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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte:

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Clarendon National Insurance Company as successor in interest to Clarendon America Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, Canopius US Insurance, Inc. and American Empire Surplus Lines Insurance Company, Appellants,

In Re:

The Harbour Cove Condominium Association, Plaintiff,

v.

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

And

Beach Villas at Ocean Keyes Property Owners Association, Inc., Plaintiff,

v.

Ocean Keyes Development, LLC, Keye Construction Co., Inc., Russell P. Baltzer, First Exteriors, LLC, CareFree Exteriors Inc., Coastal Stucco, Inc., Richard H. Construction, LLC a/k/a

Ricardo Hernandez d/b/a Richard Framing Con., Inc., Builders FirstSource-Southeast Group, LLC, Steel Homes International, Inc., Renaissance Steel Installation, LLC n/k/a Renaissance Steel, LLC, Benchmark Steel Service, LLC and Dietrich Building Systems n/k/a Clark Western Dietrich Building Systems, LLC, Defendants,

And

Ocean Keyes Development, LLC and Keye Construction Co., Inc., Third-Party Plaintiffs,

v.

Renaissance Steel Installation, LLC f/k/a renaissance Steel, LLC n/k/a Innovative Steel Technologies, Benchmark Steel Erectors, and Total Construction, LLC, Third-Party Defendants,

Of whom The Harbour Cove Condominium Association, Beach Villas at Ocean Keyes Property Owners Association, Inc., Ocean Keyes Development, LLC, Keye Construction Co., Inc., and Russell P. Baltzer are the Respondents

Appellate Case No. 2017-002146

INITIAL BRIEF OF APPELLANT NATIONWIDE MUTUAL INSURANCE COMPANY F/K/A HARLEYSVILLE INSURANCE COMPANY

NELSON MULLINS RILEY & SCARBOROUGH, LLP

Robert C. Calamari, Esquire
Post Office Box 3939
Myrtle Beach, SC 29577
(843) 448-3500

Attorney for Appellant

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STATEMENT OF THE ISSUES ON APPEAL

I) Do Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E. 2d 541 (2009) and Harleysville Group Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) require liability insurers to intervene in an underlying liability action against its insured if it seeks to preserve the right to allocate between covered and noncovered damages?

II) Did the trial court err in denying Nationwide's Motion to Intervene?

STATEMENT OF THE CASE AND FACTS

Harbour Cove Condominium Association ("Plaintiff" or "HOA") initially brought this action against Centex Homes and a handful of Centex's subcontractors, including Nationwide's insured, Martin Masonry, Inc. (3d Amend. Complaint, pp 2-11.) According to Plaintiff, Martin Masonry "was engaged in the supervision, building, and construction and specifically installed and/or supervised the installation of the masonry, brick and related flashings . . . ." (Id. at p. 7, ¶ 17.)

Due to this and other defects, Plaintiff alleged that it

> has suffered actual, incidental, consequential, and special damages and the expense of having to hire experts to investigate the causes of the water intrusion and construction defects and failures set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the condominiums and buildings at issue to make them safe and habitable

and that it

> has been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that intruded and continues to intrude into the subject condominiums and buildings causing and resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the condominiums and buildings.

(Id. at p.21.)

Centex thereafter filed a Third-Party Complaint against Martin Masonry and other subcontractors. (Centex Am. Complaint, p. 13-17). Centex alleged that its liability, if it existed at all, was ultimately the responsibility of the subcontractors. (Id. at p. 18.)

On September 18, 2017, Nationwide moved to intervene for the limited purpose of submitting special interrogatories to the jury and ensuring that damages evidence was submitted in a way that permitted the jury to accurately answer those interrogatories. (Nationwide Mot. to Intervene, p. 4.) In the alternative, Nationwide moved for a protective order preserving all coverage issues, of any kind, for determination in a subsequent action. (Id. at p. 9-10.)

On September 27, 2017, the lower court heard Nationwide's motion (along with several others). (Tr. 9/27/17, pp. 1-67.) On October 12, 2017, the lower court denied every motion to intervene. Judge Newman's findings of fact and law are produced in full, below:

1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP"). As our Supreme Court has held, "intervention is only appropriate where the party seeking intervention has 'a real proprietary interest in the subject matter of the proceedings;' an interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." *Ex parte* Gov't Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (*quoting* Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in GEICO, the court affirmed the family court's denial of insurer's motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the Harbour Cove Condominium project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not appropriate to be litigated or interjected into this construction defect action. Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance

> coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

(Order, pp.3-4.) The lower court made no ruling on Nationwide's Motion For Protective Order. See id.

The next day, Nationwide filed a notice of appeal.[1] (Notice of Appeal.)

STANDARD OF REVIEW

Typically, Rule 24 cases are reviewed on an abuse of discretion standard. Ex parte Gov't Employee's Ins. Co., 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007). However, issues of law are reviewed *de novo*. Jennings v. Jennings, 401 S.C. 1, 4, 736 S.E.2d 242, 243 (2012). As this appeal turns on the appropriate interpretation of South Carolina statutes and case law, it is subject to *de novo* review.

ARGUMENT

Through this appeal, this Court will be able to help offer a sense of clarity and concrete direction to insurers while they navigate an increasingly complex tripartite relationship between themselves, their insureds, and third-party claimants. The specific motion on appeal is a denial of Nationwide's motion to intervene in its insured's construction defects litigation. However, a resolution requires an examination of this tripartite relationship, how this relationship is approached in South Carolina and other jurisdictions, the potential ramifications of intervention, and potential alternatives if this Court determines that intervention is not permissible.

I) CURRENT LAW SUGGESTS THAT IT IS THE INSURER'S RIGHT AND RESPONSIBILITY TO INTERVENE

[1] The Court of Appeals consolidated the Harbour Cove appeals with another line of appeals arising out of similar denials of motions to intervene in Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al., Civil Action No. 2014-CP-26-06573. Nationwide filed a notice of appeal in Beach Villas, but has since settled with the plaintiff. Therefore, this appeal relates solely to Harbour Cove.

The law of construction defects has been ever-evolving. Through statutory and common law changes, the courts and legislature have tried to foster an environment that delicately balances the rights and responsibilities of insureds, their insurers, and aggrieved third parties. The lower court misinterpreted the law, and tipped the scale away from the insurers.

