

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-03326
Appellate Case No. 2017-000474

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SC Court of Appeals

Ex Parte:

Liberty Mutual Fire Insurance Company, Appellant.

v.

In Re:

Waverly at Hamlin Plantation Townhome Association, Inc., Respondent,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. Respondents,

and

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. Respondents,

v.

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v.

Barr Construction, Inc., Benjamin Mora d/b/a
Mora Construction, a/k/a Benjamin Mora
Construction, LLC, Builders FirstSource-
Atlantic Group, LLC, DBC Construction
Services, LLC, Eli, Inc., Gerardo Rosette
Sanchez a/k/a JMC Construction, Inc., Jesus
Mora a/k/a J. Mora Brick and Block Mason,
LLC, Juan Luis Sanchez, Juan Luis Sanchez
a/k/a Sanchez Brothers Painting, Latitude
Construction Services, LLC, the Muhler
Company, Inc., Paul M. Vasquez, Richard
Ditullio, Richard Ditullio a/k/a RDT
Contracting, LLC

Respondents,

FINAL BRIEF OF RESPONDENT WAVERLY AT HAMLIN PLANTATION
TOWNHOME ASSOCIATION, INC.,

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AT HAMLIN PLANTATION TOWNHOME
ASSOCIATION, INC.,***

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STATEMENT OF ISSUES ON APPEAL

1. **WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT LIBERTY MUTUAL DID NOT MEET THE APPLICABLE TESTS FOR INTERVENTION.**

2. **WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT LIBERTY MUTUAL DID NOT SUFFER PREJUDICE FROM THE DENIAL OF ITS MOTION TO INTERVENE BECAUSE IT COULD BRING A DECLARATORY JUDGMENT ACTION AFTER THE VERDICT FOR THE PURPOSE OF OBTAINING A RULING THAT APPORTIONS DAMAGES.**

STATEMENT OF THE CASE

Plaintiff Waverly at Hamlin Plantation Townhomes, Inc. (“Waverly Homeowners’ Association”) filed this construction defect action against Defendants John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc.; John Wieland Homes of Charleston, Inc.; and John Wieland Homes, Inc.; and Builder’s Support Services of the Carolinas, Inc. (collectively, the “Wieland Entities”) on June 6, 2013. (Compl.; R. pp. 6-15.) The Complaint also named Wheelock Street Capital LLC, d/b/a John Wieland Homes and Neighborhoods, Inc. as a Defendant. (*id.*; R. pp. 6-15.) The Waverly Association sought damages related to construction defects and recovery of repair costs in connection with the Waverly at Hamlin Plantation Townhomes project, which consisted of over 100 townhomes. (See *id.*; R. pp. 6-15.)

On April 17, 2014, the Wieland Entities filed an answer denying the allegations of the Complaint and asserting third party claims against Third-Party Defendants Barr Construction, Inc.; Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC; Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC; DBC Construction Services, LLC; Eli, Inc.; Gerardo Rosette Sanchez a/k/a GR Painting; Jorge Medina, Jorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC; Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC; The Muhler Company, Inc.; Paul M. Vasquez; and Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC (the “Third-Party Defendants”). (Answer & Third Party Complaint; R. pp. 16-34.)

After a week-long trial, the jury awarded the Plaintiff Waverly Homeowners’ Association a verdict in the amount of \$7,000,000 in actual damages. Subsequent to the trial, on February 3, 2017,

a hearing was heard on Defendants' Motion to Enforce Set-Off and Reduce Judgment. The parties stipulated, without objection, that the Defendants are entitled to a set-off in the amount of \$1,919,000 to account for funds previously paid by other settling Defendants. Accordingly, Judgment was entered against the Wieland Entities in the amount of \$5,0981,000 on February 9, 2017.

As set forth in Liberty Mutual's Appellate Brief, Liberty Mutual, a CGL insurance carrier, issued some twelve policies of insurance to the Wieland Entities over the course of twelve years, with coverage beginning on January 1, 2001 and continuing until March 15, 2013 (collectively, "the Liberty Policies"). (See Final Brief of Appellant, p. 3; Mot. to Intervene, R. p. 60; Order; R. p. 2.) Beginning in May of 2016, Liberty Mutual hired counsel to defend the Wieland Entities under a reservation rights. (See Order; R. p. 2; Transcript; R. p. 40, Lines 2-10.)

