RECEIVED

JUL 30 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Trial Court Case No. 2014CP2607634
Appellate Case No. 2017-02146

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, 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., 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., Defendants,

Of Whom the Harbour Cove Condominium Association is the Respondent.

FINAL BRIEF OF RESPONDENT HARBOUR COVE CONDOMINIUM ASSOCIATION

Phillip W. Segui, Jr., Esquire
Amanda M. Blundy, Esquire
SEGUI LAW FIRM, PC
864 Lowcountry Blvd., Ste. A
Mt. Pleasant, SC 29464

John T. Chakeris, Esquire
M. Abigail Young, Esquire
THE CHAKERIS LAW FIRM
231 Calhoun Street
Charleston, SC 29401

Shaun W. Cranford, Esquire
CRANFORD LAW
P.O. Box 50684
Columbia, SC 29250

Attorneys for Respondent Harbour Cove Condominium Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court properly held that South Carolina law does not permit a liability insurer to intervene in a tort action to protect its rights to contest coverage.

II. Whether appeal of a Circuit Court's denial of a Motion to Intervene is interlocutory and impermissible.

STATEMENT OF THE CASE

Harbour Cove Condominium Association (hereinafter "Harbour Cove") filed this construction defect action on November 13, 2014 against the contractors who constructed the condominium buildings known as Harbour Cove. Appellant insurers Bitco General Insurance Corporation, Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, National Fire & Marine Insurance Company, Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, and Selective Insurance Company of South Carolina (hereinafter collectively "Appellant Insurers" or "Appellants") have defended various contractors since the inception of this action and moved to intervene barely two (2) months before the trial of this matter was set to commence on October 16, 2017. All insurers moved to intervene "for the limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to that jury that addresses factual issues related to the indemnity coverage" (R. pp. 41-45).

The Circuit Court held hearings on the motions to intervene on September 28, 2017 (R. pp. 315-501) and denied all insurers' motions to intervene on October 12, 2017 for several reasons, including that the insurers did not have standing to intervene, the insurers could protect their interest in a separate action, and the recent *Harleysville* case did not mandate a right to intervention. (R. pp. 1-5). On October 13, 2017, Appellant Insurers filed their Notices of Appeal (R. pp. 111-240). Harbour Cove filed a Motion to Dismiss Appeal on October 17, 2017, which was denied on January 24, 2018 (R. pp. 12-16).

On October 25, 2017, the Court of Appeals ordered the consolidation of the Harbour Cove appeals and the appeals stemming from denial of identical motions in another ongoing construction defect action, *Beach Villas at Ocean Keyes Property Owners Association, Inc. v.*

Ocean Keyes Development, LLC, et al., Civil Action No. 2014-CP-26-06573. On February 1, 2018, this Court granted certification under Rule 204(b), SCACR.

FACTS

Harbour Cove is a condominium community in North Myrtle Beach, South Carolina, that consists primarily of five (5) residential buildings, each containing eighteen (18) condominium units. 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 (hereinafter collectively referred to as "Centex") developed and constructed the Harbour Cove Community (R. pp. 244-246).

Plaintiff filed this construction-defect action against Centex and its subcontractors as a result of an engineer's investigation of the Harbour Cove community, which revealed significant construction defects throughout the community (R. pp. 621-768). Among the defects identified at the Harbour Cove condominiums are improper installation of stucco façade and related flashings (R. pp. 624-700) by Coastal Plaster Systems, Inc., insured by Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, and National Fire & Marine Insurance Company, (R. p. 253) as well as improper installation of brick veneer and related flashings (R. pp. 707-755) by Martin Masonry Inc., insured by Bitco General Insurance Corporation, Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, and Selective Insurance Company of South Carolina (R. p. 249).

Harbour Cove's expert Russell T. Mease, P.E. of RTM Engineering, LLC has opined that the subcontractors hired by Centex violated applicable building codes, industry standards, and manufacturers' instructions in the installation of the stucco and brick cladding present at Harbour Cove, and that defective installation has led to water intrusion and damage to the underlying cladding and framing components of the condominium buildings (R. pp. 624-700, 707-755).

Namely, the installation of stucco and brick abutted to window units without proper sealant joints, lack of appropriate weeps required by industry standards, omission of control joints, and improper installation and integration of through-wall flashings are among the major defects identified by Mr. Mease (*Id.*). The cost to repair the entirety of the defects present at Harbour Cove totals nearly seven (7) million dollars, which includes complete removal of the existing cladding elements, inspection and evaluation of the moisture damage underneath, and replacement and reinstallation of cladding (R. pp. 769-774).

As a result of the violations of the building codes, pertinent industry standards, and manufacturers' installation instructions by the various subcontractors, Harbour Cove has suffered actual, incidental, consequential, and special damage and the expense of having to hire experts to investigate the causes of the water intrusion and construction defects and failure 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 (R. p. 263). Harbour Cove has also 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 (*Id.*).

STANDARD OF REVIEW

In reviewing the denial of a Rule 24 motion, an appellate court must determine whether the trial court abused its discretion. *S.C. Tax Com. v. Union County Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988); *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007); *Ex parte State ex rel. Wilson*, 391 S.C. 565, 579, 707 S.E.2d 402, 410 (2011).

ARGUMENTS

I. SOUTH CAROLINA LAW DOES NOT PERMIT A LIABILITY INSURER TO INTERVENE IN A TORT ACTION TO PROTECT ITS RIGHTS TO CONTEST COVERAGE.

The trial court in this matter denied Appellant Insurers' Motions to Intervene on five (5) grounds: (1) the insurers did not have standing to intervene under South Carolina Rule of Civil Procedure 24; (2) they can protect their interests in a separate declaratory action; (3) the recent *Harleysville* case does not give authority for intervention; (4) intervention would create an impermissible conflict of interest; and (5) intervention would be confusing to the jury and may unfairly prejudice the current parties (R. pp. 3-4).

