

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

RECEIVED

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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., 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, Richard Ditullio, Richard
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Respondents.

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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
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Ex Parte: Liberty Mutual Fire Insurance Company, ... Appellant.

v.

In re: Waverly at Hamlin Plantation Townhome
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John Wieland Homes and Neighborhoods of the
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Inc., John Wieland Homes, Inc., Builders Support
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Capital, LLC d/b/a John Wieland Homes and
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and

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Services of the Carolinas, Inc. Respondents,

v.

Barr Construction, Inc., Builders FirstSource, Inc.,
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Builders FirstSource-Atlantic Group, LLC, DBC
Construction Services, LLC, Eli, Inc., Gerardo Rosette
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Medina a/k/a JMC Construction, LLC a/k/a JMC
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Block Mason, LLC, Juan Luis Sanchez, Juan Luis
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Respondents.

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Inc.

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Certificate of Counsel

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

**ORDER DENYING LIBERTY
MUTUAL'S MOTION FOR LIMITED
INTERVENTION**

FILED
2017 FEB -6 PM 2:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Presiding Judge:	Hon. Deadra L. Jefferson
Liberty Mutual's Attorney:	Robert Calamari, Esq.
Plaintiff's Attorney:	John Hayes, IV, Esq.
Defendant's Attorney:	John A. Massalon, Esq.
Date of Hearing:	January 23, 2017
Court Reporter:	Ruth Weese

On January 23, 2017, this matter came before this Court for a hearing on Liberty Mutual's Second Motion for Limited Intervention, filed January 19, 2017.¹ Present at the hearing was Robert Calamari of Nelson, Mullins, Riley & Scarborough appearing for Liberty Mutual. John A. Massalon of Wills, Massalon & Allen appeared for the Wieland 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., John

¹ Liberty Mutual's First Motion for Limited Intervention was filed on October 13, 2016. The Motion was subsequently withdrawn on December 5, 2016 by Attorney Robert C. Calamari.

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Wieland Homes, Inc., and Builders Support Services of the Carolinas). Additionally present was John Hayes, IV, attorney for Plaintiff Waverly at Hamlin Plantation, who joined in with Attorney John A. Massalon in opposing the motion. Based on the foregoing, Liberty's Motion to Intervene is denied.

Liberty insured the Wieland Defendants under some twelve (12) insurance policies over twelve (12) years. This is a construction defect dispute involving over one hundred (100) townhomes at Waverly at Hamlin Plantation filed in 2013.² Liberty Mutual, a CGL insurance carrier for Wieland, hired counsel to defend Wieland under a reservation of rights beginning in May 2016. Liberty has moved to intervene into this action for the limited purpose of submitting special verdict questions related to allocation of covered and non-covered damages during the trial that began on Monday January 23, 2017.

Liberty Mutual's motion does not fall within the ambit of South Carolina Rules of Civil Procedure, Rule 24 — Intervention. SCRCP Rule 24(a) provides for intervention as of right when (1) a statute provides a right to intervene; and (2) the movant claims an interest relating to the property or transaction which is the subject of the action and that he is so situated that the disposition of the action may impair or impede his ability to protect that interest. SCRCP Rule 24(b) provides for permissive intervention when (1) a statute confers a conditional right to intervene; or (2) where movant's claim and main action have a question of law or fact in common. Also, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties. Liberty does not claim a statutory right to intervene, conditional or otherwise. Further, Liberty does not claim an interest in the subject matter of the

² A companion case Sills v. John Wieland Homes of the Carolinas, Inc. et al, C.A. 2014-CP-10-4335 is being tried simultaneously with the above-captioned matter. Liberty did not move to intervene in the companion case which would also be a basis to further confound the jury and to deny the motion to intervene.

dispute between the Plaintiffs and the Wieland Defendants. The purpose of Liberty's intervention request is to submit special interrogatories to the jury pertaining to the issue of insurance coverage. The undersigned is not convinced that the interest that Liberty seeks to protect is sufficient under Rule 24 because that interest is probably not ripe until such time, if ever, as the jury returns a verdict for Plaintiffs against the Wieland Defendants.

Additionally, Rule 24 does not contemplate or permit the limited intervention sought by Liberty. Liberty does not seek to participate in the trial as a party. The rule cited in Liberty's motion speaks only of intervention. Therefore, the relief requested by Liberty is not available under SCRCR Rule 24.

Nonetheless, Liberty Mutual attempts to justify its request by stating that (1) it is seeking to comply with "directives of the recent Heritage opinion," referencing a 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. The Heritage majority opinion cannot fairly be read to direct or approve Liberty'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.⁴ As stated in Heritage, the insurance company "cannot overcome the law in South Carolina concerning general verdicts." Id. at Fn. 11. 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. Id. However, the Heritage case does not authorize

³ It is not clear if the Heritage opinion is final as the time to file for rehearing would not appear to have passed.

⁴ The Court in Heritage references the cases of Magnum Foods, Inc. v. Cont'l Cas. Co., 3 F.3d 1491, 1498 (10th Cir. 1994) which relied upon Duke v. Hoch, 468 F.2d 973, 979 (4th Cir. 1972). Those cases speak more to the duties of insurance companies in notifying their insureds of conflicts in advance, were not construction cases, and do not direct that an insurer be permitted to intervene into a case on the eve of trial for the limited purpose of obtaining a special verdict or special interrogatories.

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or direct an insurer like Liberty to intervene in a case under circumstances that exist here for several reasons.

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. Id. at p. 54. 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.

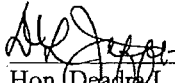
Second, the risk of jury confusion is unacceptably high. During oral argument counsel for Liberty expressed his intention to submit special interrogatories for the jury to answer presumably pertaining to the allocation of any liability among covered and uncovered claims. Less clear is how evidence would 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

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would have no right under the Rules of Civil Procedure or the Rules of Evidence to examine witnesses or introduce evidence.

Therefore, Liberty's motion to intervene is denied. In summary, this "non-party" intervention, on the eve of trial, will 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.

Accordingly the motion is DENIED.



Hon. Deandra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

February 6, 2017
Charleston, SC
At Chambers

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10- 3324

Waverly at Hamlin Plantation
Townhome Association, Inc.,

Plaintiffs,

vs.

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., Builder Support
Services of the Carolinas, Inc., and
Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods,
Inc.,

Defendants.

SUMMONS
(Jury Trial Demanded)

FILED
2013 JUN -6 PM 3:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Summons and Complaint upon the subscribers at their office at 180 Meeting Street, Suite 330, Charleston, South Carolina within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer within the prescribed time, a judgment by default will be rendered against you for the amount or other remedy requested in the attached Complaint, plus interests and costs.

[Signature Page to Follow]

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June 6, 2013
Charleston, South Carolina

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation
Townhome Association, Inc.,

Plaintiffs,

vs.

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., Builder Support
Services of the Carolinas, Inc., and
Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods,
Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO: 2013-CP-10- 3326

COMPLAINT
(Jury Trial Demanded)

FILED
2013 JUN -6 PM 3:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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

1. Waverly at Hamlin Plantation Townhome Association, Inc. (hereinafter
"Association" or "Waverly Townhomes") is a duly authorized South Carolina non-profit
corporation.

2. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina and are authorized to conduct business in this state, and have a principal place of business in Charleston County.

3. Defendant Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., is a joint venture with the Wieland Defendants formed in November 2012.

4. Waverly Townhomes is a section of the residential community, Hamlin Plantation, located in Mount Pleasant, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

5. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

6. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

7. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

8. This Court has jurisdiction over the parties and subject matter hereto.

9. The construction of Waverly Townhomes was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and

experienced in performing such construction work as to properly build Waverly Townhomes according to the normal standards of good and workmanlike practice in the construction field.

10. Construction defects in the Waverly Townhomes have recently been discovered. A recent inspection of the subject Townhomes resulted in the discovery of major problems and deficiencies including but not limited to the following:

- (a) Lack of proper flashing;
- (b) Lack of proper roofing installation;
- (c) Moisture damage along porches;
- (d) Water intrusion damage resulting from defects;
- (e) Improper flashing installation; and
- (f) Improper paving and drainage.

11. As a direct and proximate result and consequence of the faulty construction by the Defendants of Plaintiff's homes, causing major problems and defects thereto, the Plaintiff have and will continue to spend substantial sums of money for the repairs and reconstruction of major portions of Waverly Townhomes and will be subject to consequential damages.

FOR A FIRST CAUSE OF ACTION
(Unfair Trade Practices)

12. Plaintiff and the Defendants are "persons" within the meaning of S.C. Code § 39-5-10(a).

13. The Defendants, by developing, marketing and constructing the subject Residences, were engaged in commerce within the meaning of S.C. Code § 39-5-10(b).

14. The Defendants' actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code § 39-5-20(a).

15. The Defendants' acts are capable of repetition, and, upon information and belief, have been repeated.

16. The Defendants' conduct affects the public interest of South Carolina.

17. The Defendants knew, or reasonably should have known, that their conduct violated the Unfair Trade Practices Act.

18. As a direct foreseeable, and proximate result of the Defendants' unfair and deceptive practices, Plaintiff has suffered an ascertainable loss of money and property.

19. Plaintiff is entitled to recover his actual damages, which amount should be trebled, together with interest and attorney's fees.

FOR A SECOND CAUSE OF ACTION
(Breach of implied Warranty of Fitness of Habitability)

20. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 19 above, as if fully set forth herein verbatim.

21. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

22. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiff.

FOR A THIRD CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for Particular purpose)

23. The Plaintiff incorporates into this cause of action the allegations in Paragraphs 1 through 22 above, as fully as if repeated verbatim herein.

24. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

25. At the time of the sale of the subject Residences to the Plaintiff, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

26. The Defendants, at the time of the sale of the subject Residences to the Plaintiff, had reason to know that the Plaintiff was relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

27. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

28. As a result of the Defendants' breach of its implied warranties, Plaintiff has suffered physical damages.

FOR A FOURTH CAUSE OF ACTION
(Negligence)

29. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 28 above, as if fully set forth herein verbatim.

30. The construction of the subject Residences by the Defendants deviated from the normal standards of good and workmanlike practice in the construction filed in the following particulars, to-wit:

- (a) In failing and omitting to construct the residences in conformity with the applicable building codes, so as to create statutory violations;
- (b) In failing and omitting to construct the subject Residences pursuant to good and workmanlike construction practices;
- (c) In failing and omitting to install proper flashing throughout the subject Residences;
- (d) In failing and omitting to properly seal the subject Residences' exteriors to prevent water infiltration and intrusion;

31. As a direct, foreseeable and proximate result of the Defendants' negligence, Plaintiff has suffered damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

32. Plaintiff repeats and realleges their allegations of Paragraphs 1 through 31 above as if set forth herein verbatim.

33. That the Defendants entered into a contract with the homeowners and/or predecessors-in-title, whereby the Defendants were to construct the subject homes and facilities to industry standards and in a good workmanlike proper manner.

34. The Defendants did not honor their obligations under the agreement with the Plaintiff and/or their predecessors-in-title in that they failed to construct subject Residences according to industry standards and in a good, workmanlike proper manner causing major defects to the homes.

35. That the Defendants are in breach of the parties' contracts.

36. That as a result of the Defendants' breach of contract, the Plaintiff has suffered and will continue to suffer and are entitled to recover monetary damages caused by the defective construction by the Defendants and for loss of use and diminution in value of the subject Residences.

FOR A SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

37. Plaintiff repeats and realleges the allegations contained in the above paragraphs as if more fully set forth herein.

38. The Defendants had a fiduciary duty and duty of loyalty and good faith dealing to transfer Waverly Townhomes to the control of the Plaintiff in a state of good repair. Defendants, having transferred elements with the defects and deficiencies set forth above, in the alternative is required to provide the Plaintiff with the funds necessary to bring the elements up to standard of reasonably good repair and condition.

39. Defendants breached their fiduciary duty and duty of loyalty and good faith dealing by transferring the elements in a substandard and deficient condition without the funds necessary to bring them up to standards of good repair and condition.

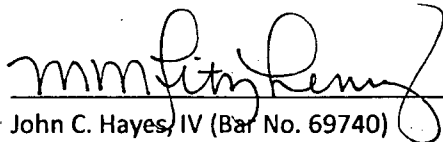
40. As a direct and proximate result and consequence of the Defendants actions, Plaintiff has suffered damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the buildings and other improvements, loss of use and diminution in value.

WHEREFORE, the Plaintiffs pray that this Court issue an Order granting judgment for the Plaintiff against the Defendants, jointly and severally, for the following:

(a) for actual damages in an amount to be proven at trial;

- (b) for trebled damages under S.C. Code § 39-5-10, et seq.;
- (c) for punitive damages;
- (d) for prejudgment and post judgment interest on Plaintiffs' damages;
- (e) for attorney's fees and costs; and
- (f) for such other and further relief as this Court may deem just and proper.

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June 6, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods of
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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.,

Defendants,

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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.

Third-Party Plaintiffs,

Barr Construction, Inc.; Benjamin Mora d/b/a
Mora Construction, a/k/a Benjamin Mora
Construction, LLC; Builder's 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; Jeorge Medina, Jeorge 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

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-10-3326

**ANSWER AND THIRD-PARTY
COMPLAINTS**

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 APR 25 PM 3:54

FILED

Brothers Paintin ; Latitude Construction
Services, LLC; The Muhler Company, Inc.;
Paul M. Vasquez; Richard Ditullio; Richard
Ditullio a/k/a ROT Contracting, LLC,

Third-Party Defendants.

The Defendant erroneously identified in the caption as Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. (hereinafter collectively referred to as "Wheelock"), through its below-signed attorneys, answering the Complaint of the Plaintiff above-named, and by way of Third-Party Complaint, alleges as follows:

1. Wheelock admits, upon information and belief, the allegations of Paragraph 1.
2. Answering the allegations of Paragraphs 2, Wheelock craves reference to the applicable corporate and business filings and documents for their exact terms and contents and denies any allegations inconsistent therewith.
3. Wheelock denies the allegations of Paragraph 3.
4. Wheelock denies the allegations of Paragraph 4 as they pertain to Wheelock.
5. Wheelock denies the allegations of Paragraphs 5 through 7, as they pertain to Wheelock.
6. Wheelock denies the allegations of Paragraph 8, as they pertain to Wheelock.
7. Wheelock denies the allegations of Paragraph 9, as they pertain to Wheelock.
8. Wheelock lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 and therefore denies them.
9. In response to the allegations contained in Paragraph 11, Wheelock denies that it performed the construction of the Plaintiff's homes. Wheelock lacks knowledge or information

sufficient to form a belief as to the truth of each and every other allegation contained in Paragraph 11, and therefore denies them.

AS TO THE FIRST CAUSE OF ACTION

10. Wheelock denies the allegations of Paragraphs 12 through 19, as they pertain to Wheelock.

AS TO THE SECOND CAUSE OF ACTION

11. Answering the allegations of Paragraph 20, Wheelock realleges its responses to the above paragraphs as if repeated herein verbatim.

12. Wheelock denies the allegations of Paragraphs 21 and 22, as they pertain to Wheelock.

AS TO THE THIRD CAUSE OF ACTION

13. Answering the allegations of Paragraph 23, Wheelock realleges its responses to the above paragraphs as if repeated herein verbatim.