On October 13, 2016—over three years after this action was commenced—Liberty Mutual filed its First Motion for Limited Intervention. (Motion; R. p. 61; Transcript; R. p. 36, lines 4-10.) Liberty Mutual's counsel, Attorney Robert Calamari, subsequently withdrew the Motion. (*id.*; R. p. 61; Transcript; R. p. 36, lines 4-10; R. p. 40, lines 11-24.) Liberty Mutual then filed its Second Motion for Limited Intervention on January 19, 2017 for the limited purpose of submitting special verdict questions related to the allocation of covered and non-covered damages during the trial that began on January 23, 2017. (Motion; R. pp. 58- 62.) Liberty Mutual did not file any pleading with its motion to intervene, much less for a declaratory judgment. Liberty argued that SCRCP, Rule 24 permitted this proposed limited intervention, and that the then-recent decision in *Harleysville Group Ins. v. Heritage Communities, Inc. et al*, Opinion N. 28698 (S.C. Sup. Ct. filed Jan 11, 2017) (Shearhouse Adv. Sh. No. 2 at 21-54) directed that Liberty Mutual seek to intervene and be allowed to intervene for this insurance coverage purpose. (Motion; R. pp. 58-62.) The *Harleysville Group*

Opinion was subsequently Affirmed and Affirmed as Modified in Opinion N. 28698 (S.C. Sup. Ct. Refiled July 26, 2017) (Shearhouse Adv. Sh. No. 28 at 15-54).

After conducting a hearing on the eve of trial, which was contested by the parties to the action, the trial court denied Liberty Mutual's Second Motion to Intervene in a reasoned opinion discussing SCRCRCP, Rule 24 Intervention and the *Harleysville Group Ins. v. Heritage Communities, Inc. et al.* decision. (Order; R. pp. 1-5.) Specifically, the trial court found that Liberty Mutual was not entitled to either intervention as of right under Rule 24(a), SCRCRCP or permissive intervention under Rule 24(b), SCRCRCP. (*id.*; R. pp. 2-3; see also Transcript; R. p. 50, line 12 to p. 52, line 7.) Further, the trial court disagreed that the *Harleysville* decision directed the intervention. (Order; R. pp. 3-4.) The trial court also found that Liberty Mutual's "limited" intervention would not prejudice Liberty Mutual, but would prejudice the parties to the construction action. (*id.*; R. pp. 4 – 5; see also Transcript; R. pp. 46-50, beginning at line 6, ending at line 12; and p. 53, lines 3-12.) Lastly, the Order denying the intervention specifically stated that Liberty Mutual "is not precluded from bringing a declaratory judgment after the verdict for the purpose of obtaining a ruling that apportions damages...." (Order; R. p. 4.) Instead of filing a declaratory judgment action on coverage issues against its insured, Liberty Mutual filed this appeal of the Order denying intervention on February 21, 2017.

Liberty Mutual admits that it is not seeking to reverse the jury verdict, nor to remand the case for a new trial, stating, "the remedy for this error [denial of intervention] should be acknowledgement of Liberty Mutual's right to address these issues in subsequent declaratory judgment litigation." (Final Brief of Appellant; p.12). Again, the trial court's Order being appealed by Liberty Mutual already states that Liberty Mutual is not precluded from bringing a declaratory judgment after the verdict for the purpose of obtaining a ruling that apportions damages. (Order; R.

p. 4.) Liberty Mutual has yet to file a declaratory judgment action.

STANDARD OF REVIEW

The decision to grant or deny a motion to [...] intervene in an action pursuant to Rule 24, SCRCPP, lies within the sound discretion of the trial court. See *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990); and *Hunnicut v. Rickenbacker*, 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977). "This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." *Jeter v. South Carolina Dep't of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 146 (2006).

Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007)

ARGUMENTS

I. THE TRIAL COURT PROPERLY DETERMINED THAT LIBERTY MUTUAL DID NOT MEET THE APPLICABLE TESTS FOR INTERVENTION.

The trial court properly determined that Liberty Mutual's motion does not fall within the ambit of South Carolina Rule of Civil Procedure, Rule 24 – Intervention. SCRCPP Rule 24(a) governs intervention as a matter of right, while Rule 24 (b) governs permissive intervention. Specifically, Rule 24 provides:

- (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
- (b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Trial Court properly noted that Liberty Mutual did not meet the requirement for Rule 24

(a) because it did not claim a statutory right to intervene, conditional or otherwise. (Order; R. pp. 2-3.) Further, Liberty Mutual did not claim an interest in the subject matter of the dispute between the Plaintiff and the Wieland Defendants. The purpose of Liberty's intervention request was to submit special interrogatories to the jury pertaining to the issue of insurance coverage. (Motion; R. p. 59-62; Order; R. p. 3.)

