

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Appellate Case No. 2019-000238

RECEIVED

JUL 15 2019

S.C. SUPREME COURT

Ex Parte:

Builders Mutual Insurance Company,
Nationwide Mutual Fire Insurance Company,
Nationwide Mutual Insurance Company,
Nautilus Insurance Company, and
FCCI Insurance Company,

Appellants,

In Re:

Palmetto Pointe at Peas Island Condominium Property
Owners Association, Inc., and Jack Love, Individually, and
on behalf of all others similarly situated,

Plaintiffs,

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building
Corporation; TriCounty Roofing, Inc.; Creekside, Inc.;
American Residential Services, LLC d/b/a Rescue Rooter
Charleston; Andersen Windows, Inc.; Atlantic Building
Construction Services, Inc. n/k/a Atlantic Construction
Services, Inc.; Christopher N. Union; Builder Services
Group, Inc. d/b/a Gale Contractor Services;
Novus Architects, Inc. f/k/a SGM Architects, Inc.;
Tallent and Sons, Inc.; WC Services, Inc.; CRG
Engineering, Inc.; Certainteed Corporation; Kelly Flooring
Products, Inc. d/b/a Carpet Baggers and John Doe 1-60,

Defendants,

Tri-County Roofing, Inc.,

Third-Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy d/b/a
Cornerstone Construction; Gutter Works, Inc. and Michael
L. Segars d/b/a Gutter Works; Mr. Gutter;
Litchfield Seamless Gutters & Windows, LLC
and Thomas Litchfield d/b/a Litchfield Seamless Gutter;
Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle
Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy
Alonzo Vasquez; and Chris a/k/a John Doe 61,

Third-Party Defendants,

And

Complete Building Corporation, Inc.,

Third-Party Plaintiff,

v.

Alderman Construction; Stanley's Vinyl Fence Designs;
Cohen's Drywall; and Mosley Concrete,

Third-Party Defendants,

Of Whom Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Jack Love,
Individually, and on behalf of all others similarly situated,
Tri-County Roofing, Inc., Stanley's Vinyl Fence Designs,
and WC Services, Inc. are the

Respondents.

**PLAINTIFFS-RESPONDENTS' MOTION TO DISMISS APPEAL
OF NATIONWIDE MUTUAL INSURANCE COMPANY
OR, ALTERNATIVELY, TO HOLD APPEAL IN ABEYANCE
PENDING FINAL DISPOSITION OF PLAINTIFFS' MOTION FOR A NEW TRIAL
AGAINST NATIONWIDE MUTUAL'S INSURED**

**Counsel identified on following page*

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*Attorneys for Plaintiffs-Respondents
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Condominium Property Owners Association,
Inc., and Jack Love, Individually, and on
behalf of all others similarly situated*

NOW COME Plaintiffs-Respondents, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated (collectively, “Plaintiffs”), by and through their undersigned counsel, and, on the grounds set forth below, hereby move this Honorable Court¹ to dismiss the appeal of Appellant Nationwide Mutual Insurance Company (“Nationwide Mutual”) or, alternatively, to hold its appeal in abeyance pending the final disposition of Plaintiffs’ motion for a new trial against Nationwide Mutual’s insured WC Services, Inc. (“WCS”).²

BACKGROUND

As set forth in Nationwide Mutual’s initial brief, which is already of record in this appeal, this is a construction defect case wherein, among other claims against other Defendants, Plaintiffs’ asserted causes of action against WCS (again, Nationwide Mutual’s insured) for negligence and breach of warranty. (Initial Br. of Nationwide Mutual p. 1.)

¹ On May 30, 2019, jurisdiction over this appeal was transferred from the Court of Appeals to this Court via Rule 204(b), SCRCP, certification.