A) *Sims* and the separation of coverage and liability

Claims for property damage caused by poor workmanship are covered by liability policies, whereas claims for poor workmanship alone are not. Crossman Cmties. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011); § 38-61-70(B), S.C. Code Ann. Accordingly, an insurer has no duty to indemnify its insured for damages related solely to faulty workmanship. Id. However, an insurer does have a duty to defend its insured if and when a liability action against that insured contains allegations of both covered and non-covered damages. See, e.g., Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1994), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996). An insurer must undertake the defense of its insured in a manner that prioritizes the interests of the insured. Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933).

However, insurance policies are, at their core, contracts between two entities, and should not be interpretted in a way that disregards the intent of the parties. Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 216 S.E.2d 547 (1975). Thus, courts have typically adhered to the principle that insurance coverage cannot be created by waiver or by estoppel. Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Illinois, 338 S.C. 43, 524 S.E.2d 847 (Ct. App. 1999). A disconnect exists, then, in how an insurer can adequately and fully protect its insured, without also having to provide more coverage than what was bargained for.

To remedy this problem, courts have long preferred that an insurer provide defense counsel for its insured, and retain its own counsel to litigate coverage issues later. Twin City Fire Ins. Co.

v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP, 336 F. Supp. 2d 610 (D.S.C. 2004) (recognizing an insurer's duty to provide independent defense counsel to its insured); Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965) (recognizing the conflict of interest that exists when an insurer is defending its insured in a liability action). In Sims, an insured was found liable for negligence in an automobile accident. Sims, 247 S.C. at 84, 145 S.E.2d at 524. After the liability claim concluded, the insurer tried to introduce evidence that the insured had intentionally caused the accident- even though the insurer chose not to defend the insured in the liability action. Id. 89, 145 S.E.2d at 526. The Court allowed the evidence to be submitted, and refused to bind the insurer by the findings in the negligence action. Id. at 87-88, 145 S.E.2d at 526. Essentially, the Court reasoned that the insurer should not be bound by the underlying judgment, because the insurer could not have participated in the action without creating an insurmountable conflict of interest for the insured's defense counsel. Ibid.

Thus, after Sims, it appeared to be settled that an insurer could hire counsel to defend its insured, allow the liability claim to proceed to its natural conclusion, and then argue coverage issues in a separate proceeding. Problems are arising, however, and particularly in the construction defect arena, when the liability action against the insured results in a verdict against the insured which contains a mixture of both covered and non-covered damages.

B) The *Newman* decision

This issue came before the Court decades later in Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009). In Newman, a construction defect dispute was arbitrated, and the arbitrator determined that the insured installed stucco in a defective manner, and that the defects caused moisture intrusion which substantially damaged the claimant's home. Id. at 194, 684 S.E.2d at 544-45. The arbitrator's award consisted of an itemized list of damages against the insured. Id. at 190, 684 S.E.2d at 542. Post arbitration, the insurer argued that it had no obligation

to indemnify its insured for any damages related to the noncovered cost of removing and replacing the stucco. Id. at 197, 684 S.E.2d at 546. The Court agreed as a practical matter, but prohibited the award from being dissected and allocated, noting that the record before it made it impossible to determine which portion of the arbitrator's damages related to the noncovered costs. Id. at 198, 684 S.E.2d at 547.

Of particular importance, the Court also provided two other opinions: the purpose of a declaratory judgment action is not to relitigate damages, and the insurer had the opportunity to raise the issue of damages before the arbitrator issued his binding award. Ibid. The first point articulated what could be considered a departure from the rationale previously articulated in Sims, as Sims expressly held that insurers could later litigate coverage matters after liability had been determined. The second point, equally troublesome for insurers, articulated an exception from the general principle that coverage cannot and should not be created by waiver or estoppel. It also provides necessary background for the Court's more recent decision in Harleysville.

C) The *Harleysville* decision

Harleysville, like Newman, involved an insurer and its insured disputing whether the insurer had to indemnify its insured for damages rendered in a construction defect liability action. 420 S.C. 321, 803 S.E.2d 288 (2017). In Harleysville, a jury rendered a general verdict against the insured, and the insurer attempted to allocate that verdict for insurance coverage purposes. Id. at 332, 803 S.E.2d at 294. The Special Referee in the underlying action refused, noting the inherent speculation present in piecing apart a jury's general verdict. Ibid. Ultimately, the Court found that the insurer did not adequately reserve the right to contest coverage because it did not inform the insured of the existence of a conflict of interest, and of its need to request an allocated verdict. Id. at 338-39, 803 S.E.2d at 297-98.

The Special Referee's determination did not go unrecognized, however. In a footnote, the Court stated that:

> In addition to finding [the insurer's] attempted reservation of rights to be insufficient, the Special Referee also found 'the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict' as to the negligent construction, breach of warranty, and breach of fiduciary duty claims, and the Special Referee refused to 'engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making.' *See Newman*, 385 S.C. at 198, 684 S.E.2d at 547 (finding that even though arbitrator's award improperly included amounts for replacing and repairing faulty workmanship itself, there was insufficient evidence in the record to allow the Court to determine which costs were solely attributable to the non-covered faulty workmanship and finding that the insurer's duty to indemnify therefore covered the entire award).

Id. at 343 n.11, 803 S.E.2d at 300 n.11. Thus, the Court, through citing Newman, implicitly agreed the principle that the lack of a damage allocation was of Harleysville's "own making." This can reasonably be interpreted as an implicit recognition that an insurer can and should raise the issue of damage allocation prior to the rendition of a final judgment, potentially through intervention.

II) A LIMITED INTERVENTION CAN RECONCILE *SIMS*, *NEWMAN*, AND *HARLEYSVILLE*

It appears that after Newman and Harleysville, an exception exists to the principal that coverage cannot be triggered by waiver or estoppel: if it is possible for the insurer to raise coverage issues and request a damage allocation before a judgment is rendered, it must do so or it will be forced to pay the entire portion of a general, unallocated verdict. How an insurer goes about raising those issues is what has to be determined by this appeal, and why Nationwide attempted to intervene at all.

It is clear that insurers should be neither required nor permitted to intervene as party litigants, because their presence would contravene Rule 411, SCRE[2] and permit the very conflict of interest that courts have been avoiding since Sims. However, Sims, Newman, Harleysville, and

[2] "The rule protects against unfair prejudice in the verdict that might result from the jury's knowledge that the defendant will not have to pay the award amount." New v. Max G. Crosby Const. Co., Inc., 2004 WL 6307901, *5 (Ct. App. Apr. 7, 2004).

Rule 24 precedent can be reconciled by allowing, but not necessarily *requiring*, an insurer to intervene in a *limited capacity* during discovery stages and pretrial procedures.

A) Rule 24(a), SCRCP, allows Nationwide to intervene.