This Court should affirm the ruling of the trial court as Appellant Insurers' intervention in this construction defect matter would be inappropriate and in violation of South Carolina law for several reasons. First, the *Harleysville* case does not support insurer intervention in this context, and consequently, Appellant Insurers have no other standing to intervene. Further, state law requires the insurers in this case to litigate their coverage defenses in a separate action to avoid an impermissible conflict of interest. Finally, intervention and the imposition of insurance questions on an already complex construction defect jury trial would confuse the jury and violate Respondent Harbour Cove's Due Process rights.

A. South Carolina jurisprudence does not mandate intervention by insurers in construction defect actions.

As this Court is aware, in recent years, South Carolina law has sought to clarify an insurer's responsibilities for damages caused by its insured in construction defect actions. In 2009, this Court in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) examined policy language regarding covered damages in the context of a tort action involving the improper installation of stucco and resulting damage. In *Newman*, insurance company Auto

Owners filed a declaratory judgment action against a homeowner who had been awarded damages at arbitration for defective installation of stucco by Auto Owners's insured. *Id.* at 187, 684 S.E.2d at 541. Auto Owners sought a determination of whether its policy covered the damages awarded to the homeowner under various policy provisions, including under its definition of "occurrence" and exclusion for "intended or expected" property damage. *Id.*

Though this Court affirmed the trial court's findings that the negligent installation of stucco resulted in an "occurrence" that caused "property damage" covered under the applicable insurance policy, Auto Owners contended the damages related to the removal of the defective stucco itself were not covered by the policy. *Id.* at 197, 684 S.E.2d at 546. On that count, the *Newman* court sided with Auto Owners, holding that the terms of the policy "unambiguously" prohibited recovery for the cost of removing the insured's work itself, stating 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." *Id.* at 198, 684 S.E.2d at 546. *Newman* effectively put liability insurers on alert that they had the ability to contest coverage of at least part of an award in a construction defect action, which is the foundation of the instant appeal.

B. *Harleysville Group Ins. v. Heritage Cmtys, Inc.* does not give authority for intervention.

The recent case of *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), is touted by Appellants in this matter as the primary authority for their intervention in this construction defect action; however, it does not actually support intervention. *Harleysville* involved directed verdicts rendered in favor of plaintiff property owners' associations, as well as trials on the appropriate amount of damages where juries returned general verdicts in actual damages and punitive damages. *Harleysville* at 331, 803 S.E.2d at 293. After the jury verdicts, Harleysville filed a declaratory judgment action seeking partition of the

general verdicts into damages for the removal of the defective work itself (which it contended were not covered under its liability policies) and removal and repair of materials damaged as a result of the improper work (covered damages). *Id.* The Special Referee deciding the matter found the costs to remove the defective work itself were not covered under Harleysville's policies, but would not speculate as to how much of the general verdicts were covered, and thus concluded Harleysville was responsible for the full amount of damages. *Id.* at 332, 803 S.E.2d at 294.

Though Appellants and insurers across the state read *Harleysville* as carte blanche authority for intervention in a tort action to protect their interests, with respect to contesting coverage, the *Harleysville* opinion focused solely on whether the insurer's reservations of rights were sufficient for the insurers to even have the ability to contest coverage. This Court in *Harleysville* concluded that "generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method) [was] not sufficient" to put the insured on notice that the insurer intended to raise defenses to coverage or pursue a declaratory judgment on coverage issues. *Harleysville* at 338, 803 S.E.2d at 297. Essentially, this Court clearly delineated that an insurer's reservation of rights must be sufficiently specific as to put the insured on notice that the insurer "intend[s] to litigate the issues of whether any damages resulted from acts meeting the definition of occurrence, whether any damages occurred during the applicable policy periods, . . . what damages were attributable to non-covered faulty workmanship," and that a potential conflict of interest exists such that the insured should seek an allocated verdict. *Id.* at 342-3, 803 S.E.2d at 300. Rather than require an insurer to intervene in a tort trial to protect its rights to contest coverage, this Court in *Harleysville* merely stated that a generic "we may contest coverage at a later date" on the part of

an insurer is insufficient to put the insured on notice that it may need to seek an allocated verdict for any damages to be covered under its policy.

Further, footnote 11 of the *Harleysville* opinion discusses the refusal of the Special Referee to allocate the juries' general verdicts, citing to *Newman*, 385 S.C. at 198, 684 S.E.2d at 547, and the idea that an award cannot be allocated without sufficient evidence to support that allocation. *Harleysville* at 343, 803 S.E.2d 300 n. 11. Appellants and, presumably, countless insurers in the state use this footnote to further bolster their position that the *Harleysville* opinion requires their intervention because an allocated verdict (and the presentation of evidence to support it) is the only way to determine whether a jury award falls within coverage limits. This conclusion is clearly misplaced as nowhere in footnote 11 does this Court indicate that allocating a verdict is the only way for an insurer to contest coverage, and other South Carolina law discussed below provides that evidence as to potential coverage may be presented in a subsequent action.

In the context of reservations of the right to contest coverage, the *Harleysville* opinion stands for the premise that a generic reservation of rights by an insurer is insufficient to actually reserve any rights. The reservation must be specific enough to put an insured on notice of the specific policy provisions under which its insurer may contest coverage; it must specifically lay out the coverage defenses the insurer may present in a subsequent action; and must advise the insured of a potential conflict of interest. Without a sufficient reservation of rights, the insurer cannot contest coverage. Nowhere does the *Harleysville* opinion support the presumption that an insurer must intervene in a tort action to protect its rights. In fact, the word "intervene" is never used by the majority opinion and appears only once when the dissent mentions Harleysville could not possibly have intervened without an impermissible conflict of interest. *Harleysville* at

363, 903 S.E.2d at 311 (Pleicones, J., dissenting). Contrary to Appellants' positions, one may reasonably conclude that *Harleysville* provides that if an insurer has properly reserved its rights, there is no need for intervention because the insured may then litigate coverage in a separate declaratory action. Regardless, no reading of *Harleysville* supports the position that an insurer can or must intervene in a tort trial to contest coverage. Respondent Harbour Cove seeks a ruling that *Harleysville* neither requires nor gives authority for intervention, or in the alternative, a finding that Appellants have made no showing of sufficient reservations of rights to contest coverage so the question of intervention is moot for the instant appeal.