14. Wheelock denies the allegations of Paragraphs 24 through 28, as they relate to Wheelock.

AS TO THE FOURTH CAUSE OF ACTION

15. Answering the allegations of Paragraph 29, Wheelock realleges its responses to the above paragraphs as if repeated herein verbatim.

16. In response to the allegations contained in Paragraph 30, Wheelock denies that it performed the construction of the Plaintiff's homes. Wheelock lacks knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in Paragraph 30, and therefore denies them.

17. Wheelock denies the allegations of Paragraph 31, as they relate to Wheelock.

AS TO THE FIFTH CAUSE OF ACTION

18. Answering the allegations of Paragraph 32, Wheelock realleges its responses to the above paragraphs as if repeated herein verbatim.

19. Wheelock denies the allegations of Paragraphs 33 through 36, as they relate to Wheelock.

AS TO THE SIXTH CAUSE OF ACTION

20. Answering the allegations of Paragraph 37, Wheelock realleges its responses to the above paragraphs as if repeated herein verbatim.

21. Wheelock denies the allegations of Paragraphs 38 through 40, as they relate to Wheelock, being all the remaining allegations of the Plaintiff's Complaint.

22. They deny each and every allegation of the Plaintiff's Complaint not specifically admitted above.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

23. Wheelock has been sued as a joint venturer of other defendants. The Complaint should be dismissed as to Wheelock because it is not and never has been engaged in a joint venture with any of the other defendants.

CONDITIONAL AFFIRMATIVE DEFENSES
AND THIRD PARTY CLAIMS

The following affirmative defenses and third-party claims are defenses that have been asserted by the other defendants. Wheelock herein asserts them conditionally and protectively in the event the action is permitted to continue against Wheelock on the disputed theory of joint venture.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

24. Plaintiff lacks standing and otherwise has improperly attempted to make the claims asserted against Wheelock in this action. Plaintiff's lack of standing and improprieties include, but are not limited to, the fact that Plaintiff has improperly attempted to file individual home-owner claims; and Plaintiff's filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiff's claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

27. Plaintiff's claims, if any, are the result of acts and omissions of other entities over which Wheelock has no control, barring Plaintiff's claims against Wheelock.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

28. That all claims are barred by the doctrine of Laches, waiver and estoppel.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

29. That the final completion and acceptance of the work undertaken by other defendants constitutes a complete defense to all claims asserted against Wheelock by Plaintiff.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

32. That Plaintiff failed to give other defendants, much less Wheelock, reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide other defendants, much less Wheelock, a reasonable opportunity to correct any such alleged defects.

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

34. Upon information and belief, any express or implied warranties were limited in duration from the date of completion and acceptance of the project by the Owner.

35. That the failure of Plaintiff within the warranty period from the date of the completion and acceptance of the project by the Plaintiff, to give notice of or make any claim for alleged deficiencies in the workmanship and/or materials provided constitutes a complete defense to all claims asserted by Plaintiff.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

36. Plaintiff's Complaint is barred by payment and/or release.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

37. Plaintiff has waived and/or is estopped from asserting the claims set forth in their Complaint.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

38. If Plaintiff sustained injuries and damages in the manner alleged in the Complaint, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Wheelock nor of anyone for whose conduct Wheelock is in any way responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiff or others, all of which will be shown at the trial of this case, and for which Plaintiff can have no recovery against Wheelock.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

40. Plaintiff's claims fail to state facts sufficient to constitute causes of action against Wheelock.

FURTHERANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

41. If Wheelock is deemed to be a contracting party, which is specifically denied by Wheelock, it has the benefit of contractually limited warranty and non-warranty obligations and exposure to the Plaintiff, excluding liability for many claims the Plaintiff is making, barring Plaintiff's claims and/or Plaintiff's claimed damages, including Plaintiff's claim for consequential damages, in whole or in part, against Wheelock.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

42. If Wheelock is deemed to be a contracting party, which is specifically denied by Wheelock, Plaintiff's claims are barred, or should be stayed, pending arbitration as there exists a valid arbitration provision in the contract between the Plaintiffs and other defendants.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

43. Plaintiff's claims should be dismissed as the Plaintiff failed to effect proper service of process on Wheelock.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

45. Plaintiff's claims are barred by the doctrine of corporate immunity.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

46. If Wheelock is deemed to be a contracting party, which is specifically denied by Wheelock, Plaintiff's claim are barred or would be reduced by the limited warranty given to Plaintiff by other defendants which was in lieu of all other warranties or obligations, express or

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

48. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of Plaintiff's failure to comply with the South Carolina Notice and Opportunity to Cure Non-Residential Construction Defects Act, South Carolina Code §40-11-510, et. seq.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

49. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of the Plaintiff's failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, South Carolina Code §40-59-810-860 (1976 as amended).

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

51. Plaintiff's claims should be dismissed or stayed as Plaintiff has failed, prior to filing suit, to comply with valid, applicable and mutually enforceable conditions precedent contained in the applicable purchase and sales documents and applicable corporate/legal documents (to include, but not limited to, the regime documents, Master Deed and Bylaws, deeds, sales contracts and Townhouse Association documents), including any and all alternative dispute provisions and provisions related to the number of owner/members who must agree to file a claim or suit. Plaintiff's lack of standing and improprieties include, but are not limited to, the fact that Plaintiff has improperly attempted to file claims for individual unit damages, and Plaintiff's filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiff's claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

52. Plaintiff's Complaint should be dismissed for failure to join necessary persons, parties and/or entities pursuant to SCRPC 19.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

53. Plaintiff's claims for the unfair trade practices act should be dismissed as the alleged actions of Wheelock do not have an impact on the public interest.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

54. Plaintiff's claims for breach of South Carolina's unfair trade practices act are barred pursuant to South Carolina Code §39-5-40.

FURTHER ANSWERING AND BY WAY OF THIRD-PARTY COMPLAINT
AGAINST THE ABOVE-NAMED THIRD-PARTY DEFENDANTS

WHEELLOCK ALLEGES AS FOLLOWS

55. These third-party actions are made preventively in case the action is allowed to go forward against Wheelock as a joint venturer with the other defendants.

56. Wheelock realleges the Paragraphs above as if repeated herein verbatim.

57. Plaintiff has sued Wheelock claiming damages caused by alleged deficient materials, design, engineering and/or construction services provided by Third-Party Defendants on the Project. See Complaint attached as Exhibit "A".

58. Upon information and belief, other defendants contracted with the following persons and entities (herein collectively referred to as "Trade Contractor Defendants") to perform work and provide materials as trade contractors and material men for the Project. The written contracts, as amended, between other defendants and the Trade Contractor Defendants are incorporated herein by reference, to include any and all arbitration provisions that are applicable and that would apply in this matter. The Trade Contractor Defendants are as follows:

- (a) framing, to include but not limited to installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings
 - Builder's Firstsource, Inc. a/k/a Builders Firstsource- Southeast Group, LLC, a/k/a Builders Firstsource- Atlantic Group, LLC
- (b) roofing, together with all associated and related waterproofings and flashings
 - Richard Ditullio, Richard Ditullio d/b/a ROT Contracting, LLC
 - DBC Construction Services, LLC
 - Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (c) window and door manufacturer, supplier, retailer and installer, together with all associated and related waterproofings and flashings
 - The Muhler Company, Inc.

- Paul M. Vasquez
- (d) railing suppliers and installers for balconies, porches and stairs, together with all associated and related waterproofings and flashings
- George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (e) waterproofing supplier and installer for balconies and porches, together with all associated and related waterproofings and flashings
- Latitude Construction Services, LLC
- (f) hardiplank/cement board siding supplier and installer, together with all associated and related waterproofings and flashings
- George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (g) hurricane strap installer, together with all associated and related waterproofings and flashings
- Builder's Firstsource, Inc. a/k/a Builders Firstsource – Southeast Group, LLC, a/k/a Builders Firstsource - Atlantic Group, LLC
- (h) masonry supplier and installer to include brick entryway steps, together with all associated and related waterproofings and flashings
- Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC
- (i) exterior painter/caulker, together with all associated and related waterproofings and flashings
- Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting
 - Gerardo Rosette Sanchez a/k/a GR Painting
- (j) foundation connections, supplier and installer, together with all associated and related waterproofings and flashings
- Benjamin Mora a/k/a Mora Construction, a/k/a Benjamin Mora Construction, LLC
 - Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC
- (k) sidewalk, walkway and driveway paving
- Eli, Inc.

(l) sitework/drainage supplier and installer

- Barr Construction, Inc.

59. Wheelock has denied all of the substantive allegations against it that were made by the Plaintiff.

FOR A FIRST CAUSE OF ACTION
(Indemnity)

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

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

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

Wheelock to recover from Trade Contractor Defendants any sums for which it may be held liable to Plaintiff.

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

FOR A SECOND CAUSE OF ACTION
(Negligence)

64. Wheelock realleges the Paragraphs above as if repeated herein verbatim.

65. To the extent, if any, that the construction was defective or deficient in workmanship, installation, materials, and/or was not merchantable or fit for their particular purposes, the Trade Contractor Defendants would have been negligent, grossly negligent, reckless and careless in the construction, supervision, inspection and/or supplying of the work or materials outlined above and incorporated into the project.

66. To the extent Wheelock is found liable to Plaintiff, Wheelock has been damaged as a direct and proximate result of such negligence, gross negligence, recklessness and carelessness in the amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, plus the cost of investigating and defending this claim.

67. Wheelock is entitled to judgment for actual damages collectively or individually against the Trade Contractor Defendants in the amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

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

69. Further, Wheelock has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Trade Contractor Defendants' alleged negligence, gross negligence and recklessness and for which the Trade Contractor Defendants are also liable to Wheelock.

FOR A THIRD CAUSE OF ACTION
(Breach of Warranty)

70. Wheelock realleges the Paragraphs above as if repeated herein verbatim.

71. The Trade Contractor Defendants expressly or impliedly warranted that all work performed by them would be performed in a careful, diligent and workmanlike manner, and that any materials and/or services designed, supplied or sold by them for use on the project would be

merchantable and fit for their intended or specific purpose. To the extent, if any, that the construction was defective or deficient in workmanship, installation, materials, and/or were not merchantable or fit for their particular purposes, Trade Contractor Defendants breached their implied and/or express warranties of merchantability, workmanlike service, and/or fitness for a particular or intended purpose in the construction of the project.

72. As a result of these alleged breaches of warranties, Wheelock has incurred damage in the amount of any money it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, plus the cost of investigating and defending this claim.

73. Wheelock is entitled to judgment against the Trade Contractor Defendants in the amount of any monies it is adjudged to owe Plaintiff, or which it pays Plaintiff in settlement of Plaintiff's claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

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

75. Further, Wheelock has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its

investigation of this matter which are the legal consequences of the Trade Contractor Defendants' alleged breach of warranty and for which the Trade Contractor Defendants are also liable to Wheelock.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)

76. Wheelock realleges the Paragraphs above as if repeated herein verbatim.

77. Upon information and belief, other defendants entered into contracts with the Trade Contractor Defendants. Trade Contractor Defendants were to provide work and materials to the Project in question as described above.

78. Upon information and belief, the terms of the contracts required Trade Contractor Defendants to provide construction goods and services for the Project that, among other things, would produce a quality building free from defects and otherwise in conformance of all contract documents, including all building codes and industry standards. Upon information and belief, the contract further required Trade Contractor Defendants to supervise and direct its work, using the best skill and attention.

79. To the extent, if any, that the construction was defective or deficient in workmanship, installation, materials, and/or were not merchantable or fit for their particular purposes, Trade Contractor Defendants breached their contract by failing to provide appropriate construction goods and services to the Project, by failing to perform their work in a careful, diligent and workmanlike manner, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all contract documents, and failing to provide goods and services that were in conformity with all appropriate building codes and industry standards.

80. As a result of these alleged breaches of contract, Wheelock has incurred damage in the amount of any money it is adjudged to owe Plaintiff, or which it paid Plaintiff in settlement of Plaintiff's claims, plus the costs of investigating and defending this claim.

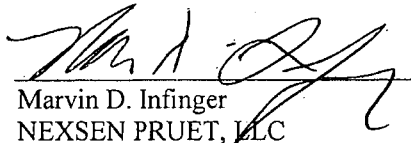
81. Wheelock is entitled to judgment against Trade Contractor Defendants in the amount of any monies it is adjudged to owe Plaintiff, or which it paid Plaintiff in settlement of Plaintiff's claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

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

83. Further, Wheelock has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Trade Contractor Defendants' alleged breach of contract and for which the Trade Contractor Defendants are also liable to Wheelock.

WHEREFORE, Wheelock prays that the claims of the Plaintiff be dismissed, and that Wheelock be given judgment against the Trade Contractor Defendants in the amount of any

liability Wheelock is found to have to Plaintiff in this action, and Wheelock demands judgment requiring Trade Contractor Defendants to defend and indemnify Wheelock against any liability which Wheelock may suffer to Plaintiff in this action, to include Wheelock's attorney's fees, costs and other expenses incurred in defending this action. Wheelock further demands judgment for actual and punitive damages against the Trade Contractor Defendants and to reimburse it fully for all costs, expenses, and attorneys' fees associated with the deficiencies described herein, in an amount to be determined by the trier of fact, and for such other and further relief as this Court may deem just and proper.



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Wheelock Street Capital, LLC

April 25, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2014-CP-10-03326

WAVERLY AT HAMLIN)
PLANTATION TOWNHOME)
ASSOCIATION, INC.,) EXCERPT OF RECORD
PLAINTIFF,)
VS.) JANUARY 23, 2017
JOHN WIELAND HOMES,) CHARLESTON, SC
DEFENDANT.)

B E F O R E:

HONORABLE DEADRA JEFFERSON, JUDGE, AND A
JURY.

A P P E A R A N C E S:

JOHN HAYES, ESQUIRE
Attorney for the Plaintiff

ROBERT CALAMARI, ESQUIRE
Attorney for Liberty Mutual

JOHN MASSALON, ESQUIRE
Attorney for the Defendants

* * * * *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

1 *****

2 (Beginning of excerpt.)

3 THE COURT: Liberty Mutual has filed a
4 motion for limited intervention, the gist of which
5 is to seek special interrogatories being submitted
6 to the jury. They submitted a similar motion on
7 December 5th of 2016. Well, actually on October
8 13th of 2016 which they subsequently withdrew on
9 December 5th of 2016. So this is their second
10 filing of the same motion. Who will be appearing
11 on behalf of Liberty Mutual?

12 MR. CALAMARI: Robert Calamari of
13 Nelson Mullins Riley and Scarborough, Your Honor.

14 THE COURT: Who will be arguing on
15 behalf of Liberty Mutual?

16 MR. CALAMARI: I am, Robert Calamari.

17 MR. MASSALON: I'm John Massalon and I
18 am here for the Defendants John Wieland Homes and
19 Neighborhood of the Carolinas, Wieland Homes of
20 Charleston, John Wieland Homes, Inc. and Builders
21 Support Services of the Carolinas to oppose the
22 motion.

23 THE COURT: Did y'all have a memo? I
24 understand memos were filed at some point today or
25 Friday?

1 MR. MASSALON: Your Honor, we filed
2 one. I will be happy to pass up an extra copy or
3 two.

4 THE COURT: That would be helpful.

5 MR. MASSALON: May I approach?

6 THE COURT: Yes, sir. Mr. Calamari,
7 did you file a memorandum?

8 MR. CALAMARI: Your Honor, it is within
9 our motion.

10 THE COURT: That's fine. I wanted to
11 make sure there wasn't anything else you wanted to
12 hand up to the Court. Mr. Hayes, did you all file
13 anything?