² As reflected in the above caption, Nationwide Mutual was not alone in taking an appeal in this case. This consolidated appeal, i.e., the appeal identified as Appellate Case No. 2019-000238, includes appeals taken by five insurance companies: Appellant Builders Mutual Insurance Company’s (“BMIC”), who, on February 19, 2019, was the first to appeal, and Appellants Nautilus Insurance Company (“Nautilus”), Nationwide Mutual Fire Insurance Company (“Nationwide Fire”), Nationwide Mutual, and FCCI Insurance Company (“FCCI”), who followed BMIC with appeals of their own. All these appeals stemmed from the trial court’s denial of Appellants’ respective motions to intervene. (The purpose of Appellants’ motions was to address matters of insurance coverage. Appellants did not ask to be made “parties” to this case, but to be recognized as having a status that would allow them, at such future time as the matter was taken up at trial, to voice input about what the verdict form should look like. Though not relevant to the instant motion, Plaintiffs’ objection to the characterization of Appellants’ motions as motions to “intervene,” along with their challenge to Appellants’ immediate appeals from the denial of those motions, is already of record in this appeal. (See Plaintiffs’ Returns/Cross-Mots. received April 30 [regarding BMIC’s appeal], May 1 [regarding Nationwide Fire and Nationwide Mutual’s appeals], and May 2, 2019 [regarding FCCI’s appeal].)) As of the date of the instant motion, only the appeals of BMIC, Nationwide Fire, and Nationwide Mutual remain pending, FCCI and Nautilus’s appeals having been voluntarily

Nationwide Mutual's appeal is from the trial court's denial of its motion to intervene. (See generally *Id.* at pp. 1–3.) Nationwide Mutual filed the motion on May 7, 2018, “for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages under [its] Policy [with WCS] and participating in the submitting of a special verdict form or submitting special interrogatories to the jury in order to obtain findings of fact necessary for that allocation.” (Nationwide Mutual Mot. to Intervene [a copy of which, minus the exhibits attached thereto, is attached to the instant motion as **Exhibit 1**] p. 7; see also Initial Br. of Nationwide Mutual p. 2.) The trial court denied the motion by order filed December 17, 2018, and thereafter denied reconsideration by order filed January 17, 2019. (Initial Br. of Nationwide Mutual pp. 1–2.) Nationwide Mutual's appeal followed on February 22, 2019. (*Id.* at p. 3.)

When this appeal began, i.e., when BMIC took the first of these consolidated appeals on February 19, 2019 (*see* footnote 2 above), this case was some four years old and set to begin a 2-week date-certain trial on in early May 2019. Though there was some dispute about whether the trial could proceed given the pendency of this appeal, by order filed May 1, 2019, the Court of Appeals authorized the trial to go forward as scheduled. (*Id.*) The case was then tried from May 6–16, 2019, and resulted in a defense verdict in favor of WCS, i.e., the jury found that WCS was not liable under either of the causes of action Plaintiff alleged against it. (*Id.*) Filed May 28, 2019, Plaintiffs' timely motion for a new trial remains pending as of the date of the instant motion. (*Id.*)

dismissed. (See Order filed June 24, 2019 [dismissing FCCI's appeal]; Order filed June 27, 2019

ARGUMENT

- I. **The Court should dismiss Nationwide Mutual’s appeal as moot (in light of the defense verdict in favor of WCS) or, alternatively, hold its appeal in abeyance pending the final disposition of Plaintiffs’ motion for a new trial against WCS.**

The sole purpose of Nationwide Mutual’s motion to intervene was expressly “limited” to “obtaining factual evidence necessary for *allocating between covered and non-covered damages* under [its] Policy [with WCS] and participating in the submitting of a special verdict form or submitting special interrogatories to the jury *in order to obtain findings of fact necessary for that allocation.*” (Exhibit 1 p. 7 (emphasis added).) Because the jury found that WCS is not liable for any damages at all, the (supposed) need to make “that allocation,” the *sine qua non* of Nationwide Mutual’s motion, is wholly absent, rendering the only point of the motion moot. While it is true that Plaintiffs have moved for a new trial against WCS—and, indeed, they hope to prevail in this effort—the mere making of that motion does not upset the defense verdict in favor of WCS. As it stands, there is simply no actual, existing controversy regarding the allocation between covered and non-covered damages awarded against WCS under Nationwide Mutual’s policy; and this will not change unless and until Plaintiffs prevail in the final disposition of their motion for a new trial against WCS. Accordingly, Nationwide Mutual’s appeal should be dismissed as moot or, alternatively, held in abeyance pending the final disposition of Plaintiffs’ motion for a new trial against WCS. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (“An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.”) (citation omitted).