Rule 24(a) permits a party to intervene in a proceeding

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a), SCRCP. Thus, a party must (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 190, 394 S.E.2d 712, 714 (1990). Rule 24 should be liberally construed, and intervention liberally granted, in order to promote judicial economy by declaring the rights of all parties potentially affected. In re Horry County State Bank, 361 S.C. 503. 604 S.E.2d 723 (2004); Stoney v. Stoney, 417 S.C. 345, 790 S.E.2d 31 (Ct. App. 2016).

i) A showing of standing is not required

The lower court interpreted South Carolina precedent as requiring a party to establish its own, independent standing in order to intervene under Rule 24(a). See Ex parte Gov't Employee's Ins. Co. 373 S.C. 132, 138, 644 S.E.2d 699, 703 (2007) ("GEICO"). While it is true that some courts have come to this conclusion, the party seeking to intervene in these cases was seeking to intervene as a party-litigant. See Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994) (intervening in order to challenge a settlement agreement entered into between the original parties); Berkely Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 190, 394 S.E.2d 712, 714 (S.C. 1990) (intervening as a party-defendant); Stoney v. Stoney, 417 S.C. 345, 356, 790 S.E.2d 31, 37

(Ct. App. 2016) (intervening as a third party plaintiff); Ken's Cabana, LLC, et al. v. Flemington Properties, LLC, et al., 2002-CP-26-669 (Ct. Cmn. Pleas June 19, 2003), aff'd In re Horry County State Bank, 361 S.C. 503, 604 S.E.2d 723 (2004) (intervening to set aside an order granting summary judgment to an original party).

When entities do not seek to intervene as party-litigants, courts have allowed parties to intervene without establishing an independent basis for standing. Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991); see also Beckman Industries, Inc. v. Int'l Ins. Co., 966 F.2d 470, 474 (9th Cir. 1992) (permitting an insurance carrier to intervene under Rule 24(b) to discover documents previously sealed under a protective order, noting that "an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits")[3]; Armor Screen Corp. v. Storm Catcher, Inc., 2009 WL 10667863, *1-2 (S.D. Fla. May 14, 2009) (extending the Beckman rationale to permit limited intervention in the insurance context).

For example, in Davis, a newspaper company was allowed to intervene without establishing its own, independent standing in a case. Davis, 304 S.C. at 504, 405 S.E.2d at 603. In its holding, the Court stressed that the company's motion was "distinguished from those in which party-litigant status is sought," and was "provisional in nature and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted." Ibid. (quoting Mokhiber v. Davis, 537 A.2d 1100 (D.C. App.1988)). Thus, the company's limited intervention served as a doorway into the litigation, in order for the company to later submit additional motions to be reviewed on their own merits.

[3] It is appropriate to analyze Federal cases interpreting Rule 24, FRCP, as the two rules are materially the same. Davis, 304 S.C. at 503, n.1 (noting that the rules are "materially the same"); South Carolina Tax Com'n v. Union County Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. S.C. 1988) ("Because the South Carolina Rules of Civil Procedure closely parallel the Federal Rules of Civil Procedure, it is appropriate to look to the Federal Rules in interpreting Rule 24.")

Nationwide is not seeking its own, independent relief, nor is it attempting to have any substantive role in litigating the underlying dispute. See Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S.Ct. 1645, 1651 (2017) ("For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests."). Rather, like in Davis, Nationwide is seeking to intervene for the limited purpose of *thereafter* submitting interrogatories, instructions, and verdict forms, to be considered separately by the court.

ii) Nationwide has an adequate interest for purposes of Rule 24.

A party's "interest" under Rule 24(a) must be "direct, substantial, and legally protectable." Ex parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661 (1993). An interest "relates" to the action in question when it relates to the "overall nature of the proceeding," rather than just "the particular issue that is before the Court.". Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 190, 394 S.E.2d 712, 714 (1990) ("The question of SCE & G's interest must be determined in relation to the overall subject matter of the action and not in relation to the particular issue that is before the Court.").

In Berkeley, a plaintiff utility company brought a breach of contract action against Mt. Pleasant to enforce its right to be the sole provider of services in a particular geographical area. Id. at 188, 394 S.E.2d at 713. During the proceeding, a separate utilities company moved to intervene as a party-defendant. Id. at 188, 394 S.E.2d at 713. The company was not a party to or third party beneficiary of the contract, but the resolution of the dispute materially affected the intervenor's own obligations to the town, and its obligations under other town ordinances and contracts. Id. at 715. The Court held that the utilities company was able to intervene as of right, reasoning that "[t]he question of [the intervenor's] interest must be determined in relation to the

overall subject matter of the action and not in relation to the particular issue that is before the Court." Id. at 190, 394 S.E.2d at 714.

The lower court determined that the insurers did not have an interest in the real property itself, and did not have a direct interest in the transaction underlying the construction of that property. (Order, p.3) (¶ 1). Therefore, the court determined that whatever interest they did have was inadequate for purposes of Rule 24. Ibid.

However, under Berkeley, the purchase and sale of the property is not the "overall subject matter of the action." Instead, the overall subject matter of the action is whether construction defects exist at the Plaintiff's property and, if so, who should be held liable to repair them. Each defendant's liability will be dependent upon facts which show whether the construction defect at issue is a result of its own poor workmanship, or the work of another. The Plaintiffs' damages will dependent upon facts which show what portions of the property were damaged, and the cost to repair that damage.

Nationwide has an interest in protecting its rights and responsibilities under the insurance contracts. This interest relates to the construction defect action because a vast majority, if not all, of the facts Nationwide will rely upon will be developed in that construction defect action. Moreover, it is highly likely that a verdict, if rendered, will contain a mixture of (1) the cost to repair defective work, which his not covered, and (2) the cost to repair damage which resulted from that defective work, which is covered. However, Nationwide is only contractually obligated to indemnify its insured for those portions of the verdict which relate to covered damages. Much like the breach of contract action in Berkeley, this construction defect action has a direct, independent impact on Nationwide's own contractual obligations. Therefore, Nationwide has a direct, substantial, and legally protectable interest related to the construction defect action under Rule 24.

iii) The declaratory judgment action will not satisfactorily protect Nationwide's interests.

A purported intervenor under Rule 24 must not only prove that it has an interest in the proceeding, but also that absent intervention, its ability to protect that interest may be impaired. Rule 24(a), SCRCP. Focusing on the Rule's use of "may," courts have recognized and highlighted that this is a low threshold to satisfy, and that an intervenor simply must show that it "would have difficulty adequately protecting its interests if not allowed to intervene." Berkeley, 302 S.C. at 190, 394 S.E.2d at 715. For example, in Berkeley, a movant's interests were found to be impaired or impeded when it would have been "extremely difficult" for that party to collaterally attack an adverse ruling rendered in the proceeding. Ibid.

