THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oakes At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present), ... Respondents,

v.

Professional Plastering & Stucco, Inc., Maria Arias, and Miquel Rosales,.....Defendants,

-and-

National Fire & Marine Insurance Company, Inc., ... Petitioner.

APPENDIX

John L. McCants
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INDEX

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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April 5, 2012

Jesse Kirchner, Esquire
Michael A. Timbes, Esquire
Thurmond Kirchner Timbes &
Yelverton, P.A.
15 Middle Atlantic Wharf, 101
Charleston, SC 29401

Re: Teseniar, Mark v. National Fire
Case #2011193671

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding your Motion in the above case. Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in the case will be sent to the Clerk of Court for Charleston County after fifteen (15) days, exclusive of the date of filing this Order.

Very truly yours,

V. Claire Allen, Deputy
CLERK

JAK/jt

cc: John L. McCants, Esquire
John T. Chakeris, Esquire
Justin O'Toole Lucey, Esquire
Phillip Ward Segui, Esquire
W. Jefferson Leath, Esquire

The South Carolina Court of Appeals

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., Respondents,

v.

Professional Plastering & Stucco, Inc., Maria Arias, and Miquel Rosales, Defendants,

National Fire & Marine Insurance Company, Appellant.

The Honorable Kristi Lea Harrington
Charleston County
Trial Court Case No. 2008-CP-10-00049

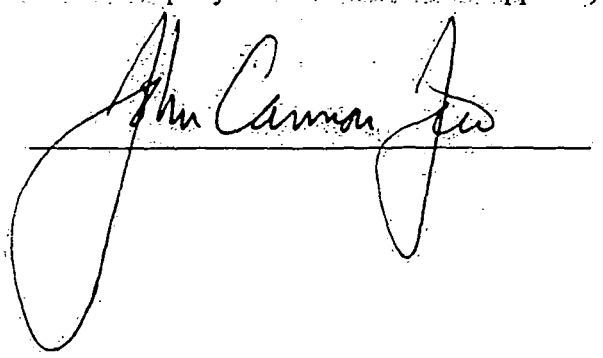
ORDER

National Fire & Marine Insurance Company (National Fire), who was not a party to the underlying action, has filed a notice of appeal from the trial court's oral ruling denying National Fire's request for a Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories pursuant to Rule 49, of the South Carolina Rules of Civil Procedure. Respondents have filed a motion to dismiss, arguing National Fire cannot appeal from any matter arising from the underlying trial because National Fire was not a party in the action, and never moved to intervene. National Fire filed a return.

After careful consideration, this appeal is dismissed. See Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); Ex parte Condon, 354

S.C. 634, 642, 583 S.E.2d 430, 434 (2003) ("[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal.").

IT IS SO ORDERED.



Columbia, South Carolina

cc: John L. McCants, Esquire
Jesse Kirchner, Esquire
Michael A. Timbes, Esquire
John T. Chakeris, Esquire
Justin O'Toole Lucey, Esquire
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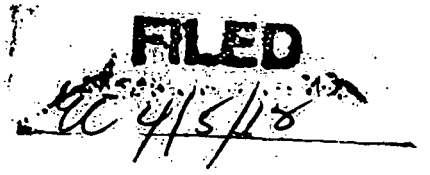
W. Jefferson Leath, Esquire



The South Carolina Court of Appeals

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September 05, 2012

John Lucius McCants
PO Box 2285
Columbia SC 29202

Re: Teseniar, Mark v. National Fire
Appellate Case No. 2011-193671

Dear Counsel:

The Order Denying the Petition for Rehearing was filed and mailed on August 30, 2012. The court is considering the Suggestion for Rehearing En Banc; therefore, the time limits to file the Petition for Certiorari are being held in abeyance.

Very truly yours,

Jenny A. Kitchings

CLERK

cc: Jesse A. Kirchner
Justin O'Toole Lucey
Phillip Ward Segui, Jr.
W. Jefferson Leath, Jr.
John T. Chakeris
Michael A. Timbes

The South Carolina Court of Appeals

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December 05, 2012

John Lucius McCants
PO Box 2285
Columbia SC 29202

Re: Teseniar, Mark v. National Fire
Appellate Case No. 2011-193671

Dear Counsel:

Your Suggestion for Rehearing En Banc has been considered and rejected by the Court. The remittitur will be sent in accordance with the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A. Kitchings

CLERK

cc: Jesse A. Kirchner
Justin O'Toole Lucey
Phillip Ward Segui, Jr.
W. Jefferson Leath, Jr.
John T. Chakeris
Michael A. Timbes

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Plaintiffs/Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. ..... Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

John L. McCants, Esquire
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Attorney for Appellant

Appellant National Fire & Marine Insurance Company ("Appellant"), by and through the undersigned counsel, petitions the Court of Appeals, pursuant to Rule 221, SCACR and Rule 219(b), SCACR, to rehear, *en banc*, the Order of the Honorable John C. Few, filed on April 5, 2012, dismissing the appeal of Appellant.

STATEMENT OF CASE

On or about January 4, 2008, Respondents Mark F. and Nan M. Teseniar, on behalf of themselves and others similarly situated, filed a civil action, C/A 2008-CP-10-49, in the Court of Commons Pleas, Ninth Judicial Circuit, alleging design and construction defects, and resulting water intrusion damages, within the buildings comprising the Twelve Oaks at Fenwick Plantation Horizontal Property Regime. Respondents filed the civil action initially against the developers but thereafter amended their complaint to include numerous other parties involved in the design and construction of the buildings, including the architect, general contractor and subcontractors, including Professional Plastering & Stucco, Inc. ("PP&S"). Appellant issued an insurance policy with commercial general liability coverage to PP&S effective for the period May 30, 2003 to May 30, 2004 (the "Policy"). Appellant is providing a defense in the civil action (now on appeal- Case No. 2011196386) to PP&S by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC, pursuant to the Policy and subject to a reservation of rights.

On March 8, 2011, Appellant filed and served a Request for Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P. 49 (the "Request") in the civil action. The Request came before the trial court for a hearing on May 3, 2011; however, the trial court continued the Request until the time of trial scheduled to start on May 9, 2011 against PP&S only. The trial court

held a jury trial the week of May 9, 2011, on the causes of action against PP&S. On May 13, 2011, prior to the case going to the jury for deliberation, the trial court orally denied Appellant's Request. The trial court did not issue a written order. On May 13, 2011, the jury returned a verdict in favor of Respondents in the amount of $7,723,225.00. The trial court entered judgment against PP&S on May 16, 2012. Appellant filed and served a Notice of Appeal on June 10, 2011.[1] On January 31, 2012, Respondents filed a motion to dismiss Appellant's appeal. Appellant filed a response to the motion to dismiss on February 9, 2012. The Honorable John C. Few issued an order, filed on April 5, 2012, granting the motion to dismiss.

ARGUMENT

Citing Rule 201(b), SCACR and Ex parte Condon, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003), Judge Few ruled that Appellant had to be a named party in the civil action in order to appeal the ruling against Appellant that is the subject of this appeal. Judge Few misapprehended Rule 201, SCACR, and Ex parte Condon is distinguishable.

Rule 201(b), SCACR states, "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." Appellant is a party. Appellant is a party to the motion and order that is the subject of this appeal.[2] The fact that Appellant is the party to the

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[1] On May 16, 2011, Respondents commenced a civil action in the Court of Common Pleas, Charleston County seeking a declaratory judgment that Appellant and the other insurers that issued insurance policies to PP&S owed indemnity to Respondents for the judgment. The civil action was removed to the federal court and is now pending before the Honorable C. Weston Houck of the United States District Court for the District of South Carolina.

[2] The usual cases on standing are the ones where a court must determine whether a party is aggrieved by an order. See Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (S.C. App. 2001). The cases typically arise where a citizen or group challenges some government action. Beaufort Realty Co., Inc., 346 S.C. 298, 551

ruling, which is the subject of this appeal, distinguishes this case from Ex parte Condon, 354 S.C. 634, 583 S.E.2d 430. In Ex parte Condon, the Supreme Court dismissed the appeal by the South Carolina Attorney General pursuant to Rule 201, SCACR. The Attorney General was neither a party to the civil action nor *the party* to the specific ruling that was being appealed in the civil action. The Attorney General's interest in the civil action was only a general one, based on his position as a state officer, and his belief that he was charged to protect the interest of the citizens of South Carolina. Ex parte Condon, 354 S.C. 634, 640, 583 S.E.2d 430, 433. The specific interest of Appellant is much different than the generalized one, in the ruling on appeal, of the Attorney General in Ex parte Condon. Appellant *is* the specific party aggrieved by the ruling that is the subject of this appeal.

Judge Few cited the language in Ex parte Condon, "[t]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal" as a basis that Appellant must be a named party. First, Judge Few's decision may be correct if Appellant were appealing the jury verdict or judgment in Appellant's name, not PP&S. It would be logical that Appellant should be a named party in that situation just as the Supreme Court said the Attorney General must be in Ex parte

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S.E.2d 588 (South Carolina Coastal Conservation League challenging decision by Beaufort Zoning Board of Appeals); Carolina Alliance for Fair Employment v. South Carolina Dept. of Labor, Licensing, and Regulation, 337 S.C. 476, 523 S.E.2d 795, (S.C.App.,1999)(Carolina Alliance for Fair Employment challenging a South Carolina wage notification statute governed by the South Carolina Department of Labor, Licensing and Regulation). Smiley v. South Carolina Dept. of Health and Environmental Control, 374 S.C. 326, 649 S.E.2d 31 (2007)(Property owner challenge to decision by Office of Ocean and Coastal Resource Management/South Carolina Department of Health and Environmental Control). The issue of standing also arises in cases where the Court must decide whether a named party to a civil action is aggrieved by a decision made within the case. Shaw v. City of Charleston, 351 S.C. 32, 567 S.E.2d 530 (S.C.App.,2002).

Condon. The quoted language does not apply to present facts. Referring to 4 C.J.S., Appeal and Error, § 242 (2012), "[g]enerally, the only persons who may appeal include a party to the action or proceeding below, *or to the judgment or order*, a legal representative of a party, or a person having privity of estate, title, or an interest that appears from the record." Further, "[t]he term 'party' in a statute has been construed, not in the technical sense as necessarily importing a litigant before the court in the proceeding in which the judgment or order was rendered, but as including any one on whose interest it has a direct tendency to inure, and it has been held that one not a 'party' may nevertheless be a 'party aggrieved' within statutes governing the right of review. A statute granting a right to appeal by a person aggrieved has been given a liberal construction with regard to the word 'person,' as including a nonparty." 4 C.J.S., Appeal and Error, § 242 (2012).

Second, Rule 201(b), SCACR has not been interpreted by the South Carolina Supreme Court to require that an aggrieved party be a named party, or there is no standing to appeal. See In Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986). In Ex Parte Whetstone, a non-party witness appealed from an order directing him to attend a deposition and produce certain documents. The respondent moved to dismiss the appeal on the ground the order was interlocutory and not directly appealable. The Supreme Court granted the motion to dismiss on the basis that an order directing a non-party to submit to discovery is not immediately appealable. In Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881. The Supreme Court held that the non-party witness had two alternatives to contest the discovery: 1) the witness may either comply with the discovery order and waive any right to challenge it on appeal, or 2) refuse to comply with the order *and*

appeal after he is held in contempt for his failure to comply. In Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881, 882. In Ex parte Whetstone is judicial precedent for the italic words cited above in 4 C.J.S., Appeal and Error, § 242 (2012). Reading Rule 201(b) SCACR to require that one must always be a named party to the civil action disregards the cases where a party is specifically aggrieved by an order or judgment of the court, but is not a named party to the civil action.

Third, formal intervention by an insurer will not insulate an insurer from the same motion to dismiss pursuant to Rule 201(b), SCACR. If Appellant formally moved to intervene, and that motion was denied, Appellant would not have standing to appeal because it would not be a named party in that instance. The result is the same as here – there is no standing to appeal. An insurer should have the right to appeal because the insurer is the party to a specific order that aggrieves the insurer. Rule 201(b), SCACR cannot be read to require in every case that a person or entity be a named party. The focus for standing is on whether the party, subject to the order, judgment, sentence or decision, is aggrieved to have standing on appeal.

Fourth, requiring formal intervention is inconsistent with the role of insurance relative to the civil action in which liability of an insured is the issue. The South Carolina Supreme Court has instructed insurers to take some action in the underlying civil action as done by Appellant. See Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) ("Newman"). In Newman, the South Carolina Supreme Court addressed the issue of insurance coverage for construction and design defects related to a building's envelope and resulting water intrusion claims to other portions of the building structure. The facts in Newman are similar to the ones in the underlying civil action.

After the arbitrator issued an award in Newman, Auto-Owners Insurance Company filed a declaratory judgment civil action with respect to the issue of insurance coverage for the removal and replacement of the stucco system and the allowance for any resulting water damaged sheathing and/or framing. The trial court ruled in favor of the homeowner holding that the policy covered both the cost for the removal and replacement of the stucco and the allowance for any water damaged sheathing and framing. Auto-Owners appealed. The Supreme Court in Newman held that while there was coverage for "property damage", the insurance policy did not cover the cost to remove and replace the stucco and relied on Exclusion n, the "Recall of Products, Work or Impaired Property" exclusion. Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546.

Although the Supreme Court ruled that Exclusion n excluded coverage for the removal and replacement of the stucco, the Supreme Court nonetheless required Auto-Owners to pay the entire judgment (removal and replacement included) because it found that Auto-Owners had not addressed the issue in the underlying arbitration. The Supreme Court stated the following:

> Nevertheless, it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. 5 (Citation Omitted)

CONCLUSION

> For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no

> evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

Footnote 5 reads as follows:

> Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547.