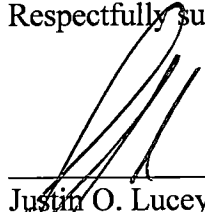
[dismissing Nautilus’s appeal].)

CONCLUSION

WHEREFORE, Plaintiffs ask the Court to dismiss Nationwide Mutual's appeal as moot (in light of the defense verdict in favor of WCS) or, alternatively, to hold Nationwide Mutual's appeal in abeyance pending the final disposition of Plaintiffs' motion for a new trial against WCS.

Respectfully submitted,

By: _____


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Condominium Property Owners Association,
Inc., and Jack Love, Individually, and on
behalf of all others similarly situated*

Mount Pleasant, South Carolina

Dated: July 15, 2019

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Appellate Case No. 2019-000238

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Builders Mutual Insurance Company,
Nationwide Mutual Fire Insurance Company,
Nationwide Mutual Insurance Company,
Nautilus Insurance Company, and
FCCI Insurance Company,

Appellants,

In Re:

Palmetto Pointe at Peas Island Condominium Property
Owners Association, Inc., and Jack Love, Individually, and
on behalf of all others similarly situated,

Plaintiffs,

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building
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Group, Inc. d/b/a Gale Contractor Services;
Novus Architects, Inc. f/k/a SGM Architects, Inc.;
Tallent and Sons, Inc.; WC Services, Inc.; CRG
Engineering, Inc.; Certainteed Corporation; Kelly Flooring
Products, Inc. d/b/a Carpet Baggers and John Doe 1-60,

Defendants,

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2015-CP-10-00955

Nationwide Mutual Insurance Company,

Petitioner,

IN RE:

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Jack
Love, individually, and on behalf of all others
similarly situated,

Plaintiff,

vs.

Island Pointe, LLC, *et al.*,

Defendants.

**NOTICE OF MOTION AND
MOTION TO INTERVENE BY
NATIONWIDE MUTUAL
INSURANCE COMPANY**

FILED
2018 MAY -1 PM 2:12
CLERK OF COURT

TO: ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to Rule 24(a)(1), SCRPC, or, in the alternative, pursuant to Rule 24(b)(2), SCRPC, Applicant, Nationwide Mutual Insurance Company (hereinafter Nationwide) hereby moves to intervene in this action. The following Memorandum provides the grounds therefor. Because this Motion pertains only to allocation of damages that may be awarded for purposes of liability insurance, no claim or defense is pled for purposes of pleading requirement in Rule 24(c), SCRPC.

Nationwide is entitled to intervention as a commercial general liability (“CGL”) carrier for Defendant WC SERVICES, INC. hereinafter (“WC SERVICES”), as its rights may be affected by a disposition of this case on the merits. This motion is made on the following grounds:

1. Nationwide issued Contractors policy number 61 AC 897-119-3002 to “WC Services, Inc.” This policy, including annual renewals, was in effect from December 29, 2004

EXHIBIT

1

until cancellation effective January 14, 2007 (hereinafter “the Policies”). The limits of coverage were \$1,000,000 per occurrence and in the aggregate for products-completed operations. A certified copy of this 2006-07 policy is attached as Exhibit A.

2. The Policies only cover “sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ . . . to which this insurance applies.” (Exh. A, Form ACP-0007, ¶ A.1.a.)

3. The Policies only apply to “property damage” if it is caused by an “occurrence.” (Id. at ¶ A.1.b.(1)(a).)

4. The Policies define “property damage” as physical injury to tangible property, including all resulting loss of use of that property. (Id. at ¶ F.16.) “Occurrence” is defined as “an accident, including continuous and repeated exposure to substantially the same general harmful conditions.” (Id. at ¶ F.12.)

5. Under the contractual terms of the Policies, as interpreted by South Carolina law, defective construction is not covered. Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011). However, resulting damage to otherwise non-defective components may constitute covered “property damage” caused by an “occurrence,” satisfying the requirements of the insuring agreement. Id.

6. Additionally, the contractual terms of the Policies exclude coverage for business risks such as defective construction. (Exh. A, Form ACP-0007, ¶¶ B.k. l., m., n., and o.)

7. The Policies contain various other exclusions which may require an allocation between covered and non-covered damages. (See Exh.A.)