Without making any factual findings, the lower court summarily determined that the carriers could "satisfactorily" protect their interests in a separate declaratory judgment action. However, Nationwide's interests are not adequately protected simply by virtue of the fact that it has the ability to bring a declaratory action. In order for the declaratory action to be effective and meaningful, coverage issues have to actually be preserved. Newman and Harleysville made it clear that Nationwide cannot undertake a damage allocation in a separate declaratory judgment. Supra §§ I.B., I.C. Therefore, Nationwide's interests absolutely will not be protected in a declaratory action unless Nationwide first ensures that damages are initially allocated within this action.

iv) Nationwide's interests are not adequately protected by other parties.

The final prong in the Rule 24(a) analysis is whether the current parties to the dispute will "inadequately represent" the interests of the purported intervenor. SCRCP, Rule 24(a). In analyzing whether existing representation is adequate, courts have applied the Sagebrush test, which consists of three factors:

> (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such

> arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (S.C. 1990).

Courts have also considered parties' respective financial interests to detremine whether one party will adequately represent the interests of the other. For example, in Roper Hosp. v. Clemons, 325 S.C. 534, 484 S.E.2d598 (Ct. App. S.C. 1997), it was found that a party's interests were adequately protected by a current party because that current party was ultimately responsible for the purported intervenor's services. Id. at 543, 484 S.E.2d at 602. Conversely, in Berkeley, a party's economic interests were found to be inadequately represented simply because the current party had no direct economic interest in the outcome of the case, whereas the putative intervenor did. Berkeley, 302 S.C. at 192, 394 S.E.2d at 716.

Considering Harleysville, if a general verdict is rendered, Nationwide will be unable to perform any sort of coverage analysis in order to determine what portion of the verdict represents covered damages. Supra, § I.C. Like the insurers in Harleysville, it will then be obligated to pay the entire verdict, even though every party to this action is acutely aware that at least *some* of the damages claimed are not covered by insurance proceeds. In effect, the existence of a general verdict increases Nationwide's liability to pay a judgment, and drastically reduces, if not entirely removes, its insured's. An allocated verdict, on the other hand, will preserve the likelihood that the insureds have at least some liability to pay a portion of these damages. Thus, both Nationwide and its insureds have financial interests in the outcome of this action, but their interests are diametrically opposed. Under Berkeley, the insureds cannot be trusted to adequately protect Nationwide's interests.

B) Rule 24(b), SCRCP, allows Nationwide to intervene.

Alternatively, this Court can also find that Nationwide is permitted to intervene under Rule 24(b). Rule 24(b) allows a party to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." SCRCP, Rule 24(b). The court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id. Under the facts and circumstances of this case, Nationwide's limited intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

i) An independent basis for jurisdiction is not required

As discussed above, courts have frequently permitted insurers to intervene in limited capacities under Rule 24 without establishing their own, independent standing. Supra § II.A.i. Armor Screen Corp. v. Storm Catcher, Inc., 2009 WL 10667863, *1-2 (S.D. Fla. May 14, 2009) (finding that an independent basis for subject matter jurisdiction was not required when an insurer sought a limited intervention in order to submit interrogatories and a special verdict form, and noting that "the critical distinction, for jurisdictional purposes, is that the insurer sought only to clarify the exact liability for each defendant as to each claim and did not seek to litigate any potential coverage claims it may have with [the insureds]."); Beckman Industries, Inc. v. Int'l Ins. Co., 966 F.2d 470, 474 (9th Cir. 1992) ("an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits"). Because Nationwide seeks to intervene in a limited capacity, it should not be required to show an independent basis for subject matter jurisdiction.

ii) Nationwide has claims and defenses in common with the construction defect action

Rule 24(b) permits intervention "when claims or defenses have a question of law or fact common to each other" because "sound administrative procedures encourage the disposition of all the claims or defenses in one action rather than a multiplicity of actions." South Carolina Tax Com'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988).

Accordingly, Rule 24(b) is typically available to a party that "might institute or be called upon to defend a separate proceeding that would substantially duplicate the one in question." Id. at 263, 368 S.E.2d at 75-76.

Courts in other jurisdictions have found Rule 24(b)'s commonality requirement satisfied by an insurer who sought to intervene for the limited purpose of fact discovery, in order to determine insurance coverage based on those facts. Beckman Industries, 966 F.2d at 474 ("The issue of interpretation of the policy supplies a sufficiently strong nexus between the district court action and the state actions to satisfy the commonality requirement. Further specificity., *e.g.*, that the claim involve the same clause of the policy, or the same legal theory, is not required when intervenors are not becoming parties to the litigation."); Armor Screen Corp., 2009 WL 10667863 at *2 ("In order to determine whether defendants are covered by the insurance policy with FCCI, it must be determined whether any of the defendants acted with knowledge or intent, which defendants are liable for which claims, the dates of any wrongful publication or advertising and which laws or statutes each defendant violated; these are exactly the issues a jury will have to determine when rendering a decision in this case."); Thomas v. Henderson, 297 F. Supp. 2d 1311, 1326 (S.D. Ala. 2003) ("There is no question that Old Republic's proposed intervention has questions of fact in common with those of the pending action."); Backus v. South Carolina, 2012 WL 406860, *2 (D.S.C. Feb. 8, 2012) (citing Thomas v. Henderson and noting that courts permit intervention under Rule 24(b) in the interest of judicial economy when common questions of fact exist); Fidelity Bankers Life Ins. Co. v. Wedco, Inc., 102 F.R.D. 41, 44, 75 A.L.R. Fed. 861 (D. Nev. 1984) ("In order to be entitled to punitive damages, a plaintiff must prove that the defendant acted with fraud, oppression or malice. [] Damages resulting from fraudulent or malicious acts of the insureds are specifically excluded from the coverage of the errors and omissions policies. The

future defense of the insurance companies, therefore, has questions of fact in common with the main action.") (internal citation removed).

