THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

Trial Court Case No. 2015-CP-26-00279
Trial Court Case No. 2015-CP-26-02718
Appellate Case No. 2019-001053
Appellate Case No. 2019-001055

Ex Parte: Hartford Fire Insurance Company and Hartford Casualty Insurance Company, Appellants,

In Re: The River Crossing Condominium Association, and Vincent J. Tamburro, on behalf of himself and others similarly situated, Plaintiffs,

v.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction, Co., Inc.; Centex-Rodgers, Inc.; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC; Right Way Construction, Inc.; Right Way Group, Inc.; RWG, Inc., RWGR, Inc.; Stock Building Supply, LLC f/k/a Stock Building Supply, Inc., Builders FirstSource – Southeast Group, LLC, Martin Masonry, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Craftmaster Manufacturing, Inc. d/b/a CMI, Roof Doctor of the Carolinas, Inc., Stock Building Supply, LLC f/k/a Carolina Builders Corporation, Orfield Laboratories, Inc., Trebor Industries, Inc., Steven Bosch, d/b/a The Roofer Man, Certainteed Corporation Successor by merger to Exterior Systems, Inc., a/k/a Norandex, Inc., Weather Protection Systems, Inc., Crawford Door Systems, Inc., Cox Millwork & Supply, Inc., AM Jacobs, Inc., Galvin Depompe, Roberta Depompe, Morningstar Consultants, Inc., Jeld-Wen, Inc. as successor to and/or merger with Craftmaster Manufacturing, Inc., d/b/a CMI, and Sign Studio & Graphics, Inc., Defendants,

Of which The River Crossing Condominium Association, and Vincent J. Tamburro, on behalf of himself and others similarly situated, and Centex Homes, a Nevada General Partnership, are the Respondents.

Ex Parte: Hartford Fire Insurance Company and Hartford Casualty Insurance Company, Appellants,

In Re: The Tanglewood Condominium Association, Plaintiff,

v.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC, Centex Construction Co., Inc., Centex-Rodgers, Inc.; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC, Defendants,

Of which The Tanglewood Condominium Association and Centex Homes, a Nevada General Partnership, are the Respondents.

MOTION TO CERTIFY TO THE SOUTH CAROLINA SUPREME COURT UNDER RULE 204, SCACR

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively, "Hartford") move to certify these appeals for immediate review by this Court.

Transferring jurisdiction to this Court "is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." Rule 204(b), SCACR. This Court has granted certification in cases presenting recurring questions affecting liability insurers and policyholders with respect to construction defect litigation. *See Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 332, 803 S.E.2d 288, 294 (2017) ("*Harleysville*"); and *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 190, 684 S.E.2d 541, 542 (2009) ("*Newman*"). This Court has also certified cases involving insurers' attempts, in other contexts, to intervene in lawsuits to protect their interests. *Ex parte Gov't Employee's Ins. Co. (GEICO)*, 373 S.C. 132, 134, 644 S.E.2d 699, 700 (2007).

This Court has twice certified appeals to resolve uncertainty in the law regarding whether, under *Harleysville*, a liability insurer can or must intervene in construction defect (CD)

litigation against its insured to request a special verdict or special interrogatories (which is the exact issue that these appeals involve):

- *Ex parte Hartford Fire Insurance Company et al.*, Appellate Case No. 2017-02146 (certification granted Feb. 1, 2018), which the Court dismissed as moot when Hartford accepted a settlement demand against its insureds conditioned on Hartford's dismissal of its appeal; and
- *Ex parte Builders Mutual Insurance Company et al. (In re: Palmetto Pointe v. Island Pointe)*, Appellate Case No. 2019-000238 (certification granted May 31, 2019), which is pending, and alongside which the Court could decide this appeal.

Here, Hartford and other insurers moved to intervene in these CD lawsuits, pending against their insureds, due to the uncertainty stemming from *Harleysville* as discussed *infra*. The Circuit Court entered an order denying the motions to intervene, for the same reasons that intervention was denied in *Ex parte Hartford*. Hartford has appealed and requests certification on the same two issues that it raised in *Ex parte Hartford*:

1. Does a liability insurer have a right or obligation to intervene in an underlying construction defect action to request an allocated verdict under *Harleysville*?
2. What are an insurer's rights if a trial court denies its request to intervene for the limited purpose of requesting an allocated verdict under *Harleysville*?

Hartford seeks certification so that the Court can resolve these issues regarding *Harleysville*'s meaning.