8. Upon information and belief, the Plaintiff in this matter intends to present evidence of defective development and/or construction by WC SERVICES at the trial of this action.

9. To the extent damages are awarded against WC SERVICES for defective work or damage to WC SERVICES' work, the damages awarded are not damages to which the Policies apply, and they are therefore not covered.

10. To the extent damages are awarded against WC SERVICES that are subject to exclusions, the damages awarded are not covered.

11. The contractual terms of the Policies and South Carolina law may require an allocation between covered and non-covered damages.

12. Nationwide contends that this allocation does not involve relitigating the issue of damages; it is rather a determination of the amount of covered damages under the contractual terms of the Policies and South Carolina law based upon a review of the evidence submitted at trial in this action. Nevertheless, the Supreme Court of South Carolina has recently held in *dicta* that this contractual allocation of covered damages may not be made in a separate coverage action. Harleysville Group Ins. v. Heritage Cmities, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 36 n.11).

13. The court did not clarify this holding in its final opinion. Harleysville Group Ins. v. Heritage Cmities, Inc., et al., 420 S.C. 321, 803 S.E.2d 288 (2017). Instead, the court cited a prior case in which allocation was not allowed due to failure to raise the issue in an underlying arbitration proceeding. See Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). In Newman, the court indicated that "it is not the purpose of this declaratory judgment action to relitigate the issue of damages." Id. Thus, it appears that South Carolina law may not allow insurers to obtain facts necessary for determinations involving liability coverage for construction defect claims in separate declaratory judgment actions.

14. Generally, insurers lack standing to intervene in underlying actions to determine liability. Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03

(2007); Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (1994) (citing Blue Cross and Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35 (1980)). These holdings were based upon the understanding that factual determinations for coverage purposes could be litigated in separate coverage actions. See Ex Parte GEICO, 373 S.C. at 137, 644 S.E.2d at 702; Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). Harleysville and Newman appear to contradict this prior understanding.

15. Notice and opportunity to be heard are fundamental requirements of due process. If Nationwide is denied any forum for obtaining facts necessary for its allocation for coverage purposes, then its due process rights are violated in violation of both state and federal law.

16. Furthermore, in Harleysville, the court referenced a burden-shifting procedure for allocating between covered and non-covered damages. 420 S.C. at 341, 803 S.E.2d at 299 (citing Duke v. Hoch, 468 F.2d 973, 976-77 (5th Cir. 1972)). Under Harleysville and Duke, the insurer has the burden of demonstrating that the plaintiff's claim against its insured includes damages for non-covered acts. Duke, 468 F.2d at 976. Once this is established by the insurer, the insured has the burden of proving the precise portion of the damages that are covered. Id. at 977 ("The burden of apportioning these damages is on the party seeking to recover from the insurer."). If the insured fails to provide sufficient evidence to support an allocation, none of the damages are covered. Id. Thus, failure to allow intervention by Nationwide may prejudice the rights of WC SERVICES and the Plaintiff, as third-party claimant.

17. If intervention is not permitted, Nationwide lacks any means of conducting discovery to ascertain the facts necessary to make a determination as to the amount of covered damages. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 373 (4th Cir. 2005) (holding that "an attorney in South Carolina who represents an insured owes the insured a duty of loyalty and cannot, for example, communicate information detrimental to the

insured to the insurance company.”) (citing Rules 1.8(b) and 1.6 of the South Carolina Rules of Professional Conduct).

18. Accordingly, Nationwide hereby moves to intervene in this action for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages and participating in the drafting of a special verdict form or submitting special interrogatories to the jury to support an allocation of any damages award for purposes of a determination of covered and non-covered damages.

19. Under South Carolina law, a party seeking intervention under Rule 24(a)(2), SCRPC, must: (1) establish timely intervention; (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. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004).

20. Nationwide’s motion to intervene is timely. This motion is being filed well in advance of trial. This motion is not expected to significantly impact discovery. The amount of damages is determined by the factfinder in this action. Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001). Nationwide seeks only to obtain evidence for and to obtain findings to support an allocation, as a matter of contract, as to how much of the damages that may be awarded against WC SERVICES in this action are covered. See Rock Hill Tel. Co., Inc. v. Globe Communic’ns, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (holding that when indemnity is by contract, “the contract itself establishes the relationship between the parties”); Newman, 385 S.C. at 198, 684 S.E.2d at 546 (requiring a record supporting an allocation between covered and non-covered damages).