There are several overlapping issues of fact in the construction defect and declaratory judgment actions. In each case, experts and witnesses will be called upon to articulate what portions of the buildings were damaged, what directly and indirectly caused that damage, when the damage began, and how much it will cost to repair that damage. All of these factual determinations weigh heavily on both the liability case and the separate coverage action.

iii) A limited intervention will not create a conflict of interest, confuse the jury, or unfairly prejudice the parties

The lower court, citing Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (S.C. 1965), determined that a conflict of interest would be present if the insurers were allowed to intervene. Essentially, the court reasoned that counsel for the insureds would be presented with a conflict because "on the one hand, counsel must try to minimize its insured's liability by showing a lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured." (Order, p. 4, ¶ 4). The court also found that the special interrogatories and/or verdict form proposed by the insurers would confuse the jury due to the interjection of coverage issues into a the construction defect action. (Order, p. 4, ¶ 5).

Courts outside of South Carolina have recognized that the irreconcilable conflict articulated in Sims can be avoided by ensuring carriers are permitted to intervene only in a limited capacity. Armor Screen Corp., 2009 WL 10667863 at *2 ("Finally, [the insureds] will not be prejudiced from FCCI's intervention. First, FCCI is permitted to submit the proposed special interrogatories and an itemized verdict form for this Court's consideration. This Court will consider FCCI's submissions along with plaintiff and [the insureds'] submissions together. At that point the Court will determine what jury instructions, special interrogatories and verdict forms will be submitted

to the jury. Since this Court will also consider plaintiff and [the insureds'] arguments in determining what forms to submit to the jury, FCCI's presence will not prejudice [the insureds]."); Thomas v. Henderson, 297 F. Supp. at 1327 (finding that the potential for prejudice could be controlled by conditioning intervention on the understandings that the right to proffer interrogatories did not obligate the court to approve them, the insurer could not compromise the interests of its insured, insurance coverage issues would not be litigated in the case, the insurer would not interfere with the insured's defense, and any concerns regarding the same would be brought before the court); Plough, Inc. v. Int'l Flavors & Fragrances, Inc., 96 F.R.D. 136, 137 (W.D. Tenn. 1982) (allowing an insurer to intervene with the understanding that the parties would later submit interrogatories and verdict forms for the court's approval).

The conflict of interest articulated by the lower court and Sims is not present here, because Nationwide does not wish to intervene as a party litigant. Nationwide does not wish to defend or prosecute any claim, and does not wish to interfere with or otherwise participate in the insured's defense. Nationwide will have no involvement in the litigation of the merits. Rather, Nationwide's involvement only arises at the final, pre-trial stages of the case, by way of submitting pre-trial motions for the court's review. If Nationwide's limited intervention is allowed based upon the understanding that interrogatories, verdict forms, and jury instructions will later be submitted by all parties for the court's approval, all parties and the court can ensure that there will be no threat of jury confusion, interjection of coverage issues, or conflicts of interest. The lower court denied Nationwide's motion for intervention based, in part, on the analysis that "the special interrogatories and/or special verdict forms requested" would confuse the jury and interject coverage issues. Respectfully, the lower court could and should have permitted Nationwide to first intervene, and thereafter ordered the parties to meet and confer in order to later submit interrogatories, verdict forms, and jury instructions for separate review and approval. See Davis v. Jennings, 304 S.C.

502, 503-04, 405 S.E.2d 601, 602-03 (1991) (permitting a newspaper entity to intervene, noting that granting the intervention was "provisional in nature and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted.").

III) IF INTERVENTION IS NOT GRANTED, COVERAGE ISSUES SHOULD BE PRESERVED FOR DETERMINATION LATER

Should the Court determine intervention is an inappropriate, it should hold that the lower court should have granted Nationwide's Motion For Protective Order. Any and all coverage issues can be preserved for determination later, based upon the rationale first articulated in Sims and supported by the Restatement (Second) of Judgments. As discussed supra, § I.A., Sims found that when a conflict of interest existed between the insurer and the insured, the insurer would not be bound by the facts of the liability case, and coverage defenses could be litigated in a subsequent action. This approach is supported by the Restatement, which states that an "indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee." Restatement (Second) of Judgments § 58(1)(b).

Under this scenario, insurers can inform their insureds via a reservation of rights that a conflict of interest exists, id. § 58 cmt. a., and further inform them that any and all factual issues are subject to relitigation in a separate proceeding. A reservation of rights letter to this effect can reconcile this approach with the Court's recent decision in Harleysville. As discussed supra, § I.C., the Harleysville decision turned on the fact that the Court found the insurer's reservation of rights letter inappropriate. Assuming an appropriate reservation of rights letter, then, it appears that the Court may consider total issue preservation a viable option.

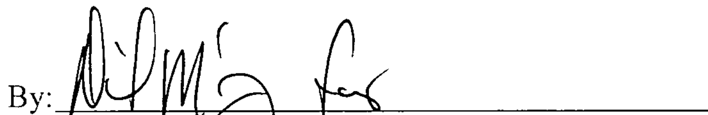
Admittedly, preserving all fact issues for relitigation later will use more judicial resources, will be considerably more costly for insurers and their insureds, and may increase the onset of

inconsistent verdicts. However, it will also ensure adequate and complete protection of insureds against liability actions, while preserving the insurers' independent rights to litigate coverage matters. In the event this Court finds limited interventions inappropriate, complete issue preservation is a viable and effective alternative solution.

IV) CONCLUSION

The ever-evolving construction defect litigation environment has made it unclear how insurers can adequately and fully protect their insureds, while also preserving their bargained-for coverage defenses and limitations. Allowing insurers to intervene in a limited capacity, in order to preserve coverage issues for determination later, will maintain the delicate balance of interests the courts and legislature have been attempting to preserve. Accordingly, the Court should reverse the lower court's order and remand with instructions to grant Nationwide's limited intervention motion. Alternatively, if the Court determines intervention is not appropriate, it should affirm the decision below, but remand with instructions to grant Nationwide's Motion For Protective Order, permitting any and all factual issues to be litigated in a separate coverage action.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Robert C. Calamari
SC Bar No. 064985
E-Mail: bob.calamari@nelsonmullins.com
3751 Robert M. Grissom Parkway / Suite 300
Post Office Box 3939 (29578-3939)
Myrtle Beach, SC 29577-3165
(843) 448-3500

Attorneys for Appellant Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company

Myrtle Beach, South Carolina
March 15, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte:

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Clarendon National Insurance Company as successor in interest to Clarendon America Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, Canopius US Insurance, Inc. and American Empire Surplus Lines Insurance Company, Appellants,

In Re:

The Harbour Cove Condominium Association, Plaintiff,

v.

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

And

Beach Villas at Ocean Keyes Property Owners Association, Inc., Plaintiff,

v.