14 MR. HAYES: Your Honor, we have not
15 filed anything.

16 THE COURT: You are joining in the
17 opposition to the motion?

18 MR. HAYES: We are joining. I may have
19 a few points if the Court allows.

20 THE COURT: Certainly. Mr. Calamari,
21 you may proceed, then I will hear from Mr. Massalon
22 and Mr. Hayes.

23 MR. CALAMARI: Thank you, Your Honor.
24 As discussed, this is a motion for limited
25 intervention filed by me on behalf of Liberty

1 Mutual Fire Insurance Company. Liberty Mutual is
2 the insurance carrier that sold policies of
3 insurance to the Wieland entities represented by
4 Mr. Massalon in this matter. They have made claims
5 for benefits under the policy and there are certain
6 issues that we feel requires intervention is
7 necessary.

8 I would initially point out without
9 intervention there's no vehicle for us to make any
10 statements. The defense is being handled by --

11 THE COURT: Well, that really raises an
12 interesting question. How is your claim even ripe
13 at this point that you need to have a say? If
14 there's no verdict then it is a moot issue. So why
15 then would you be allowed to intervene and sort of
16 interject yourself at the last moment in this
17 litigation and possibly prejudicially to these
18 parties then change the entire way they have
19 determined strategically they are going to address
20 this case when it may become a moot issue.

21 MR. CALAMARI: Your Honor, we don't
22 disagree with any of those statements. Liberty
23 Mutual is purely trying to follow what the Supreme
24 Court did in fact --

25 THE COURT: Which also raises another

1 issue because it's a dec action. Is it really --
2 does it really stand for the proposition that you
3 are arguing that it stands for? Because I think
4 that's a real strained reading of those three lines
5 in that opinion.

6 MR. CALAMARI: And, Your Honor, again,
7 we don't necessarily disagree with the Court's
8 comments, but we are trying to protect our interest
9 in seeing the language in those and other cases
10 that we have looked at over the years. But if I
11 may, the lawsuit was filed in 2013. It was not
12 tendered to Liberty until 2016. At which time they
13 got involved, provided a defense and hired Mr.
14 Manos to defend it. Mr. Haselden was --

15 THE COURT: Didn't someone else
16 represent them prior to that?

17 MR. CALAMARI: Mr. Haselden was, but
18 had not been tendered to Liberty Mutual.

19 THE COURT: So who was Mr. Haselden --
20 who obtained Mr. Haselden's services?

21 MR. HASELDEN: I was retained by the
22 Wieland entities directly.

23 MR. CALAMARI: When Liberty Mutual got
24 involved they agreed to pay him to stay on the
25 case. So they continued to provide payment to him

1 so we didn't have to pay.

2 THE COURT: I just wanted the record to
3 be clear that it wasn't like the case was sort of
4 lingering out here with no representation. There
5 were, in fact, lawyers involved representing the
6 Wieland interests.

7 MR. CALAMARI: Yes, Your Honor,
8 absolutely. Liberty Mutual sent a reservation of
9 rights letter initially on the file in May of 2016
10 and it was later updated in September of 2016.

11 As Your Honor pointed out, this is the
12 second motion to intervene. We filed a motion to
13 intervene in October and in the letter to the
14 insured explained the conflict, the potential
15 diverging interests, the problems that could result
16 from such a motion. And they countered with a
17 letter from personal counsel Clark Thiel who is
18 with the Pillsbury firm in San Francisco who said
19 absolutely we object to you intervening. It
20 creates a conflict of interest. We don't think you
21 have any involvement in the underlying action that
22 should be defended.

23 So based on those objections we
24 withdrew our motion. And we are ready to come to
25 trial through Mr. Massalon, not any involvement

1 from Liberty Mutual. And then on January 11th the
2 Supreme Court came out with the Heritage decision.
3 And the briefs and everything leading into the
4 Heritage decision dealt with how did Harleysville
5 protect its interests.

6 THE COURT: Well, I think that's a
7 strained reading of that case as well. The whole
8 purpose and the scope of that case talks about the
9 reservation of rights and how it is interpreted.
10 It really -- the peripheral statement about special
11 interrogatories or otherwise, but there are other
12 rules that apply in your intervention and I think
13 it is just a real creative way to read the case and
14 I think it's sort of -- you have to sort of contort
15 yourself a little bit to say that it stands for the
16 proposition that you are advancing which is that
17 you have the right to intervene in the case because
18 the other language in the case is quite interesting
19 because basically you are asking your client who is
20 your insured to fight the Plaintiffs and fight you
21 at the same time which is a little unreasonable
22 really. I don't know that it is ripe to even deal
23 with because the jury could, and I quit trying to
24 figure out what 12 people are going to do. So you
25 never what a jury might do. A jury might say zero

1 in which case it is a moot issue and you would have
2 effected strategically how these parties tried this
3 case much to your own detriment. Theoretically the
4 day of trial. Where they have been working on this
5 now for four years basically, it's just shy of four
6 years. I can't remember the exact filing date of
7 the case. I think it was December of 2013. We are
8 just shy of four years, but they certainly have
9 been working and dealing with this case from a
10 particular procedural history and theory in terms
11 of client and likewise the Defendants have
12 strategically determined how they are going to
13 defend this.

14 So I am trying to figure out I guess
15 how is it that -- because basically what you're
16 asking them to do is to have the jury insulate you
17 from being responsible under your insurance
18 contract based on the answer they might give.

19 MR. CALAMARI: Actually, Your Honor, I
20 believe the tenor of that case, I agree with you,
21 deal mainly with reservation of rights letters, but
22 the issues presented to the Court and the tenor of
23 that case seems to be how we preserve evidence so
24 we can decide coverage issues later. And that's
25 what we are asking for. And we understand. The

1 final point that we would make is we are not
2 intending to intervene to harm the defense of this
3 action.

4 THE COURT: Well, you all don't want to
5 provide coverage, do you?

6 MR. CALAMARI: At this stage we want to
7 have evidence so when we bring the DJ action --

8 THE COURT: If you are bringing a DJ
9 action that means you don't want to provide
10 coverage. People don't bring DJ actions if they
11 plan to write a check. They bring DJ actions
12 because they say within the context of the four
13 corners of this insurance document we don't believe
14 we have any responsibility to do anything for you
15 period other than and we are being generous in
16 providing a defense. But in terms of indemnifying
17 you against any loss, we have no responsibility.

18 So in effect what you would be asking
19 this jury to do is to insulate you so that you
20 don't have to pay them later. So how is that not
21 adverse to their --

22 MR. CALAMARI: Again, Your Honor, I am
23 not disagreeing with you.

24 THE COURT: And how they would try the
25 case?

1 MR. CALAMARI: I am not disagreeing
2 with you such an action could be viewed as adverse,
3 which is why we withdrew the motion originally
4 based on the objections. But then when the Supreme
5 Court came out with this order and we saw the
6 language in there we felt like we needed to make
7 the motion and ask the Court to participate for the
8 issue of preservation of damages whether it be
9 through --

10 THE COURT: What else could they be
11 awarded damages for? There is several causes of
12 action, right, against John Wieland. One is a
13 UTPA. There is an unfair trade practices action.
14 There is a breach of implied warranty, a fitness of
15 habitability, fitness for a particular purpose,
16 negligence, breach of contract and breach of
17 fiduciary duty. All of these would have separate
18 verdict forms and they would have to elect. That's
19 assuming they all survive directed verdict.

20 Then I bifurcated the counterclaim. So
21 then you still don't know how much, if any,
22 indemnity claims would apply to some of these other
23 folks. So isn't it really premature?

24 MR. CALAMARI: Your Honor, again, I
25 don't disagree with anything. We are trying to

1 comply. It would be actually allocation of the
2 construction damages award whether they are the
3 cost of repairing defective work or cost of
4 repairing the damage that results from the
5 defective work. That would be the allocation
6 issue. One potentially satisfying the diminution
7 of property damage and the other potentially not
8 satisfying the diminution of property damage.

9 THE COURT: Anything further?

10 MR. CALAMARI: Nothing, Your Honor.
11 That would be our motion to permit to intervene, to
12 request the special interrogatories, the special
13 verdict form at the appropriate time. Thank you,
14 Your Honor.

15 THE COURT: Would you be requesting
16 these special interrogatories that were attached to
17 your original motion?

18 MR. CALAMARI: Likely, but as your
19 Honor pointed out --

20 THE COURT: Those are extremely complex
21 and I think have a real great chance of confusing
22 the jury as to what they are really trying.

23 MR. CALAMARI: Your Honor, again we are
24 not disagreeing with you. We are trying to protect
25 the record and as the trial would pursue we would

1 watch the evidence and whatever you allow to go to
2 jury, that would probably tailor the questions that
3 we would ask.

4 THE COURT: Mr. Massalon, be glad to
5 hear from you.

6 MR. MASSALON: I will be brief because
7 I have many of the same concerns the Court has
8 already articulated. Under Rule 24 there are only
9 two kinds of intervention, an intervention of
10 rights under 24A and permissive intervention under
11 24B. The huge problem with this motion is that
12 this claim by Liberty doesn't meet either criteria
13 because they are not claiming an interest in this
14 case. What they are trying to do as Mr. Calamari
15 has candidly admitted is protect themselves in the
16 event of an adverse verdict and in the event that
17 there is a declaratory judgment case filed and
18 whatnot.

19 In addition, not having an interest
20 under Rule 24 that gets them in the case, as Your
21 Honor has pointed out, I don't know how either Mr.
22 Manos or Mr. Haselden do what Mr. Calamari is
23 asking to be done without putting themselves in a
24 very awkward position between --

25 THE COURT: Ethically it puts them

1 between a rock and a hard place because how would
2 they represent their interest and an interest that
3 -- just in terms strategically I would think they
4 have already formulated how they are going to try
5 this case and this would cause them I would imagine
6 great anxiety in how do you do both.

7 MR. MASSALON: Absolutely.

8 THE COURT: From a prejudice standpoint
9 from the Defendants I am concerned.

10 MR. MASSALON: And so what I think that
11 leaves us with -- and I don't know of such a thing
12 as a limited intervention under the rules. And so
13 what I think that leaves with us is Mr. Calamari
14 jumping in. And so I think he's in the case in the
15 trial. If you allow him to do what he does doing
16 it for Liberty, perhaps they have to be a party,
17 too. And so --

18 THE COURT: I am trying to figure out
19 how do they intervene. That was the other thing I
20 meant to ask Mr. Calamari. How do you intervene
21 without being made a party.

22 MR. MASSALON: I don't know the answer
23 to that. From my client's standpoint, that
24 introduces the whole issue of insurance and I
25 wish --

1 THE COURT: How do you explain their
2 presence?

3 MR. MASSALON: Exactly. I wish I had a
4 more articulate way to say this, but it sounds like
5 the net result of this is going to be that the jury
6 is going to spend a lot of time thinking about
7 damages which my client doesn't really want them to
8 think about. Mr. Hayes and Mr. McCarty would like
9 them to think about nothing but damages, but we
10 would like them to think about something else. And
11 it just seems like it is terribly prejudicial. It
12 is premature. And I think if Mr. Calamari is in
13 for a penny he is in for a pound.

14 So I think that all those issues have
15 to be ironed out and for all those reasons, we
16 would ask that you deny the motion. Thank you.

17 THE COURT: Mr. Hayes, be glad to hear
18 from you.

19 MR. HAYES: Your Honor, I will join in
20 that motion and I will try to be brief. Your
21 Honor, again, John Hayes on behalf of Plaintiffs.
22 We find this untimely. Under Davis v. Jennings,
23 four factors, the time has past. Liberty Mutual
24 moved to intervene and withdrew it so they clearly
25 knew that they had -- if they were going to do it

1 they should have done it timely. It was their
2 choice to withdraw it. There is no reason for
3 delay. For them to have not done it until last
4 week and the litigation has progressed as you said
5 almost four years here. We are on the eve of
6 trial. I believe the Plaintiffs have their
7 strategy. I'm sure the defense has theirs. It was
8 not based upon them being able to intervene. That
9 changes that.

10 On a trial purpose it's been said, and
11 I will try not to beat this too much, but how do
12 you try the case. This will be so confusing to the
13 jury. Not even -- I guess you would have to put
14 them on the caption, identify their lawyer because
15 otherwise you would have some nonidentified lawyer
16 asking questions if they were able to ask questions
17 during the course of the trial.

18 Now, with the second stage of it, you
19 said well, we are not going to do that. We are
20 just going to let them do interrogatories. How do
21 you give interrogatories to a jury unless the
22 experts have been questioned, unless the jury --

23 THE COURT: On those very specific
24 issues which goes back to strategy.

25 MR. HAYES: On those specific issues.

1 And I am assuming Mr. Manos and Mr. Haselden aren't
2 going to do that. So how do you present them with
3 these interrogatories in the trial that make
4 absolutely no sense to them. I believe that will
5 lead to confusion to the jury. Mr. Massalon said
6 it very well. In for the penny, in for the pound.
7 It is our contention they are in the case or out of
8 it.

9 THE COURT: Any rebuttal, Mr. Calamari?

10 MR. CALAMARI: Nothing further, Your
11 Honor. Thank you.

12 THE COURT: You're welcome. I just
13 have some real concerns that I think I have already
14 articulated in the nature of the questions that I
15 have asked of Mr. Calamari and the observations
16 while Mr. Massalon made his argument. I am
17 concerned whether Liberty Mutual meets the
18 requirements of both Rule 24A or B. They really
19 are not what we would consider an indispensable
20 party. They really don't have any interest in the
21 litigation. Their interest doesn't arise until a
22 verdict actually is returned against their insured
23 at which time I would anticipate and it is
24 anticipated that they would file a declaratory
25 judgment action to clarify coverage. In other

1 words, what they are -- if there is a verdict, in
2 fact a verdict, what they are required to indemnify
3 their -- in what way they are required to indemnify
4 their insured. I have read the Harleysville group
5 insurance case and really factually it is not on
6 point. It clearly deals with a declaratory
7 judgment action. The real focus of the opinion is
8 the interpretation of a reservation of rights and
9 whether it is adequate in its working such to put
10 the insured on notice.

11 Now, there is some glancing language at
12 paragraph 6 that says the right to control the
13 litigation carries with it certain duties including
14 the duty not to prejudice the insured's rights by
15 failing to request special interrogatories or a
16 special verdict to clarify coverage of damages.
17 This is a Tenth Circuit court case that has been
18 cited which the language quoted is, "If the burden
19 of apportioning damages between covered and
20 noncovered were to rest on the insured who is not
21 in control of the defense, the insurer could obtain
22 for itself an escape from responsibility merely by
23 failing to request a special verdict or special
24 interrogatories."

25 So it really doesn't stand for the

1 proposition for which it is being advanced because
2 this is the exact opposite situation. This is not
3 a situation where the insured is in control of this
4 litigation. They did not bring the litigation.
5 They are not advancing it. The Plaintiffs have
6 brought the litigation. The defense is defending
7 the litigation.