Accordingly, Newman provides that an insurer takes some action in the underlying civil action.

Formal intervention by an insurer is inconsistent with its role relative to the liability action involving the insured. Intervention by an insurer as a party pursuant to Rule 24 of the South Carolina Rules of Civil Procedure is problematic and inconsistent with other principles of law. An insurer should not intervene as could the Attorney General in Ex parte Condon. To Illustrate, like in the present civil action, in Northwestern Nat. Life Ins. Co. v. Council of Unit Owners of Treetop Condominiums, 907 F.2d 1139 (Table), 1990 WL 86206 (4th Cir. 1990)(Unpublished), a horizontal property regime filed a construction defect claim against the stucco applicator. The stucco applicator had a liability insurance policy with Northwestern that was in effect at the time of the allegedly defective construction. Northwestern disclaimed liability under the policy to the stucco applicator, but agreed to pay the costs of the stucco applicator's defense because there was at least the potential that the regime sustained damages covered under the policy.

Northwestern moved to intervene pursuant to Fed. R.Civ.P. 24(a)(2) as a party defendant. Northwestern Nat. Life Ins. Co., *p. 1-2. Northwestern argued that its interest in the damages issue justified intervention as a matter of right under Fed.R.Civ.P. 24(a)(2) and, alternatively, that permissive intervention under Rule 24(b)(2) was appropriate where common questions of fact respecting the nature and extent of the regime's damages were present in both the underlying action and the coverage issue. Northwestern Nat. Life Ins. Co., *p. 1. The district court did not permit intervention; and the Fourth Circuit Court of Appeals affirmed the decision. Northwestern Nat. Life Ins. Co., *p. 1-2.

The district court's decision to deny intervention was based in part on the conflict with allowing an insurer to intervene as a named party. Northwestern Nat. Life Ins. Co., * p. 2. The district court found that trying a defective construction case and an insurance coverage case in effect at the same time before the same jury raised "insurmountable problems," including a conflict of interest in Northwestern's duty to defend the insured while protecting its own interests, the possibility of prejudice to the insured from the disclosure of his insurance coverage and the necessity of special verdicts on the damages question, and concerns over res judicata and collateral estoppel effects. Northwestern Nat. Life Ins. Co., *p. 2. The district court opined that a declaratory judgment action was the appropriate method to resolve coverage issues. Northwestern Nat. Life Ins. Co., *p. 2.

Appellant submits that making the insurer a party to the underlying construction defect action is inconsistent with other principles of South Carolina law. The appropriate forum to decide coverage is a separate declaratory judgment civil action, which is what Respondents did do and which is pending in Civil Action No.: 2:11-cv-01452-CWH

(United States District Court, District of South Carolina). The construction defect civil action should be free of the mention of insurance. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962) ("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

The Supreme Court has a long history of not allowing the existence of insurance to be introduced in litigation between a third party plaintiff and an insured. Hence, Appellant should not be made to intervene or appear in the underlying trial between the Respondents and PP&S for the purpose of showing that certain damages may fall within insurance policy exclusions. See Dobson v. American Indemnity Co., 227 S.C. 307, 87 S.E.2d 869, 870 (1955). The bar exists to prevent a jury's liability determination from being improperly influenced or prejudiced. See also Cox v. Employers Liability Assur. Corp., 191 S.C. 233, 236, 196 S.E. 549, 550 (1938) ("The writer of this opinion, after twelve years' experience upon the trial bench, knows of no more effective method of embalming a defense than that of informing a jury in a negligence case that the defendant in the suit is protected against their verdict by liability insurance."); Horsford v. Carolina Glass Co., 92 S.C. 236, 258-59, 75 S.E. 533, 541 (1912) ("There can be no doubt on the bench or at the bar that, in an action by an employee against his employer to recover damages for personal injury, both reason and authority forbid bringing into the evidence or argument the fact that defendant is protected by employer's liability insurance. Such evidence or argument has a manifest and strong tendency to carry the jury away from the

real issue and to lead them to regard carelessly the legal rights of the defendant on the ground that some one else will have to pay the verdict.").

The purpose of a declaratory judgment action is to assess the legal relationship and responsibilities of the parties. S.C. Code Ann. § 15-53-20 (Supp. 2009) ("Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations."); 26 C.J.S. Declaratory Judgments § 3 (2001) ("The object of a declaratory judgment is to enable a party whose rights, privileges, and powers are endangered, or uncertain, and to invoke the aid of the court to obtain a declaration of rights or legal relations."); 26 C.J.S. Declaratory Judgments § 66 (2001) ("A declaratory judgment may be invoked to adjudicate the construction and operation of liability or indemnity insurance policies regarding the rights and liabilities of the parties. Accordingly, a suit for a declaratory judgment may determine the extent of coverage, the insurer's liability and duties, such as the duty to defend or to indemnify the insured against a claim on which the suit is brought."). Declaratory judgments allow a court to determine the extent of an insurer's liability due to the type or categorization of damages, but declaratory judgments do not establish the amount of damages, that is for the trier of fact. 22A Declaratory Judgments § 133 (2003) ("Declaratory suits to determine the scope of insurance coverage have often been brought independently of the underlying claims, even though the exact amount to which the insurer may be liable depends on the outcome of the underlying suits against the insured who seeks the declaratory judgment.").

The Supreme Court has previously recognized the purpose of a declaratory judgment action in an insurance coverage matter. In Sims v. Nationwide, 247 S.C. 82,

84, 145 S.E.2d 523, 523 (1965) evidence indicated the insured intentionally caused a vehicle collision, and intentional acts were excluded from the insurance policy involved there. Nationwide refused to defend Sims in the underlying tort action. Id. In the subsequent indemnity case, Nationwide attempted to offer evidence that Sims' action was intentional and therefore excluded from the policy. Sims v. Nationwide, 247 S.C. 82, 84, 145 S.E.2d 523, 524. The trial court held that Nationwide was precluded from entering this evidence since it did not do so in the underlying litigation between its insured and the third party. Sims v. Nationwide, 247 S.C. 82, 145 S.E.2d 523.

On appeal, this Court reversed the trial court's decision to preclude the insurer's ability to offer evidence as to the exclusion stating that the general rule—"where an insurance company has notice and opportunity to defend an action against its insured, the company is bound by pertinent material facts established against its insured, whether it appears in the defense of the action or not"—is inapplicable where the interests of the insured and insurer *diverge* in the underlying trial." Sims v. Nationwide, 247 S.C. 82, 84-85, 145 S.E.2d 523,524 (emphasis added). In recognizing that the interests of the insured and insurer can diverge, the Sims court stated:

> It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance.

Sims v. Nationwide, 247 S.C. 82, 86-87, 145 S.E.2d 523,525 (quoting Farm Bureau Mutual Auto Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949).

In so holding, the Sims Court additionally relied on the Restatement of the Law of Judgment, section 107(a), Comment (g), which states, "it is stated that this rule is binding only as to issues relevant to the proceeding; and that the judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the circumstances under which he was required to give indemnity do not exist." Sims v. Nationwide, 247 S.C. 82, 87, 145 S.E.2d 523,525. Accordingly, under Sims, when an insurer and an insured's interests diverge in the underlying case, an insurer may introduce evidence supporting its interest in the declaratory judgment indemnity case. To hold otherwise would deprive the insurer of its day in court.

The appropriate forum to address insurance coverage is in the declaratory judgment action, not in the construction defect liability civil action. However, Newman indicates that an insurer may lose the ability to establish some distinction between covered and uncovered damages in the declaratory judgment action unless the insurer interjects itself to ask the fact finder to separate and value the elements of damage. If so, the only avenue to do so is through special interrogatories, not intervention as a party. The trial court denied Appellant's proffer of special interrogatories, and the jury was permitted to award an undifferentiated verdict. Therefore, the trial court erred in denying the Request.

CONCLUSION

The Court should rehear the decision of the Honorable John C. Few *en banc*.

Respectfully Submitted,

John L. McCants, Esquire
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Columbia, SC 29201
(803) 212-4959
E-mail: jmccants@ellislawhorne.com
Attorney for Appellant

April 20, 2012.

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Mark T. Teseniar, et al	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 08-CP-10-0049
	)	
Fenwick Plantation Tarragon, LLC et al	)	
	)	
	)	
Defendants.	)	

PARTIAL TRANSCRIPT OF JURY TRIAL
May 11-13, 2011

The within transcript is a portion of the jury trial held in the above-captioned action on May 10 through May 13, 2011, before The Honorable Kristie L. Harrington, in Courtroom 4C of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Jesse Kirchner, Esq.
Phillip Sequi, Esq.
John Chakeris, Esq.
Jefferson Leath, Jr., Esq.
Justin Lucey, Esq.
Appearing for Plaintiffs

J.J. Anderson, Esq.
Christy Mahon
Appearing for Defendants

Vivian Cross, Court Reporter
Transcribed by
Deborah Garrison
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

MR. McCANTS: I'm John McCants on behalf of Master Fire and Marine Insurance Company. Do you want to take up my matter after you finish with the case?

THE COURT: I will simply -- I can take up your matter very quickly. I am not going to entertain any suggestions as to requests to charge or as to verdict forms from parties not listed in the case and not parties to the case. I will, out of an abundance of caution, mark your request to charge and your verdict form as a Court's exhibit. Thank you.

MR. McCANTS: Note my objection. Thank you, Your Honor.

THE COURT: Thank you. Hold on one second. One more time -- we need your name, and if you could spell your last name for this court reporter. I believe my previous court reporter got everything. Stand right there. If you'll just spell it.

MR. McCANTS: Your Honor, I'm John McCants. I'm here on behalf of National Fire and Marine Insurance Company. My last name is M-C-C-A-N-T-S.

THE COURT: Thank you, Mr. McCants.

MR. MCCANTS: Thank you, Your Honor.

THE COURT: Mr. Kirchner?

MR. ANDERSON: Your Honor, I have one other matter. We are going to need to make a proffer of testimony of our witness, Mr. Dawkins, and wondered when you wanted to do that.

THE COURT: I'm trying to accommodate the jury's schedule, because one individual, who is our foreperson, that needs to be out by 5:00 o'clock. So I'm trying -- we could -- while they deliberate you could proffer Mr. Dawkins. That's my inclination.

MR. KIRCHNER: Your Honor, I just want to make it clear for the record that what I'm concerned with is the sequence, in that the proffer has not been made prior to -- the proffer is being made after the opportunity for him to testify. And I wanted to make sure that there was no waiver of any issue concerning that.

THE COURT: The record will be very clear as to what we're doing, and I will allow him to be proffered at an appropriate time if it does not delay the proceedings any further

and that it will not indicate a waiver of any objections that you may have. Thank you, Mr. Anderson.

MR. LUCEY: Your Honor, may I approach and hand you our jury charges?

THE COURT: I have one question to you is as to Defendants' 17. That's the only question I have.

MR. LUCEY: We've reviewed that and have no objection, Your Honor.

THE COURT: You have no objection to including Defendant's 17. Is that correct?

MR. LUCEY: That's correct.

THE COURT: Thank you. All the jurors are here. Are we ready to proceed?

MR. MCCANTS: Your Honor, I just want to make sure what you're marking. Is it the document I sent your law clerk in the e-mail?

THE COURT: The letter. It's a stack of papers. And, Mr. McCants, I will take that up. I'm really trying to get this trial concluded to accommodate my jurors so that we don't have to -- that I don't have to sequester them. All right? Because they're getting a little antsy.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Mark F. Tesenlar & Nan M. Tesenlar, et al. ☐ Plaintiff v. Fenwick Plantation Tarragon, LLC, Et Al. ☒ Defendant.	)	IN THE COURT OF COMMON PLEAS CASE NO. 08-CP-10-0049 MOTION INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Phillip W. Segui, Jr., Esquire, Bar No. Address: Segui Law Firm, PC 864 Lowcountry Blvd., Suite A Mt. Pleasant, SC 29464 phone: (843) 884-1865 fax: e-mail: other:	, Bar No. Address: phone: fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Request for a Special Verdict and/or General Verdict Form, etc.
Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion –
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant — 03/08/2011 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Tesenlar & Nan M. Tesenlar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

FILED
2011 MAR -9 AM 10: 17
JULIE J. ARMSTRONG
CLERK OF COURT
BY_____

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

REQUEST FOR A SPECIAL VERDICT FORM AND/OR GENERAL VERDICT FORM ACCOMPANIED BY WRITTEN INTERROGATORIES PURSUANT TO S.C.R.CIV.P. 49

National Fire & Marine Insurance Company ("National Fire"), by and through the undersigned counsel, does hereby request that the Court provide a special verdict form to the jury and/or a general verdict form accompanied by written interrogatories. National Fire issued an insurance policy with commercial general liability coverage to Professional Plastering & Stucco, Inc. ("Professional Plastering") for the period May 30, 2003 to May 30, 2004. National Fire is providing a defense to Professional Plastering by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC pursuant to the policy and a reservation of rights. National Fire is an interested party in the civil action as one or more parties may seek indemnity under the policy for any verdict. National Fire is informed and believes that the policy does not cover certain alleged damages. In that regard, National Fire cites to the South Carolina Supreme Court decisions in Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, S.C. Sup. Ct. Order dated January 7, 2011 pg. 32 (Shearouse Adv.Sh. No. 1)(Petition for Rehearing Pending), Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) and L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 621 S.E.2d 33 (2005).

To avoid potential prejudice with the verdict, National Fire requests that the Court submit a special verdict form and/or general verdict with special interrogatories without reference to National Fire or insurance coverage. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962)("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

National Fire requests the Court submit appropriate forms to the jury pursuant to S.C.R.Civ.P. 49 for the jury to differentiate damages alleged to be caused by Professional Plastering. National Fire requests that the Court prepare these forms at such time during the course of the trial as is appropriate based upon the evidence presented at trial. National Fire reserves all rights as to the issues of defense and/or indemnity.