C. Appellants lack standing to intervene under *Ex Parte GEICO* and South Carolina Rule of Civil Procedure 24.

Regardless of *Harleysville*, binding law demonstrates that Appellants are required to have standing to intervene in an ongoing tort action, and here, that standing is lacking. Rules of Civil Procedure 24(a) and 24(b) discuss intervention of right and permissive intervention, respectively. Rule 24, SCRCP. Rule 24(a) provides that "anyone shall be permitted to intervene" when he has an interest in the property or transaction at issue in the lawsuit, those interests may be impeded by the disposition of the action, and his interests are not protected by existing parties to the action. *Id.* Alternatively, subsection (b) of Rule 24 allows intervention when an applicant's claim or defense has a question or law of fact in common with the subject matter of the action. *Id.* As detailed below, and discussed in *Ex Parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 644 S.E.2d 699 (2007) ("*GEICO*"), Appellants meet the requirements for neither type of intervention.

1. Contrary to Appellants' positions, they must have standing to intervene.

Appellants seek a reading of the Rules and case law that suggests they are not required to have standing to intervene, as they seek to intervene in a limited capacity rather than as parties to

the instant litigation.[1] Neither the courts in this state nor the rules of procedure make any distinction between standing to intervene as a party versus standing to intervene for limited purposes, and this Court has routinely held a party seeking to intervene must have standing. *GEICO* at 138, 644 S.E.2d at 702 (citing *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). Additionally, *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991), the only binding case to which Appellant Nationwide cites in support of its proposition that South Carolina courts have previously held no standing is required for limited intervention, is significantly distinguishable from the current posture of this action.

Davis involved a property action that was settled and dismissed, and a newspaper's attempt to intervene to object to the sealing of the record after the action was completed. This Court held that because the newspaper sought to intervene for the limited purpose of challenging the seal of the record, no showing of standing was required. *Davis* at 504, 405 S.E.2d at 603. *Davis* is significantly distinguishable from the instant action on several grounds, namely that the holding was specifically limited to Rule 24's applicability to third-party challenge of protective orders and did not declare that all limited interventions were absolved of a standing requirement. *Id.* Further, the newspaper company moved to intervene *after* the action had been settled and dismissed with prejudice, which is contrary to the procedural posture of this ongoing construction defect action. *Id.* at 503, 405 S.E.2d at 602. Had the newspaper company in *Davis* sought to intervene for some limited purpose in the early stages of the litigation, this Court would have been evaluating significantly different facts and would likely have reached another conclusion. This Court, when evaluating the timeliness of the newspaper's intervention, cited to

[1] Initial Brief of Appellant Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company at 8.

a First Circuit Court of Appeals decision providing that if "desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the parties." *Id.* at 505, 405 S.E.2d at 603 (citing *Public Citizen*, 858 F.2d at 786). The citation to and discussion of this language from the *Public Citizen* case indicates that the fact that the action had concluded was central to this Court's reasoning as to why intervention in that limited capacity should be permitted and why the newspaper's motion was not untimely. South Carolina courts have made it clear they do not rule by implication, and the holding that an intervenor must not show standing when it seeks to challenge a protective order in the context of a case that had already been dismissed from the court system cannot be extrapolated to provide that no hopeful intervenor must have standing when it seeks to intervene in a limited capacity. Despite the reliance on *Davis*, Appellants in this matter must have standing to intervene.

2. Appellants do not have standing to intervene as of right.

The Appellants in this action have no standing to intervene as of right under Rule of Civl Procedure 24(a) because they do not have sufficient interests at stake in this construction defect litigation. *GEICO* involved an insurer's attempt to intervene in a family court declaratory judgment action that sought to establish a common law marriage for stacking purposes. *GEICO*, 373 S.C. at 134, 644 S.E.2d at 700. This Court in *GEICO* affirmed the lower court's refusal to permit the insurer's intervention by concluding that the insurer had no standing to intervene as of right under Rule 24(a)(2). *Id.* at 138, 644 S.E.2d at 702. In reaching its decision, this Court began by discussing the proposition that even though the rules of intervention should be applied liberally in the interests of judicial economy, intervention still requires standing under the rules. *Id.* (citing *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327). A party has standing to intervene if it has

a "personal stake" in the subject matter of a lawsuit and is a real party in interest with real, actual, material, or substantial interest in the subject matter of the action - an interest which is merely "peripheral and not the real interest at stake" does not warrant intervention. *Id.* In affirming the lower court's ruling, this Court reasoned that the insurer's interest was merely in the effects of the family court's decision and concluded that "the subject matter of the family court action in the instant case is the validity of a common law marriage, which does not involve a determination of insurance benefits." *Id.* at 139, 644 S.E.2d at 703.

The holding and opinions of this Court in *GEICO* are easily applied to the facts of the instant appeal in that Appellants do not have standing to intervene under Rule 24(a) because they are not real parties in interest. Certain Appellants argue that *GEICO* "does not preclude the possibility that the court intended to require intervention"[2] though the fact that the *GEICO* opinion completely fails to even utter the word is clear evidence this Court did not intend its ruling to be taken as license to grant insurer intervention in a tort action. *Hutto v. Southern Farm Bureau Life Ins. Co.*, 259, S.C. 170, 173, 191 S.E.2d 7, 9 (1972) (holding "it is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in a case and not mentioned in the opinion'"); *Coleman v. Page's Estate*, 202 S.C. 486, 491, 25 S.E.2d 559, 560 (1943) ("A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside.").

[2] Initial Brief of Appellants Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company at 13.