Further, the trial court aptly noted that Rule 24 does not contemplate or permit the *limited* intervention sought by Liberty Mutual. (Order; R. p. 3.) The rule cited in Liberty's motion speaks only of intervention. Liberty Mutual did not seek to participate in the trial as a party. (See Transcript; R. p. 47, line 18 to p. 48, line 13; and p. 50, lines 9-11). Therefore, the trial court properly determined that the relief request by Liberty is not available under SCRCF Rule 24.

Further, even if SCRCF Rule 24 were to be interpreted so as to encompass the limited intervention sought in Liberty Mutual's Motion to Intervene, Liberty Mutual's motion fails to meet the requirements set forth under Rule 24(a). Namely, Liberty Mutual's Motion to Intervene was untimely.

In *Davis v. Jennings*, the Supreme Court of South Carolina noted that a court must consider the following factors in determining whether a motion to intervene is timely: 1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; 2) the reason for the delay; 3) the stage to which the litigation has progressed; and 4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denying intervention. 304 S.C. 502, 504, 405 S.E.2d 601, 603 (S.C. 1991), see also *Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (S.C. 1992).

Liberty Mutual's Motion to intervene is untimely because it waited over three (3) years after the action was filed, on the eve of trial, to file its motion. (Motion, R. p. 58; see also Transcript; R. p.

48, line 19 to p. 49, line 9.) The Court properly considered the untimeliness of Liberty Mutual's Motion and the prejudice it would cause the parties, noting, "So why then would you be allowed to intervene and sort of interject yourself at the last moment in this litigation and possibly prejudicially to these parties then change the entire way they have determined strategically they are going to address this case...." (Transcript; R. p. 38, Lines 14-20.) Liberty Mutual's counsel notably answered, "Your Honor, we don't disagree with any of those statements." (*id.*, Lines 21-22; R. p. 38.)

Liberty Mutual's motion to intervene attempted to justify its request by stating that (1) it is seeking to comply with "directives of the recent *Heritage* opinion," referencing a then-recent January 11, 2017 opinion issued by the South Carolina Supreme Court, Opinion No. 296983; and that (2) it is only seeking intervention for the purpose of obtaining special interrogatories or a special verdict form. (Motion; R. p. 61; Order; R. p. 3.) Referring to *Heritage*, the Court noted, "[D]oes it really stand for the proposition that you are arguing that it stands for? Because I think that's a real strained reading of those three lines in that opinion." (Transcript at 5, Lines 2-5; R. p. 39.) Again, Liberty Mutual's counsel responded by stating, "And, your Honor, again, we don't necessarily disagree with the courts comments...." (*id.*, Line 6-8; R. p. 39.)

The trial court properly determined that the *Heritage* majority opinion cannot fairly be read to direct or approve Liberty Mutual's last minute motion to intervene for the purpose of seeking jury interrogatories and a special verdict form, which neither the insured nor its counsel has requested. (Order; R. pp. 3-5). As stated in *Heritage*, the insurance company "cannot overcome the law in South Carolina concerning general verdicts." (Order; R. pp. 3-5.) This statement reflects the recognition that in South Carolina an insurer is responsible for the entire general verdict where at least one of several claims are covered. (Order; R. pp. 3-5.) However, the trial court properly noted

that the *Heritage* case does not authorize or direct an insurer like Liberty Mutual to intervene in a case under circumstances that exist here for several reasons. (Order; R. p. 4-6)

First, as noted in the dissent in *Heritage*, insurance companies intervening in these lawsuits and asserting a defense against coverage would seem to create an impermissible conflict of interest in violation of established South Carolina law. (Order; R. p. 4.) The trial court properly assessed the prejudice to the Wieland Defendants if Liberty Mutual were permitted to intervene in the action, noting as follows:

Asking the Wieland Defendants to defend themselves against the Plaintiffs' claims and the efforts of their own insurance carrier simultaneously would be unfair. Counsel for the Defendants has spent considerable effort during discovery and trial preparation to formulate a defense strategy. Undoubtedly, that strategy would be disrupted if Liberty was permitted to intervene at this stage, probably to the detriment of Liberty's insured. Conversely, I find no prejudice to Liberty Mutual in denying its Motion since (1) the issues it raises are not ripe until a verdict is reached, and (2) it is not precluded from bringing a declaratory judgment action after the verdict for the purpose of obtaining a ruling that apportions damages, if any, found in this case. (Order; R. p. 4.)