Respectfully Submitted,

John L. McCants, Esquire
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, Fifth Floor
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190
ATTORNEYS FOR NATIONAL FIRE & MARINE INSURANCE COMPANY

Columbia, South Carolina
March 8, 2011

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

CERTIFICATE OF SERVICE

FILED
2011 MAR -9 AM 10: 17
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

I, Susan Bennett, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of a **Request for Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P. 49** upon the below-referenced counsel of record this the 8th day of March 2011 by depositing a copy of the same in the US Mail, postage prepaid and addressed as follows:

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ELLIS: LAWHORNE

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March 8, 2011

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street Suite 106
Charleston, SC 29401-2258

RE: Mark F. Teseniar and Nan M. Teseniar, *et al.* vs. Fenwick Plantation Tarragon, LLC, *et al.*
Civil Action No.: 2008-CP-10-0049
EL&S File No.: 002090-58983

Dear Ms. Armstong:

Enclosed herein for filing please find an original and one copy of a **Request for Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P. 49** in connection with the above-referenced matter. Please file the original and return a clocked-in copy of same to my office using the enclosed self-addressed, postage-paid envelope.

By copy of this letter to counsel of record and attached Certificate of Service, I am hereby serving each with a copy of same.

Thank you for your assistance in this matter and should you otherwise have any questions or comments, please do not hesitate to contact me.

With warm personal regards, I am

Sincerely yours,

John L. McCants

JLM/sb

Enclosure(s)

cc: (w/ encl.)
Phillip W. Segui, Jr., Esquire

John T. Chakeris, Esquire
Jesse A. Kirchner, Esquire
W. Jefferson Leath, Jr., Esquire
Michael B. T. Wilkes, Esquire
Ellen S. Cheek, Esquire
Laura Johnson Evans, Esquire
Randall C. Stoney, Jr., Esquire
Barbara J. Wagner, Esquire
Jonathan J. Anderson, Esquire
Charles G. Blackburn, Esquire
Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
R. Bryan Barnes, Esquire
J. Geoffrey Osborn, Jr., Esquire
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David S. Cobb, Esquire
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Jason A. Daigle, Esquire
Christopher M. Adams, Esquire
Charles L. Appleby, IV, Esquire
Robert D. Waltz, Esquire
M. Brittain Travis, Esquire
William A. Scott, Esquire
Justin O. Lucey, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Tesenlar & Nan M. Tesenlar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

FILED
2011 MAY 12 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

Memorandum Submitted by National Fire & Marine Insurance Company

National Fire & Marine Insurance Company ("National Fire"), by and through the undersigned counsel, hereby submits this memorandum in regards to its Request for a Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P.49.

National Fire issued an insurance policy with commercial general liability coverage to Defendant Professional Plastering & Stucco, Inc. ("Professional Plastering") effective for the period May 30, 2003 to May 30, 2004 (the "Policy"). National Fire is providing a defense to Professional Plastering by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC, pursuant to the Policy and a reservation of rights to challenge any obligations for a defense and indemnity. In addition, Audubon Insurance Company, a subsidiary of Chartis U.S., Inc., is providing a defense to Professional Plastering and retained Everett A. Kendall, Esq. and Christy Mahon, Esq. of Sweeny Wingate & Barrow, PA. to defend Professional Plastering.

The subject civil action is a building construction defect one and concerns a condominium community located in Charleston, S.C. known as Twelve Oaks at Fenwick Plantation ("Twelve Oaks"). The buildings in Twelve Oaks consist of ten (10) residential buildings, a pool house and a leasing center. Summit Contractors Group, Inc. was the general

contractor for the construction of the buildings and constructed the buildings in the early 2000s for Defendant Fenwick Plantation Tarragon, LLC, or other Tarragon entity, to be a 216 unit apartment complex.

Summit Contractors and Professional Plastering executed a Subcontract Agreement dated March 14, 2002, for Professional Plastering to perform the "stucco" scope of work for the construction of the buildings. Plaintiffs allege that Professional Plastering subcontracted with Maria Arias, Miquel Rosales and APS Enterprises Unlimited, Inc., to perform the stucco scope of work. (Fifth Amended Complaint ¶ 14, 15). The City of Charleston issued a Certificate of Occupancy dated December 17, 2002 for the buildings. The Twelve Oaks community was converted to a condominium regime in 2006.

Plaintiffs commenced the civil action on or about January 4, 2008 complaining about the construction of the buildings and water intrusion damages (See e.g., Fifth Amended Complaint ¶ 42). Plaintiffs allege as follows:

> The design and construction defects have resulted in repeated water intrusion into the residences, failure of the components of the exterior envelope, failure of the structural system(s), and other consequential damages to the common elements of the Association and to the interior of the units. Upon information and belief, these adverse events have occurred each and every year since construction; and constitute 'occurrences' and 'property damage' and compensable damages under standard and/or typical general liability and/or completed operations insurance policies maintained by the defendants herein; further the negligence of each defendant has resulted in damage to the work of the others.

(Fifth Amended Complaint ¶ 42).

As to Professional Plastering, Plaintiffs allege, "[i]ts subcontract was to correctly install the stucco exteriors with the proper details and components so as to prevent water intrusion into the buildings in accordance with the building code requirements." (Fifth Amended Complaint ¶

8). Further, "[t]hese subcontractors were to correctly install the stucco exteriors with the proper details and components so as to prevent water intrusion into the buildings in accordance with building code requirements." (Fifth Amended Complaint ¶ 33). Plaintiffs allege as follows:

> In violation of its contractual and common law duties, Defendants Professional Plastering, Maria Arisas, Miquel Rosales, and APS Enterprises Unlimited, Inc. did not install the stucco and components in a competent and workmanlike fashion and in conformity to the requirements of the building code, but rather constructed the exterior building envelope of the buildings at Fenwick in a defective condition causing or contributing to the leaks into the buildings and in a manner which will require significant repair in order to maintain a water resistant or water management exterior as required by code and by good building practices.

(Fifth Amended Complaint ¶ 34).

Insurance coverage for the damages alleged by Plaintiffs are not determined in this civil action. To the extent there is a verdict against Professional Plastering, National Fire has reserved the right to have a court determine issues regarding coverage or indemnity under the Policy. The present civil action should otherwise be free of the mention of insurance. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962)("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

Insurance coverage for a construction defect, building envelope, water intrusion claim in South Carolina is addressed in Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009)("Newman") and Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, S.C. Sup. Ct. Order dated January 7, 2011 pg. 32 (Shearouse Adv.Sh. No. 1)(Petition for Rehearing Granted)("Crossman").

The facts in Newman involved a construction defect claim arising out of the construction

of a single family house. The homeowner and homebuilder submitted the claim to binding arbitration; and Auto Owners Insurance Company provided defense counsel to the builder pursuant to an insurance policy with commercial general liability coverage. The arbitrator awarded damages to the homeowner based on a contractor's itemized cost of repair proposal that included an estimate for the cost to remove and replace the stucco siding, and included an allowance to repair any water-damaged sheathing and framing that may be found once the stucco was removed from the house.

After the arbitrator issued the award, Auto-Owners filed a declaratory judgment civil action. The issue of coverage related to the damages for the removal and replacement of the stucco system and the allowance for water damaged sheathing and/or framing. The trial court ruled in favor of the homeowner holding that the policy covered the damages for the removal and replacement of the stucco and the allowance.

On appeal, the South Carolina Supreme Court affirmed the trial court and issued a decision holding that the CGL policy covered the damages for the removal/replacement of the stucco and the allowance. Auto-Owners petitioned for a rehearing, which the Supreme Court granted to Auto-Owners. The Supreme Court reheard arguments and issued a second decision, which replaced the first one. See Newman, 684 S.E.2d 541. In Newman, the Supreme Court held that there was an occurrence of property damage, i.e., faulty construction, performed by a subcontractor to the builder (insured), that resulted in physically damaged sheathing and framing (property damage). The Court also held that the CGL policy did not cover the damages for the removal and replacement of the stucco and relied on Exclusion N:

C. Damages awarded for replacement of the defective stucco

> Auto-Owners finally argues that even if an "occurrence" warrants recovery for the Homeowner's property damage, the trial court erred in determining that the CGL policy covered the arbitrator's itemized allowance for replacing and repairing the defective stucco itself as an incidental cost to repairing the damage to other property. We agree.
>
> Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself. Specifically, the policy exclusion provides that the insurance does not cover damages "claimed for any loss, cost or expense ... for the repair, replacement, adjustment, removal or disposal of ... 'Your product'; ... 'Your work'; or ... 'Impaired property'; if such product, work or property is withdrawn ... from use ... because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco-even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy-and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover. See LJ 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.

Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546.

In the present civil action, Plaintiffs have submitted a Preliminary Repair Estimate prepared by ProCon & Associates, Inc. Among other things, the estimate includes separate line item costs to remove and replace the stucco system, Professional Plastering's work, and to repair water damaged or deteriorated building materials. At the appropriate time, and if applicable, National Fire believes that this document may be sufficient to distinguish the different types of damages relative to insurance coverage. However, although the Supreme Court ruled that Exclusion N excluded coverage for the removal and replacement of the stucco, the Supreme Court required Auto-Owners to pay the entire judgment (removal and replacement included). The Supreme Court stated the following:

> Nevertheless, it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this

matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. 5 (Citation Omitted)

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

Footnote 5 reads as follows:

Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547.

Accordingly, National Fire is before this court seeking the requested relief herein.

In Crossman, Crossman Communities of N.C. constructed five condominium projects. Like the homeowners in the present civil action, the homeowners filed suit against Crossman Communities of N.C. after discovering construction defects and water damages with to the buildings. The homeowners alleged Crossman Communities of N.C. defectively constructed the buildings, and as a result, the buildings experienced substantial decay and deterioration. The parties stipulated that the property damage resulted from water intrusion, that the damage was progressive in nature, and the damage caused by the negligent construction of subcontractors. "The trial court ruled there was property damage 'that resulted from, and was in addition to, the subcontractors' work itself,' and thus, 'the property damage was caused by an occurrence'." Id. at 34. The Supreme Court reversed the trial court. The Supreme Court in Crossman also overruled Newman. However, parties in Crossman filed Petitions for Rehearing before the Supreme Court.

The Supreme Court granted the Petitions and scheduled oral argument for May 23, 2011. Accordingly, Crossman may not be a final decision as of the trial of the present civil action.

The Supreme Court in Crossman stated, "[t]hus, the issue we must resolve is: When faulty workmanship directly causes further damage to non-defective components of an insured's project, does this necessarily constitute an occurrence?" Id. at 46. The Supreme Court held, "[t]he natural and expected consequence of negligently installing siding to these condominiums is water intrusion and damage to the interior of the units. There is no fortuity element present under the factual scenario." Id. at 47. The Supreme Court stated, "[w]e hold that faulty workmanship can cause an occurrence." Id. at 46. However, "[f]aulty workmanship is not an 'occurrence'." Id. at 46.

The Supreme Court stated, "[w]e hold that where the damage to the insured's property is no more than the natural and probable consequences of faulty workmanship such that the two cannot be distinguished, this does not constitute an occurrence...." Id. at 47. "To provide coverage under these circumstances would transform the CGL policy into a performance bond..." Id. at 49. "Rather, the damage was a direct result and the natural and expected consequence of faulty workmanship; faulty workmanship did not cause an occurrence resulting in damage." Id. at 49, 50.

The Supreme Court addressed the exception to Exclusion L by stating, "the subcontractor exception is relevant only if there is a finding of initial coverage. That is, any property damage for which an insured seeks coverage must have been caused by an occurrence before the policy is triggered." Id. at 37. The Supreme Court also addressed Newman as follows:

> Th[e] finding of an 'occurrence' without regard to the fortuity component of an 'accident' was error." Id. at 44. "Newman lacked the predicate 'occurrence' as does the case before us. We overrule Newman to the extent it permitted coverage for faulty workmanship that directly causes further damage to property in the absence of an 'occurrence' with its

> fortuity underpinnings." Id. at 49. The Supreme Court stated, "[f]or faulty workmanship to give rise to potential coverage, the faulty workmanship must result in an occurrence, that is, an unintended, unforeseen, fortuitous, or injurious event." Id. at 49. The Supreme Court stated, "[d]amage that does not arise from a fortuitous event is not an occurrence. Damages to the insured's project that are the natural and probable consequences of faulty workmanship do not constitute an 'occurrence'."

Id. at 49.

Under the present circumstances, to avoid potential prejudice with the verdict, National Fire requests that the court submit a special verdict form and/or general verdict with special interrogatories and do so without reference to insurance. See Crocker v. Weathers, 126 S.E.2d 335.

National Fire believes that any special interrogatories must be based on the evidence presented at trial. Accordingly, it is premature to commit to specific interrogatories. However, to provide an example of the kinds of interrogatories that may be applicable, National Fire submits the attached interrogatories; and requests that the Court amend or modify these forms at such time during the course of the trial as is appropriate based upon the evidence admitted at trial. National Fire reserves all rights as to the issues of defense and/or indemnity.

Respectfully Submitted,

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April 29, 2011

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Tesenlar & Nan M. Tesenlar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

EXAMPLES OF WRITTEN INTERROGATORIES

1. Do you find that Defendant Professional Plastering & Stucco, Inc.'s ("Professional Plastering") installation of the stucco system or its scope of work proximately caused any physical injury to tangible property other than Professional Plastering's work?

Yes ____; No____.

2. If you answer "yes" to Interrogatory #1, please list or identify in the below space the physically injured tangible property other than Professional Plastering's work; and, if you answer "yes" to Interrogatory # 1, state the dollar amount of damages that you award for the physically injured tangible property other than Professional Plastering's work. To answer this interrogatory, you may use the property descriptions used in the ProCon & Associates, Inc.'s Preliminary Repair Estimate.