The only interest Appellants have in the subject matter of the litigation is whether or not any award entered against their insureds is covered under their insurance policies, which is purely financial. Though certain Appellants may claim they have an interest in essentially protecting the record of the trial of the tort action to preserve information that may be used in a subsequent action[3], the *Sims* case provides that insurers may present additional evidence in a separate coverage action and need not protect the trial record. *See infra* Section D. Appellants have no interest in the subject matter of the construction defect action, and to paraphrase this Court in *GEICO* – the subject matter of this action is the validity of the Respondent Harbour Cove Condominium Association's construction defect claims, which does not involve a determination of insurance benefits. Accordingly, Appellants do not have standing to intervene as of right under Rule 24(a).

3. Appellants do not have standing to intervene under the permissive intervention rules.

Rule 24(b) permits intervention when a potential intervenor's claim or defense has questions of law or fact in common with those at stake in the ongoing action. Rule 24(b)(2), SCRCP. A trial court has complete discretion to allow or deny permissive intervention, and the decision will only be reserved upon a showing of abuse of discretion. *S.C. Tax Com. V. Union County Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988). "A reversal of a denial of permissive intervention has been termed 'so unusual as to be almost unique.'" *Id.* at 262, 368 S.E.2d at 75 (citing *New Orleans Public Service, Inc. v. United Gas Pipeline Co.*, 732 F. (2d) 45 (5th Cir. 1984), *cert denied*; *Morial v. United Gas Pipe Line Co.*, 469 U.S. 1019, 105 S. Ct. 434, 83 L. Ed. (2d) 360 (1984).). In *S.C. Tax Com.*, the Court of Appeals addressed whether the South

[3] Initial Brief of Bitco General Insurance Corporation at 12-3.

Carolina Tax Commission could intervene to determine whether a tax exemption applied to a company that had sued the Union County Treasurer to collect taxes paid under protest. *S.C. Tax Com.* at 258, 368 S.E.2d at 73. The Tax Commission had sought to intervene under both Rule 24(a) and 24(b) and the Court of Appeals affirmed the lower court's denial of intervention on both counts. *Id.* In evaluating whether the Tax Commission could permissively intervene, the Court analyzed Rule 24(b)(2) and opined that permissive intervention is premised on the theory that when claims or defenses share common questions of law or fact, judicial economy supports the disposition of all of them in one action via intervention. *Id.* at 263, 368 S.E.2d at 75. The Court further stated that "[t]he typical situation for which the Rule was designed is one where the prospective intervenor might institute or be called upon to defend a separate proceeding that would *substantially duplicate* the one in question." *Id.* at 263, 368 S.E.2d at 75-6 (emphasis added).

The Court of Appeals made it clear in *S.C. Tax Com.* that permissive intervention is only practical when it would effectively eliminate the need for a duplicative proceeding. Applying the conclusions reached by the Court in that case to the facts at issue here, permissive intervention is entirely improper for the appellants in this case. First, Appellants have shown no abuse of discretion on the part of the trial court, and therefore, no reversal is warranted here. *See S.C. Tax Com.* at 262, 368 S.E.2d at 75. Further, permitting Appellants to use the permissive intervention rules has no bearing on judicial economy here because there is already a separate coverage action pending,[4] and because the allocated verdict Appellants seek merely establishes the basis for Appellants' defenses to coverage that must be litigated in a subsequent coverage

[4] *Centex Homes, a Nevada General Partnership v. The Cypress Bend Condominium Association, et al.*, No. 2016-CP-26-6670 (filed October 29, 2016).

action[5]. Even if this Court determined judicial economy was served by permitting intervention, the Appellants have no questions or law or fact in common with the parties in this tort action, and any subsequent declaratory action would not "substantially duplicate" this construction defect lawsuit. The questions of law and fact at issue in the construction defect action involve whether certain contractors and subcontractors violated building codes, industry standards, and manufacturers' instructions in the construction of the Harbour Cove condominium buildings; yet, the questions raised in a declaratory judgment action about insurance coverage wholly relate to the insurers' policy provisions and their applicability to any award. An action centered around the appropriate installation of stucco is not substantially duplicated in an action surrounding an insurance policy's definition of "occurrence." There is no commonality among the claims of Appellant insurers and the tort issues in this construction defect action for purposes of Rule 24(b).

Rule 24(b) also requires this Court to consider whether permissive intervention will unduly delay or prejudice the adjudication of the rights of the existing parties. Rule 24(b), SCRCP. The insurers seeking to intervene have been defending this matter since its inception in 2014 and moved to intervene in the months immediately prior to the trial date set by the trial court, so any intervention will not be timely. Further, permitting their intervention will prejudice the parties by inserting improper questions of insurance into the trial of this matter and infringe upon the Respondent Harbour Cove Condominium Association's Due Process rights. *See infra* Section E.

[5] Initial Brief of Appellant Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company at 12.

4. Courts in other jurisdictions have affirmed denials of limited intervention under identical circumstances.

In *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.,* 725 F.2d 871 (2nd Cir. 1984), an insurer moved to intervene to submit proposed interrogatories regarding damages to the jury in the event that they returned a verdict for Plaintiff. *Restor-A-Dent* at 873. The insurer retained counsel for the insured and provided a defense but informed the insured that it did not have any duty to indemnify for intangible losses. *Id.* The insurer argued "that a general verdict would make difficult, if not impossible, a precise determination as to the allocation of the jury's award and alleged that its intervention would not delay or impede the action." *Id.* The plaintiff in that matter opposed the motion, arguing that the insurer knew of the lawsuit almost from inception since it was defending the Defendant, yet had remained silent until all discovery was completed and the pre-trial order submitted. *Id.* The plaintiff also claimed "that it would be 'grossly' prejudiced if intervention were permitted since if special interrogatories are added to the list of items that the jury must address ... the burden to reach a just verdict will become excessive, falling entirely on the shoulders of the plaintiff.'" *Id.*