Ocean Keyes Development, LLC, Keye Construction Co., Inc., Russell P. Baltzer, First Exteriors, LLC, CareFree Exteriors Inc.,

Coastal Stucco, Inc., Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Con., Inc., Builders FirstSource-Southeast Group, LLC, Steel Homes International, Inc., Renaissance Steel Installation, LLC n/k/a Renaissance Steel, LLC, Benchmark Steel Service, LLC and Dietrich Building Systems n/k/a Clark Western Dietrich Building Systems, LLC, Defendants,

And

Ocean Keyes Development, LLC and Keye Construction Co., Inc., Third-Party Plaintiffs,

v.

Renaissance Steel Installation, LLC f/k/a renaissance Steel, LLC n/k/a Innovative Steel Technologies, Benchmark Steel Erectors, and Total Construction, LLC, Third-Party Defendants,

Of whom The Harbour Cove Condominium Association, Beach Villas at Ocean Keyes Property Owners Association, Inc., Ocean Keyes Development, LLC, Keye Construction Co., Inc., and Russell P. Baltzer are the Respondents

Appellate Case No. 2017-002146

PROOF OF SERVICE

I certify that I have served Appellant Nationwide Mutual Insurance Company f/k/a Harleysville's Initial Brief and Designation of Matter by depositing a copy of same in the United States Mail, postage prepaid, March 15, 2018 addressed to the attorneys of record, listed as follows:

Phillip W. Segui, Jr., Esquire
Amanda Blundy, Esquire
SEGUI LAW FIRM
864 Lowcountry Blvd. #A
Mt. Pleasant, SC 29464
psegui@seguilawfirm.com
ablundy@seguilawfirm.com
Attorneys for Respondent The Harbour Cove Condominium Association

John T. Chakeris
CHAKERIS LAW FIRM
231 Calhoun Street
Charleston SC 29403
john@chakerislawfirm.com
Attorney for Respondent The Harbour Cove Condominium Association

Shaun W. Cranford, Esquire
CRANFORD LAW
P.O. Box 50684
Columbia, SC 29250
shaun@cranfordlawfirm.com
Attorney for Respondent The Harbour Cove Condominium Association

Robert I. Wylie, IV, Esquire
MULLEN WYLIE, LLC
Post Office Box 1980
Myrtle Beach, SC 29578
rwylie@mullenwylie.com
Attorney for Respondent Beach Villas at Ocean Keyes Property Owners Association, Inc.

James E. Lady, Esquire
MULLEN WYLIE, LLC
171 Church Street, Suite 370
Charleston, SC 29401
jlady@mullenwylie.com
Attorney for Respondent Beach Villas at Ocean Keyes Property Owners Association, Inc.

A. Preston Brittain, Esquire
BRITTAIN LAW FIRM, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577
preston@brittainlawfirm.com
Attorney for Respondent Beach Villas at Ocean Keyes Property Owners Association, Inc.

Mark S. Barrow, Esquire
Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
SWEENY WINGATE & BARROW, PA
Post Office Box 12129
Columbia, SC 29211

msb@swblaw.com
eak@swblaw.com
cem@swblaw.com
AND
Steven M. Klepper, Esquire
(pro hac vice)
Kramon & Graham, PA
One South Street, Suite 2600
Baltimore, MD 21202
sklepper@kg-law.com
Attorneys for Appellants Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company

Peter H. Dworjanyn, Esquire
COLLINS & LACY, P.C.
PO Box 12487
Columbia, SC 29211
pdworjanyn@collinsandlacy.com
Attorney for Appellant Canopius US Insurance, Inc.

Clay McCollough, Esquire
Ross A. Appel, Esquire
MCCULLOUGH KAHN, LLC
359 King Street
Suite 200
Charleston, SC 29401
clay@mklawsc.com
ross@mklawsc.com
Attorneys for Appellant American Empire Surplus Attorney for Appellant American Empire Surplus Lines Insurance Company

John L. McCants, Esquire
ROGERS, LEWIS, JACKSON, MANN & QUINN, LLC
Post Office Box 11803
Columbia, SC 29211
jmccants@rogerslewis.com
Attorney for Appellant National Fire & Marine Insurance Company

Lawrence M. Hunter, Jr., Esquire
HUNTER & FOSTER, P.A.
PO Box 10309
Greenville, SC 29603
lawrence@hunterfoster.com
Attorney for Appellant Bitco General Insurance Corporation

Neil S. Haldrup, Esquire

Thomas B. Boger, Esquire
WALL TEMPLETON & HALDRUP, P.A.
Post Office Box 1200
Charleston, SC 29401
neil.haldrup@walltempleton.com
tommy.boger@walltempleton.com
Attorneys for Appellant Clarendon National Insurance Company as successor in interest to Clarendon America Insurance Company

Robert I. Wylie, IV, Esquire
MULLEN WYLIE, LLC
Post Office Box 1980
Myrtle Beach, SC 29578
rwylie@mullenwylie.com
Attorney for Respondent Beach Villas at Ocean Keyes Property Owners Association, Inc.

Robert T. Lyles, Esquire
Joseph K. Cunningham, Esquire
LYLES & LYLES, LLC
Post Office Box 773
Charleston, SC 29402
rtl@lylesfirm.com
jkc@lylesfirm.com
Attorneys for Respondent Russell P. Baltzer

David Miller, Esquire
Holly M. Lusk, Esquire
BELLAMY, RUTENBERG, COPELAND, EPPS,
GRAVELY & BOWERS, P.A
P.O. Box 357
Myrtle Beach, SC 29578
dmiller@bellamylaw.com
hlusk@bellamylaw.com
Attorneys for Respondents Russell P. Baltzer, Ocean Keyes Development, LLC, and Keye Construction Co., Inc.

Dominic A. Starr, Esquire
J. Christopher Clark, Esquire
MCANGUS GOUDELOCK & COURIE, LLC
Post Office Box 1349
Myrtle Beach, SC 29578
dominic.starr@mgclaw.com
chris.clark@mgclaw.com

Attorneys for Respondents Ocean Keyes Development, LLC, and Keye Construction Co., Inc.

Patrick J. McDonald, Esquire
N. Keith Emge, Jr., Esquire
RESNICK & LOUIS, P.C.
234 Seven Farms Drive, Suite 128
Charleston, SC 29492
pmcdonald@rlattorneys.com
cemge@rlattorneys.com
Attorneys for Respondent Ocean Keyes Development, LLC

Thomas C. Hildebrand, Jr., Esquire
Laura F. Locklair, Esquire
F. Elliotte Quinn, IV, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston SC 29401
tomhildebrand@parkerpoe.com
lauralocklair@parkerpoe.com
elliottequinn@parkerpoe.com
Attorneys for Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., In.; Centex-Rogers, Inc.; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC

Jeffrey A. Ross, Esquire
Philip P. Cristaldi, Esquire
JEFF ROSS LAW LLC
1100 Queensborough Boulevard, Suite 201
Mt. Pleasant, SC 29464
jross@jeffrosslaw.com
pcristaldi@jeffrosslaw.com
Attorneys for Martin Masonry, Inc.