_____

_____

_____

_____

_____

_____

Dollar Amount: _____.

3. Do you find that Defendant Professional Plastering's installation of the stucco system or its scope of work proximately caused any damages that are the costs to repair and/or replace Professional Plastering's work?

4. If you answered "yes" to Interrogatory 3, state the dollar amount of damages that you award for the repair and/or replacement of Professional Plastering's work.

Dollar Amount: _____.

5. Do you find that Plaintiffs have met their burden of proof as to loss of use damages? If you answer yes, please identify the dollar amount that is part of your overall verdict against Professional Plastering that represents loss of use damages.

Yes ____ Dollar Amount: _____.

_____
(Foreman)

May ___, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Plaintiffs/Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. .....Appellant.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Petition for Rehearing and Suggestion for Rehearing *En Banc* on Plaintiffs/Respondents and other counsel of record by depositing a copy of same in the United States Mail, postage prepaid, on April 10, 2012, addressed to the following attorneys of record:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. .....Appellant.

RESPONDENTS' REPLY TO APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

The above-named Respondents hereby request that this Honorable Court deny the Petition for Rehearing and Suggestion for Rehearing *En Banc* of the Order of the Honorable John C. Few dismissing the appeal filed by Appellant, National Fire & Marine Insurance Company, Inc. ("Appellant").

BACKGROUND

The factual setting and procedural posture of the matter on appeal are crucial. Appellant is not a party to the lawsuit captioned above. Instead, Appellant is an insurer that provided a defense to Professional Plastering & Stucco, Inc. ("PPS") in the lawsuit under a reservation of

rights. Appellant never moved to intervene in the action, never made a formal appearance in the action, and, in keeping with the foregoing, never subjected itself to the jurisdiction of the circuit court. Appellant's only involvement in the week-long jury trial was to request[1] that the circuit court submit special interrogatories to the jury.[2] Notably, neither Respondents nor PPS, the only parties actually participating in the trial, endorsed Appellant's request. The circuit court denied Appellant's request from the bench without a written order. Appellant's scant involvement in the proceedings below is reflected in a short colloquy that occurred on the last day of trial, which starts at page 527 of the trial transcript.

Appellant appealed the circuit court's refusal to give the requested special interrogatories. Thereafter, Respondents moved this Court for an Order dismissing Appellant's appeal on the basis that it lacks appellate standing to challenge the Court's decision. Because Chief Judge Few neither overlooked nor misapprehended any matter of law or fact in dismissing Appellant's appeal, there is no basis upon which to grant Appellant's request for a rehearing.

LAW AND ANALYSIS

I. CHIEF JUDGE FEW NEITHER OVERLOOKED NOR MISAPPREHENDED ANY MATTER OF LAW OR FACT, AND REHEARING *EN BANC* IS NOT WARRANTED.

There is nothing raised in the Appellant's motion that demonstrates anything was overlooked or misapprehended. The operable facts are undisputed and fit squarely within the well-settled precedent relied upon by Chief Judge Few, and Appellant's request for rehearing is merely a recitation of the arguments it previously made. Rule 221(a), SCACR, requires that

[1] Attention is drawn to the Motion Information Form and Cover Sheet accompanying Appellant's Motion when it was filed. The section for "Defendant's Attorney" is completely blank. Similarly, the moving attorney, John L. McCants, Esquire, did not identify himself as counsel for either the Plaintiffs or a Defendant in the space provided beneath his signature. The reason for this is self-explanatory: he did not represent any "party" in the action, nor was he moving to intervene on behalf of any non-party claiming an interest in the case.

[2] Presumably, Appellant intended to use the answers supplied on its proposed verdict form in the underlying liability trial against its insured as evidence in a declaratory judgment action to address Appellant's coverage obligations stemming from PPS's negligent construction.

Appellant state with particularity the points that were overlooked or misapprehended by the Court. Here, there are none. As the Order states, the decision to dismiss was made after "careful consideration."

Further, rehearing *en banc* is disfavored and will not be ordered except "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 19, SCACR. Chief Judge Few's Order dismissing the appeal is squarely on point with prior appellate court decisions addressing the exact issue presented herein. Further, Appellants' material rights, *i.e.*, adjudication of its coverage responsibilities, are yet to be determined in an entirely independent proceeding. With that in mind, these are not the circumstances that warrant a rehearing or review *en banc*.

II. APPELLANT DOES NOT GAIN STANDING TO APPEAL SIMPLY BY FILING A REQUEST FOR SPECIAL INTERROGATORIES IN A PENDING IN CASE IN WHICH IT HAS OTHERWISE MADE NO EFFORT TO PARTICIPATE AS A PARTY.

Ex parte Condon, 354 S.C. 634, 583 S.E.2d 430 (2003) is directly on point, and Chief Judge Few's reliance upon its instruction is sound. In *Condon*, the Attorney General was not a party to the underlying action and never moved to intervene. Nevertheless, the Attorney General sought to appeal from the trial. In dismissing Attorney General Condon's appeal the Supreme Court observed,

> ...[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal. Accordingly, we dismiss this appeal based on the Attorney General's failure to move for intervention as required by *Rule 24, SCRCP*. Such a ruling avoids the necessity of addressing the Attorney General's standing to become involved in this action, and makes clear that the Attorney General is required to follow the Rules of Civil Procedure when he wishes to become involved in a case.

Id. at 642, 583 S.E.2d at 434. Appellant argues *Condon* is distinguishable on the basis that, unlike the Attorney General, Appellant is a "party" to its own motion. This logic is fundamentally flawed, and, at most, reveals a distinction without a difference. In the literal sense, Appellant was indeed a party to its own request. But that fact, standing alone, does not create standing to appeal. If Appellant's lack of appellate standing is not clear from *Condon*, as Appellant contends, it is nevertheless made certain by *Ex Parte: South Carolina Department of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010).

In *Ex Parte SCDMV*, the Department was not a party in the action, and it never moved to intervene pursuant to Rule 24, SCRCP. However, the Department did file successive motions seeking reconsideration by the circuit court under Rule 59, SCRCP, although it never moved to intervene. If Appellant's logic were applied, the Department should have had standing to appeal in *Ex Parte SCDMV* because the Department was a "party" to its own motions. However, the Supreme Court, citing *Condon*, summarily dismissed the Department's appeal, holding yet again that a non-party may not appeal under such circumstances. Applying *Condon* and *Ex parte SCDMV*, Appellant lacks standing to appeal regardless of whether Appellant was a party to its own motion. Appellant has cited to no case that supports the distinction it attempts to make.

In support of its request for rehearing, Appellant also suggests that Chief Judge Few's Order has the effect of mandating that, in every circumstance, one must first be accepted as a party in the action before a right of appeal attaches. This is not correct—the Order does not impinge upon the acceptable circumstances where a non-party is legally aggrieved by an order, creating standing to appeal. For example, consider the situation where a non-party files a motion to intervene under Rule 24, SCRCP. For more than a century, it has been the law of this state

that a non-party whose motion to intervene is denied has the right to appeal that denial.[3] *See Ex Parte Johnson v. Tunno*, 63 S.C. 205, 207-08, 41 S.E. 308 (holding the denial of a motion to intervene is appealable). This is precisely the situation in which a non-party is "aggrieved" by an order. This also explains why the proper procedure would have been for Appellant to have moved to intervene if it truly desired to participate in the trial.

Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 is equally unavailing to Appellant. *Whetstone* involved an appeal attempted by a non-party to the action after he was ordered to attend a deposition and produce documents. The appeal was dismissed as interlocutory, rather than for lack of appellate standing. In that regard, *Whetstone* has no application to the present matter except that it reiterates the requirement that a party must be aggrieved in the legal sense before he may appeal. *Id.* at 581, 347 S.E.2d at 882. In addition, although not a part of the court's reasoning given that the appeal was dismissed as interlocutory, the power of contempt over a non-party in the context of discovery arises from, *inter alia*, Rules 37 and 45, SCRCP. Both of these rules grant the circuit court the power to sanction non-parties for their failure to comply with lawful subpoenas and discovery efforts. For example, Rule 45, SCRCP, provides that "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed in contempt of the court from which the subpoena issued."[4] By its own terms, Rule 45 subjects the non-party who fails without cause to abide by a lawful subpoena to the enforcement powers of the Court. In stark contrast, it begs the question as to whether Appellant ever subjected itself to the circuit court's jurisdiction in the case below.

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[3] Appellants incorrectly state on page 5 of their Motion for Reconsideration that, "If Appellant formally moved to intervene, and that motion was denied, Appellant would not have standing to appeal because it would not be a named party in that instance." The reverse is true.

[4] Consider that the Court issuing the subpoena may be different from the circuit court in which the action is pending. The contempt power of the court provided under the Rules of Civil Procedure to enforce discovery bears no relation whatsoever to the facts or posture of the current appeal before this Court.

Condon and *Ex Parte SCDMV* control, and these decisions mandate that Appellant lacks standing to appeal because it has not been legally aggrieved as contemplated under Rule 201(b), SCACR. Thus, Chief Judge Few correctly applied the law of this state in dismissing Appellant's appeal without encroaching upon proper circumstances where a non-party may appeal.[5]

III. APPELLANT OVERLOOKS THE IMPRACTICALITY OF SUBMITTING SPECIAL INTERROGATORIES TO THE JURY ON ISSUES THAT WERE NEVER DEVELOPED BY THE PARTICIPATING PARTIES IN THE TRIAL.

In *Auto Owners Insurance Company, Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009),[6] the Supreme Court agreed with the logic of Auto Owners' argument, but nevertheless held the insurer responsible for the full amount of the arbitrator's award, stating, "it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable to the removal and replacement of the defective stucco...." *Id.* At 199, 684 S.E.2d at 547 (emphasis added). The "record before the Court" in *Newman* was the record from the declaratory judgment action, which is the proceeding from which that appeal emanated. It is unclear from the Court's opinion to what degree Auto Owners presented evidence of the varying types or categories of damages in the course of the declaratory judgment action. We are only told in the opinion that there was insufficient information in the record for the Supreme Court to parse the amount of resulting damages from the amount of damages for removal and replacement of the stucco in that case.[7] This point is interesting, especially if one

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[5] As Appellant's Motion and Accompanying Memorandum before the circuit court correctly point out, "Insurance coverage for the damages alleged by the Plaintiffs are not determined in this action." Having reserved its rights, Appellant is a party to a separate declaratory judgment action to have its coverage obligations determined. Its day in court is yet to come, and it has not been aggrieved in legal sense in the underlying action.

[6] *Newman* was decided by an arbitrator well versed in construction defect cases. Presumably, any concern of mentioning the existence of liability insurance before a jury would not exist where the matter is decided by an arbitrator familiar with construction litigation.

[7] It appears the result in *Newman*, and the Supreme Court's comment in footnote 5 of that opinion, give Appellant concern that it must have the jury in the underlying trial of its insured's liability make the necessary factual findings for Appellant to later use in its declaratory judgment action. Such a setting is ripe for conflicts of interest.

keeps in mind how the evidence and issues were presented to the jury in the underlying liability case against Appellant's insured, PPS.

In the course of the underlying trial against PPS, there was certainly no requirement that Respondents present evidence of the damages they suffered in a manner that caters to a non-party insurer's particular requests or interests. In a trial to determine the liability of a contractor for defective work, damages proximately caused by the contractor's negligence either exist or they do not—the particular "category" of damage, *i.e.*, resulting damage versus replacement of defective work, is irrelevant in relation to the jury's determination of whether the contractor defectively constructed the building. Counsel for Respondents presented their case at trial in a manner designed to benefit their clients' interests, not to build a record for a non-party insurer's use in a coverage dispute. The same is true of the Defendant, PPS. Counsel for PPS did not (and ethically should not)[8] present evidence and testimony designed to parse out covered types of damages from those that might not be covered by Appellant's policy. Doing so would serve only the interests of Appellant and may very well be directly contrary to the interests of PPS. This is where the rubber meets the road: If neither Respondents nor PPS offered any evidence in the course of the trial to educate the jury on categorical differences between resulting damages to other construction trades versus damages solely related to the repair and replacement of PPS's own work, it strains logic to expect that twelve jurors could intelligently answer the special interrogatories Appellant desired the court to submit. Twelve jurors should not be expected to accomplish that which the learned Justices of the South Carolina Supreme Court could not resolve in *Newman* in the absence of a sufficient record of evidence to guide them. In effect, Appellant wanted the jury to answer questions that were not litigated by the actual parties.

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[8] *Cf. Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Company of South Carolina*, 433 F.3d 365 (4th Cir. 2005)(observing an attorney representing an insured owes a duty of loyalty to the insured and is forbidden to undertake actions that are detrimental to the insured, such as communicating harmful information to the insurance company).

Appellant correctly cites to *Sims v. Nationwide*, 247 S.C. 82, 145 S.E.2d 523 (1965) for the proposition that these questions must be dealt with in the separately pending declaratory judgment action. In that proceeding, Appellant may offer whatever admissible evidence and testimony it deems important, free from conflicts of interest with its insured, so that the trial court might have an adequate record from which to intelligently address the coverage issues before it. If there is any confusion over what *Newman* requires of an insurer in this regard, that confusion needs to be raised to and ruled upon in the course of the declaratory judgment action, where Appellant is a party and can build its own record for meaningful judicial review. If Appellant's legal rights are affected in that declaratory judgment proceeding, presumably it would then have standing to appeal. Here, however, Appellant has no such standing, and Chief Judge Few properly dismissed its appeal.