The insurer in *Restor-A-Dent* sought both Intervention of Right and Permissive Intervention under the Federal Rules of Civil Procedure. *Id.* The court denied the insurer's intervention of right because the insurer did not have an interest relating to the property or transaction that was the subject matter of the action. *Id.* at 875. The insurer's "interest, on the other hand, is in the amount it will have to pay [Defendant] if [Plaintiff] wins. Accordingly, [the insurer] does not have an interest in the subject matter of the action between [Plaintiff] and [Defendant]." *Id.* The Court further reasoned that any potential interest asserted by the insurer depended upon two contingencies: a jury verdict for plaintiff and a finding in a litigation not yet commenced between insurer and insured that insurer is not responsible for certain losses under

the policy terms. *Id.* The court denied the permissive intervention motion because Plaintiff "should not be burdened at this late stage in the litigation with the responsibility of introducing the evidence that will settle the potential differences between "the insurer and Defendant. *Id.* at 876 (internal quotation marks omitted). The Second Circuit Court of Appeals held the trial court properly denied the motion for additional reasons, including: (1) that the insurer had no great need for the relief it sought; (2) that there was no assurance that the main action would not be delayed; and (3) that the intervention by an insurer who supplied the insured's attorney could deter a settlement or could create a conflict of interest. *Id.* at 877.

High Plains Coop. Ass'n v. Mel Jarvis Constr. Co., Inc., 137 F.R.D. 285 (D. Neb. 1991) was a nearly identical situation. A defendant's insurer sought permissive intervention to submit special interrogatories to the jury on the issue of damages. In denying the insurer's request to intervene, the court noted: "There is ... precedent for the proposition that courts may deny intervention by insurers for even the limited purposes sought here." *Id.* at 288. The insurer "did not have any 'great need for the relief sought' because the trial judge would likely require a separate verdict for each of the three causes of action brought by the plaintiff." *Id.* There "was no assurance that the intervention would not unduly delay the main action, and an appeal of the court's failure to submit the requested interrogatories as framed by the insurer may likely complicate an appeal of the main action." *Id.* Defendant "was being represented by counsel provided by the insurer/intervenor which 'may well exacerbate a potential conflict of interest for the attorney furnished by [the insurer] to represent [the defendant],' and could deter settlement as well." *Id.* The court hesitated to allow an insurer to intervene in an action simply on the basis of an assertion in its brief that the policy at issue excludes coverage for the negligent acts of the insured. *Id.* at 290.

In *Universal Underwriters Ins. Co. v. E. Cent. Alabama Ford-Mercury, Inc.*, 574 So. 2d 716 (Ala. 1990), a defendant's insurer sought to intervene for the sole purpose of submitting special interrogatories or a special verdict form to the jury, attempting to resolve any coverage questions that might be involved in the case without making its presence known to the jury. The insurer argued its interest would not be adequately protected unless it was allowed to intervene for the limited purposes, and asserted it had an "interest relating to the subject matter of the action that, under the rules of fairness and equity, gave it a right to intervention, or, in the alternative, that permissive intervention should be allowed." *Universal* at 718-9.

In affirming the trial court's denial of the motion to intervene, the Court reasoned "when an insurer refuses to defend or defends under a reservation or rights, the insurer is not precluded from determining the coverage issue in a declaratory judgment action either before or after the resolution of the underlying action." *Id.* at 722. The "insureds would be prejudiced by further delay if [the insurer] were allowed to intervene at such a late date in the proceedings." *Id.* "This Court has held that an insurer does not have an interest when that interest is contingent upon the recovery in another action." *Id.* at 723. The court held the insurer did not have a "direct, substantial, and protectable interest," and thus had no right to intervene. *Id.* In assessing the trial court's denial of the motion to intervene under the permissive intervention rules, the court held that permissive intervention is within the broad discretion of the trial judge and found no abuse of discretion. *Id.*

In *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Bakker,* 917 F.2d 22, 1990 U.S. App. LEXIS 18390 (4th Cir. 1990) (Unpublished Disposition), the insurer sought to intervene for the limited purpose of submitting special interrogatories, verdicts, and/or instructions to the jury to resolve a potential coverage question. The insurer wanted a jury finding which would distinguish

whether any award entered was based on Defendants' dishonesty or negligence, and argued acts brought about by or contributed to by dishonesty were excluded from coverage. The district judge denied the motion, observing that the motion was filed only two months before the commencement of trial. "In addition to the complicating impact on the continuing litigation, with which the district judge was obviously concerned, if [the insurer] were allowed to intervene in the underlying action in which its insureds are parties, we would be concerned with its intolerable position in the litigation that is potentially hostile to its own insureds." *Bakker* at 22. If the insurer's "motion to intervene were denied, its interest to resolve insurance coverage issues would not be prejudiced, because open issues, if any, could be litigated at a later time." *Id.*

D. State law requires a separate action to avoid an impermissible conflict of interest.

South Carolina case law is clear that when an insurer undertakes the indemnity and defense of its insured in a liability action, it cannot raise its own defenses to coverage in the same action without creating a catastrophic conflict of interest. Insurers can and must raise their own defenses and litigate coverage in separate actions.

1. An insurer cannot defend its insured and its own interests in same action.

South Carolina law is clear that an insurer cannot defend its insured and assert its own defenses to coverage in the same action. *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 85, 145 S.E.2d 523, 524 (1965). *Sims* involved an insurer that refused to defend its insured on the grounds that the car accident at issue had been caused by an intentional act, which was not covered under the policy, and the insurer's attempt in a subsequent action to introduce evidence of intent. *Id.* at 84, 145 S.E.2d at 523. In its discussion of the insurer's options, this Court opined that it was "perfectly obvious" that the insurer could not defend the insured in the tort action and

assert its defenses to coverage in the same action without creating a "clear conflict of interests between insurer and insured." *Id.* at 85, 145 S.E.2d at 524. Further, this Court in *Sims* quoted *Farm Bureau Mutual Ins. Co. v. Hammer et al.*, 4th C.C.A. 177 F. (2d) 793 (4th Cir. 1949) and its discussion of Section 107 of the Restatement of the Law of Judgments, which has now been replaced by Section 58 of the Restatement (Second) of the Law of Judgments. *Id.* Section 58 provides that in an indemnitee/indemnitor setting, a conflict of interest "exists when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not." Restatement (Second) of Judgments § 58 (1982).