21. Nationwide has an interest relating to the property or transaction which is the subject of this action. As discussed above, this action represents the only forum in which Nationwide can obtain an allocation as to the amount of covered damages under the Policies.

22. Nationwide is in a position such that, without intervention, disposition of this action will impair or impede its ability to protect that interest. The Supreme Court appears to have held that if intervention is not sought, an insurer waives its right to seek an allocation as to the amount of covered damages. Harleysville, 420 S.C. at 343 n.11, 803 S.E.2d at 300 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547.

23. Nationwide is not adequately represented by other parties to this action. None of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the Plaintiffs and WC SERVICES are aligned against the interest of Nationwide. Indeed, federal courts often realign parties to coverage litigation to reflect the fact that the interests of the liability carrier are adverse to the interests of both the plaintiffs and the defendants in the underlying tort litigation. See Bi-Lo, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, C.A. No. 0:14-cv-00335-CMC, 2014 WL 12605522 at *7-8 (D.S.C. Apr. 30, 2014). When the interests of the party seeking intervention are adverse to the interests of the party litigants, "there is an obvious lack of adequate representation." In re Horry Bounty State Bank, 361 S.C. at 509, 604 S.E.2d at 726.

24. Accordingly, Nationwide has satisfied all of the elements for intervention as of right under Rule 24(a)(2). The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to this Court's discretion.

25. In the alternative, Nationwide also moves to intervene under Rule 24(b). Permissive intervention is allowed at the court's discretion based upon the existence of a common question of fact or law between the underlying litigation and the intervenor's claims or defenses.

S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988). Sound administrative procedure favors the disposition of all claims or defenses in a single action. Id. As discussed above, this action represents the only forum in which an allocation of covered versus non-covered damages can be made.

26. Nationwide's motion to intervene is made for the limited purpose of obtaining facts for and presenting the jury with a special verdict or special interrogatories for a finding as to allocation between covered and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (holding that intervention is appropriate for third-party challenges to protective orders).

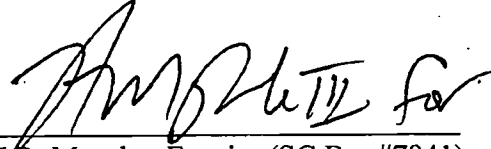
27. Upon information and belief, the granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original parties to the instant action, in that intervention is for the limited purpose of allocation will not impact the ability of the original parties to present their claims and/or defenses at trial.

Nationwide respectfully moves to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages under the Policy and participating in the submitting of a special verdict form or submitting special interrogatories to the jury in order to obtain findings of fact necessary for that allocation. The grounds for this Motion are set forth above.

[Signature page follows]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read "Timothy J. Newton for". The signature is written in a cursive style and is positioned above a horizontal line.

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Columbia, South Carolina
May 3, 2018

Tri-County Roofing, Inc.,

Third-Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy d/b/a
Cornerstone Construction; Gutter Works, Inc. and Michael
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and Thomas Litchfield d/b/a Litchfield Seamless Gutter;
Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle
Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy
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And

Complete Building Corporation, Inc.,

Third-Party Plaintiff,

v.

Alderman Construction; Stanley's Vinyl Fence Designs;
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Third-Party Defendants,

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PROOF OF SERVICE

**Counsel identified on following page*

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behalf of all others similarly situated*

I, Justin Lucey, of Justin O'Toole Lucey, P.A., counsel for Plaintiffs-Respondents, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated, certify that **PLAINTIFFS-RESPONDENTS' MOTION TO DISMISS APPEAL OF NATIONWIDE MUTUAL INSURANCE COPMANY OR, ALTERNATIVRELY, TO HOLD APPEAL IN ABEYANCE PENDING FINAL DISPOSITION OF PLAINTIFFS' MOTION FOR A NEW TRIAL AGAINST NATIONWIDE MUTUAL'S INSURED** was served on all other parties to this appeal on July 15, 2019, a copy thereof deposited in the U.S. Mail properly posted for delivery to the following addressees:

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<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

By: _____

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