IV. REHEARING IS UNNECESSARY BECAUSE THE RECORD IS UNCLEAR AND APPELLANT CANNOT PREVAIL ON THE MERITS.

Attention is drawn to the materials submitted in support of Appellant's request for rehearing. Among those materials is Appellant's Memorandum submitted to the circuit court in support of its request for special interrogatories, which states, "[Appellant] believes that any special interrogatories must be based upon the evidence presented at trial. Accordingly, it is premature to commit to specific interrogatories." (Memorandum Submitted by National Fire & Marine Insurance Company, p. 9)(emphasis added). Also provided to this Court by way of Appellant's petition is the sample verdict form accompanying Appellant's motion in the circuit court, which is entitled, "Examples of Written Interrogatories." (*See* Petition for Rehearing)(emphasis added.) Even though Appellant did not at that time commit to the questions it wanted to submit to the jury, it provided examples "of the kinds of interrogatories that may be applicable..." along with its Memorandum. (Memorandum Submitted by National

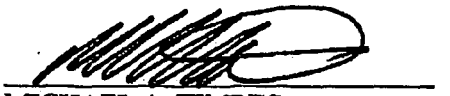
Fire & Marine Insurance Company, p. 9)(emphasis added). There are no subsequent or amended special interrogatories provided to this Court for consideration in support of Appellant's petition for rehearing. Whether the "Example" interrogatories or some subsequent iteration thereof are now in dispute is unclear from Appellant's petition. It is Appellant's requirement to develop a record sufficient for this Court review the alleged errors. *Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). Either way, Appellant cannot prevail.

The circuit court has the discretion to determine whether to submit special interrogatories to the jury. *Frazier v. Badger*, 361 S.C. 94, 105, 603 S.E.2d 587, 592 (2004). "To warrant a reversal, a party must show that he was prejudiced by the trial court's refusal to submit special interrogatories." *Id.* (citing *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 279-80 (Ct. App. 1997). While the foregoing standard touches on the merits of the matter rather than Appellant's standing to appeal, the point is worth considering in light of Appellant's request for a rare rehearing *en banc*. It is difficult to imagine how the circuit court abused its discretion in denying Appellant's motion when Appellant had not yet committed to any particular special interrogatories when the ruling was made. To the extent Appellant intends to rely on any other interrogatories, they have not been provided to this Court for review. *See Harkins*, 340 S.C. at 616, 533 S.E.2d at 891. A rehearing of this matter would serve no purpose under these circumstances.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondents hereby respectfully request an Order of this Honorable Court declining to reconsider its dismissal of Appellant's appeal.

FOR RESPONDENTS:



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April 30, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned herewith certifies that she, on this date, January 31, 2012, did mail and serve via regular U.S. Mail one (1) copy of the foregoing "Respondents' Reply to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc" with proper postage affixed thereto, to all counsel of record, at the following addresses:

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This 30 day of April, 2012.

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

BY: _____
Moira W. Kerrigan
Legal Assistant to Michael A. Timbes

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Plaintiffs/Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. .....Appellant.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Attorney for Appellant

Appellant National Fire & Marine Insurance Company ("Appellant"), by and through the undersigned counsel, hereby replies to Respondent's Reply to Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*.

ARGUMENT

The sole issue before the Court is whether Judge John C. Few erred in dismissing Appellant's appeal on the basis that Appellant lacked standing under Rule 201(b), SCACR. Respondents moved to dismiss the appeal on the basis that Appellant lacked standing under SCACR 201(b) because Appellant was not a named party in the underlying civil action. Rule 201(b), SCACR states, "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." Judge Few agreed with Respondent's position and cited to Ex parte Condon, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003) as the basis that Appellant must be a named party in order to have standing to appeal. Appellant contends that Judge Few misapprehended the scope of Rule 201, SCACR, and Ex parte Condon should not read in the absolute to require a person to be a named party in order to have standing to appeal.

General appellate law as outlined in *Corpus Jurisprudence Secundum* ("*CJS*") shows the broader scope of appellate standing and that standing is not limited to persons who are a named party to the civil action.[1] The scope of standing is broader and the

[1] 4 C.J.S., Appeal and Error, § 242 (2012) states, "[g]enerally, the only persons who may appeal include a party to the action or proceeding below, *or to the judgment or order*, a legal representative of a party, or a person having privity of estate, title, or an interest that appears from the record." Further, "[t]he term 'party' in a statute has been construed, not in the technical sense as necessarily importing a litigant before the court in the proceeding in which the judgment or order was rendered, but as including any one on whose interest it has a direct tendency to inure, and it has been held that one not a 'party' may nevertheless be a 'party aggrieved' within statutes governing the right of review. A statute granting a right to appeal by a person aggrieved has been given a liberal construction with regard to the word 'person,' as including a nonparty." 4 C.J.S., Appeal and Error, § 242 (2012).

inquiry is more focused on whether a person is aggrieved by a particular order. Respondents did not address the general principles set forth in *CJS* or show how South Carolina is distinguishable. South Carolina law is in accord with the general principles set forth in *CJS* that non-parties aggrieved by a particular order have standing to appeal such orders. See In Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986), (finding a non-party would have standing to appeal). Further, see also, Ex Parte Johnston v. Tunno, 63 S.C. 205, 41, 308 (1902) for the proposition that a non-party person may appeal a decision denying the person intervention into a civil action. Assuming the 1902 decision survives the enactment of the later Rule 201(b), SCACR, Ex Parte Johnston is further precedent for a non-party having standing to appeal a decision that aggrieves them.

Further, Ex parte Condon is not directly on point for Judge Few's decision, and the distinction drawn by Appellant is one with a difference. In summary, Ex parte Condon is distinguishable on the basis that the Attorney General was neither a party to the civil action nor *the party* to the specific ruling that was being appealed in the civil action. In Ex Parte Condon, the Attorney General appealed a ruling of the trial court granting the class Plaintiffs their attorneys' fees. The Attorney General believed he had a public duty as the South Carolina's chief legal counsel to challenge the award. The Attorney General was challenging a ruling directed to the named parties in the civil action. The Supreme Court held that the Attorney General's general public interest in the ruling was insufficient; and to have standing to challenge the ruling, the Attorney General should have intervened and become a named party to the civil action. The Supreme Court in Ex parte Condon reached a logical result that is consistent with Rule 201, SCACR. The court system cannot have persons, even if some have a more omnipresent

interest, e.g., the Attorney General, challenging rulings and verdicts against named parties in a civil action that do not directly aggrieve a nonparty. The reasoning of Ex parte Condon would apply to the present appeal if Appellant were challenging a decision by the trial judge that was directed against the parties in the civil action, e.g., dispositive motion or evidentiary ruling. The logic of Ex parte Condon would apply if Appellant were challenging the jury verdict entered against Professional Stucco & Plastering, Inc. in Appellant's name. In these instances, Ex parte Condon would be good precedent.

Respondent cited Ex parte: South Carolina Department of Motor Vehicles, 390 S.C. 457, 702 S.E.2d 568 (2010) as support for their position. The facts in Ex parte: South Carolina Department of Motor Vehicles are basically the same as the ones in Ex parte Condon with the exception that the SC Department of Motor Vehicles ("SCDMV") took one more procedural step than the Attorney General in Ex parte Condon. In Ex parte Condon, the Attorney General directly appealed the underlying ruling without first filing post-trial motions. In Ex parte: South Carolina Department of Motor Vehicles, SCDMV filed a SCRCP 59(e) post-trial motion first before pursuing the appeal.[2]

Respondent contends that Ex parte: South Carolina Department of Motor Vehicles is authority for the proposition that even a non-party to a ruling (which the SCDMV was pursuant to the order denying the post-trial motion) does not have appellate rights. The distinction is not material to the standing analysis. The intermediate, procedural step of SCRCP 59(e) does make the facts in Ex parte: South Carolina Department of Motor Vehicles materially distinguishable from the ones in Ex parte Condon. In both cases, the

[2] In Ex parte: South Carolina Department of Motor Vehicles, the trial court correctly ruled that SCDMV lacked standing because it was not a party; and the Supreme Court correctly dismissed the appeal pursuant to Rule 201, SCACR.

facts involved persons or entities that were, in fact, challenging underlying rulings between the named parties; and the Supreme Court correctly found that the Attorney General and SCDMV did not have standing to do so because they were not named parties in the respective civil actions. Both Ex parte: South Carolina Department of Motor Vehicles and Ex parte Condon are distinguishable from the present facts and should not be read in the absolute to require a person to be a named party.

As stated above, the sole issue before the Court is whether Judge John C. Few erred in dismissing Appellant's appeal. After responding to Appellant's argument on standing, Respondents briefed in Section III the practicability of the submitting special interrogatories to a jury. In response to Section III, Appellant states that it has addressed in its prior briefs filed with the Court the inherent problems with an insurer appearing in the underlying construction defect civil action; and appellant craves reference to those arguments. Appellant will otherwise briefly address Respondents' overall point in Section III in the following discussion.

Although the Supreme Court in Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) ruled that an exclusion barred coverage for the removal and replacement of the stucco, the Supreme Court required Auto-Owners to pay the entire judgment (removal and replacement included). In effect, Auto-Owners was bound by a general verdict or award. The Supreme Court stated the following:

> Nevertheless, it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. 5 (Citation Omitted)

CONCLUSION

> For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

Footnote 5 reads as follows:

> Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547.

The Supreme Court did not provide instructions on the procedural mechanism for an insurer to "defend" against a general jury verdict. The language quoted above has created a great deal of uncertainty in the construction defect cases filed in South Carolina where there may be CGL insurance policies that may cover some but not all of the damages sought in a civil action. The present matter is no exception. Respondents filed a declaratory judgment/collection action against Appellant and the other insurers who issued CGL policies to Professional Plastering & Stucco, Inc. on the first business day after the jury verdict demanding that the insurers pay the full verdict without any regard to segregating the damages between covered and non-covered ones consistent with the principles of Newman. Having the jury answer special interrogatories submitted by the trial court, that are consistent with the evidence presented to the jury, is a method that addresses the concerns expressed by the Supreme Court in Newman. The proposed special interrogatories submitted into the record by Appellant were consistent with the

evidence admitted into the record and consistent with the rulings on coverage in Newman. The Court did not submit them only because Appellant was not a named party. Assuming a record supports the special interrogatories, which it did in this case, there is no prejudice to the named parties; and special interrogatories may achieve what the Supreme Court had concerns with in Newman.

Finally, with regard to Section IV, Respondents' arguments go to the merit of the appeal. Appellant has briefed issues in its Initial Brief. Appellant contends that such arguments should be more fully briefed in substantive part of the appeal once the procedural issue of standing is decided by the Court.

CONCLUSION

The Court should rehear the decision of the Honorable John C. Few *en banc*.

Respectfully Submitted,

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Attorney for Appellant

May 14, 2012.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Plaintiffs/Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. .....Appellant.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Reply Brief to Respondents Brief in Opposition to Petition for Rehearing and Suggestion for Rehearing *En Banc* on Plaintiffs/Respondents and other counsel of record by depositing a copy of same in the United States Mail, postage prepaid, on May 14, 2012, addressed to the following attorneys of record:

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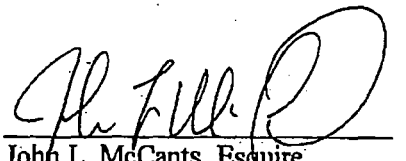
May 14, 2012.



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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. .....Appellant.

MOTION TO DISMISS APPEAL

COME NOW the above-named Respondents, by and through their undersigned counsel, and herewith move this Court for an Order dismissing the appeal filed by Appellant, National Fire & Marine Insurance Company, Inc.[1]

BACKGROUND

This appeal arises from a construction defect case commenced by Respondents against various defendants, including Professional Plastering & Stucco, Inc. ("PPS"). Appellant, National Fire & Marine Insurance Company, Inc., is an insurer of PPS. Before trial, Respondents settled the claims against all defendants except PPS. The trial against PPS ensued

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[1] Case Tracking No.: 2011193671

from May 9 through May 13, 2011. The jury returned a verdict in favor of Respondents, finding PPS responsible for their significant damages.[2] Appellant thereafter commenced this appeal.

To better understand the improper nature of Appellant's appeal, it is important at the outset to note certain indisputable facts. Prior to trial, Appellant filed a written motion requesting a special verdict form and/or general verdict form with special interrogatories. (*See Exhibit A, attached*). However, Appellant is not a party to the litigation. Respondents asserted no claims whatsoever against Appellant, and Appellant does not appear as a party in the caption of its own motion from which this appeal arises.[3] More importantly, Appellant never moved to intervene in the case pursuant to *Rule 24, SCRCP*. Respondents offered that they would consent if Appellant wanted to join in the action as party, but Appellant refused. Although Appellant never intervened, it did send counsel to observe the trial from the public gallery. However, the attorney never made an appearance in the action. Before the case was submitted to the jury, Appellant's counsel renewed its request to be heard regarding Appellant's own desires for the format of the verdict form. The circuit court orally refused to hear the request, as noted in Appellant's Notice of Appeal. This appeal follows.

LAW AND ANALYSIS

Rule 24, SCRCP, provides for both intervention as a matter of right and permissive intervention, and expressly requires that "a person desiring to intervene shall serve a motion to intervene upon the parties." Appellants never moved to intervene, despite Respondents' offer to

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[2] PPS has filed its own independent appeal from the verdict. (*See* Case Tracking No. 201196386). This Motion to Dismiss relates only to the above appeal filed by Appellant.

