or Unfairly Prejudice the Parties.

The circuit court found the following:

> [T]he 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 evidence in the record to support the special interrogatories and/or special verdict forms.

(R. p. 4, lines 18-22).

First, the circuit court has the power to exercise reasonable control over the mode and order of the trial. Rule 611(a), SCRE. Rule 49, SCRCP, is a rule of civil procedure specifically formulated to have juries answer questions about the basis for their verdict. National Fire is not seeking to do something that has no basis in civil procedure. National Fire submits that a circuit court should not avoid using Rule 49, SCRCP, because a construction defect case may be complex. The circuit court should proceed on the premise that Rule 49, SCRCP, is a procedure that can work as noted by the Fifth Circuit Court of Appeals in Duke in the following:

> "[a]ssuming as we must that the jury will follow instructions and make a correct allocation, the insurance company loses no benefit to which it is validly entitled from having the jury earmark the losses. Arguably the jury might, while complying with instructions, at its option throw damages into that category which it will speculate is insured. This is too tenuous to deserve more than mention. There may, however, be some awkwardness in argument to the jury, but this is nominal when balanced against the consequences to the insureds."
>
> Duke, 468 F.2d at 979.

Second, National Fire submits that asking a jury to answer interrogatories is not nearly as complicated as other tasks required by juries in construction defect cases, including having a jury grasp building code, industry standards, and construction estimates.[12] National Fire submits that interrogatories tailored to how much a jury awards for removing and replacing the stucco versus the cost to repair moisture damaged sheathing is much less complicated than Harbour Cove Association's burden of proof on liability and damages overall.[13] Also, the task is practically completed already in this matter due to Harbour Cove Association's estimate. (Procon & Associates Estimate dated June 22, 2016). Thus, the next step is simply for a jury to affirm how much of that estimate or what parts of that estimate, *if any*, will be awarded as damages against Coastal Plaster. National Fire submits that a circuit court can and does have control over the trial to complete this task and can do so without overly complicating the trial or confusing the jury.

The circuit court questioned how it would proceed if there is no evidence in the record to support an allocation to answer interrogatories. (R. p. 4, lines 18-22). National Fire submits that the answer is straightforward. Under the majority rule, once an insurer establishes that part of the liability represented by a judgment is for noncovered damages, the proponent of insurance then has the burden to prove the precise portion of the unallocated verdict that represents insured damages. Duke, 468 F.2d at 977. Accordingly, it should be incumbent upon Harbour Cove

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[12] Under South Carolina law, a breach of a building code provision or breach of an industry standard, among other things, may be a legal basis for a construction defect claim. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989).

[13] Further, to avoid the result in Heritage Communities, the jury must differentiate damages per building because Coastal Plastering only worked on two of the five buildings. Heritage Communities, Inc., 420 S.C. at 349, 803 S.E.2d at 303. ("[T]the Special Referee, mindful of the general jury verdicts, specifically declined to conduct a per-building calculation because the jury verdicts were not rendered on a per-building basis"). A jury may be asked whether there is evidence in the record to support the time frame for progressive damages albeit the Special Referee was able to perform that task in the declaratory judgment action in Heritage Communities. Heritage Communities, Inc., 420 S.C. 321, 349, 803 S.E.2d at 304.

Association to make a record with enough evidence on the allocation of damages that does not leave a court hearing a declaratory judgment action with only a general verdict. Harbour Cove Association has the burden of proof on damages in the construction defect case, and it is Harbour Cove Association that is seeking insurance coverage for those damages. At trial in the construction defect case, Harbour Cove Association can decide how much or how little evidence it wishes to present to a jury. If Harbour Cove Association falls short, then Harbour Cove Association should bear the consequences – not an insurer.

(D) The Circuit Court Did Not Find that National Fire's Interest May be Adequately Represented by Existing Parties.

The circuit court did not find that National Fire's interest may be adequately protected by existing parties. The burden of demonstrating inadequacy of representation is on National Fire. Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716. This burden is minimal and National Fire need only show that the representation of its interests "may be" inadequate. Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716. The following factors are used in determining

> [W]hether the existing representation is adequate: (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.

Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716.

First, it should be undisputed that Harbour Cove Association *may be* inadequate to represent National Fire's position. Harbour Cove Association has objected to National Fire's intervention and wants there to be general verdict. Harbour Cove Association wants a court hearing a declaratory judgment to find as the Supreme Court did in Newman and Heritage Communities. Second, the circuit court specifically found that defense counsel (retained by

insurers) has a conflict of interest and cannot request the special interrogatories or special verdict form. The circuit court found that the following concerning defense counsel:

> [T]he 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 providing consequential damages in order to trigger and maximize coverage for its insured.

(R. p. 4, lines 10-17).

Given that Harbour Cove Association's counsel will not do so and Coastal Plaster's counsel cannot do so, there is no one left in the courtroom to do so other than National Fire. Thus, National Fire should be allowed to do so; or, if not, the Supreme Court should place the burden of allocating damages squarely on the parties seeking indemnity or insurance coverage in the declaratory judgment action and not bind National Fire to a general verdict.

Conclusion

The Supreme Court should reverse the circuit court and permit limited intervention by National Fire. In the alternative, the Supreme Court should place the burden on Harbour Cove Association and Coastal Plaster to allocate damages in the construction defect case for the purposes of determining insurance coverage in a declaratory judgment action.

Respectfully Submitted,

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July 25 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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

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, 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

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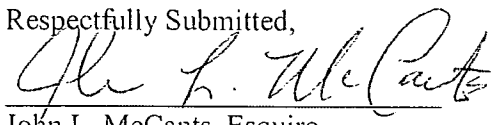
CERTIFICATE OF COUNSEL

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

Respectfully Submitted,



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July 25, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Civil Action 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.

APPELLANT NATIONAL FIRE & MARINE INSURANCE COMPANY'S PROOF OF SERVICE OF FINAL BRIEF

I certify that I served National Fire & Marine Insurance Company's Final Brief And Certificate Of Counsel by depositing a copy of the documents in the United States Mail, postage prepaid, on July 26, 2018 addressed to the attorneys of record, listed as follows:

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