

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-10-3857

SHIPWATCH CONDOMINIUM
ASSOCIATION, INC.,

Plaintiffs,

vs.

CAROLINA CONCRETE SYSTEMS,
INC.; SISNROY ENGINEERING, LLC
ROBERT G. SISNROY, INDIVIDUALLY;
TERRENCE J. MCKELVEY; GLASGOW
ROOFING, INC.; GLASSTEC, INC.;
SPECTECH, INC.; SONNEBORN, INC.;
CHIMNEY SWEEPS, INC.; LOW
COUNTRY CHIMNEYS, INC.; EFCO
CORP.; W.C. JOHNSTON
ARCHITECTURAL SALES, INC.;
CHARLESTON GLASS COMPANY,
INC.; FIRST EXTERIORS, LLC;
ACROCRETE, INC.; BASF CORP.;
GARRY FREEMAN ARCHITECT, INC.;
GARY FREEMAN, INDIVIDUALLY,

Defendants.

**ORDER DENYING MOTIONS TO
INTERVENE**

FILED
2019 JUN 11 AM 11:25
JULIE J. ANNIS/ROB
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-10-3858

OSCAR MENDIONDO, INDIVIDUALLY
AND AS REPRESENTATIVE OF A
CLASS OF SIMILARLY SITUATED
OWNERS OF CONDOMINIUM UNITS
IN THE HORIZONTAL PROPERTY
REGIME KNOWN AS SHIPWATCH
CONDOMINIUMS,

Plaintiff,

vs.

CAROLINA CONCRETE SYSTEMS,
INC.; SISNROY ENGINEERING, LLC

RECEIVED
JUN 11 2019
SC Court of Appeals

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ROBERT G. SISNROY, INDIVIDUALLY;)
TERRENCE J. MCKELVEY; GLASGOW)
ROOFING, INC.; GLASSTEC, INC.;)
SPECTECH, INC.; SONNEBORN, INC.;)
CHIMNEY SWEEPS, INC.; LOW)
COUNTRY CHIMNEYS, INC.; EFCO)
CORP.;)
W.C. JOHNSTON ARCHITECTURAL)
SALES, INC.; CHARLESTON GLASS)
COMPANY, INC.; FIRST EXTERIORS,)
LLC; ACROCRETE, INC.; BASF CORP.;)
GARRY FREEMAN ARCHITECT, INC.;)
GARY FREEMAN, INDIVIDUALLY,)
))
))
))
Defendants.)

This matter is before the Court upon motions for intervention ("Motions") pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, filed by the following insurance carriers ("Insurers") for insureds who are defendants in these actions:

- 1) American Economy Insurance Company
- 2) Crum & Forster Specialty Insurance Company
- 3) First Mercury Insurance Company
- 4) Hartford Casualty Insurance Company
- 5) Hartford Fire Insurance Company
- 6) Hartford Underwriters Insurance Company
- 7) Owners Insurance Company
- 8) Peerless Indemnity Insurance Company

The present actions are related complex construction defect cases concerning the same alleged defects. The Insurers each seek to intervene for the "limited purpose" of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury.

The Insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

- (1) definition of progressive damages;

- (2) how to determine the cost of repairing alleged defective workmanship originally performed by each individual subcontractor;
- (3) how to determine the cost of repairing alleged damage to other parts of the buildings that result from the alleged defective workmanship of the subcontractor; and
- (4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the Insurers seek to be permitted to request certain special interrogatories such as, but not limited to, the following:

- (1) line item for the cost of removing and replacing the work of their respective insured(s);
- (2) cost of removing and replacing portions of the building allegedly damaged by the work of their respective insured(s); and
- (3) the date on which the alleged progressive damage started and ended.

“The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion.” Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E. 2d 161, 169 (2003) (citing South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. Ex parte Government Employee’s Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court’s denial of an insurer’s motion to intervene). “However, a party must have standing to intervene in

an action pursuant to Rule 24, SCRPC.” Id. A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a “real party in interest.” Id. “A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.” Id.

The insurers have not moved to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

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 (“SCRPC”). 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) and affirming 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 each of the actions, the Condominium project at issue in each case. 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 Condominium project in each case. Each of the Insurers’ interest arises solely out of its contract of insurance with its

insured(s) 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.

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 an impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E2d 523 (1965). I find that the deep injection of insurance coverage issues into these construction defect actions 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 already complex construction defect cases, particularly given that Insurers have requested that they not be made parties and their involvement and the issue of insurance not be disclosed to the jury, and that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

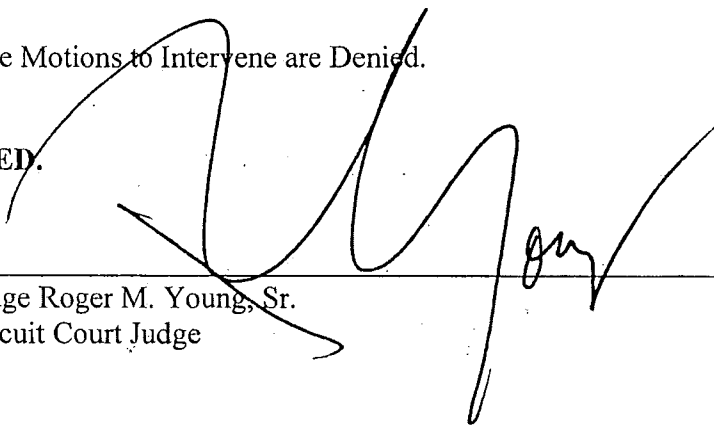


6. The Court further finds that the Insurers shall be allowed to contest all insurance coverage issues, in a pending or subsequent action and that any finding, argument, or issue as to reservation of rights letters to the insureds, is proper for consideration in a subsequent action and not in this present action.

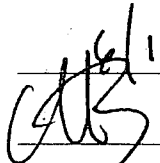
7. The Court hereby denies intervention, irrespective of timing, on grounds that this Court finds that intervention would be prohibited at any time.

Based on the foregoing the Motions to Intervene are Denied.

AND IT IS SO ORDERED.



Judge Roger M. Young, Sr.
Circuit Court Judge

 6/10, 2019
South Carolina