J. David Banner, Esquire
AIKEN BRIDGES ELLIOTT TYLER & SALEEBY, PA
Post Office Box 1931
Florence, SC 29503
jdb@aikenbridges.com
Attorney for Roof Doctor of the Carolinas, Inc.

Jonathan J. Anderson, Esquire
Curtis B. Martin, Esquire
ANDERSON REYNOLDS & STEPHENS, LLC

P O Box 87
Charleston, SC 29402
janderson@arslawsc.com
cmartin@arslawsc.com
Attorneys for Coastal Plaster Systems, Inc., a/k/a Coastal Plastering Systems, Inc., a/k/a Coastal Plaster, Inc., incorrectly identified as Coastal Drywall d/b/a Coastal Plaster Systems, and Lundy Dowell d/b/a Coastal Plaster Systems

Carrie A. Fox, Esquire
AIKEN BRIDGES ELLIOTT TYLER & SALEEBY, PA
181 E. Evans Street, Suite 409
P.O. Drawer 1931
Florence, SC 29503
caf@aikenbridges.com
Attorney for Morningstar Consultants, Inc.

James H. Elliott, Jr., Esquire
Samia H. Albenberg, Esquire
F. Heyward Grimball, Esquire
RICHARDSON PLOWDEN & ROBINSON, PA
40 Calhoun Street, Suite 220
Charleston SC 29401
jelliott@richardsonplowden.com
salbenberg@richardsonplowden.com
fhgrimball@richardsonplowden.com
Attorneys for First Exteriors, LLC

J. Austin Thomas, Esquire
GROOMS & THOMAS, LLC
4420 Oleander Drive, Suite 104
Myrtle Beach, SC 29577
athomas@groomsandthomaslaw.com
Attorney for Mike Phillips

G. Michael Smith, Esquire
THOMPSON & HENRY, P.A.
Post Office Box 1740
Conway, SC 29578
msmith@thompsonlaw.com
Attorney for Carefree Exteriors, Inc.

Jeffrey A. Ross, Esquire
Ed Anglin, Esquire
JEFF ROSS LAW LLC
1100 Queensborough Boulevard, Suite 201
Mt. Pleasant, SC 29464

jross@jeffrosslaw.com
eanglin@jeffrosslaw.com
Attorneys for Coastal Stucco

Kevin M. O'Brien, Esquire
PHELPS DUNBAR LLP
GlenLake One
4140 ParkLake Ave., Suite 100
Raleigh, NC 27612
obrienk@phelps.com
Attorney for Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Construction

Barbara J. Wagner, Esquire
BARNWELL WHALEY PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401
bwagner@barnwell-whaley.com
Attorney for BR Brick & Masonry, Inc.

Shanna M. Stephens, Esquire
W. Coleman Lawrimore, Esquire
ANDERSON REYNOLDS & STEPHENS, LLC
P O Box 87
Charleston, SC 29402
sstephens@arslawsc.com
clawrimore@arslawsc.com
Attorneys for Carolina Drywall & Interiors a/k/a Carolina Drywall Contractors, Inc.

Theodore L. Manos, Esquire
Michael E. Wright, Esquire
ROBERTSON HOLLINGSWORTH & RAHN, LLC
550 King Street, Suite 300
Charleston, SC 29402
tlm@roblaw.net
mew@roblaw.net
Attorneys for South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, RWG, Inc., RWGR, Inc., Right Way Construction, Inc., and Right Way Group, Inc.

J. Kenneth Carter, Jr., Esquire
TURNER PADGET GRAHAM & LANEY, PA
P.O. Box 1473
Columbia, SC 29202
kcarter@turnerpadget.com

Attorney for Tri-City Insulation and Building Products of Myrtle Beach, Inc.

Brian E. Wolfe, Esquire
Clay A. Campbell, Esquire
BAUCOM CLAYTOR BENTON MORGAN & WOOD
200 Providence Road, Suite 106
Charlotte, NC 28207
bwolfe@baucomclaytor.com
ccampbell@baucomclaytor.com
Attorneys for Roof Doctor of the Carolinas, Inc.

Preston B. Dawkins, Jr., Esquire
AIKEN BRIDGES ELLIOTT TYLER & SALEEBY, PA
P.O. Drawer 1931
Florence, SC 29503
pbd@aikenbridges.com
Attorney for Roof Doctor of the Carolinas, Inc.

E. Glenn Elliott, Jr., Esquire
AIKEN BRIDGES ELLIOTT TYLER & SALEEBY, PA
P.O. Drawer 1931
Florence, SC 29503
ege@aikenbridges.com
Attorney for Gary Hunnell d/b/a Grand Strand Roofing

Theodore Parker, III, Esquire
PARKER NELSON & ASSOCIATES
2460 Professional Court, Suite 200
Las Vegas, NV 89128
tparker@pnalaw.net
Attorney for Stock Building Supply, LLC

Jacqueline Dixon Phillips, Esquire
Carlton Bowers, Esquire
PARKER NELSON & ASSOCIATES
211 King Street, Suite 107
Charleston, SC 29401
jdixon@pnalaw.net
cbowers@pnalaw.net
Attorneys for Stock Building Supply, LLC

H. Mark Hamlet, Esquire
Jessica Humphries, Esquire
HAMLET & ASSOCIATES, PLLC
5215 Junction Park Circle, Suite 202
Wilmington, NC 28412

mhamlet@hamletandassociates.com
jhumphries@hamletandassociates.com
Attorneys for Vance Johnson Plumbing Co., Inc.

G. Troy Thames, Esquire
WILSON JONES CARTER & BAXLEY, PA
421 Wando Park Boulevard, Suite 100
Mt. Pleasant, SC 29464
tthames@wjlaw.net
Attorney for Vance Johnson Plumbing Co., Inc.

Michael D. Freeman, Esquire
GRIFFITH SADLER SHARP, PA
600 Monsoon Street
P.O. Box 570
Beaufort, SC 29901
mfreeman@griffithfreeman.com
Attorney for American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc., and ITP, Inc.