In this action the insurers seek to distinguish, one way or another, between covered and non-covered damages. Specifically, they seek a determination of what portion of a potential jury award is for the removal of defective work versus repair of components damaged by defective work, with the assumption that costs for removal of defective work itself are not covered by their policies. The insured has great interest in establishing that the entirety of any damage award be covered by its policy, and the insurer obviously has an interest in showing the damages are not covered. As the insurers in this case have agreed to defend and indemnify their insureds in the trial of this action, counsel supplied by the insurers to their insureds would presumably orient their case at trial towards a finding that any potential damages are covered. Applying the logic of *Sims* and the Restatement (2d) of Judgments, the insurers in this case cannot represent the interests of their insureds while presenting their own defenses to coverage in the same action.

Further, because of the insured's interest in having the majority of a jury award covered by its insurance policy, the defense strategy of the insured's counsel has now transitioned from "the defendant violated no standards of care, and if he did it caused no damage" to "the

defendant did violate the standard of care and it caused significant damage" or "the defendant violated no standards of care but somehow proximately caused significant consequential damages." This shift in position is a prime example of the conflict of interest created by intervention of an indemnitor in a tort action, as the insurer's intervention now prevents the insurer from fulfilling its duty to indemnify its insured. Rather, the insurer is now forcing the counsel it hired to defend its insured to concede liability on some front to keep the insured from being personally liable for a potential verdict in the millions of dollars. The result is a clear conflict of interest, which should not exist.

2. A separate declaratory judgment action is sufficient to protect an insurer's interests even without an allocated verdict.

Contrary to Appellants' positions that they cannot contest coverage without an allocated verdict, *Sims* and the Restatement (2d) of Judgments also provide that a subsequent declaratory action is sufficient to protect an insurer's interest without an allocation. Appellants lean heavily on the presumption that if they are to contest coverage in a separate declaratory action, a verdict allocating any award between costs to remove faulty work and costs to repair the consequential damages of faulty work is absolutely necessary for a coverage determination. This is not the case.

When analyzing the *Farm Bureau* case, this Court in *Sims* quoted that court's "unassailable logic" that the notion that an indemnitor is bound by facts established against an indemnitee when the indemnitor has notice and opportunity to defend and indemnify the indemnitee functions only when the indemnitee and indemnitor have identical interests. *Sims* at 86-7, 145 S.E.2d at 525. The *Farm Bureau* court further supported that position by its reference to Section 107 of the Restatement of the Law of Judgments, which provided that an indemnitor and indemnitee are bound by the existence and extent of liability of the indemnitee, but a

"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* at 87, 145 S.E.2d at 525 (quoting *Farm Bureau*, 4th C.C.A., 177 F. (2d) 793 (citing Restatement of Judgments § 107(a) (1942)). The current version of Restatement Section cited by the *Farm Bureau* court, Restatement of Judgments (2d) Section 58, clarifies this premise, stating "[t]he indemnitor is precluded from relitigating those issues determined in the action against the indemnitee *as to which there was no conflict of interest* between the indemnitor and the indemnitee." Restatement (2d) of Judgments, §58 (1)(b) (1982) (emphasis added). Put more simply, an indemnitor with interests adverse to those of its indemnitee is not bound by the material facts established against the indemnitee when contesting coverage in a subsequent action. Essentially, when an insurer has a conflict of interest with its insured such that it cannot protect its own interests while indemnifying its insured, South Carolina law permits the insurer to introduce additional facts in a declaratory action to defend its coverage positions. Simply put, the insurers here can contest coverage in a declaratory action without an allocated verdict and thus, without intervention.

E. The injection of insurance issues in a construction defect trial would confuse the jury and add to Harbour Cove's burden of proof.

If Appellants are permitted to intervene, even in a limited capacity, the confusion to the jury and undue burden on the existing parties would outweigh any benefit derived from an allocated verdict. Appellants seek to partially intervene for the limited purpose of submitting interrogatories and/or a special verdict form to the jury allocating any award between damages to remove faulty work and damages to repair components damaged by faulty work. Despite Appellants' contentions that this limited involvement would do nothing to alert the jury to the

insurers' presence or further complicate the trial of this construction defect action, the submission of special verdict forms and interrogatories to the jury requires the proffer of additional evidence and places an undue burden on the current parties to the action.

In addition to the relatively straightforward issue of allocating any award between consequential damages and repair of defective work, there are a myriad of other directly related policy provisions both in the main policies and various endorsements that potentially would necessarily have to be examined in addition to the larger coverage issues. It is expected that in a typical construction defect action with multiple defendants, each party may have multiple policy variations from year to year and quite often different insurance carriers year to year with drastically different policy provisions and endorsements. The complexity of these potential insurance questions to be answered multiplies when, as in this case, there could potentially be multiple parties involved in an action and which would result in an inordinate number of determinations necessary for a fair and just determination of the more basic coverage issues. With multiple parties, insurance carriers, policies, and endorsements at play, any interrogatories or special verdict form submitted to a jury could likely require many pages to adequately address these complex matters.