8 And I don't know exactly, I am going to
9 have to look at this case to see exactly what the
10 facts were, I'm not sure whether this was another
11 declaratory judgment action. I really have no idea
12 and I don't want to speak out of turn. And the
13 other case is a Fifth Circuit case. I'm not sure
14 what the facts are of that case, either. But it
15 talks about the duty to defend, really talks
16 against -- it really is against the insurer. It
17 doesn't really support the insured getting special
18 interrogatories, but it is more in the nature of an
19 insured shouldn't be prejudiced by an insurer who
20 controls the litigation and who then insulates
21 themselves against liability because they are in
22 control of the litigation.

23 So I am just not certain it really
24 stands for the proposition for which it is being
25 advanced and for which it has been argued. I don't

1 think factually or legally it is applicable to this
2 case.

3 My other concern really arises in the
4 prejudice that would be manifest to the defense and
5 the Plaintiff. As I have already observed, they
6 have been in this litigation a while. There's a
7 strategic way they want to try the case. And I
8 don't think the defense should be prejudiced by
9 basically derailing their strategy to somehow now
10 not to defend against the Plaintiff, but also have
11 to fight their own insurance company who is not a
12 party to the litigation.

13 And I'm inclined to agree with Mr.
14 Massalon if you are in for a pound, you are in for
15 a penny. You don't sort of get to stir the pot and
16 sort of say I'm in but I'm sort of out. You are
17 either a party to the case or you are not. I am
18 not aware of any limited intervention that's
19 allowed in our state or by an interpretation of our
20 rules. I think when you move to intervene you
21 become a party. Which now adds a whole other
22 dimension to this litigation again dealing with
23 insurance. Jurors are very astute. If you look at
24 the educational background of the jury that was
25 selected in this case, they come from a myriad of

1 backgrounds, but we have some very -- not to sound
2 pejorative in any sense, but I think my daddy
3 always says common sense is far better than book
4 sense any day of the week.

5 But I think you have a real good
6 mixture of common sense and book sense on this
7 jury. What is going to end up happening is a bunch
8 of questions that have absolutely nothing to do
9 with this litigation, which I am inclined to agree
10 has a tendency to confuse them and to really
11 detract from what the issues are in the litigation.

12 Now, having said that, in a dec action,
13 if there's -- sort of looking ahead if I have a
14 crystal ball, and I were clairvoyant which I don't
15 claim to be, in looking ahead if a verdict comes
16 back against the Defendant, how are they prejudiced
17 in really trying these issues that they claim would
18 deny coverage? There's nothing that precludes you
19 from calling experts. There is nothing that
20 precludes you from calling the same expert to
21 apportion this damage and to preserve your client's
22 rights in terms of when you start talking about --
23 when you deal with a dec action you start talking
24 about very specific language in an insurance
25 contract and how it is to be interpreted and what

1 is included under the ambit of that language. And
2 I really can't discern any prejudice to you that
3 would preclude you from being able to do that, from
4 calling experts, from saying and even using
5 portions of this record from the experts who are
6 going to testify. Because I think there are -- I
7 am just anticipating because I have tried quite a
8 few of these, I think their testimony will be
9 fairly clear about what they believe caused the
10 damage, what flowed from as a result of this damage
11 and the scope of the repairs. So I really can't
12 discern any prejudice to the insurance company.

13 Then the other part is I bifurcated the
14 case. So you still are going to deal with the
15 cross claims in a separate action which is going to
16 come down to an indemnity claim which I think may
17 well give some additional clarity.

18 So I am just not certain how the
19 insurance company would be prejudiced. I am more
20 concerned about any prejudice be suffered both by
21 the insured and the Plaintiff in terms of
22 strategically how they are to try the case because
23 the information being sought by the insurance
24 company would be totally different and totally
25 strategically different from what I would

1 anticipate the parties intend to try this case.

2 So I am going to deny the motion. I'm
3 going to ask Mr. Massalon if you could do me an
4 order. I don't know that there's any real hurry on
5 it, but if you could make any findings of fact
6 consistent with the record, also citing any
7 statutory or case law that would support those
8 findings I would appreciate it and I will be glad
9 to look at it and sign it when you get it for me.

10 (End of excerpt.)

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CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomat
Reporter for the State of South Carolina at Large,
do hereby certify that the foregoing transcript is
a true, accurate, and complete record.

I further certify that I am neither related
to nor counsel for any party to the cause pending
or interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal this 25th day of January, 2017 at
Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomat
Reporter

COPY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Waverly at Hamlin Plantation) Civil Action No. 2013-CP-10-03326
Townhome Association, Inc.,)

Plaintiff,)

vs.)

Liberty Mutual's Second Motion for
Limited Intervention

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.,)

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., John Wieland Homes Inc.,)
Builders Support Services of the)
Carolinas, Inc.)

Third-Party Plaintiffs,)

vs.)

Barr Construction, Inc. Benjamin Mora)
d/b/a Mora Construction, a/k/a)

FILED
2011 JAN 19 PM 3:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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, George Medina, George)
 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, Richard)
 Ditullio, Richard Ditullio a/k/a RDT)
 Contracting, LLC)
 Third-Party Defendants.)

YOU WILL PLEASE TAKE NOTICE that Liberty Mutual Fire Insurance Company, (herein "Liberty Mutual") as soon as practicable following service of this Motion, will move before this Honorable Court for an Order Granting its Motion for Limited Intervention for the purpose of complying with the South Carolina Supreme Court Opinion No. 27698, issued January 11, 2017 titled *Harleysville Group Insurance, a Pennsylvania Corporation v. Heritage Communities, Inc. a South Carolina Corporation, et. al.* (hereafter "*Heritage*"). (A copy of the Opinion is attached hereto, labelled as Exhibit A and incorporated herein by reference).

This Motion is made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the facts of this matter showing that Liberty Mutual has an insurance coverage interest in this matter.

Liberty Mutual issued twelve (12) policies of insurance to John Wieland Homes & Neighborhoods, Inc. as follows:

1. RG2-651-004209-031 policy period 01/01/01 to 01/01/02
2. RG2-651-004209-032 policy period 01/01/02 to 01/01/03
3. RG2-651-004209-033 policy period 01/01/03 to 02/14/04
4. RG2-651-004209-034 policy period 02/14/04 to 01/01/05
5. RG2-651-004209-035 policy period 02/14/05 to 02/14/06
6. RG2-651-004209-036 policy period 01/14/06 to 02/14/07
7. TB2-651-004209-037 policy period 02/14/07 to 02/14/08
8. TB2-651-004209-038 policy period 02/14/08 to 02/14/09
9. TB2-651-004209-039 policy period 02/14/09 to 02/14/10
10. EB2-651-004209-030 policy period 02/14/10 to 02/14/11
11. EB2-651-004209-031 policy period 02/14/11 to 02/14/12
12. EB2-651-004209-032 policy period 02/14/12 to 03/15/13

The above policies are hereafter identified as the "Liberty Policies."

This lawsuit involves claims by Waverly at Hamlin Plantation Townhome Association, Inc., (hereafter "Waverly Association") against 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., (hereafter collectively "Wieland Entities") and other defendants relating to alleged construction defects and repair costs. The project is the Waverly at Hamlin Plantation Townhomes. Wieland claims status as an insured under the Liberty Policies and that the duties of defense and indemnity have been triggered by the lawsuit.

The basis for this Motion is to make the best effort to comply with the directives of the recent *Heritage* Opinion. The Court, in *Heritage*, indicated that an insurance carrier should make an effort to have the trial court issue special interrogatories or a special verdict form. (See, *Heritage Opinion*, Section III Coverage Issues, A. Reservation of Rights to Contest Coverage wherein the Court cited law stating "The right to control the litigation carries with it certain duties, including the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage issues."). With this motion, Liberty Mutual desires to comply with the Supreme Court's ruling in *Heritage*.

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

Liberty Mutual previously filed a Motion to Intervene but withdrew it based on objections and directives from the insured's counsel.

And We So Move.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Myrtle Beach, South Carolina

January _____, 2017

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Harleysville Group Insurance, a Pennsylvania
Corporation, Appellant/Respondent,

v.

Heritage Communities, Inc., a South Carolina
Corporation; Heritage Magnolia North, Inc., a South
Carolina Corporation; Buildstar Corporation, a South
Carolina Corporation; Magnolia North Horizontal
Property Regime; Magnolia North Property Owners
Association, Inc., a South Carolina Corporation; and
National Surety Corp., Defendants,

Of whom Heritage Communities, Inc., a South Carolina
Corporation; Heritage Magnolia North, Inc., a South
Carolina Corporation; Buildstar Corporation, a South
Carolina Corporation; and National Surety Corp. are
Respondents,

and Magnolia North Horizontal Property Regime and
Magnolia North Property Owners Association, Inc., a
South Carolina Corporation, are Respondents/Appellants.

Appellate Case No. 2013-001281

And

Harleysville Group Insurance, a Pennsylvania
Corporation, Appellant/Respondent,

v.

Heritage Communities, Inc., a South Carolina
Corporation; Heritage Riverwalk, a South Carolina
Corporation; Buildstar Corporation, a South Carolina

EXHIBIT A

Corporation; Riverwalk at Arrowhead Country Club Horizontal Property Regime; Riverwalk at Arrowhead Country Club Property Owners Association, Inc., a South Carolina Corporation; National Surety Corp.; and Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime, Defendants,

Of whom Heritage Communities, Inc., a South Carolina Corporation; Heritage Riverwalk, a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; National Surety Corp.; and Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime, are Respondents,

and Riverwalk at Arrowhead Country Club Horizontal Property Regime and Riverwalk at Arrowhead Country Club Property Owners Association, Inc. are Respondents/Appellants.

Appellate Case No. 2013-001291

Appeal from Horry County
John M. Milling, Special Referee

Opinion No. 27698
Heard January 14, 2016 – Filed January 11, 2017

AFFIRMED AND AFFIRMED AS MODIFIED

C. Mitchell Brown, William C. Wood, Jr., and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Robert C. Calamari, of Nelson Mullins Riley & Scarborough, of Myrtle Beach, for Appellant/Respondent.

John P. Henry and Philip C. Thompson, Sr., both of
Thompson & Henry, P.A., of Conway, for
Respondents/Appellants.

JUSTICE KITTREDGE: These cases present cross-appeals from declaratory judgment actions to determine coverage under Commercial General Liability (CGL) insurance policies issued by Harleysville Group Insurance (Harleysville). These cases arise from separate actions, but we address them in a single opinion as they involve virtually identical issues regarding insurance coverage for damages stemming from the defective construction of two condominium complexes in Myrtle Beach: Magnolia North Horizontal Property Regime (Magnolia North) and Riverwalk at Arrowhead Country Club Horizontal Property Regime (Riverwalk). The Special Referee found coverage under the policies was triggered and calculated Harleysville's pro rata portion of the progressive damages based on its time on the risk. We affirm the findings of the Special Referee in the Magnolia North matter, and we affirm as modified in the Riverwalk matter.

I.

The Riverwalk and Magnolia North developments were constructed between 1997 and 2000. After construction was complete and the units were sold, the purchasers became aware of significant construction problems, including building code violations, structural deficiencies, and significant water-intrusion problems. In 2003, the purchasers filed suit to recover damages for necessary repairs to their homes.

The lawsuits were filed by the respective property owners' associations (the POAs), which sought actual and punitive damages for the extensive construction defects under theories of negligent construction, breach of fiduciary duty, and breach of warranty.¹ As to the Riverwalk development, individual homeowners

¹ The Magnolia North trial involved claims of negligent construction, breach of implied warranty of workmanlike service, and breach of fiduciary duty for failing to repair or fund repairs needed in the common areas at the time the property was turned over to the POA. In the Riverwalk litigation, the POA asserted similar claims of negligence and breach of fiduciary duty.

also filed a class action to recover damages for the loss of use of their property during the repair period.² The defendants in the underlying suits were the related corporate entities that developed and constructed the condominium complexes: Heritage Communities, Inc. (the parent development company), Heritage Magnolia North, Inc. and Heritage Riverwalk, Inc. (the project-specific subsidiary companies for each separate development), and Buildstar Corporation (the general contracting subsidiary that oversaw construction of all Heritage development projects), to which we refer collectively as "Heritage."

During the period of construction from 1997 to 2000, the various Heritage entities each maintained several liability insurance policies with Harleysville with per-occurrence limits totaling between \$3,000,000 and \$4,000,000 on the primary policies and between \$9,000,000 and \$13,000,000 on the excess liability policies.³ Heritage was uninsured after the last policy lapsed in 2001, and the financial strain of numerous construction-defect lawsuits caused Heritage to go out of business in 2003.⁴

After receiving notice of the lawsuits, Harleysville informed its insureds that it

² This class action was consolidated for trial with the Riverwalk POA suit.

³ Between August 1997 and November 1999, Heritage Communities, Inc. maintained various policies with \$1,000,000 in primary liability coverage and \$4,000,000 in excess coverage. From April 1997 to August 2000, BuildStar Corporation maintained \$1,000,000 of coverage in both primary and excess policies. From June 1997 to June 2001, Heritage Riverwalk, Inc. maintained policies of \$1,000,000 in primary coverage and \$4,000,000 in excess coverage. From September 1998 to November 2000, Heritage Magnolia North maintained \$1,000,000 in liability coverage and \$4,000,000 in excess coverage.

⁴ In January 2001, Heritage Communities, Inc., the parent development company, filed for protection under Chapter 11 of the United States Bankruptcy Code and thereafter was administratively dissolved by the South Carolina Secretary of State in June 2011. *See* S.C. Code Ann. § 33-14-210(d) (2006) ("A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs.") The remaining corporate entities, though not officially dissolved, have ceased operations.

would provide for their defense; however, Harleysville contends this was done under a full reservation of rights. Harleysville's efforts to reserve its rights were generic statements of potential non-coverage coupled with furnishing most of the Heritage entities with copies (through a cut-and-paste method) of the insurance policies. There is no dispute that Harleysville would control the litigation. Harleysville contends that all coverage issues would be litigated following the entry of any adverse jury verdict.

At the outset of each trial, Harleysville's counsel for Heritage conceded liability, and in both trials, the trial court directed a verdict in favor of the POA on the negligent construction cause of action. *See Magnolia North Prop. Owners' Ass'n v. Heritage Cmty.*, 397 S.C. 348, 369–70, 725 S.E.2d 112, 123–24 (Ct. App. 2012) (observing that "during opening arguments, counsel [for Heritage] conceded liability" and affirming the trial court's decision to direct a verdict in favor of the POA); *Pope v. Heritage Cmty.*, 395 S.C. 404, 429–30, 717 S.E.2d 765, 778–79 (Ct. App. 2011) (quoting Heritage's concessions of liability during opening statements and finding no error in the trial court's decision to direct a verdict in favor of the POA). Thus, the only contested issue in the underlying trials was the nature and extent of the damages resulting from the admitted negligent construction.

In this regard, the parties presented various experts who offered widely different estimates of the costs to correct the construction defects. According to the POAs' experts, the cost of necessary repairs totaled approximately \$9,200,000 at Magnolia North and \$8,600,000 at Riverwalk. In contrast, defense experts testified the necessary repairs would cost much less—approximately \$2,400,000 at Magnolia North and \$2,500,000 at Riverwalk. Ultimately, the juries declined to adopt any one expert's estimate, instead returning verdicts somewhere between the parties' figures. In the Magnolia North matter, the jury returned a general verdict for \$6,500,000 in actual damages and \$2,000,000 in punitive damages, and in the Riverwalk suit, the jury returned a general verdict of \$4,250,000 in actual damages and \$250,000 in punitive damages in favor of the POA and \$250,000 in loss-of-use damages and \$750,000 in punitive damages in the class action.