[3] Attention is drawn to the Motion Information Form and Cover Sheet filed accompanying Appellant's Motion when it was filed. The section for "Defendant's Attorney" is completely blank. Similarly, the moving attorney, John L. McCants, Esquire, did not identify himself as counsel for either the Plaintiffs or a Defendant in the space provided beneath his signature. The reason for this is self-explanatory: he did not represent any "party" in the action. (*See Exhibit A, attached*).

consent to such a motion if Appellant so desired. One who chooses *not* to participate cannot complain on appeal of the result at trial. *Rule 201(b), SCACR,* is similarly instructive, providing that only "a *party* aggrieved by an order, judgment, or sentence may appeal." (Emphasis added). Two decisions handed down by the South Carolina Supreme Court are directly on point and mandate the dismissal of this appeal.

For example, the present facts are *identical* to those presented in *Ex parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003). In *Condon*, the South Carolina Supreme Court dismissed an appeal filed by then Attorney General Charlie Condon. The Attorney General was never named as a party in the action, and he never moved at any point to intervene. After the trial, the Attorney General nevertheless sought to appeal. In dismissing his appeal, the Supreme Court aptly stated,

> ...[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal. Accordingly, we dismiss this appeal based on the Attorney General's failure to move for intervention as required by *Rule 24, SCRCP*. Such a ruling avoids the necessity of addressing the Attorney General's standing to become involved in this action, and makes clear that the Attorney General is required to follow the Rules of Civil Procedure when he wishes to become involved in a case.

Id. at 642, 583 S.E.2d at 434.

An identical result was reached by the Supreme Court after the South Carolina Department of Motor Vehicles ("SCDMV") tried to appeal from an order to which it was not a party. *Ex Parte: South Carolina Department of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010). Although the SCDMV filed various motions with the court relating to the on-going action, it never sought to actually intervene in the case. Relying on the "well-known rule of appellate procedure that only an aggrieved party may appeal" and citing to its prior ruling in

Condon, the Supreme Court once again stated, "Having failed to intervene as a party, SCDMV's appeal is dismissed." *Id.* at 458, 702 S.E.2d 568.

As applied to this case, the foregoing authorities are clear and unambiguous in their message: Because Appellant is not a party to the action and never sought to intervene in the case, it cannot, as a matter of law, appeal from any matter arising during the course of the trial. As such, Appellant's appeal must be dismissed.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondents hereby respectfully request an Order of this Honorable Court dismissing Appellant's appeal in its entirety.

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January 31, 2012
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CERTIFICATE OF SERVICE

The undersigned herewith certifies that she, on this date, January 31, 2012, did mail and serve via regular U.S. Mail one (1) copy of the foregoing "Motion to Dismiss Appeal", with proper postage affixed thereto, to all counsel of record, at the following addresses:

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This 31st day of January, 2012.

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

BY: _____
Moira W. Kerrigan
Legal Assistant to Michael A. Timbes

EXHIBIT "A"

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
Mark F. Teseniar & Nan M. Teseniar, et al. ☐ Plaintiff	)	CASE NO. 08-CP-10-0049
	)	
v.	)	MOTION INFORMATION FORM AND COVER SHEET
	)	
Fenwick Plantation Tarragon, LLC, Et Al. ☒ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Phillip W. Segui, Jr., Esquire, Bar No. Address: Segui Law Firm, PC 864 Lowcountry Blvd., Suite A Mt. Pleasant, SC 29464 phone: (843) 884-1865 fax: e-mail: other:	, Bar No. Address: phone: fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Request for a Special Verdict and/or General Verdict Form, etc.
Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion –
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant — 03/08/2011 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

FILED
2011 MAR -9 AM 10: 17
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

REQUEST FOR A SPECIAL VERDICT FORM AND/OR GENERAL VERDICT FORM ACCOMPANIED BY WRITTEN INTERROGATORIES PURSUANT TO S.C.R.CIV.P. 49

National Fire & Marine Insurance Company ("National Fire"), by and through the undersigned counsel, does hereby request that the Court provide a special verdict form to the jury and/or a general verdict form accompanied by written interrogatories. National Fire issued an insurance policy with commercial general liability coverage to Professional Plastering & Stucco, Inc. ("Professional Plastering") for the period May 30, 2003 to May 30, 2004. National Fire is providing a defense to Professional Plastering by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC pursuant to the policy and a reservation of rights. National Fire is an interested party in the civil action as one or more parties may seek indemnity under the policy for any verdict. National Fire is informed and believes that the policy does not cover certain alleged damages. In that regard, National Fire cites to the South Carolina Supreme Court decisions in Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, S.C. Sup. Ct. Order dated January 7, 2011 pg. 32 (Shearouse Adv.Sh. No. 1)(Petition for Rehearing Pending), Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) and L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 621 S.E.2d 33 (2005).

To avoid potential prejudice with the verdict, National Fire requests that the Court submit a special verdict form and/or general verdict with special interrogatories without reference to National Fire or insurance coverage. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962)("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

National Fire requests the Court submit appropriate forms to the jury pursuant to S.C.R.Civ.P. 49 for the jury to differentiate damages alleged to be caused by Professional Plastering. National Fire requests that the Court prepare these forms at such time during the course of the trial as is appropriate based upon the evidence presented at trial. National Fire reserves all rights as to the issues of defense and/or indemnity.

Respectfully Submitted,

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1501 Main Street, Fifth Floor
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(803) 254-4190
ATTORNEYS FOR NATIONAL FIRE & MARINE INSURANCE COMPANY

Columbia, South Carolina
March 8, 2011

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

CERTIFICATE OF SERVICE

FILED
2011 MAR -9 AM 10: 17
JULIE J. ARMSTRONG
CLERK OF COURT
BY_____

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

I, Susan Bennett, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of a **Request for Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P. 49** upon the below-referenced counsel of record this the 8th day of March 2011 by depositing a copy of the same in the US Mail, postage prepaid and addressed as follows:

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
FEB 0 9 2012
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Plaintiffs/Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. ..... Appellant.

RESPONSE BY APPELLANT NATIONAL FIRE AND MARINE INSURANCE COMPANY, INC. TO RESPONDENT'S MOTION TO DISMISS

National Fire & Marine Insurance Company, Inc. ("Appellant"), by and through the undersigned counsel, hereby responds to Respondent's Motion to Dismiss Appeal.

On or about January 4, 2008, Respondents filed a civil action alleging design and construction defects, and resulting water intrusion damages, within the buildings comprising the Twelve Oaks at Fenwick Plantation Horizontal Property Regime. Respondents filed the civil action initially against the developers but thereafter amended their complaint to include numerous other parties involved in the design and construction of the buildings, including the architect, general contractor and subcontractors. In their

Fifth Amended Complaint, filed on May 9, 2011, Respondents sought relief against the subcontractor Professional Plastering & Stucco, Inc., ("PP&S"). The civil action was scheduled for a date certain trial to begin on May 9, 2011.

Appellant issued an insurance policy with commercial general liability coverage to PP&S effective for the period May 30, 2003 to May 30, 2004. Appellant is providing a defense in the civil action (now on appeal) to PP&S by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC, pursuant to the Policy and subject to a reservation of rights. On March 8, 2011, Appellant served a Request for Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P. 49 (the "Request"). The purpose of the Requests was to do as instructed in Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009)("Newman") and segregate damages.

The Supreme Court in Newman held that while there was an occurrence of property damage, i.e., faulty construction, performed by a subcontractor to the builder (insured), that resulted in physically damaged sheathing and framing (property damage), the CGL policy did not cover the cost to remove and replace the stucco and relied on Exclusion N, the "Recall of Products, Work or Impaired Property" exclusion :

> C. Damages awarded for replacement of the defective stucco
>
> Auto-Owners finally argues that even if an "occurrence" warrants recovery for the Homeowner's property damage, the trial court erred in determining that the CGL policy covered the arbitrator's itemized allowance for replacing and repairing the defective stucco itself as an incidental cost to repairing the damage to other property. We agree.
>
> Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself. Specifically, the policy exclusion provides that the insurance does not

> cover damages "claimed for any loss, cost or expense ... for the repair, replacement, adjustment, removal or disposal of ... 'Your product'; ... 'Your work'; or ... 'Impaired property'; if such product, work or property is withdrawn ... from use ... because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco-even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy-and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover. See L-J 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.

Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546.

Although the Supreme Court ruled that Exclusion N excluded coverage for the removal and replacement of the stucco, the Supreme Court nonetheless required Auto-Owners to pay the entire judgment (removal and replacement included) because it found that Auto-Owners had not addressed the issue in the underlying arbitration. The Supreme Court stated the following:

> Nevertheless, it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. 5 (Citation Omitted)

CONCLUSION

> For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

Footnote 5 reads as follows:

> Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547.

The Supreme Court did not provide specific guidance on how an insurer is to raise the matter of differentiating the verdict for the purposes of insurance coverage in the underlying liability civil action; and, as argued in Appellant's initial brief, the proper procedure should be to do so in the declaratory judgment action.

In this matter Appellant's Request came before the trial court for a hearing on May 3, 2011; however, the trial court continued the Request until the time of trial scheduled to begin the following week. (Transcript May 9, 2011, Pg.69). The Honorable Krista Lea Harrington held a jury trial starting on May 9, 2011 on Respondents' causes of action against PP&S. On May 13, 2011, prior to jury deliberations, the trial court orally denied National Fire's Request. (Transcript May 13, 2011 Pg. 527-28). The trial court did not issue a written order but stated the court would not permit a non-party to be heard on the Requests. (Transcript May 13, 2011 Pg. 527-28). Respondents did not submit a written legal memorandum in opposition to the Requests, so Appellant is uncertain about Respondents' assertion that they would consent to the intervention of Appellant as named party. On May 13, 2011, the jury returned a verdict in favor of Respondents in the amount of $7,723,225.00. The trial court entered judgment on the verdict on May 16, 2011. Appellant filed and served a Notice of Appeal on June 10, 2011.

On May 16, 2011, Respondents commenced a civil action in the Court of Common Pleas, Charleston County seeking a declaratory judgment that Appellant and the

other insurers that issued insurance policies to PP&S owed indemnity to Respondent for the judgment. The civil action was removed to the federal court and is now pending before the Honorable Weston Houck of the United States District Court for the District of South Carolina.

Appellant disagrees that it must intervene pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and become a named party in order to comply with the substance of Newman. A substantive part of the appeal is whether Appellant must intervene pursuant to Rule 24 of the South Carolina Rules of Civil Procedure. Appellant disagrees that an insurer should do so and has briefed that position in its Initial Brief.

Respondent moved to dismiss the present appeal on the basis that Respondent was not a named party to the civil action. Respondent contends that Rule 201(b), SCACR requires Appellant to be a named party to the civil action in order to appeal the decision of the lower court denying Appellants' Request. In further support of its position, Respondent cited Ex Parte Condon, 345 S.C. 634, 583 S.E2d 430 (2003) and Ex parte: South Carolina Department of Motor Vehicles, 390 S.C. 457, 702 S.E.2d 568 (2010).

Rule 201(b), SCACR specifically states, "only a party aggrieved by an order, judgment, sentence or decision may appeal." Subparagraph (b) does not require that one be a named party to the civil action. The subparagraph only requires that a party be aggrieved by an order to appeal it. The Court has previously explained that under Rule 201(b), "[t]he word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." Beaufort Realty Co. v. Beaufort Cnty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct.App.2001). "A party is aggrieved by a judgment or decree when it operates on his or

her rights of property or bears directly on his or her interest." Id. Appellant is certainly such a party as it filed the Request. Appellant filed the Request in accordance with Newman, and the trial court denied the Request because Appellant was not a named party. Whether Appellant, as an insurer, has to be a named party or not is substantive issue on appeal.

In Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) confirms that a party not named in the civil action has appellate rights. In Ex Parte Whetstone, a non-party witness appealed from an order directing him to attend a deposition and produce certain documents. The respondent moved to dismiss the appeal on the ground the order was interlocutory and not directly appealable. The Supreme Court granted the motion to dismiss on the basis that an order directing a non-party to submit to discovery is not immediately appealable. Id. at 580, 347 S.E.2d at 881. The Supreme Court held that the non-party witness had two alternatives to contest the discovery: 1) the witness may either comply with the discovery order and waive any right to challenge it on appeal, or 2) refuse to comply with the order *and appeal* after he is held in contempt for his failure to comply. Id. at 580, 347 S.E.2d at 882. In summary, a party not named in the civil action does have appellate rights.

The facts in Ex Parte Condon and Ex parte: South Carolina Department of Motor Vehicles are distinguishable from the present matter. In Ex parte: South Carolina Department of Motor Vehicles, Respondent petitioned the circuit court for a driver's license. The statute relied on by Respondent required him to serve the State of South Carolina., which was done. The petition proceeded to a hearing, and the State did not challenge the petition. The circuit court granted the relief requested by Respondent.

Respondent then served the order on The South Carolina Department of Motor Vehicles (SCDMV). Through a series of motions, the SCDMV challenged the order before the circuit court but was unsuccessful. As a result, SCDMV appealed the order. The Supreme Court dismissed the appeal because the SCDMV was not a party to the civil action.

In contrast to Ex parte: South Carolina Department of Motor Vehicles, Appellant did ask for specific relief of the trial judge at trial, and was denied the requested relief. Appellant is appealing the decision that it must intervene pursuant to Rule 24 of the South Carolina Rules of Civil Procedure. In contrast, the SCDMV did not appear before the trial court in any way during the trial to contest the petition. Further, the SCDMV was not specifically aggrieved by an order as was Appellant.

The SCDMV's interest was similar to the generalized interests of the Attorney General in Ex Parte Condon. In Ex Parte Condon, taxpayers filed a class action civil action against the State of South Carolina and the Department of Revenue, among others, alleging that the taxpayers had failed to receive a certain sales tax exemption. As part of a settlement, the Circuit Court awarded attorney fees to class counsel. The South Carolina Attorney General filed a notice of appeal as to the award of attorney fees. The Supreme Court held that the Attorney General could not appeal the award of attorney fees because the Attorney General was not a party to the civil action.