The submission of special interrogatories and special verdict forms requires the parties to a tort action to proffer evidence they may not normally submit, as the jury needs information and instruction to be able to answer the interrogatories and complete the verdict form. The need to establish what damages may be consequential versus which are related to correcting defective work is unduly burdensome on both the plaintiff and defendants in this action and prejudicially adds to the plaintiff's burden of proof. Now, not only must Harbour Cove show that the defendants breached the standard of care and proximately caused damage to the condominium

buildings at issue, the injection of insurance coverage issues requires Harbour Cove to make potentially a number of other showings with regard to the damages claimed. Further, Appellant Insurers have offered no suggestions as to how they propose the parties to this construction defect action present evidence to sufficiently equip a jury with the information necessary to answer special interrogatories or a special verdict form. The Appellants want certain questions answered, but apparently seek to have counsel for Plaintiff and Defendants figure out for themselves the best way to present their cases with insurance coverage questions in mind. At the trial court level, the grant of a motion to intervene shortly before trial, as was the case here, introduces sudden insurance questions which inherently complicate the presentation of the case by all parties and as such are prejudicial, to the Plaintiff but also to the insureds. This complication changes the presentation of evidence and conduct of the entire trial of the action and has the potential to confuse the jury to such extent that they cannot render a competent verdict.

As stated by the Circuit Court in its Order denying the insurers' Motions to Intervene, the interrogatories and verdict forms sought 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 there may not be any evidence in the record to support the special interrogatories and/or special verdict forms" (R. p. 4). The insurers' intervention would place an undue burden on parties to an already complicated construction defect action.

Notably, Appellants rely on the Fifth Circuit Court of Appeals case *Duke v. Hoch*, 468 F.2d 973, 1972 U.S. App. LEXIS 7288 (5th Cir. 1972) and its discussion of allocated verdicts to support their apparent position that the interrogatories and verdict form they would have imposed

upon the jury are relatively routine and "workable."[6] Though referenced and discussed in *Harleysville*, *Duke* is a federal case from the Fifth Circuit and is neither binding on this Court nor relevant to the instant analysis. Nonetheless, the underlying issues are readily distinguishable. The matters addressed in *Duke* appear to be much less complicated and more easily determined than those in a typical multifamily construction defect case. The additional burdens on the parties in the cited matter would seem slight. Here, given the overlay of very complicated coverage determinations of very complicated liability determinations in a multi-party matter is a horse of a different color entirely.

F. Intervention would infringe upon Harbour Cove's Due Process Rights.

Appellants' intervention for the limited purpose of submitting a special verdict form and interrogatories to the jurors would infringe upon Harbour Cove's Procedural Due Process rights to present evidence and cross-examine witnesses. South Carolina has adopted the requirements set forth by the United States Supreme Court that the rights to introduce evidence and confront and cross-examine witnesses are required elements for the satisfaction of procedural Due Process. *Vora v. Lexington Med. Ctr.*, 354 S.C. 590, 582 S.E.2d 413,416 (2003). This Court has also held that "where important decisions turn on questions of fact, Due Process requires an opportunity to confront and cross-examine adverse witnesses." *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 10011, 5 L.Ed. 287 (1970). Due Process is flexible and calls for procedural protections the particular situation demands. *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 69,

[6] Initial Brief of Appellants Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company at 19.

663 S.E.2d 497, 503 (Ct. App. 2008) citing *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 C.S. 452, 485 636 S.E.2d 598, 615 (2006).

Respondent Harbour Cove's procedural Due Process rights require that it be permitted to present evidence at the trial of this matter to support its positions as to how the jury should answer any interrogatories or complete any special verdict form in the event insurers intervene. *Olson* at 69. At that point, Harbour Cove should be entitled to conduct some discovery on all potential insurance coverage positions raised by Appellants under South Carolina Rule of Civil Procedure 26(b)(1), as those issues have now become relevant in this tort action. Rule 26(b)(1), SCRCP. As Due Process is flexible and may be tailored to specific situations, Harbour Cove's presentation of evidence may even potentially necessitate calling representatives of insurers to examine them regarding the insurance policies at issue, as coverage issues will have been injected into this construction defect action. As addressed above regarding additional overage matters beyond the basic consequential damages analysis, the applicability of certain other policy provisions during limited time periods may need to be presented in a constitutionally-sufficient context for a jury to properly render a meaningful verdict. Additionally, Harbour Cove's Due Process rights would require Appellants' full intervention as parties to the construction defect action rather than limited intervention so Harbour Cove may conduct typical discovery to prepare its case for trial. Permitting the insurers to intervene and proceed immediately to trial prohibits Harbour Cove from conducting discovery that has only now become relevant and as such deprives Harbour Cove of its Due Process rights. Alternatively, insurer intervention even with a prescribed discovery period unfairly prejudices Harbour Cove in this action, as it would extend the length of this action that has been pending since 2014.

II. APPEAL OF A CIRCUIT COURT'S DENIAL OF A MOTION TO INTERVENE IS INTERLOCUTORY AND IMPERMISSIBLE.

A. Denial of Motion to Intervene does not determine the action.

An order is immediately appealable when it affects a substantial right and "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." S.C. Code Ann. § 14-3-330(2) (1962). Section 14-3-330(2) must be "narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 302-3, 705 S.E.2d 475, 478 (Ct. App. 2011) citing *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). The Court of Appeals in *Thornton* interpreted that narrow construction to require any appealability analysis to focus on the nature and effect of an order rather than its official title or label. *Id.* at 303. Further, in the context of the Appellate Court Rule providing only an aggrieved party may appeal an order (Rule 201(b), SCACR), this Court has interpreted an "aggrieved" party as one "substantially" aggrieved by a judgment that bears directly on its interest. *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970).

Under *Harleysville* and the reasons heretofore stated, an order denying an insurer's motion to partially intervene in the trial of a tort action to protect its defenses to coverage neither substantially aggrieves the insurer nor bears directly on its interests, as it can satisfactorily protect those interests in a subsequent declaratory action. *See supra* Section I.B. *Harleysville* bestows no right or ability on an insurer to intervene, so prohibiting that intervention has no effects on an insurer's rights. Looking at the instant situation in light of *Thornton*'s focus on the effects of an order, the insurers here – and any insurer seeking to intervene in an action against its insured for these same purposes – suffer no effects as a result of the frustration of their intervention attempts. By narrowly construing the order denying the motions to intervene, one

arrives at the conclusion that the denial of intervention merely prevents the insurers from interfering with a complex construction defect trial to burden the parties and the jury with additional responsibilities rather than eliminating the ability to have coverage determined via a separate action. The denial of Appellants' Motions to Intervene does not sufficiently determine the action such that it is immediately appealable.