Following these general jury verdicts against its insureds, Harleysville filed the present declaratory judgment actions to determine what portion of the judgments in the underlying construction-defect lawsuits would be covered under Heritage's CGL policies. In filing these suits, Harleysville contended that, under the terms of the policies, it has no duty to indemnify Heritage for these judgments.

Alternatively, if any of the damages were found to be covered, Harleysville sought an accounting to somehow parse the jury verdicts and determine which portion of the juries' general verdicts constituted covered damages. Harleysville further argued it could be responsible for only that portion of damages occurring during the period of time its policies provided coverage.

The matter was referred to a Special Referee, who held an evidentiary hearing in December 2010. Because this Court's decision in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*⁵ was pending at the time, the parties agreed for the Special Referee to stay the matter until *Crossmann* was resolved. After *Crossmann* was decided in August 2011, the parties agreed for the Special Referee to reopen the evidentiary hearing in December 2011 to hear arguments and testimony regarding the applicability of the time-on-the-risk formulation as set forth in *Crossmann*. The POAs objected to the admission of evidence regarding time on the risk, arguing that it was inappropriate to parse the juries' general, unallocated verdicts by evaluating Harleysville's time on the risk.

Ultimately, the Special Referee found coverage under the policies was triggered because the juries' general verdicts included some covered damages. 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. The Special Referee made factual findings regarding the dates of the progressive damages period and the period during which Harleysville provided coverage. The Special Referee thereafter calculated Harleysville's pro rata portion of the progressive damages based on Harleysville's time on the risk. Lastly, the Special Referee found punitive damages were covered and that no policy exclusion applied to preclude coverage for any portion of those damages.

The parties subsequently filed cross-appeals. Harleysville is the primary Appellant. Upon the parties' joint motion, these matters were certified from the court of appeals to this Court pursuant to Rule 204(b), SCACR.

II.

⁵ 395 S.C. 40, 717 S.E.2d 589 (2011).

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Id.* (citing *Auto-Owners Ins. Co. v. Hamlin*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006)). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Id.* Indeed, this Court's scope of review "is limited to correcting errors of law." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (quoting *State Farm Mut. Auto. Ins. Co. v. James*, 337 S.C. 86, 93, 522 S.E.2d 345, 348-49 (Ct. App. 1999)).

The threshold question in determining coverage under a CGL policy is whether the claim at issue is for "property damage" caused by an "occurrence" within the general grant of coverage in the CGL insuring agreement. Specifically, the CGL policies at issue in these cases provide:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" [or] "property damage" . . . to which this insurance applies. . . .

a. This insurance applies only:

(1) To "bodily injury" or "property damage":

(a) That occurs during the policy period; and

(b) That is caused by an "occurrence."⁶

⁶ The language of the excess liability policies is similar and provides:

We will pay on behalf of the insured the "ultimate net loss" in excess of the "applicable underlying limit" which the insured becomes legally obligated to pay as damages because of:

The CGL policies define "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," and define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."⁷ Applying these terms to ascertain the scope of coverage in construction-defect cases has resulted in considerable litigation, not just in South Carolina, but across the country.

In *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), this Court explored the issue in determining whether costs to repair negligently constructed roadways were covered under the general contractor's CGL policy. *Id.* at 122, 621 S.E.2d at 35. Observing there was no claimed damage to property other than to the defectively constructed roadway—in other words, the completed work itself—this Court held the claimed losses were not covered by the CGL policy. *Id.* at 123–24, 621 S.E.2d at 36–37. However, in *L-J*, we foreshadowed that the coverage question would be resolved differently under different circumstances. Specifically, we explained that where a claimed loss is for damage to property other than the faulty workmanship itself, such as where continuous or repeated water intrusion causes damage to otherwise non-defective construction components, then the claim may be covered under the terms of the policy, as it would not constitute a mere allegation of faulty or defective workmanship. *Id.* at 123–24, 621 S.E.2d at 36 (citing *High Country Assocs. v. N.H. Ins. Co.*, 648 A.2d 474 (N.H. 1994)).

Consistent with our projection in *L-J*, several years later in *Auto Owners Insurance Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), we held that a subcontractor's negligent application of stucco, which allowed water to seep into the plaintiff's home causing damage to the home's framing and exterior sheathing, constituted an occurrence under the builder's CGL policy. Although the Court found the damages caused by the continuous moisture intrusion resulting from this negligent construction were covered by the CGL policy, the Court emphasized that

a. "Bodily injury" or "property damage" covered by this policy and caused by an "occurrence" which occurs during the policy period

⁷ The definitions of "property damage" and "occurrence" are identical in the primary and excess policies.

the costs of removing and replacing the defective stucco itself amounted to faulty workmanship, which was not covered.⁸ *Id.* at 194, 684 S.E.2d at 544–45.

Two years later, in *Crossmann*, the Court reaffirmed the result in *Newman*—that costs to repair faulty workmanship itself are not covered under a CGL policy but costs to repair resulting damage to otherwise non-defective components are covered—while clarifying that the relevant policy term in the insuring agreement is "property damage," rather than "occurrence." 395 S.C. at 48–50, 717 S.E.2d. at 593–94 (explaining the use of the phrase "physical injury" in defining property damage suggests that such property was "not defective at the outset, but rather was initially proper and injured thereafter"). We clarified that faulty workmanship was

⁸ On March 10, 2008, this Court issued an initial decision in *Newman* in which we found all damages caused by water intrusion resulting from defectively installed stucco were covered under the terms of the CGL policy. In so holding, we initially affirmed the trial court's finding that the cost of repairing and replacing the defectively installed stucco itself was included in the covered damages, as the underlying damage could neither be assessed nor repaired without first removing the exterior sheathing. Thereafter, Auto Owners filed a petition for rehearing on April 21, 2008; on that same day, Harleysville filed a motion with this Court seeking leave to file a brief as Amicus Curiae in support of Auto Owners' petition for rehearing, which was subsequently granted. In its Amicus brief, citing numerous cases from other jurisdictions in support, Harleysville urged this Court to grant rehearing and argued, among other things, that the Court should reverse its decision finding repair or replacement costs for the faulty workmanship to be covered under the CGL policy, even if the Court ultimately determined other resulting damage was covered. Auto Owners' petition for rehearing was granted on August 22, 2008, and the case was reheard on November 6, 2008, prior to the underlying Magnolia North and Riverwalk trials. On September 8, 2009, the Court refiled its decision in *Newman*, this time determining that the cost to remove and replace the defective stucco was not covered under the CGL policy; however, the Court concluded that because there was no evidence in the record indicating which portions of the arbitrator's award of damages may be attributed to the removal and replacement of defective stucco, the entire damages award was covered. A key point here is that Harleysville's presence in, and corresponding knowledge of, the *Newman* litigation illustrates Harleysville's understanding at the time of the underlying Riverwalk and Magnolia North trials of the distinction between faulty workmanship and resulting property damage and the importance of that distinction for purposes of determining coverage.

not covered because it did not constitute property damage—not because it did not meet the definition of "occurrence." *Id.* (explaining the ongoing water penetration fell within the expanded definition of occurrence—namely, the "continuous or repeated exposure to substantially the same general harmful conditions"—and thus constituted the relevant occurrence). This Court further found the scope of an insurer's duty to indemnify was limited to damages accrued during the insurer's time on the risk, overruling earlier case law that held an insurer's liability was joint and several. *Id.* at 59–64, 717 S.E.2d at 599–01.

In so holding, the Court acknowledged that, when property damage is progressive (as is the case with damages resulting from water intrusion), "it is often 'both scientifically and administratively impossible'" to determine precisely what quantum of property damage occurred during each policy period. *Id.* at 64, 717 S.E.2d at 601 (quoting *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 301 (Mass. 2009)). Thus, the Court determined that where it is impracticable to calculate the exact measure of damages attributable to the injury that triggered each policy, the default rule is that an insurer's pro rata share of the damages is a function of the total number of years damages progressed and the portion of those years a particular insurer provided coverage. *Id.* at 64–65, 717 S.E.2d at 602.

Although *Crossmann* represented a sea change in terms of adopting the time-on-the-risk approach (and abandoning the "joint and several" approach), *Crossmann* left unchanged the basic concept, first signaled in *L-J* then formally adopted in *Newman*, that the cost of repairing faulty workmanship is not covered under CGL policies but resulting property damage beyond the defective work product itself is covered. With these principles in mind, we turn to the legal issues presented on appeal.

III.

Coverage Issues

Harleysville and the POAs each contend the Special Referee made various errors in declaring the scope of coverage under the policies. We disagree and address these claims of error below.

A. Reservation of Rights to Contest Coverage

Harleysville first contends the Special Referee erred in finding it failed to properly reserve the right to contest coverage as to the underlying damages that constitute

faulty workmanship, which are not covered under South Carolina law. We disagree. It is axiomatic that an insured must be provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage. We agree with the Special Referee that generic denials of coverage coupled with furnishing the insured with a verbatim recitation of all or most of the policy provisions (through a cut-and-paste method) is not sufficient. That is precisely what happened here, with the exception of the coverage dispute concerning punitive damages.

A basic understanding of reservation of rights to contest coverage may be helpful. "A 'unilateral reservation of rights' is a notice given by the insurer that it will defend [the insured in the lawsuit] but reserves all rights it has based on noncoverage under the policy" 14 Couch on Ins. § 202:38. A reservation of rights is a way for an insurer to avoid breaching its duty to defend and seek to suspend operation of the doctrines of waiver and estoppel prior to a determination of the insured's liability. *Id.* "Although a reservation of rights may protect an insurer's interests, it also is intended to benefit the policyholder by alerting the policyholder to the potential that coverage may be inapplicable for a loss; that conflicts may exist as between the policyholder and the insurer; and, that the policyholder should take steps necessary to protect its potentially uninsured interests." 12 New Appleman on Insurance § 149.02[2][a].

"A reservation of rights letter must give fair notice to the insured that the insurer intends to assert defenses to coverage or to pursue a declaratory relief action at a later date." *United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp.*, 948 F. Supp. 263, 268 (S.D.N.Y. 1996). Moreover, because an insurer typically has the right to control the litigation and is in the best position to see to it that the damages are allocated, courts have found that where an insurer defends under a reservation of rights, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus noncovered damages. *See Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346, 348 (1933) (observing that where an insurer reserves the right to control the defense, the insured is "directly deprived of a voice or part in such negotiations and defense" and noting that if an insurer's interests conflict with those of its insured, the insurer is "bound, under its contract of indemnity, and in good faith, to sacrifice its interests in favor of those of the [insured]"); *see also Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 618 (Minn. 2012) (holding that "when an insurer notifies its insured that it accepts the defense of a[] [] claim under a reservation of rights that includes covered and noncovered claims, the insurer not only has a duty to defend the

claim, but also to disclose to its insured the insured's interest in obtaining a written explanation of the award that identifies the claims or theories of recovery actually proved and the portions of the award attributable to each"); *id.* (reasoning that the "insurer is in a unique position to know the scope of coverage and exclusions in its policies" and "the duty to notify [the insured] is not onerous").

"The right to control the litigation carries with it certain duties," including "the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages." *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994) (citations omitted) (explaining "[i]f the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories" (citing *Duke v. Hoch*, 468 F.2d 973, 979 (5th Cir. 1972))). Therefore, by "virtue of its duty to defend, an insurer gains the advantage of exclusive control over the litigation," and "it would be unreasonable to permit the insurer to not disclose potential bases for denying coverage." *Id.* (internal citations and quotation marks omitted).

"If the insured does not know the grounds on which the insurer may contest coverage, the insured is placed at a disadvantage because it loses the opportunity to investigate and prepare a defense on its own." *Desert Ridge Resort LLC v. Occidental Fire & Cas. Co. of N.C.*, 141 F. Supp. 3d 962, 967 (D. Ariz. 2015). Indeed without knowledge of the bases upon which the insurer might dispute coverage, "the insured has no reason to act to protect its rights because it is unaware that a conflict of interest exists between itself and the insurer." *Magnum Foods*, 36 F.3d at 1498 (internal quotation marks and citation omitted). Thus, "[t]he general rule precluding an insurer from raising new grounds contesting coverage in a subsequent action is justified in th[is] []context." *Id.*

Where the insurer fails to adequately reserve the right to contest coverage, the insurer may be precluded from doing so. See *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 695 S.E.2d 6, 10–11 (Ga. 2010) (finding an insurer could not assert a defense of noncoverage based on its failure to effectively reserve the right to contest coverage). "For a reservation of rights to be effective, the reservation must be unambiguous; if it is ambiguous, the purported reservation of rights must be construed strictly against the insurer and liberally in favor of the insured." *Id.* at 10. (citations and internal quotation marks omitted); see *Desert Ridge Resort*, 141 F. Supp. 3d. 966–68 (explaining that where an insurer

undertakes and exclusively controls the defense of the insured under a reservation of rights, prior to undertaking the defense, the insurer must specify in detail any and all bases upon which it might contest coverage in the future since "[g]rounds not identified in the reservation of rights may not be asserted later by the insurer"); *id.* (explaining the existence of a potential conflict of interest between insured and insurer is what requires the insured to set forth the bases upon which it might contend damages are not covered in a greater amount of detail than would otherwise be required); *Weber v. Biddle*, 483 P.2d 155, 159 (Wash. Ct.App. 1971) (underscoring that when an insurer controls the defense of the action against its insured, "a high fiduciary duty [i]s owed by the insurer to the insured" and observing a "general notice of reservation of rights failing to refer specifically to the policy provision upon which the insurer wished to rely may be insufficient").

At the hearing before the Special Referee, Harleysville produced letters it sent to former Heritage principals and counsel between December 2003 and February 2004.⁹ These letters explained that Harleysville would provide a defense in the underlying suits and listed the name and contact information for the defense attorney Harleysville had selected to represent Heritage in each matter. These letters identify the particular insured entity and lawsuit at issue, summarize the allegations in the complaint, and identify the policy numbers and policy periods for policies that potentially provided coverage.¹⁰ Additionally, each of these letters (through a cut-and-paste approach) incorporated a nine- or ten-page excerpt of various policy terms, including the provisions relating to the insuring agreement, Harleysville's duty to defend, and numerous policy exclusions and definitions. Despite these policy references, the letters included no discussion of Harleysville's

⁹ The Magnolia North lawsuit was filed on May 28, 2003, but it was not until more than six months later that Harleysville sent "reservation of right" letters—one to Heritage Communities, Inc. on December 11, 2003, and another to Heritage Magnolia North, Inc. on December 12, 2003. As none of the parties take issue with this delay, we do not address the timeliness of Harleysville's letters.

¹⁰ Notwithstanding the production of various letters at the hearing, Harleysville conceded it could not find a reservation of rights letter addressed to Buildstar specifically regarding the Magnolia North litigation or any letter regarding the individual homeowners' class action; however, Harleysville's construction-defect litigation manager, Lee Wright, testified that such letters were sent by other Harleysville officials and explained that Harleysville was unable to produce those documents at trial because its copies had been misplaced.

position as to the various provisions or explanation of its reasons for relying thereon. With the exception of the claim for punitive damages, the letters failed to specify the particular grounds upon which Harleysville did, or might thereafter, dispute coverage.