Next, the trial court properly considered that the risk of jury confusion in allowing Liberty Mutual to intervene would be unacceptably high. The court properly noted the procedural issues that would arise in allowing Liberty Mutual to intervene, noting:

During oral argument counsel for Liberty expressed his intention to submit special interrogatories for the jury to answer presumably pertaining to the allocation of any liability among covered and uncovered claims. Less clear is how evidence would be introduced during the trial which would allow the jury to decide the special interrogatories. It is safe to assume that Plaintiffs' counsel would have no interest in submitting such evidence and trial counsel for the Wieland Defendants would be ethically constrained from introducing such evidence or examining witnesses about the differences between covered and uncovered claims. That leaves Mr. Calamari as the only attorney with the interest and ability to introduce that evidence; however, Mr. Calamari does not represent a party in the case and so he would have no right under the Rules of Civil Procedure or the Rules of Evidence to examine witnesses or introduce evidence. (Order; R. pp. 4-5.)

In determining that Liberty Mutual should not be permitted to intervene, the trial court used

its discretion, to determine that permitting Liberty Mutual's intervention on the eve of trial "would only complicate and delay the underlying action, confuse the jury, and introduce a question of insurance coverage that is simply not the subject matter of this action." (Order; R. p. 5.)

As the Supreme Court of South Carolina aptly held in *Ex Parte Gov't Employee's Ins. Co.*:

The decision to grant or deny a motion to [...] intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court. See *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990); and *Hunnicut v. Rickenbacker*, 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977). "This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." *Jeter v. South Carolina Dep't of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 146 (2006).

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Here, the trial court exercised its sound discretion, noting that Liberty Mutual "is not precluded from bringing a declaratory judgment after the verdict for the purpose of obtaining a ruling that apportions damages...." (Order; R. p. 4). Curiously, despite the clear and unambiguous order of the trial court, Liberty Mutual has yet to bring a declaratory judgment action, but instead chose to prematurely and unnecessarily file this appeal, noting "the remedy for this error [denial of intervention] should be acknowledgement of Liberty Mutual's right to address these allocation issues in subsequent declaratory judgment litigation." (Final Brief of Appellant; p. 12.)

II. LIBERTY MUTUAL'S APPEAL SHOULD BE DISMISSED BECAUSE NO JUSTICIABLE CONTROVERSY EXISTS AND LIBERTY MUTUAL SEEKS A REMEDY ALREADY AFFORDED TO IT BY THE TRIAL COURT.

SCACR, Rule 220(a) states that the appellate court may "affirm, reverse, or modify the decision below or remand all or any issues for further proceedings." The Court may also dismiss the appeal. See *Scelba v. Scelba*, 342 S.C. 223, 535 S.E.2d 668 (Ct. App. 2000). A justiciable controversy is a concrete and substantial controversy and not merely a dispute of a contingent,

hypothetical, or abstract character. *West v. West*, 263 S.C. 146, 208 S.E.2d 530 (1974) citing *South Carolina Elec. & Gas Co. v. South Carolina Public Service Authority*, 215 S.C. 193, 54 S.E.2d 777 (1949); *Power v. Mcnair*, 255 S.C. 150, 177 S.E.2d 551 (1970); *Dantzler v. Callison*, 227 S.C. 317, 88 S.E.2d 64 (1955). While liberally construed, even the Declaratory Judgment Act does not require the courts to give a purely advisory opinions as to the issues sought to be raised. *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957). “[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review.” *Colleton County Taxpayers Ass’n v. Sch. Dist. Of Colleton County*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).