B. Appellants have no standing to appeal.

Additionally, Appellant is not a party to the instant action and as such has no standing to appeal. "Rule 201(b), SCACR, provides that 'only a *party* aggrieved by an order, judgment, or sentence may appeal.'" *Ex Parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003). A party has standing to intervene in a case when it has a personal stake in its subject matter and is a real party in interest. *GEICO* at 139, 644 S.E.2d at 703. A real party in interest is one who has a real, actual, material interest or substantial interest in the subject matter of the action, rather than only a formal or technical interest. *Id.* Appellant has no standing to appeal the denial of its motion to intervene and had no standing to intervene in the first place. Regarding its standing to appeal, Appellant is not a party to this case and did not seek to intervene as one. Appellant merely sought to submit certain special interrogatories to a potential jury in an effort to allocate damages awarded by a jury verdict. Appellant is not a party and does not have standing to appeal any ruling made by the Court in this case.

CONCLUSION

At this point in evolving South Carolina tort law, insurers and litigants alike are faced with a need for confirmation and clarification of the steps an insurer must take to protect its interests. With regard to the instant case, the Court should confirm that *Harleysville* does not stand for the proposition that insurers may intervene in tort actions at will and affirm the Circuit Court's

ruling that a subsequent declaratory action is sufficient to determine coverage issues and protect insurers' interests. The Court should also find that judicial economy supports the premise that denial of motions to intervene by insurers seeking to protect coverage defenses are not immediately appealable.

Phillip W. Segui, Jr.
Amanda M. Blundy
SEGUI LAW FIRM, PC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, SC 29464
(843) 884-1865
Email: psegui@seguilawfirm.com
ablundy@seguilawfirm.com

- *AND* -

John T. Chakeris
M. Abigail Young
THE CHAKERIS LAW FIRM
231 Calhoun Street
Charleston, SC 29401
(843) 853-5678
Email: john@chakerislawfirm.com
abby@chakerislawfirm.com

- *AND* -

Shaun W. Cranford
CRANFORD LAW
P.O. Box 50684
Columbia, SC 29250
(803) 779-6444
Email: shaun@cranfordlawfirm.com

Attorneys for Respondent Harbour Cove Condominium Association

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Trial Court Case No. 2014-CP-26-07634
Appellate Case No. 2017-02146

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, 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., 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., Defendants,

Of Whom the Harbour Cove Condominium Association is the Respondent.

CERTIFICATE OF COUNSEL

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

July 27, 2018

FOR

Phillip W. Segui, Jr.
Amanda M. Blundy
SEGUI LAW FIRM, PC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, SC 29464
(843) 884-1865
Email: psegui@seguilawfirm.com
ablundy@seguilawfirm.com

- *AND* -

John T. Chakeris
M. Abigail Young
THE CHAKERIS LAW FIRM
231 Calhoun Street
Charleston, SC 29401
(843) 853-5678
Email: john@chakerislawfirm.com
abby@chakerislawfirm.com

- *AND* -

Shaun W. Cranford
CRANFORD LAW
P.O. Box 50684
Columbia, SC 29250
(803) 779-6444
Email: shaun@cranfordlawfirm.com

Attorneys for Respondent Harbour Cove Condominium Association

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 30 2018

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Trial Court Case No. 2014-CP-26-07634
Appellate Case No. 2017-02146

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, 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., 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., Defendants,

Of Whom the Harbour Cove Condominium Association is the Respondent.

PROOF OF SERVICE OF FINAL BRIEF

I certify that I have served the Final Brief of Respondent Harbour Cove Condominium Association on all Appellants by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2018 addressed to their attorneys of record, listed as follows:

Bob Calamari, Esquire
Nelson Mullins Riley & Scarborough, LLP
BNC Bank Corporate Center, Suite 300
3751 Robert M. Grissom Parkway
Myrtle Beach, SC 29577
bob.calamari@nelsonmullins.com
Attorney for Appellants Selective Insurance Company of South Carolina and Nationwide Mutual Insurance Company

John L. McCants, Esquire
Rogers Lewis Jackson Mann & Quinn, LLC
1330 Lady St., Suite 400
Columbia, SC 29201
jmccants@rogerslewis.com
Attorney for Appellant National Fire & Marine Insurance Company

Lawrence M. Hunter, Jr., Esquire
Hunter & Foster, PA
P.O. Box 10309
Greenville, SC 29603
Lawrence@HunterFoster.com
Attorney for Appellant Bitco General Insurance Corporation

Mark S. Barrow, Esq.
Christy E. Mahon, Esq.
Everett A. Kendall, II, Esq.
Sweeny Wingate & Barrow, P.A.
1515 Lady Street
Columbia, SC 29201
msb@swblaw.com
cem@swblaw.com
eak@swblaw.com

Steven M. Klepper, Esquire
(admitted *pro hac vice*)
Kramon & Graham, P.A.
One South Street
Suite 2600
Baltimore, MD 21202

Attorneys for Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company

July 27, 2018

Phillip W. Segui, Jr.
Amanda M. Blundy
SEGUI LAW FIRM, PC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, SC 29464
(843) 884-1865
Email: psegui@seguilawfirm.com
ablundy@seguilawfirm.com

- *AND* -

John T. Chakeris
M. Abigail Young
THE CHAKERIS LAW FIRM
231 Calhoun Street
Charleston, SC 29401
(843) 853-5678
Email: john@chakerislawfirm.com
abby@chakerislawfirm.com

- *AND* -

Shaun W. Cranford
CRANFORD LAW
P.O. Box 50684
Columbia, SC 29250
(803) 779-6444
Email: shaun@cranfordlawfirm.com

Attorneys for Respondent Harbour Cove Condominium Association