In contrast, concerning punitive damages, Harleysville did provide in detail the basis for the potential denial of coverage:

The complaint filed against you seeks punitive damages.
[Harleysville] reserves the right to disclaim coverage for these since under all of your policies, they would not arise from an "occurrence," do not fit the definition of "bodily injury" or "property damage," and/or were "expected and intended" within the meaning of exclusions in the policies.

These letters further advised Heritage of the possibility it may face an uninsured exposure or interest to the extent that any damages ultimately awarded exceeded the policy limits. Harleysville therefore recommended that Heritage and its principals consider employing personal counsel to represent any uninsured exposure or interest, despite the Heritage entities having long been defunct at the time of the construction-defect trials. Importantly, however, none of the reservation letters advised Heritage of the need for allocation of damages between covered and non-covered losses or referenced a possible conflict of interest or Harleysville's intent to pursue a declaratory judgment action following any adverse jury verdicts in the underlying lawsuits.

The Special Referee thoroughly analyzed these letters to determine whether Harleysville properly reserved its rights. As to the substance of Harleysville's letters to Heritage, the Special Referee found the letters were not sufficiently specific to put Heritage on notice of Harleysville's specific defenses, particularly as to the need for an allocated verdict.

Perhaps in recognition of the inadequacy of the letters, Harleysville additionally relied on an oral reservation of rights based on conversations with representatives of Heritage. The Special Referee considered this argument (and the evidence advanced by Harleysville) and concluded that even if an oral reservation is permitted in South Carolina, the oral reservations Harleysville claimed to have communicated to the principals of the defunct Heritage entities "fall short of the specificity [required] and are ambiguous at best," noting "[p]roviding timely and

specific policy defenses and disclosing actual or potential conflicts are important fiduciary duties of the insurer[,] especially when, as here, Harleysville is controlling the defense of its insured." The Special Referee concluded that Harleysville failed to properly reserve its rights to dispute coverage as to actual damages and, thus, Harleysville was precluded from attempting to do so in this action.

Here, except as to punitive damages, Harleysville's reservation letters gave no express reservation or other indication that it disputed coverage for any specific portion or type of damages. Nor did the letters or testimony indicate that, in the event Heritage was found liable in the construction-defect suits, Harleysville intended to file the instant lawsuit to contest various coverage issues. Specifically, Harleysville did not expressly put its insureds on notice that it intended 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 whether certain damages resulted from intentional acts by the insured and were thus excluded. And in no way did the letters inform the insureds that a conflict of interest may have existed or that they should protect their interests by requesting an appropriate verdict. As the Fifth Circuit found in *Duke v. Hoch*, Harleysville's reservation "was no more than a general warning" and "too imprecise to shield [the insurer]." 468 F.2d 973, 979 (5th Cir. 1972). We find there is evidence in the record to support the Special Referee's finding that Harleysville's reservation letters were insufficient to reserve its right to contest coverage of actual damages,¹¹ and

¹¹ Moreover, even were we to conclude there was no evidence to sustain this finding, the ultimate disposition of the coverage question would nevertheless remain unchanged. In addition to finding Harleysville's attempted reservation of rights to be insufficient, the Special Referee also found "the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict" as to the negligent construction, breach of warranty, and breach of fiduciary duty claims, and the Special Referee refused to "engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making." Indeed, Harleysville cannot overcome the law in South Carolina concerning general verdicts. See *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 561-62, 614 S.E.2d 611, 614-15 (2005) (affirming trial court's holding in a declaratory judgment action that insurer had a duty under the CGL policy to indemnify insured for the entire general verdict where at least one of several claims was covered and explaining that when a jury

therefore, we affirm.¹² Because we find Harleysville did not effectively reserve the

returns a general verdict, a finding of coverage as to any of the claims submitted to that jury "answers the coverage question" as to the entire general verdict); *see also Newman*, 385 S.C. at 198, 684 S.E.2d at 547 (finding that even though arbitrator's award improperly included amounts for replacing and repairing faulty workmanship itself, there was insufficient evidence in the record to allow the Court to determine which costs were solely attributable to the non-covered faulty workmanship and finding that the insurer's duty to indemnify therefore covered the entire award). The dissent ignores the Special Referee's finding in this regard, which serves as an alternative and independent basis upon which we affirm.

¹² The dissent also suggests that the timing of this Court's decision in *Newman* somehow precludes Harleysville from having set forth in its reservation of rights letters the faulty workmanship versus covered damages distinction upon which it now seeks to parse the general jury verdict. As noted, any claim that Harleysville was not aware of this very distinction borders on frivolity because Harleysville appeared in other earlier cases (e.g., *Newman*) for the express purpose of urging the very distinction it now asserts. Moreover, as early as December 2004, Harleysville had formally taken the position that faulty workmanship was not covered in a dispute with a different insured in a South Carolina federal court. Specifically, Harleysville filed a complaint seeking a declaration that it had no duty to defend its insured, a Beaufort County homebuilder and general contractor, in thirteen state-court actions, and arguing the damages at issue in those lawsuits arose from the insured's faulty workmanship and, thus, were not covered under the CGL policy. *Harleysville Mut. Ins. Co. v. Cambridge Bldg. Corp.*, 66 Fed. R. Serv.3d 811 (D.S.C. 2006) (quoting Harleysville's description of the coverage questions presented as "whether the claims arise from an "occurrence"; whether they constitute "property damage"; and whether the claims allege only damage to property arising from a defect, deficiency, inadequacy or dangerous condition in [the insured's] work"). Moreover, Harleysville further asserted that "the law of South Carolina is settled: there is no insurance coverage for construction defects." *Id.* (quoting Harleysville's pleadings). Thus, regardless of any decisions by this Court in the interim, the position taken by Harleysville—that faulty workmanship is not covered under the insuring agreement—has been consistent since 2004, and Harleysville demonstrated that it understood how to articulate its position in detail; it simply failed to do so in the cases presently before the Court. Moreover, the relevant language in Harleysville's policies has, at all times, remained unchanged, as has South Carolina's common law regarding conflicts of interest and the high

right to contest coverage, we need not address Harleysville's claims of error regarding various policy exclusions. We turn now to the issue of punitive damages, the coverage of which Harleysville effectively reserved the right to contest.

B. Punitive Damages—Insuring Agreement

Harleysville argues it has no duty to indemnify Heritage for punitive damages, which it contends are not covered under the insuring agreement in the first instance. Specifically, Harleysville contends that by awarding punitive damages, the jury necessarily found that Heritage's wrongdoing and the results therefrom were not accidental, which is required for losses to amount to an occurrence. We disagree.

The insuring language in the CGL policies provides Harleysville will indemnify Heritage for "those sums" Heritage becomes legally obligated to pay as damages arising from an occurrence. The policies include the standard CGL definition of an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In arguing punitive damages are not "accidental" and therefore not an occurrence, Harleysville ignores that the progressive water intrusion constitutes the relevant occurrence. Further, Harleysville disregards not only the progressive-damage aspect of the occurrence definition (i.e., "continuous or repeated exposure to substantially the same general harmful conditions") but also this Court's holding in *Crossmann* that the insuring language of a CGL policy is triggered by progressive damages caused by repeated water intrusion. *Crossmann*, 395 S.C. at 47, 717 S.E.2d at 593. Thus, Harleysville is contractually obligated to indemnify Heritage for those sums Heritage becomes legally obligated to pay as a result of that progressive water intrusion, and the policy does not limit "those sums" to compensatory or actual damages.

Properly looking to the terms of the applicable policies, the Special Referee found that if Harleysville intended to preclude coverage for punitive damages, it could

standards of conduct an insurer owes to its insureds. *See Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965); *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). Thus, the suggestion in the dissent that Harleysville is being held to a standard of clairvoyance must be rejected.

simply have added the word "compensatory" before the word "damages" in the policies' insuring language. Because the policies' language did not unambiguously exclude punitive damages, the Special Referee applied well-established law and construed the policy language in favor of the insured, finding Harleysville was required to indemnify Heritage for punitive damages.

"[A]mbiguities in an insurance contract must be construed in favor of the insured." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615–16, 732 S.E.2d 626, 628 (2012). Moreover, this Court has previously found punitive damages are covered as they constituted a sum the insured was "legally obligated to pay as damages." *Carroway v. Johnson*, 245 S.C. 200, 204, 139 S.E.2d 908, 910 (1965); *see S.C. State Budget & Control Bd. v. Prince*, 304 S.C. 241, 249, 403 S.E.2d 643, 648 (1991) ("Here, as in *Carroway*, the policy does not limit recovery to actual damages. Instead, the policy uses broader language which, under the rules of construction and interpretation of insurance policies, must be read as encompassing punitive damages."). Because the policy does not unambiguously exclude punitive damages, we construe the policy language in favor of the insured to include punitive damages, and we therefore affirm the Special Referee's finding that punitive damages are covered. *See, e.g., Crossmann*, 395 S.C. at 47, 717 S.E.2d at 593–94 (noting that an ambiguity in a CGL policy must be construed in favor of the insured).

C. Punitive Damages—"Expected or Intended" Exclusion

Harleysville next argues the Special Referee erred in failing to find punitive damages fall within the policy exclusion barring coverage for acts that are "expected or intended." Harleysville contends that by awarding punitive damages, the jury *necessarily* found that Heritage's wrongdoing was a "conscious failure" and involved a "present consciousness of wrongdoing," and thus, Heritage's wrongdoing and the results thereof were intended or at least expected damages, which would be excluded under the policy.¹³ We disagree.

An insurance company bears the burden of establishing the applicability of policy exclusions. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) (citing *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565

¹³ On each jury verdict form, the jury answered "Yes" to the question, "Does the Jury find by clear and convincing evidence that the Defendants' actions were willful, wanton, reckless, and/or grossly negligent?"

(1979)). For an act to be excluded from coverage under the policy exclusion for losses "expected or intended from the standpoint of the insured," this Court has held that "not only the act causing the loss must have been intentional but [] the results of the act must also have been intended." *Miller v. Fidelity-Phoenix Ins. Co.*, 268 S.C. 72, 75, 231 S.E.2d 701, 702 (1977) (explaining the insured must be shown to have acted intentionally and to have intended the specific type of loss or injury that resulted for the exclusion to apply). These questions of the insured's intent are factual in nature. *Id.* "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Newman*, 385 S.C. at 191, 684 S.E.2d at 543 (citing *Hamin*, 368 S.C. at 540, 629 S.E.2d at 685).

The Special Referee found Heritage intended to construct quality condominiums and that Harleysville failed to meet its burden of proving Heritage expected or intended its subcontractors to perform negligently or expected or intended the property damage that resulted from the negligent construction. In so finding, the Special Referee relied upon evidence that Heritage expected its subcontractors to be reliable and skilled, that Heritage was actively addressing construction and water-intrusion concerns to determine the source of the problems, and that post-construction testing revealed a portion of the water intrusion was the result of defectively manufactured components rather than improper installation. In this regard, the Special Referee relied upon *Pennsylvania Thresherman & Farmer's Mutual Casualty Insurance Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957), a Fourth Circuit decision applying South Carolina law, in finding that an insured's negligent conduct may be so gross as to form a basis for punitive damages yet not rise to the level of an intentional act such that it would come within the ambit of the expected-or-intended policy exclusion. Ultimately, the Special Referee concluded there was nothing in the record demonstrating Heritage intended to injure the POAs or homeowners and, thus, punitive damages were not excluded from coverage.

Although Harleysville produced some testimony suggesting Heritage was aware of certain instances of post-construction water intrusion around various windows, there is other evidence that suggests Heritage was attempting to find the source of the leaks and stop them. We recognize the counter-argument propounded by Harleysville that Heritage approached the construction of these condominium projects with the aim of doing as little as possible. The evidence of shoddy workmanship would tend to support the argument that Heritage had knowledge that the projects were substandard. But our standard of review as to this factual

issue of intent is not de novo. Because there is evidence in the record to support the Special Referee's findings, we are constrained by the standard of review to affirm the finding that Harleysville failed to meet its burden of showing the expected-or-intended policy exclusion operates to exclude punitive damages from coverage. See *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (observing that the determination of a party's intent is a question of fact); *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (explaining that the issue of intent is a question for the factfinder); see also *Miller*, 268 S.C. at 75, 231 S.E.2d at 702 (noting that an insurer must demonstrate not only that the insured acted intentionally but also that the insured intended the specific type of loss or injury that resulted for the damages to be excluded from coverage as "expected or intended" losses); *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 776 (1976) (explaining that in an action at law tried without a jury, an appellate court reviews the evidence, "not to determine the preponderance thereof but to determine whether there is any evidence which reasonably supports the factual findings of the judge").

IV.

Allocation Issues: Time on the Risk

Both Harleysville and the POAs contend the Special Referee made various errors in allocating damages based on the time-on-the-risk formula set forth in *Crossmann*. For the reasons below, we affirm the Special Referee's time-on-the-risk computation as to Magnolia North and affirm as slightly modified as to the loss-of-use damages in the Riverwalk litigation.

In December 2011, the Special Referee reopened the evidentiary hearing to allow the parties to present arguments and evidence regarding the application of *Crossmann*'s time-on-the-risk formula. During the hearing, the parties presented evidence that following construction, the last certificate of occupancy was issued in January 2000 at Riverwalk and August 2000 at Magnolia North. The evidence also revealed that Heritage maintained insurance coverage through June 2001 at Riverwalk and November 2000 at Magnolia North.

Additionally, the POAs offered the testimony of Drew Brown, an expert in building diagnostics and general contracting, who testified that the water intrusion damage at the Riverwalk and Magnolia North developments began at the time of the first rain event following improper installation of the building components. In terms of the progressive nature of the damages, Brown further explained:

[D]amage and decay are two different things. Damage begins with the water entering the sensitive, the moisture[-]sensitive building products, and that's the standard of the [building] code. The [building] code indicates that we must protect these building components from damage, from water intrusion, which then will—that water intrusion begins, the wood products begin to uptake that water, that damage cycle has begun. Eventually, decay will begin, which is a microbial process that will, will actually begin to destroy the ability of the wood to carry any load

Brown testified that by the time he conducted site visits between December 2003 and April 2004, many of the building components at the developments were damaged to the point they required replacement and that subsequent decay eventually caused structural failure and collapse at both developments.¹⁴

In conducting the time-on-the-risk analysis, 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. The Special Referee concluded that the most equitable way to proceed in these specific cases would be to compare the total number of days in the damage period to the total number of days of coverage under the Harleysville policies.

In determining the proper progressive-damages period, the Special Referee found the damages began thirty days after the first certificate of occupancy was issued at each development. As to the progressive-damages period end date, the Special

¹⁴ At the hearing, Harleysville proffered the testimony of a general-contracting construction expert, who conducted site visits to survey the construction deficiencies and prepared a report to estimate the percentage of damage attributable to faulty workmanship at each development. Although this evidence was ultimately excluded because the site visits and subsequent reports long post-dated the jury verdicts and did not correspond with the evidence of damages presented to the juries, we emphasize that even Harleysville's own expert testified it was impossible to determine when the damage began or ended at either development. Thus, even had the Special Referee admitted this evidence, it nevertheless would not support the point Harleysville now urges—namely, that the progression of damages was reasonably ascertainable.