Liberty states that it comes “to this Court requesting review and reversal of the trial court order, and clarity on how it may protect its right to ensure that it is not forced to pay damages covered by the applicable policies.” (Final Brief of Appellant; 5.) However, when one looks closer to Liberty’s brief, it suggests this court “adopt” a new “framework” for addressing how insurance companies obtain findings of allocation of covered and noncovered construction damages. It then proposes a substantive framework (based on Ohio law) for an insurance carrier in this circumstance. (Final Brief of Appellant; p. 5.) This appeal seeks the equivalent of a claim for Declaratory Judgment, or would result in an advisory opinion. This court should decline to exercise jurisdiction in this case for that purpose as Liberty Mutual has yet to bring a Declaratory Judgment Action following the verdict in this case. The issue is not ripe because Liberty Mutual has not filed a declaratory judgment. There is no underlying Order precluding Liberty Mutual from pursuing a Declaratory Judgment.

Liberty Mutual admits that it is not seeking to reverse the jury verdict, nor to remand the case for a new trial. It claims it seeks only reversal of the order denying it a right to intervene. Such relief, however, would have no impact on the parties or merits of this case, and would serve only

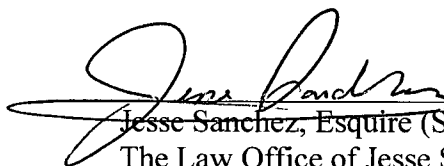
advisory purposes. Liberty Mutual even goes so far as to state that the advice or declaration its is seeking is that “the remedy for this error [denial of intervention] should be acknowledgement of Liberty Mutual’s right to address these allocation issues in subsequent declaratory judgment litigation.” (Final Brief of Appellant; page 12.) However, Judge Jefferson’s Order said exactly that—that Liberty Mutual “is not precluded from bringing a declaratory judgment after the verdict for the purpose of obtaining a ruling that apportions damages....” (Order; R. p. 4).

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Circuit Court.

[Signature on following page.]

Respectfully submitted,



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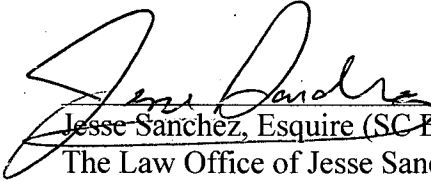
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent Waverly at Hamlin Plantation
Townhome Association, Inc. complies with Rule 211(b), SCACR.


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SC Court of Appeals

Ex Parte:

Liberty Mutual Fire Insurance Company,

Appellant.

v.

In Re:

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Respondent,

v.

John Wieland Homes and Neighborhoods of the
Carolinas, Inc. as Successor by Statutory Merger
to John Wieland Homes and Neighborhoods of
South Carolina, Inc., John Wieland Homes of
Charleston, Inc., John Wieland Homes, Inc.,
Builders Support Services of the Carolinas, Inc.
and Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods, Inc.

Respondents,

and

John Wieland Homes and Neighborhoods of the
Carolinas, Inc. as Successor by Statutory Merger
to John Wieland Homes and Neighborhoods of
South Carolina, Inc., John Wieland Homes of
Charleston, Inc., John Wieland Homes, Inc.,
Builders Support Services of the Carolinas, Inc.

Respondents,

v.

Barr Construction, Inc., Benjamin Mora d/b/a
Mora Construction, a/k/a Benjamin Mora
Construction, LLC, Builders FirstSource-
Atlantic Group, LLC, DBC Construction
Services, LLC, Eli, Inc., Gerardo Rosette
Sanchez a/k/a JMC Construction, Inc., Jesus
Mora a/k/a J. Mora Brick and Block Mason,
LLC, Juan Luis Sanchez, Juan Luis Sanchez
a/k/a Sanchez Brothers Painting, Latitude
Construction Services, LLC, the Muhler
Company, Inc., Paul M. Vasquez, Richard
Ditullio, Richard Ditullio a/k/a RDT
Contracting, LLC

Respondents,

PROOF OF SERVICE

I, the undersigned, certify that I have served the Final Brief of Respondent Waverly at Hamlin Plantation Townhome Association, Inc. to the attorneys of record by depositing a copy of it in the United States Mail on January ____, 2018 addressed to the following:

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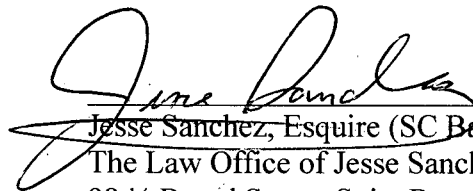
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January 8, 2018