G. Michael Smith, Esquire
THOMPSON & HENRY, PA
Post Office Box 1740
Conway, SC 29528
msmith@thompsonlaw.com
Attorney for Dunn Plumbing

O. Carlisle Edwards, Jr., Esquire
MCANGUS GOUDELOCK & COURIE, LLC
P O Box 650007
Mt. Pleasant SC 29465
cedwards@mgclaw.com
Attorney for Cohen's Drywall Company, Inc.

K. Michael Barfield, Esquire
D. Summers Clarke, II, Esquire
BARNWELL WHALEY PATTERSON & HELMS, LLC
Post Office Drawer H
Charleston, SC 29402
mbarfield@barnwell-whaley.com
sclarke@barnwell-whaley.com
Attorneys for CEMS Engineering, Inc.

Christina Bisset, Esquire
MCANGUS GOUDELOCK & COURIE, LLC
P O Box 1349

Myrtle Beach, SC 29578
christina.bisset@mgclaw.com
Attorney for Sunland Fire Protection, Inc.

Emily R. Gifford, Esquire
RICHARDSON PLOWDEN & ROBINSON, PA
P O Drawer 7788
Columbia, SC 29202
egifford@richardsonplowden.com
Attorney for Martin Architectural Group, PC

David S. Black, Esquire
HOWELL GIBSON & HUGHES, PA
P O Box 40
Beaufort, SC 29901
dblack@hghpa.com
Attorney for Builders FirstSource-Atlantic Group, LLC

William E. Lawson, Esquire
TURNER PADGET GRAHAM & LANEY PA
P O Box 2116
Myrtle Beach, SC 29578
wlawson@turnerpadget.com
Attorney for Air Mechanical, Inc.

Tracie Brisson, Esquire
WRIGHT, WORLEY, POPE, EKSTER & MOSS, PLLC
228 North Front St., Suite 101-B
Wilmington, NC 28401
traciebrisson@wwpemlaw.com
Attorney for Coastal Drywall, Inc., d/b/a Coastal Plaster Systems and Lundy Dowell d/b/a Coastal Plaster Systems

John E. Rogers, II, Esquire
Ginger D. Goforth, Esquire
WARD LAW FIRM
P O Box 5663
Spartanburg, SC 29304
jrogers@wardfirm.com
ggoforth@wardfirm.com
Attorneys for Ansur America Insurance Co and JS Elite Flooring

James L. Werner, Esquire
Katon E. Dawson, Jr., Esquire
PARKER POE ADAMS & BERNSTEIN, LLP
Post Office Box 1509

Columbia, SC 29201
jimwerner@parkerpoe.com
katondawson@parkerpoe.com
Attorneys for Dietrich Building Systems

Allen DuPre, Esquire
LYLES & LYLES, LLC
Post Office Box 773
Charleston, SC 29402
ald@lylesfirm.com
Attorney for Ferst Plastering, Inc.

R. Trippett Boineau, III, Esquire
Heath McAlvin Stewart, Esquire
MCANGUS, GOUDELOCK & COURIE, LLC
Post Office Box 12519
Columbia, SC 29211-2519
trippett.boineau@mgclaw.com
heath.stewart@mgclaw.com
Attorneys for Coastal Tinting, Inc. and BCI, INC.

Edward R. Cole, Esquire
David R. Sligh, Esquire
TURNER, PADGET, GRAHAM & LANEY, P.A.
Founders Centre
2411 North Oak Street, Suite 301
Myrtle Beach, SC 29578
ecole@turnerpadget.com
dsligh@turnerpadget.com
Attorneys for Model Homes Interiors

Sarah E. Wetmore, Esquire
Nick C. Stewart, Esquire
CARLOCK, COPELAND & STAIR LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
swetmore@carlockcopeland.com
nstewart@carlockcopeland.com
Attorneys for Steven Bosch d/b/a The Rooferman

Sarah E. Wetmore, Esquire
Madison B. Suttie, Esquire
CARLOCK, COPELAND & STAIR LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
msuttie@carlockcopeland.com

Attorneys for Weather Protection Systems, Inc.

Paul E. Sperry, Esquire
CARLOCK, COPELAND & STAIR LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
psperry@carlockcopeland.com
Attorney for AO Hardee

John M. Leiter, Esquire
LAW OFFICES OF JOHN M. LEITER PA
1203 48th Ave. N., Suite 109
Myrtle Beach, SC 29577
jleiter@48th.com
Attorney for Crescent Architects, LLC

Michael Leech, Esquire
CLAWSON AND STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston SC 29492-8144
mleech@clawsonandstaubes.com
Attorney for Taylor Made Builders, Inc.

Myra V. Whitener, Esquire
PARKER NELSON & ASSOCIATES, CHTD
211 King Street, Suite 202
Charleston, SC 29401
myra@thepeckfirm.com
Attorney for Vereen Concrete Co., Inc.

Brian P. Crotty, Esquire
NELSON MULLINS
1320 Main Street, 17th Floor
Columbia, SC 29201
Brian.crotty@nelsonmullins.com
Attorney for Liberty Mutual Fire Insurance Co

Robert M. Kennedy, Jr., Esquire
PHELPS DUNBAR LLP
GlenLake One
4140 ParkLake Ave., Suite 100
Raleigh, NC 27612
robert.kennedy@phelps.com
Attorney for Catalina London, Ltd.

Robert B. Hawk, Esquire

ETHRIDGE LAW GROUP, LLC
P.O. Box 20969
Charleston, SC 29413
rhawk@ethridgelawgroup.com
Attorney for Steven Bosch d/b/a Rooferman

Jenny C. Honeycutt, Esquire
BEST HONEYCUTT, P.A.
PO Box 13466
Charleston, SC 29422
jenny@besthoneycutt.com
Attorney for Third-Party Cox Milwork & Supply, Inc.

John B. O'Neal, IV, Esquire
Bill O'Neil, Esquire
Jean M. Jennings, Esquire
HOOD LAW FIRM, LLC
172 Meeting Street
Charleston, SC 29401
blanton.oneal@hoodlaw.com
bill.oneil@hoodlaw.com
jeanmarie.jennings@hoodlaw.com
Attorney for Com Tech

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: ______________________________
Robert C. Calamari
SC Bar No. 064985
E-Mail: bob.calamari@nelsonmullins.com
3751 Robert M. Grissom Parkway / Suite 300
Post Office Box 3939 (29578-3939)
Myrtle Beach, SC 29577-6412
(843) 448-3500

Attorneys for Appellants Selective Insurance Company of South Carolina and Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company

Myrtle Beach, South Carolina

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