Referee used the date of Brown's last site visit prior to the underlying trials as the damages cut-off point, reasoning that by that date, the building components identified in Brown's report were sufficiently damaged to require replacement, notwithstanding any further progression and decay. Using those dates, the Special Referee determined that damages progressed for a period of 2,347 days at Riverwalk and 1,943 days at Magnolia North. The Special Referee further determined that Harleysville provided coverage for 1,300 days in the Riverwalk matter and 691 days in the Magnolia North matter. The Special Referee used those figures to calculate a time-on-the-risk multiplier for each development, which he then applied to calculate Harleysville's pro rata portion of the progressive damages.

On appeal, both parties take issue with the dates the Special Referee used in his calculations, and Harleysville contends the Special Referee erred in failing to conduct a per-building analysis and in refusing to include loss-of-use and punitive damages in the figure to be reduced by the time-on-the-risk multiplier. Additionally, the POAs contend application of the time-on-the-risk formula at all is inappropriate because the jury rendered general verdicts, and therefore Harleysville should be required to indemnify Heritage for the entire amount of all jury verdicts—not a reduced amount proportionate to Harleysville's time on the risk.

A. Loss of Use—Actual Damages

Harleysville contends the actual damages awarded for loss of use in the Riverwalk class action should be deemed to be progressive in nature and, thus, included in the amount subject to allocation based on Harleysville's time on the risk. We agree and modify the Special Referee's Riverwalk calculation slightly to include allocation of the actual damages resulting from loss of use.

"An insurance policy is a contract . . . and the terms of the policy are to be construed according to contract law." *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (citing *Estate of Revis v. Revis*, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997)). "Where [a] contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (citing *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). "It is a question of law for the court whether the language of a contract is ambiguous." *Id.* (citing *Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302–03).

The policies provide "[p]roperty damage' that is loss of use of tangible property that is not physically injured will be deemed to occur at the time of the 'occurrence' that caused it."¹⁵ In this case, the relevant occurrence is the repeated infiltration of water into the improperly constructed buildings, which is a progressive injury. See *Crossmann*, 395 S.C. at 52 n.8, 717 S.E.2d at 595 n.8 (explaining a progressive injury "results from an event or set of conditions that occurs repeatedly or continuously over time, such as . . . the continual intrusion of water into a building"). Because the underlying occurrence is progressive in nature, we find the language of the policies unambiguously provides that loss-of-use damages must be deemed to have progressed over the same period of time. Accordingly, we modify the Special Referee's time-on-the risk calculation for Riverwalk as follows:

Riverwalk	
Actual damages—POA	\$4,250,000
Actual damages—Class Action	\$250,000
Setoff ¹⁶	(\$1,028,821)
Adjusted actual damages	\$3,471,179
Time-on-the-risk multiplier	0.5538
Harleysville's pro rata share of actual damages	\$1,922,338
Punitive damages—POA	\$250,000
Punitive damages—Class Action	\$750,000
Total amount covered by Harleysville's policies	\$2,922,338

In sum, we affirm the findings of the Special Referee as modified above, and find the policies covered \$2,922,338 as to the Riverwalk litigation.

B. Punitive Damages

Turning to the issue of punitive damages, Harleysville argues that punitive damages, like actual damages, are subject to allocation based on time on the risk.

¹⁵ The excess liability policies contain a similar provision: "All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

¹⁶ By way of post-trial motion in the underlying construction-defect suit, Harleysville was granted a setoff as a result of settlement amounts paid by defendants other than Heritage.

Without establishing a categorical rule, we disagree with Harleysville in these circumstances and affirm.

In the construction-defect trials, the POAs presented evidence that during the construction process at both Riverwalk and Magnolia North (as well as several of Heritage's other large-scale condominium developments in Horry County), Heritage chose not to employ an inspecting architect to evaluate and approve or disapprove any modifications and substitutions to the original construction plans and specifications. The POAs contended the absence of an inspecting architect resulted in the widespread and unchecked substitution of inferior building products and improper structural modifications that ultimately led to the pervasive structural and water-intrusion problems, all of which could have been avoided had the original specifications been followed or properly modified. Further, the POAs argued that although Heritage was aware of significant water-intrusion problems at the other developments before beginning construction at Riverwalk and Magnolia North, Heritage nevertheless continued the same inadequate construction practices at these developments. The POAs presented additional evidence that despite knowledge of the ongoing construction problems, Heritage also deliberately targeted its sales efforts toward elderly, out-of-state residents and marketed its condominiums on the basis of quality and luxurious amenities, such as swimming pools and tennis courts, that were never constructed. The POAs contended that all of this evidence demonstrated Heritage willfully and repeatedly sold improperly constructed condominiums to innocent purchasers and that such conduct justified the imposition of punitive damages. As noted, the jury verdicts included punitive-damage awards of \$2,000,000 in the Magnolia North suit, \$250,000 in the Riverwalk POA suit, and \$750,000 in the Riverwalk class action.

Although the Special Referee determined the time-on-the-risk principles set forth in *Crossmann* were applicable to the actual damages awarded by the juries, the Special Referee rejected Harleysville's argument that punitive damages were likewise subject to time-on-the-risk allocation, observing that the formula set forth in *Crossmann* referred only to damages that were deemed to be progressive.

On appeal, Harleysville argues that punitive damages are necessarily predicated upon the underlying progressive damages and, therefore, are also subject to time-on-the-risk allocation. Harleysville further avers that, like actual damages, punitive damages also serve a compensatory role, and since the pattern of reprehensible conduct justifying the imposition of punitive damages took place

over a period of several years, "basic principles of fairness" require that Harleysville not be saddled with the entire punitive damages award.

Initially, we find Harleysville seeks to blur the distinction between actual and punitive damages and conflates the underlying purposes of these two different types of damages. "The purpose of *actual or compensatory damages* is to compensate a party for injuries suffered or losses sustained." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (emphasis added) (examining the fundamental differences between actual damages and punitive damages and rejecting the argument that punitive damages should be reduced by the proportion of the plaintiff's comparative negligence). "The goal [of compensatory damages] is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred." *Id.* (citations omitted).

In contrast, punitive damages relate not to the plaintiff, but rather to the "the defendant's reckless, willful, wanton, or malicious conduct." *Id.* at 379, 529 S.E.2d at 533 (emphasis added); see also *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009) (observing that an award of punitive damages "'further[s] a state's legitimate interests in punishing *unlawful conduct* and deterring its repetition'" (emphasis added) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996))); *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 7 (1784) (focusing on the conduct of the defendant in affirming an award of "very exemplary damages" and finding such damages were warranted where the defendant's conduct was found to be "very wanton," particularly in light of the defendant's special training and experience). "Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes." *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001). "The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Id.* (citations omitted). "The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Id.*

Although this Court has acknowledged punitive damages may also "compensate . . . for the willfulness with which the [plaintiff's] right was invaded," this Court has unequivocally rejected the attempt to "blur all distinctions between actual and punitive damages by unduly emphasizing [any] compensatory aspect." *Clark*, 339 S.C. at 379, 529 S.E.2d at 533 (citations and internal quotation marks omitted). Indeed, "[i]t is a well-established principle of the common law, that . . . a jury may inflict what are called exemplary, punitive, or vindictive damages upon a

defendant, having in view *the enormity of his offence rather than the measure of compensation to the plaintiff.*" *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15–16 (1991) (emphasis added) (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1852)); *see also id.* at 54 (O'Connor, J., dissenting) ("Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible."). We therefore reject Harleysville's attempt to mischaracterize the punitive damages in these cases as compensatory.

We turn now to the question of whether punitive damages, though not compensatory in nature, are nevertheless subject to time-on-the-risk allocation. The concept of time on the risk is a judicially created, equitable method of allocating progressive damages "where it is impossible to know the exact measure of damages attributable to the injury that triggered each policy," as is the case here. *Crossmann*, 395 S.C. at 64, 717 S.E.2d at 602; *see id.* at 64–67, 717 S.E.2d at 601–03 (explaining that the time-on-the-risk method is the "equitable approach [that] best harmonizes" the language of CGL policies with the scientific and administrative impossibility of identifying the precise quantum of property damage occurring during each policy period). Ultimately, this method of allocation "addresses a problem of proof" in cases involving progressive property damages "where it is not feasible to make a fact-based allocation of losses attributable to each policy period." *Boston Gas Co.*, 910 N.E.2d at 316. At the heart of the time-on-the-risk theory is the idea that the policy period is a temporal limitation upon an insurer's indemnity obligation. *See Crossmann*, 395 S.C. at 60, 717 S.E.2d at 599 (rejecting the "joint and several" allocation approach because, *inter alia*, that approach ignores "critical language" limiting the insurer's indemnity obligation to those losses occurring during the policy period). As we explained in *Crossmann*, the time-on-the-risk allocation is a determination of "how much coverage [is to] be provided by each triggered policy." *Id.* at 59, 717 S.E.2d at 599. In other words, the analysis begins with a determination of when coverage-triggering losses occurred, then allocates losses based on the period of time each insurer was on the risk.

A key point to the time-on-the-risk analysis is that this allocation method was developed as a means of apportioning actual, compensatory damages where the injury progressed over time. *See Crossmann*, 395 S.C. at 45, 717 S.E.2d at 591 ("Where proof of the *actual property damage* distribution is not available, the allocation formula adopted herein will serve as an appropriate default method for dividing the loss" (emphasis added)). As such, the logic and policy

considerations underlying the time-on-the-risk method may not as easily lend themselves to the application of this concept to punitive damages. Nevertheless, the parties have presented this Court (and the Special Referee) with a paucity of legal authority to inform our decision as to the allocability of punitive damages, thus forcing us to resort to these policy considerations as our guide in navigating this novel issue. We emphasize it is not our intent to create a bright-line rule that punitive damages may never be subject to allocation based on time on the risk. However, we conclude the punitive-damage awards are not subject to reduction under the facts of these cases.

Specifically, the difficulty here is that Harleysville does not contend, and has presented no evidence, that any of the reprehensible acts upon which punitive damages are predicated occurred outside the relevant policy periods. To the contrary, the evidence in the record demonstrates that all of Heritage's reprehensible acts that justified the juries' imposition of punitive damages took place entirely during the period of time Harleysville's policies were effective. Thus, we conclude the Special Referee did not err in finding punitive damages were not subject to reduction based on the time-on-the-risk multiplier in these cases.

C. Time-on-the-Risk Allocation of the General Verdict

We next turn to the POAs' contention that it was error to apply the time-on-the-risk allocation to the general verdicts based on the possibility that some portion of the jury awards might include losses which are attributable to non-progressive damages stemming from the POAs' breach of fiduciary duty or breach of warranty claims. We affirm.

In rejecting this argument, the Special Referee determined that both covered and non-covered (faulty workmanship) claims were submitted to the jury and concluded that it would be too speculative and inappropriate to allocate the jury verdicts between progressive damages subject to time-on-the-risk allocation and fixed losses not subject to time-on-the-risk allocation. Thus, the Special Referee concluded the entire amount of actual damages would be reduced in proportion to Harleysville's time on the risk.

Essentially, the POAs attempt to use the general verdict rule as both a shield and a sword, arguing first that the general verdict rule shields any evaluation of covered versus non-covered damages, yet thereafter arguing application of time-on-the-risk principles is wholly precluded by the possibility that some portion of the jury

verdicts might be attributable to non-progressive damages. We find the Special Referee properly rejected this argument; the general verdict rule may not serve as a basis for the POAs to obtain coverage for non-covered claims and simultaneously serve as a basis to avoid time-on-the-risk apportionment of any aspect of the jury verdicts. *See Mitchell v. Fed. Intermediate Credit Bank*, 165 S.C. 457, 164 S.E. 136, 140 (1932) (noting a party may not use the same argument as both a shield and a sword) (citations omitted).

D. Factual Determinations

Lastly, we do not believe the Special Referee abused his discretion in refusing to conduct a per-building analysis or in setting the policy period or progressive-damages period dates, as there is evidence in the record to support those findings. *See Crossmann*, 395 S.C. at 65–66, 717 S.E.2d at 602 (finding it is within the sound discretion of the trial court to determine, in light of the particular facts and circumstances of each case, the most appropriate manner for applying the basic time-on-the-risk formula to reasonably approximate each insurer's time on the risk); *Newman*, 385 S.C. at 191, 684 S.E.2d at 543 ("In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them."); *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006) (explaining that when a determination lies within the sound discretion of the trial court, the standard of review on appeal is limited to determining whether there was an abuse of discretion); *see also Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 670 N.E.2d 740, 756–57 (Ill. Ct. App. 1996) (refusing to disturb the trial court's exercise of discretion in apportioning progressive damages):

Based on the foregoing, we affirm the Special Referee's time-on-the-risk calculation as to Magnolia North and affirm as slightly modified as to Riverwalk.

V.

Miscellaneous Trial Issues

Harleysville argues the Special Referee erred in excluding certain evidence and in making various factual findings. After a full review of the record, we find the Special Referee did not abuse his discretion and affirm pursuant to Rule 220, SCACR. *See Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174–75, 467 S.E.2d 439, 442 (1996) ("Conduct of a trial, including admission and rejection of testimony, is largely within the trial judge's sound discretion, the

exercise of which will not be disturbed on appeal unless appellant can show abuse of such discretion, commission of legal error in its exercise, and resulting prejudice to appellant's rights." (citing *Fetner v. Aetna Life Ins. Co.*, 199 S.C. 79, 18 S.E.2d 521 (1942))).

Additionally, Harleysville contends it was error for the Special Referee not to construe its motion for judgment as a matter of law as being made pursuant to Rule 41(b), SCRCP. Rule 41(b), SCRCP, provides that, in a non-jury action, after the plaintiff "has completed the presentation of his evidence, *the defendant* . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." (emphasis added). Here, Harleysville was the plaintiff—not the defendant. Moreover, Harleysville in no way sought a ruling that it, as "the plaintiff[,]" has shown no right to relief." Indeed, Harleysville's motion sought a ruling to the contrary, namely that Harleysville was entitled to relief as a matter of law. Thus, we find the argument that the Special Referee erred in failing to construe Harleysville's motion as one made pursuant to Rule 41(b), SCRCP, is without merit. Cf. *Waterpointe I Prop. Owner's Ass'n v. Paragon, Inc.*, 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000) (construing *defendant's* "directed verdict" motion in a non-jury action as a motion for involuntary non-suit under Rule 41(b), SCRCP, and reviewing it as such). In any event, there can be no prejudicial error here, for it is manifest the Special Referee rejected most of Harleysville's arguments and had no intention of summarily ruling in favor of Harleysville.

VI.

In sum, we find the Special Referee correctly found Harleysville failed to reserve the right to contest coverage of actual damages and that punitive damages are covered under the CGL policies. We also find there is evidence in the record to support the Special Referee's factual findings as to the progressive damages periods and that the Special Referee did not abuse its discretion in determining Harleysville's time on the risk at Magnolia North. We find loss-of-use actual damages at Riverwalk are subject to time-on-the-risk allocation but that punitive damages at both developments are not. We thus affirm in the Magnolia North matter and affirm as modified in the Riverwalk matter.

AFFIRMED AND AFFIRMED AS MODIFIED.

BEATTY, C.J., HEARN, JJ., and Acting Justice James E. Moore, concur.
Acting Justice Costa M. Pleicones dissenting in a separate opinion.

ACTING JUSTICE PLEICONES: I respectfully dissent and would reverse and remand to the special referee with instructions.

In my view, the critical dates necessary to the determination of the merits here are these:

May 2003: Magnolia North POA sues Heritage

December 2003: Riverwalk POA sues Heritage

December 2003 - January 2004: Harleysville informs Heritage it will defend under a reservation of rights

November 10, 2005: *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005) becomes final. Holds that faulty workmanship that damages only the work itself is not an "occurrence" within the meaning of a CGL policy.