In Ex Parte Condon, the Circuit Court did not issue an order that directly affected the Attorney General. The order did not aggrieve the Attorney General. The order did not direct the Attorney General to take any action. The Attorney General had a general interest in the outcome of the civil action based on the Attorney General's "duty to

protect the public". Id. at 640, 583 S.E.2d 430, 433. The Supreme Court held that the Attorney General's duty to protect the public was an insufficient interest; and the Attorney General was required to intervene pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

In contrast to Ex Parte Condon, Appellant is appealing the specific oral decision by the trial court made in response to a written submission by Appellant. Appellant disagrees that it must intervene pursuant to Rule 24 and become a party; and that disagreement is a substantive part of the appeal. The rights of the Attorney General and SCDMV in Ex Parte Condon and Ex parte: South Carolina Department of Motor Vehicles were more generalized and asserted by them as interested state agencies. In contrast, the trial court's decision specifically aggrieved Appellant and coupled with Newman may deprive Appellant of rights with respect to the coverage litigation.

Wherefore, having responded to Respondents' Motion to Dismiss Appeal, Appellant requests that the Court of Appeals deny the same.

Respectfully Submitted,

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Attorney for Appellant

February 9, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington Circuit Court Judge

Case No. 2008-CP-10-0049

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present).....Plaintiffs/Respondents,

v.

Professional Plastering & Stucco, Inc., Defendant.

-and-

National Fire & Marine Insurance Company, Inc. ..... Appellant.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Response by Appellant National Fire & Marine Insurance Company, Inc. to Respondent's Motion to Dismiss on Plaintiffs/Respondents and other counsel of record by depositing a copy of same in the United States Mail, postage prepaid, on February 9, 2012, addressed to the following counsel of record:

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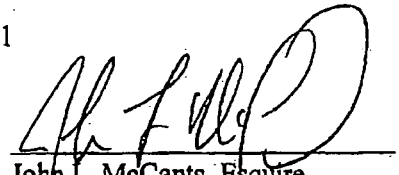

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February 9, 2012.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2008-CP-10-0049

MARK F. TESENIAR and NAN M. TESENIAR, et al,

PLAINTIFFS,

VS.

FENWICK PLANTATION TARRAGON, LLC, ET AL,

DEFENDANTS.

JURY TRIAL

VOLUME 1

held before the Honorable Kristi L. Harrington

Mia Perron, Circuit Court Reporter, 9th Judicial Circuit

in the Charleston County Courthouse

Charleston, South Carolina

on Monday, May 9, 2011, Commencing at 11:28 a.m.

SUSAN "MIA" PERRON, CVR-CM
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

THE COURT: All right.

MR. MCCANTS: Good afternoon, Your Honor. I'm John McCants. I'll reintroduce myself. I'm counsel for National Fire -- Insurance Company. We met briefly the other day and I introduced one of -- I was here on behalf of -- we were the insurer for Professional Plastering for a one-year period. And I had submitted samples or examples of special interrogatories. I had suggested -- renew the suggestion that the matter be taken up at an appropriate time with the jury charge after the evidence has been submitted.

THE COURT: All right. Thank you. We will address that matter at the appropriate time.

All right. Gentlemen, anything else?

MR. KIRCHNER: Your Honor, the only other thing is for our PowerPoint. If I may just have a few moments just to hook up whatever it is I need to --

THE COURT: You may. I have over-anticipated how long that we were going to be. So as soon as the jury gets here. That will give us a few minutes. But they're not supposed to be back until 2:30. Once they all get here we'll get started, since we're a little bit ahead, and we'll begin with opening statements.

And do we anticipate that Mr. Glick will be the

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Mark T. Teseniar, et al	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 08-CP-10-0049
	)	
Fenwick Plantation Tarragon, LLC et al	)	
	)	
	)	
Defendants.	)	

PARTIAL TRANSCRIPT OF JURY TRIAL
May 11-13, 2011

The within transcript is a portion of the jury trial held in the above-captioned action on May 10 through May 13, 2011, before The Honorable Kristie L. Harrington, in Courtroom 4C of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Jesse Kirchner , Esq.
Phillip Sequi, Esq.
John Chakeris, Esq.
Jefferson Leath, Jr., Esq.
Justin Lucey, Esq.
Appearing for Plaintiffs

J.J. Anderson, Esq.
Christy Mahon
Appearing for Defendants

Vivian Cross, Court Reporter
Transcribed by
Deborah Garrison
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

MR. McCANTS: I'm John McCants on behalf of Master Fire and Marine Insurance Company. Do you want to take up my matter after you finish with the case?

THE COURT: I will simply -- I can take up your matter very quickly. I am not going to entertain any suggestions as to requests to charge or as to verdict forms from parties not listed in the case and not parties to the case. I will, out of an abundance of caution, mark your request to charge and your verdict form as a Court's exhibit. Thank you.

MR. McCANTS: Note my objection. Thank you, Your Honor.

THE COURT: Thank you. Hold on one second. One more time -- we need your name, and if you could spell your last name for this court reporter. I believe my previous court reporter got everything. Stand right there. If you'll just spell it.

MR. McCANTS: Your Honor, I'm John McCants. I'm here on behalf of National Fire and Marine Insurance Company. My last name is M-C-C-A-N-T-S.

THE COURT: Thank you, Mr. McCants.

MR. MCCANTS: Thank you, Your Honor.

THE COURT: Mr. Kirchner?

MR. ANDERSON: Your Honor, I have one other matter. We are going to need to make a proffer of testimony of our witness, Mr. Dawkins, and wondered when you wanted to do that.

THE COURT: I'm trying to accommodate the jury's schedule, because one individual, who is our foreperson, that needs to be out by 5:00 o'clock. So I'm trying -- we could -- while they deliberate you could proffer Mr. Dawkins. That's my inclination.

MR. KIRCHNER: Your Honor, I just want to make it clear for the record that what I'm concerned with is the sequence, in that the proffer has not been made prior to -- the proffer is being made after the opportunity for him to testify. And I wanted to make sure that there was no waiver of any issue concerning that.

THE COURT: The record will be very clear as to what we're doing, and I will allow him to be proffered at an appropriate time if it does not delay the proceedings any further

and that it will not indicate a waiver of any objections that you may have. Thank you, Mr. Anderson.

MR. LUCEY: Your Honor, may I approach and hand you our jury charges?

THE COURT: I have one question to you is as to Defendants' 17. That's the only question I have.

MR. LUCEY: We've reviewed that and have no objection, Your Honor.

THE COURT: You have no objection to including Defendant's 17. Is that correct?

MR. LUCEY: That's correct.

THE COURT: Thank you. All the jurors are here. Are we ready to proceed?

MR. MCCANTS: Your Honor, I just want to make sure what you're marking. Is it the document I sent your law clerk in the e-mail?

THE COURT: The letter. It's a stack of papers. And, Mr. McCants, I will take that up. I'm really trying to get this trial concluded to accommodate my jurors so that we don't have to -- that I don't have to sequester them. All right? Because they're getting a little antsy.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
Mark F. Teseniar & Nan M. Teseniar, et al.	)	CASE NO.
☐ Plaintiff	)	08-CP-10-0049
	)	
v.	)	MOTION INFORMATION FORM
	)	AND COVER SHEET
Fenwick Plantation Tarragon, LLC, Et Al.	)	
☒ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
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Address:	Address:
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864 Lowcountry Blvd., Suite A	
Mt. Pleasant, SC 29464	
phone: (843) 884-1865 fax:	phone: fax:
e-mail: other:	e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Request for a Special Verdict and/or General Verdict Form, etc.
Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant — 03/08/2011 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

FILED
2011 MAR -9 AM 10: 17
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

REQUEST FOR A SPECIAL VERDICT FORM AND/OR GENERAL VERDICT FORM ACCOMPANIED BY WRITTEN INTERROGATORIES PURSUANT TO S.C.R.CIV.P. 49

National Fire & Marine Insurance Company ("National Fire"), by and through the undersigned counsel, does hereby request that the Court provide a special verdict form to the jury and/or a general verdict form accompanied by written Interrogatories. National Fire issued an insurance policy with commercial general liability coverage to Professional Plastering & Stucco, Inc. ("Professional Plastering") for the period May 30, 2003 to May 30, 2004. National Fire is providing a defense to Professional Plastering by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC pursuant to the policy and a reservation of rights. National Fire is an interested party in the civil action as one or more parties may seek indemnity under the policy for any verdict. National Fire is informed and believes that the policy does not cover certain alleged damages. In that regard, National Fire cites to the South Carolina Supreme Court decisions in Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, S.C. Sup. Ct. Order dated January 7, 2011 pg. 32 (Shearouse Adv.Sh. No. 1)(Petition for Rehearing Pending), Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) and L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 621 S.E.2d 33 (2005).

To avoid potential prejudice with the verdict, National Fire requests that the Court submit a special verdict form and/or general verdict with special interrogatories without reference to National Fire or insurance coverage. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962)("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

National Fire requests the Court submit appropriate forms to the jury pursuant to S.C.R.Civ.P. 49 for the jury to differentiate damages alleged to be caused by Professional Plastering. National Fire requests that the Court prepare these forms at such time during the course of the trial as is appropriate based upon the evidence presented at trial. National Fire reserves all rights as to the issues of defense and/or indemnity.

Respectfully Submitted,

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(803) 254-4190
ATTORNEYS FOR NATIONAL FIRE & MARINE INSURANCE COMPANY

Columbia, South Carolina
March 8, 2011

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

CERTIFICATE OF SERVICE

FILED
2011 MAR -9 AM 10: 17
JULIE J. ARMSTRONG
CLERK OF COURT
BY_____

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

I, Susan Bennett, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of a **Request for Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P. 49** upon the below-referenced counsel of record this the 8th day of March 2011 by depositing a copy of the same in the US Mail, postage prepaid and addressed as follows:

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ELLIS:LAWHORNE

JOHN L. MCCANTS
Direct Dial (803) 212-4959
jmccants@ellislawhorne.com

March 8, 2011

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street Suite 106
Charleston, SC 29401-2258

RE: Mark F. Teseniar and Nan M. Teseniar, *et al.* vs. Fenwick Plantation Tarragon, LLC, *et al.*
Civil Action No.: 2008-CP-10-0049
EL&S File No.: 002090-58983

Dear Ms. Armstong:

Enclosed herein for filing please find an original and one copy of a **Request for Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P. 49** in connection with the above-referenced matter. Please file the original and return a clocked-in copy of same to my office using the enclosed self-addressed, postage-paid envelope.

By copy of this letter to counsel of record and attached Certificate of Service, I am hereby serving each with a copy of same.

Thank you for your assistance in this matter and should you otherwise have any questions or comments, please do not hesitate to contact me.

With warm personal regards, I am

Sincerely yours,

John L. McCants

JLM/sb

Enclosure(s)

cc: (w/ encl.)
Phillip W. Segui, Jr., Esquire

John T. Chakeris, Esquire
Jesse A. Kirchner, Esquire
W. Jefferson Leath, Jr., Esquire
Michael B. T. Wilkes, Esquire
Ellen S. Cheek, Esquire
Laura Johnson Evans, Esquire
Randall C. Stoney, Jr., Esquire
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Justin O. Lucey, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

FILED
2011 MAY 12 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY_____

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

Memorandum Submitted by National Fire & Marine Insurance Company

National Fire & Marine Insurance Company ("National Fire"), by and through the undersigned counsel, hereby submits this memorandum in regards to its Request for a Special Verdict Form and/or General Verdict Form Accompanied by Written Interrogatories Pursuant to S.C.R.Civ.P.49.

National Fire issued an insurance policy with commercial general liability coverage to Defendant Professional Plastering & Stucco, Inc. ("Professional Plastering") effective for the period May 30, 2003 to May 30, 2004 (the "Policy"). National Fire is providing a defense to Professional Plastering by Jonathan J. Anderson, Esq. of Anderson & Reynolds, LLC, pursuant to the Policy and a reservation of rights to challenge any obligations for a defense and indemnity. In addition, Audubon Insurance Company, a subsidiary of Chartis U.S., Inc., is providing a defense to Professional Plastering and retained Everett A. Kendall, Esq. and Christy Mahon, Esq. of Sweeny Wingate & Barrow, PA. to defend Professional Plastering.

The subject civil action is a building construction defect one and concerns a condominium community located in Charleston, S.C. known as Twelve Oaks at Fenwick Plantation ("Twelve Oaks"). The buildings in Twelve Oaks consist of ten (10) residential buildings, a pool house and a leasing center. Summit Contractors Group, Inc. was the general

contractor for the construction of the buildings and constructed the buildings in the early 2000s for Defendant Fenwick Plantation Tarragon, LLC, or other Tarragon entity, to be a 216 unit apartment complex.

Summit Contractors and Professional Plastering executed a Subcontract Agreement dated March 14, 2002, for Professional Plastering to perform the "stucco" scope of work for the construction of the buildings. Plaintiffs allege that Professional Plastering subcontracted with Maria Arias, Miquel Rosales and APS Enterprises Unlimited, Inc., to perform the stucco scope of work. (Fifth Amended Complaint ¶ 14, 15). The City of Charleston issued a Certificate of Occupancy dated December 17, 2002 for the buildings. The Twelve Oaks community was converted to a condominium regime in 2006.

Plaintiffs commenced the civil action on or about January 4, 2008 complaining about the construction of the buildings and water intrusion damages (See e.g., Fifth Amended Complaint ¶ 42). Plaintiffs allege as follows:

> The design and construction defects have resulted in repeated water intrusion into the residences, failure of the components of the exterior envelope, failure of the structural system(s), and other consequential damages to the common elements of the Association and to the interior of the units. Upon information and belief, these adverse events have occurred each and every year since construction; and constitute 'occurrences' and 'property damage' and compensable damages under standard and/or typical general liability and/or completed operations insurance policies maintained by the defendants herein; further the negligence of each defendant has resulted in damage to the work of the others.