January 2009: Riverwalk verdict

May 2009: Magnolia North verdict

October 29, 2009: *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) becomes final. Holds that progressive damage to other materials as the result of subcontractor's faulty workmanship is "property damage" and therefore a covered occurrence under CGL policy, and interprets two policy exclusions.

A. Reservation of Rights

The majority finds Harleysville's notices of its reservation of rights insufficient because they (1) failed to notify the insureds of the particular grounds upon which it might dispute coverage; (2) did not advise of the need to allocate damages between covered and non-covered losses; and (3) did not inform the insureds that Harleysville would seek a declaratory judgment if there were adverse jury verdicts. I note four things at the outset: (1) the majority cites no South Carolina authority that requires this type of information be included in a reservation of rights letter; (2) these letters were sent almost two years before *L-J* became final in November 2005, and more than eight months before the initial *L-J* opinion was filed in August 2004, at a time when 'occurrence' and 'property damage' definitions were

unsettled; (3) the letters were sent more than five and a half years before *Newman* held that 'progressive' damages to other materials were property damage, and interpreted two standard CGL policy exclusions; and (4) the reservation of rights letters were sent by Harleysville to its sophisticated insured, Heritage Builders, and not to the POAs who now purport to contest the sufficiency of these notices.

I disagree with the majority and find the reservation of rights letters to be adequate. In support of my conclusion, I quote from a letter sent by Harleysville ("HMIC") on January 23, 2004:

RESERVATION OF RIGHTS

This letter is not intended to waive any of HMIC's rights under any HMIC insurance policy or at law. HMIC continues to reserve it [sic] rights as set forth in its prior reservation of rights, and as set forth herein, including but not limited to the following issues:

- 1) Whether property damage or bodily injury was caused by an occurrence as defined by any policy or policies and happened during an HMIC policy period;
- 2) Whether notice was provided to HMIC in compliance with the notice provision of the policy or policies;
- 3) Whether the cooperation clause of any policy or policies has been complied with;
- 4) Whether the applicable limits of any and all applicable primary or excess policies of insurance have, in fact, been exhausted;
- 5) Whether or not any exclusion applies to preclude coverage under any policy or policies; and
- 6) Any additional coverage defenses which may arise during the investigation of this matter.

The pleadings seek punitive damages. HMIC reserves the right to disclaim coverage for these since under all of your policies, they would not arise from an "occurrence," do not fit the definition of "bodily injury" or "property damage," and/or were

"expected and intended" within the meaning of exclusions in the policies.

If there is available to you coverage from any other insurance carrier or source in addition to that provided by HMIC, you should immediately notify the carrier or source of all the facts and circumstances surrounding this matter, and that you have been named as a defendant in this lawsuit. Please notify HMIC of the name and address of any such other insurance carrier, and of the policy number under which this additional coverage is available to you.

Nothing contained in this letter should be deemed a waiver of the terms and conditions of the HMIC policy. HMIC expressly reserves the right to rely upon any term or condition of the insurance contract or any other ground which may be found to limit or preclude coverage.

In the event that it is determined that there is no coverage for this action under the HMIC policy, HMIC expressly reserves the right to recover the amounts incurred in the defense of this action from you or any of your other insurers that may be liable for these costs.

Please advise us of any information that you have that you believe may affect our determination concerning the coverage available under the HMIC policy.

HMIC's position is based upon the facts which have been made available to it to date. HMIC expressly reserves the right to modify its determination concerning the potential for coverage under this policy if the information developed during our investigation of this claim warrants the modification.

In my opinion, the majority's conclusion - that this language was insufficient to put the builder on notice, and its suggestion that an insurance company must explain its position or its reasons in order to reserve its rights, or must specify which types of damages it might dispute - is unwarranted, especially when one considers these letters and conversations took place between sophisticated commercial entities long before *L-J* had settled (for a time) the meaning of the

terms "occurrence," and much longer before the Court had interpreted the meaning of certain policy exclusions. *See, e.g., Newman, supra.*

I would reverse the Special Referee's finding that Harleysville did not effectively reserve its rights. To the extent the majority relies upon *Newman* to suggest Harleysville is "at fault in not seeking an allocation of covered damages," I point out the verdicts in Riverwalk (January 2009) and in Magnolia North (May 2009) predate *Newman* (October 2009) by at more than five months. 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. *See Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965). In my view, nothing in the general verdicts bars Harleysville from now litigating its liability under its reservation of rights letters.

For the reasons given above, I would allow Harleysville to litigate its liability, including any liability for the punitive damages award, in these declaratory judgment actions. I would also reverse and remand the allocation of damages as any "time on risk" analysis is necessarily affected by the proper allocation of damages, and a determination of their "progression."

I respectfully dissent.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

**MEMORANDUM IN OPPOSITION TO
LIBERTY MUTUAL'S SECOND
MOTION FOR LIMITED
INTERVENTION ON BEHALF OF
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., JOHN
WIELAND HOMES, INC., BUILDERS
SUPPORT SERVICES OF THE
CAROLINAS, INC.**

FILED
JAN 23 AM 11:52
CLERK OF COURT

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., John Wieland Homes, Inc., and Builders Support Services of the Carolinas, Inc. (hereinafter "Wieland") submit this Memorandum in Opposition to Liberty Mutual's (hereinafter "Liberty") Second Motion for Limited Intervention in this action.

This is a construction defect dispute involving over 100 townhomes at Waverly at Hamlin Plantation filed over three (3) years ago. Liberty Mutual, a CGL insurance carrier for Wieland, who began defending under a reservation of rights in May 2016, has moved to intervene into this action for the limited purpose of submitting special verdict questions at the trial scheduled to begin on Monday January 23, 2017 related to allocation of covered and non-covered damages.

Liberty Mutual's motion does not fall with the ambit of South Carolina Rules of Civil Procedure, Rule 24 — Intervention. Rule 24(a) provides for intervention as of right when (1) a statute provides a right to intervene; and (2) the movant claims an interest relating to the property or transaction which is the subject of the action and that he is so situated that the disposition of the action may impair or impeded his ability to protect that interest. Rule 24(b) provides for permissive intervention when (1) a statute confers a conditional right to intervene; or (2) where movant's claim and main action have question of law for fact in common. And, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties.

Liberty Mutual attempts to minimize its request by stating that (1) it is seeking to comply with "directives of the recent Heritage opinion," referencing a January 11, 2017 opinion issued by the South Carolina Supreme Court, Opinion No. 29698¹; and that (2) it is only seeking intervention for the purpose of obtaining special interrogatories or a special verdict form. Presumably, Liberty does not seek to participate in the trial as a party, nor disclose to the jury the existence of the Liberty policies.

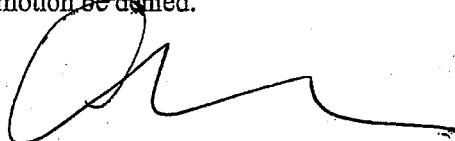
However, one interprets the very recent Heritage case, the majority opinion cannot be read to direct Liberty's last minute motion to intervene for the purpose of seeking jury interrogatories and a special verdict form, which neither the insured's or its counsel has not requested. As stated in Heritage, the insurance company "cannot overcome the law in South Carolina concerning general verdicts." Id. at Fn. 11. In the dissent in Heritage, the Court acknowledged insurance companies intervening in these lawsuits and asserting a defense against coverage necessarily creates an impermissible conflict of interest in violation of established South Carolina law. Id. at p. 54. Compare Restor-A-Dent Dental Lab., Inc. v. Certified Alloy Products, 725 F.2d 871, 877 (2nd

¹ It is not clear if the Heritage opinion is final as the time to file for rehearing would not appear to have passed.

54. Compare Restor-A-Dent Dental Lab., Inc. v. Certified Alloy Products, 725 F.2d 871, 877 (2nd Cir. 1984) (denying insurer's request for special interrogatories on apportionment because (1) the insurer did not have any "great need for the relief sought," (2) the trial judge would likely require a separate verdict for each of the causes of action and resulting damages; (3) there was no assurance that the intervention would not unduly delay the main action; and (4) allowing the insurer to intervene "might, as a practical matter, deter a settlement and may well exacerbate a potential conflict of interest for the attorney furnished by [the insurer] to represent [the insured]).

The motion should be denied. The intervention on the eve of trial is not directed by the Heritage opinion, and while the effort post-trial at allocating between covered and non-covered damages will necessarily include interpretation and application of the court's order in Heritage, such is for a different day. This "non-party" intervention, on the eve of trial, will only complicate and delay the underlying action; and the ultimate question of insurance coverage is simply not the subject matter of this action.

Wieland respectfully requests the motion be denied.



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CHARLESTON, SC

January 23, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson
Circuit Court Judge

Case No. 2013-CP-10-03326

Ex Parte: Liberty Mutual Fire Insurance Company,..... Appellant,

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., ... Respondent,

v.

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,
Jeorge Medina, Jeorge 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

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SC Court of Appeals

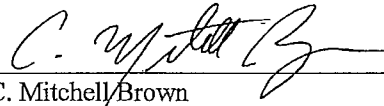
Company, Inc., Paul M. Vasquez, Richard Ditullio,
Richard Ditullio a/k/a RDT Contracting, LLC, ...

Respondents.

Notice of Appeal

Liberty Mutual Fire Insurance Company ("Appellant") appeals the Order Denying Liberty Mutual's Motion for Limited Intervention filed February 6, 2017, attached as Exhibit A, in the above-captioned action. Appellant received written notice of the entry of the February 6th order on February 9, 2017.

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Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

**ORDER DENYING LIBERTY
MUTUAL'S MOTION FOR LIMITED
INTERVENTION**

FILED
2017 FEB -6 PM 2:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Presiding Judge:

Liberty Mutual's Attorney:

Plaintiff's Attorney:

Defendant's Attorney:

Date of Hearing:

Court Reporter:

Hon. Deadra L. Jefferson

Robert Calamari, Esq.

John Hayes, IV, Esq.

John A. Massalon, Esq.

January 23, 2017

Ruth Weese

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SC Court of Appeals

On January 23, 2017, this matter came before this Court for a hearing on Liberty Mutual's

Second Motion for Limited Intervention, filed January 19, 2017.¹ Present at the hearing was

Robert Calamari of Nelson, Mullins, Riley & Scarborough appearing for Liberty Mutual. John A.

Massalon of Wills, Massalon & Allen appeared for the Wieland 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., John

¹ Liberty Mutual's First Motion for Limited Intervention was filed on October 13, 2016. The Motion was subsequently withdrawn on December 5, 2016 by Attorney Robert C. Calamari.

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Wieland Homes, Inc., and Builders Support Services of the Carolinas). Additionally present was John Hayes, IV, attorney for Plaintiff Waverly at Hamlin Plantation, who joined in with Attorney John A. Massalon in opposing the motion. Based on the foregoing, Liberty's Motion to Intervene is denied.

Liberty insured the Wieland Defendants under some twelve (12) insurance policies over twelve (12) years. This is a construction defect dispute involving over one hundred (100) townhomes at Waverly at Hamlin Plantation filed in 2013.² Liberty Mutual, a CGL insurance carrier for Wieland, hired counsel to defend Wieland under a reservation of rights beginning in May 2016. Liberty has moved to intervene into this action for the limited purpose of submitting special verdict questions related to allocation of covered and non-covered damages during the trial that began on Monday January 23, 2017.

Liberty Mutual's motion does not fall within the ambit of South Carolina Rules of Civil Procedure, Rule 24 — Intervention. SCRPC Rule 24(a) provides for intervention as of right when (1) a statute provides a right to intervene; and (2) the movant claims an interest relating to the property or transaction which is the subject of the action and that he is so situated that the disposition of the action may impair or impeded his ability to protect that interest. SCRPC Rule 24(b) provides for permissive intervention when (1) a statute confers a conditional right to intervene; or (2) where movant's claim and main action have question of law for fact in common. Also, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties. Liberty does not claim a statutory right to intervene, conditional or otherwise. Further, Liberty does not claim an interest in the subject matter of the

² A companion case Sills v. John Wieland Homes of the Carolinas, Inc. et al, C.A. 2014-CP-10-4335 is being tried simultaneously with the above-captioned matter. Liberty did not move to intervene in the companion case which would also be a basis to further confound the jury and to deny the motion to intervene.

dispute between the Plaintiffs and the Wieland Defendants. The purpose of Liberty's intervention request is to submit special interrogatories to the jury pertaining to the issue of insurance coverage. The undersigned is not convinced that the interest that Liberty seeks to protect is sufficient under Rule 24 because that interest is probably not ripe until such time, if ever, as the jury returns a verdict for Plaintiffs against the Wieland Defendants.

Additionally, Rule 24 does not contemplate or permit the limited intervention sought by Liberty. Liberty does not seek to participate in the trial as a party. The rule cited in Liberty's motion speaks only of intervention. Therefore, the relief requested by Liberty is not available under SCRCF Rule 24.

Nonetheless, Liberty Mutual attempts to justify its request by stating that (1) it is seeking to comply with "directives of the recent Heritage opinion," referencing a 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. The Heritage majority opinion cannot fairly be read to direct or approve Liberty'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.⁴ As stated in Heritage, the insurance company "cannot overcome the law in South Carolina concerning general verdicts." Id. at Fn. 11. 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. Id. However, the Heritage case does not authorize

³ It is not clear if the Heritage opinion is final as the time to file for rehearing would not appear to have passed.

⁴ The Court in Heritage references the cases of Magnum Foods, Inc. v. Cont'l Cas. Co., 3 F.3d 1491, 1498 (10th Cir. 1994) which relied upon Duke v. Hoch, 468 F.2d 973, 979 (4th Cir. 1972). Those cases speak more to the duties of insurance companies in notifying their insureds of conflicts in advance, were not construction cases, and do not direct that an insurer be permitted to intervene into a case on the eve of trial for the limited purpose of obtaining a special verdict or special interrogatories.

or direct an insurer like Liberty to intervene in a case under circumstances that exist here for several reasons.

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. Id. at p. 54. 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.

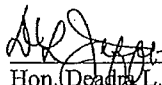
Second, the risk of jury confusion is unacceptably high. During oral argument counsel for Liberty expressed his intention to submit special interrogatories for the jury to answer presumably pertaining to the allocation of any liability among covered and uncovered claims. Less clear is how evidence would 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

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would have no right under the Rules of Civil Procedure or the Rules of Evidence to examine witnesses or introduce evidence.

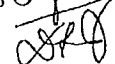
Therefore, Liberty's motion to intervene is denied. In summary, this "non-party" intervention, on the eve of trial, will only complicate and delay the underlying action, confuse the jury, and introduce a question of insurance coverage that is simply not the subject matter of this action.

Accordingly the motion is DENIED.



Hon. Debra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

February 10, 2017
Charleston, SC
At Chambers

Page 5 of 5 ⁵⁴⁵


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

RECEIVED
DEC 29 2017
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
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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, Richard Ditullio,
Richard Ditullio a/k/a RDT Contracting, LLC,.....

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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Columbia, South Carolina

December 15, 2017

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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DEC 15 2017

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
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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, 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

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DEC 29 2017

SC Court of Appeals

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DEC 29 2017

SC Court of Appeals

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 Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Liberty Mutual Fire Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

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12/15, 2017