(Fifth Amended Complaint ¶ 42).

As to Professional Plastering, Plaintiffs allege, "[i]ts subcontract was to correctly install the stucco exteriors with the proper details and components so as to prevent water intrusion into the buildings in accordance with the building code requirements." (Fifth Amended Complaint ¶

8). Further, "[t]hese subcontractors were to correctly install the stucco exteriors with the proper details and components so as to prevent water intrusion into the buildings in accordance with building code requirements." (Fifth Amended Complaint ¶ 33). Plaintiffs allege as follows:

> In violation of its contractual and common law duties, Defendants Professional Plastering, Maria Arisas, Miquel Rosales, and APS Enterprises Unlimited, Inc. did not install the stucco and components in a competent and workmanlike fashion and in conformity to the requirements of the building code, but rather constructed the exterior building envelope of the buildings at Fenwick in a defective condition causing or contributing to the leaks into the buildings and in a manner which will require significant repair in order to maintain a water resistant or water management exterior as required by code and by good building practices.

(Fifth Amended Complaint ¶ 34).

Insurance coverage for the damages alleged by Plaintiffs are not determined in this civil action. To the extent there is a verdict against Professional Plastering, National Fire has reserved the right to have a court determine issues regarding coverage or indemnity under the Policy. The present civil action should otherwise be free of the mention of insurance. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962)("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

Insurance coverage for a construction defect, building envelope, water intrusion claim in South Carolina is addressed in Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009)("Newman") and Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, S.C. Sup. Ct. Order dated January 7, 2011 pg. 32 (Shearouse Adv.Sh. No. 1)(Petition for Rehearing Granted)("Crossman").

The facts in Newman involved a construction defect claim arising out of the construction

of a single family house. The homeowner and homebuilder submitted the claim to binding arbitration; and Auto Owners Insurance Company provided defense counsel to the builder pursuant to an insurance policy with commercial general liability coverage. The arbitrator awarded damages to the homeowner based on a contractor's itemized cost of repair proposal that included an estimate for the cost to remove and replace the stucco siding, and included an allowance to repair any water-damaged sheathing and framing that may be found once the stucco was removed from the house.

After the arbitrator issued the award, Auto-Owners filed a declaratory judgment civil action. The issue of coverage related to the damages for the removal and replacement of the stucco system and the allowance for water damaged sheathing and/or framing. The trial court ruled in favor of the homeowner holding that the policy covered the damages for the removal and replacement of the stucco and the allowance.

On appeal, the South Carolina Supreme Court affirmed the trial court and issued a decision holding that the CGL policy covered the damages for the removal/replacement of the stucco and the allowance. Auto-Owners petitioned for a rehearing, which the Supreme Court granted to Auto-Owners. The Supreme Court reheard arguments and issued a second decision, which replaced the first one. See Newman, 684 S.E.2d 541. In Newman, the Supreme Court held that there was an occurrence of property damage, i.e., faulty construction, performed by a subcontractor to the builder (insured), that resulted in physically damaged sheathing and framing (property damage). The Court also held that the CGL policy did not cover the damages for the removal and replacement of the stucco and relied on Exclusion N:

C. Damages awarded for replacement of the defective stucco

> Auto-Owners finally argues that even if an "occurrence" warrants recovery for the Homeowner's property damage, the trial court erred in determining that the CGL policy covered the arbitrator's itemized allowance for replacing and repairing the defective stucco itself as an incidental cost to repairing the damage to other property. We agree.
>
> Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself. Specifically, the policy exclusion provides that the insurance does not cover damages "claimed for any loss, cost or expense ... for the repair, replacement, adjustment, removal or disposal of ... 'Your product'; ... 'Your work'; or ... 'Impaired property'; if such product, work or property is withdrawn ... from use ... because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco-even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy-and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover. See L-J 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.

Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546.

In the present civil action, Plaintiffs have submitted a Preliminary Repair Estimate prepared by ProCon & Associates, Inc. Among other things, the estimate includes separate line item costs to remove and replace the stucco system, Professional Plastering's work, and to repair water damaged or deteriorated building materials. At the appropriate time, and if applicable, National Fire believes that this document may be sufficient to distinguish the different types of damages relative to insurance coverage. However, although the Supreme Court ruled that Exclusion N excluded coverage for the removal and replacement of the stucco, the Supreme Court required Auto-Owners to pay the entire judgment (removal and replacement included). The Supreme Court stated the following:

> Nevertheless, it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this

matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. 5 (Citation Omitted)

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

Footnote 5 reads as follows:

Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547.

Accordingly, National Fire is before this court seeking the requested relief herein.

In Crossman, Crossman Communities of N.C. constructed five condominium projects. Like the homeowners in the present civil action, the homeowners filed suit against Crossman Communities of N.C. after discovering construction defects and water damages with to the buildings. The homeowners alleged Crossman Communities of N.C. defectively constructed the buildings, and as a result, the buildings experienced substantial decay and deterioration. The parties stipulated that the property damage resulted from water intrusion, that the damage was progressive in nature, and the damage caused by the negligent construction of subcontractors. "The trial court ruled there was property damage 'that resulted from, and was in addition to, the subcontractors' work itself,' and thus, 'the property damage was caused by an occurrence'." Id. at 34. The Supreme Court reversed the trial court. The Supreme Court in Crossman also overruled Newman. However, parties in Crossman filed Petitions for Rehearing before the Supreme Court.

The Supreme Court granted the Petitions and scheduled oral argument for May 23, 2011. Accordingly, Crossman may not be a final decision as of the trial of the present civil action.

The Supreme Court in Crossman stated, "[t]hus, the issue we must resolve is: When faulty workmanship directly causes further damage to non-defective components of an insured's project, does this necessarily constitute an occurrence?" Id. at 46. The Supreme Court held, "[t]he natural and expected consequence of negligently installing siding to these condominiums is water intrusion and damage to the interior of the units. There is no fortuity element present under the factual scenario." Id. at 47. The Supreme Court stated, "[w]e hold that faulty workmanship can cause an occurrence." Id. at 46. However, "[f]aulty workmanship is not an 'occurrence'." Id. at 46.

The Supreme Court stated, "[w]e hold that where the damage to the insured's property is no more than the natural and probable consequences of faulty workmanship such that the two cannot be distinguished, this does not constitute an occurrence...." Id. at 47. "To provide coverage under these circumstances would transform the CGL policy into a performance bond...." Id. at 49. "Rather, the damage was a direct result and the natural and expected consequence of faulty workmanship; faulty workmanship did not cause an occurrence resulting in damage." Id. at 49, 50.

The Supreme Court addressed the exception to Exclusion L by stating, "the subcontractor exception is relevant only if there is a finding of initial coverage. That is, any property damage for which an insured seeks coverage must have been caused by an occurrence before the policy is triggered." Id. at 37. The Supreme Court also addressed Newman as follows:

> Th[e] finding of an 'occurrence' without regard to the fortuity component of an 'accident' was error." Id. at 44. "Newman lacked the predicate 'occurrence' as does the case before us. We overrule Newman to the extent it permitted coverage for faulty workmanship that directly causes further damage to property in the absence of an 'occurrence' with its

> fortuity underpinnings." Id. at 49. The Supreme Court stated, "[f]or faulty workmanship to give rise to potential coverage, the faulty workmanship must result in an occurrence, that is, an unintended, unforeseen, fortuitous, or injurious event." Id. at 49. The Supreme Court stated, "[d]amage that does not arise from a fortuitous event is not an occurrence. Damages to the insured's project that are the natural and probable consequences of faulty workmanship do not constitute an 'occurrence'."

Id. at 49.

Under the present circumstances, to avoid potential prejudice with the verdict, National Fire requests that the court submit a special verdict form and/or general verdict with special interrogatories and do so without reference to insurance. See Crocker v. Weathers, 126 S.E.2d 335.

National Fire believes that any special interrogatories must be based on the evidence presented at trial. Accordingly, it is premature to commit to specific interrogatories. However, to provide an example of the kinds of interrogatories that may be applicable, National Fire submits the attached interrogatories; and requests that the Court amend or modify these forms at such time during the course of the trial as is appropriate based upon the evidence admitted at trial. National Fire reserves all rights as to the issues of defense and/or indemnity.

Respectfully Submitted,

John L. McCants, Esquire
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, Fifth Floor
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190
ATTORNEY FOR NATIONAL FIRE & MARINE INSURANCE COMPANY

Columbia, South Carolina
April 29, 2011

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks At Fenwick Property Owners Association, Inc., (from December 16, 2009 to present),

Plaintiffs,

vs.

Fenwick Plantation Tarragon, LLC, A South Carolina Limited Liability Company, f/k/a Fenwick Tarragon Apartments, LLC, a South Carolina Limited Liability Company; Charleston Tarragon Manager, LLC, A Delaware Limited Liability Company; Tarragon Development Corporation, A Nevada Corporation; Summit Contractors, Inc.; Fogleberg Koch Architects, Inc.; Development, Compliance & Inspections, Inc.; H2L Consulting Engineers; Twelve Oaks at Fenwick Property Owners Association, Inc. (from August 8, 2006 to December 15, 2008); Professional Plastering & Stucco, Inc.; Johnson Companies, Inc. d/b/a Johnson Roofing, Inc.; Los Campos, Inc.; North Florida Framing, Inc.; Best Masonry & Tool Supply, L.P., as successor in interest to Best Masonry & Tool Supply, Inc., as Successor in Interest to Magna Wall, Inc.; All South Vinyl Products, Inc.; Marquez Construction, Inc.; J.T. Walker Industries, Inc.; J.T. Industries d/b/a General Aluminum Corporation and General Aluminum Company of Texas, LP and J.R. Hobbs Co. – Atlanta LLC f/k/a JRH Merger Co., LLC; Jamie Helman, individually; Scott Ferguson, individually; Chris Cobbs, individually; Federal Insurance Company; Maria Arias; Miquel Rosales; and APS Enterprises Unlimited, Inc.;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-0049

Professional Plastering & Stucco, Inc.

Third-Party Plaintiff,

vs.

Luis Martinez, Villagomez Painting, Inc.; and D.M. Painting;

Third-Party Defendants.

EXAMPLES OF WRITTEN INTERROGATORIES

1. Do you find that Defendant Professional Plastering & Stucco, Inc.'s ("Professional Plastering") installation of the stucco system or its scope of work proximately caused any physical injury to tangible property other than Professional Plastering's work?

Yes ____; No____.

2. If you answer "yes" to Interrogatory #1, please list or identify in the below space the physically injured tangible property other than Professional Plastering's work; and, if you answer "yes" to Interrogatory # 1, state the dollar amount of damages that you award for the physically injured tangible property other than Professional Plastering's work. To answer this interrogatory, you may use the property descriptions used in the ProCon & Associates, Inc.'s Preliminary Repair Estimate.

_____

_____

_____

_____

_____

_____

Dollar Amount: _____.

3. Do you find that Defendant Professional Plastering's installation of the stucco system or its scope of work proximately caused any damages that are the costs to repair and/or replace Professional Plastering's work?

4. If you answered "yes" to Interrogatory 3, state the dollar amount of damages that you award for the repair and/or replacement of Professional Plastering's work.

Dollar Amount: _____.

5. Do you find that Plaintiffs have met their burden of proof as to loss of use damages? If you answer yes, please identify the dollar amount that is part of your overall verdict against Professional Plastering that represents loss of use damages.

Yes ____ Dollar Amount: _____.

_____
(Foreman)

May ____, 2011

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JAN 24 2013
S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Mark F. Teseniar & Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oakes At Fenwick Property Owners Association, Inc., (from December 16, 2008 to present),.....Plaintiffs/Respondents,

v.

Professional Plastering & Stucco, Inc., Maria Arias, and Miquel Rosales,.....Defendants,

-and-

National Fire & Marine Insurance Company, Inc., ... Petitioner.

CERTIFICATE OF SERVICE

I, Victoria Moody, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of the **Appendix** upon the Clerk of Court for the South Carolina Supreme Court as well as the below-referenced counsel of record, this 24th day of January 2013, by depositing a copy of the same in the U.S. Mail, postage prepaid and addressed as follows:

Phillip W. Segui, Jr., Esquire
Segui Law Firm, PC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, South Carolina 29464
Attorney for Respondent

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Attorneys for Defendant Professional Plastering & Stucco, Inc.

Victoria Moody
Paralegal to Kirby D. Shealy III

ELLIS : LAWHORNE

KIRBY D. SHEALY III
803 212 4966
kshealy@ellislawhorne.com

January 24, 2013

Via Hand Delivery:
The Honorable Daniel E. Shearouse
Supreme Court Building
1231 Gervais Street
Columbia, SC 29211

Re: *Teseniar, et. al. v. National Fire & Marine Insurance Company, Inc., et al.*
Appellate Case No: 2013-000023
ELS File No. 002090-58983

Dear Mr. Shearouse:

Pursuant to an Order from the Supreme Court dated January 18, 2013, enclosed please find one bound and one unbound copy of our appendix, which is being substituted for the original appendix we filed on January 4, 2013. I have enclosed an extra copy which I would appreciate your stamping and returning to the runner delivering same. By copy of this letter, I am serving all counsel of record with the new appendix. Please contact me with any questions or comments.

Sincerely,

Kirby D. Shealy III

KDS/LRZ/vhm

cc: Phillip W. Segui, Jr., Esquire
John T. Chakeris, Esquire
Jesse A. Kirchner, Esquire
W. Jefferson Leath, Jr., Esquire
Justin O. Lucey, Esquire
Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
Jonathan J. Anderson, Esquire