Uncertainty Regarding *Harleysville*

Harleysville addressed coverage in a CD action seeking both the cost to repair faulty workmanship itself (which is not covered "property damage") and the cost to repair resulting damage to otherwise non-defective components (which may qualify as "property damage"). 420

S.C. at 335, 803 S.E.2d at 296. In requiring the insurer to pay for both types of repair costs, the Court held that the insurer's reservation of rights "letters were not sufficiently specific to put [its insured] on notice of [the insurer's] specific defenses, particularly as to the need for an allocated verdict." *Id.* at 342, 803 S.E.2d at 299.

The Court further held that the "'right to control the litigation carries with it certain duties,' including 'the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.'" *Harleysville*, 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)). In a footnote, the Court stated:

> 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.

Hartford's Motions to Intervene

The present actions are complex CD cases, in which Hartford is defending certain of its insureds under reservations of rights. Hartford (and other insurers) sought intervention for the limited purpose of requesting special verdict sheets or special interrogatories.

The Circuit Court denied all of the insurers' motions for intervention, holding 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 ("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) 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, including the declaratory judgment action that is currently pending captioned: Centex Homes, a Nevada General Partnership v. The Cypress Bend Condominium Association, et al., C.A. No. 2016-CP-26-6670 (the "Declaratory Judgment Action"). The Declaratory Judgment Action concerns the defense and indemnity obligations allegedly owed by insurers and seek declarations regarding, among other things, regarding whether damages claimed in this action "are covered under the [policies issued by the Insurers]". 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 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 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 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 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.

Order Denying Motions to Intervene, pp.5-7 (June 21, 2019) (attached as Exhibit A).

Paragraphs 1 through 5 of the Circuit Court's order in these cases are nearly identical to the orders that were under review in *Ex parte Hartford*, which this Court had certified. *See Harbour Cove* Order Denying Motion of Insurers for Limited Intervention, pp.3-4 (Oct. 12, 2017) (attached as Exhibit B); *Beach Villas* Amended Order Denying Motion of Insurers for Limited Intervention, pp.4-5 (Oct. 13, 2017) (attached as Exhibit C). Hartford's certification motion and opening brief in that appeal are attached and incorporated by reference. *See* Hartford Motion to Certify Under Rule 204, SCACR (Nov. 8, 2017) (attached as Exhibit D); Hartford's Final Brief (July 23, 2018) (attached as Exhibit E); *see also* Order Granting Motion to Certify (Feb. 1, 2018) (attached as Exhibit F). Settlements ultimately rendered that appeal moot. *See* Hartford Letter (Oct. 17, 2018) (attached as Exhibit G). The Court dismissed *Ex parte Hartford* on January 30, 2019, upon the final settlement of the underlying CD claims.

Appropriateness of Certification in These Cases

Uncertainty regarding *Harleysville*'s meaning compelled Hartford to seek intervention in these CD cases. Hartford would prefer to leave all coverage questions for a subsequent action, and it believes that any reference to insurance coverage would be improper and prejudicial before the jury. *See Todd v. Joyner*, 385 S.C. 509, 514, 685 S.E.2d 613, 616 (Ct. App. 2008),

aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009). But until this Court resolves uncertainty regarding its holding in *Harleysville*, insurers will continue to seek intervention to request allocated verdicts.

Illustrating why Hartford is compelled to seek intervention, a different trial judge entered the order in *Ingram v. Lauderdale Bay Developers, LLC*, No. 2017-CP-26-2854 (Oct. 18, 2018) (attached as Exhibit H), the day after National Fire and Hartford advised the Court of the settlement in *Ex parte Hartford*. The *Ingram* order granted an insurer's motion to intervene for the limited purpose of "request[ing] that the trial court submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury's verdict," based on its finding that such intervention was mandatory for an insurer to preserve its rights under *Harleysville*.

The Court recognized the importance of resolving these recurring issues by certifying the appeal in *Ex parte Builders Mutual* on May 31, 2019 which raises these same issues. The Court should also certify this appeal, which addresses the same issues as *Ex parte Builders Mutual*, for the following reasons:

- Hartford will argue particular points, which the parties may not argue, regarding how to harmonize *Harleysville* with overarching legal principles regarding liability insurance, intervention, and the final judgment rule. *See* Exhibit E.
- In particular, Hartford intends to again argue that *Harleysville*, read in conjunction with Restatement (Second) of Judgments § 58, stands only for the proposition that the insurer's reservation of rights in that case was inadequate to preserve its right to a subsequent allocation.

If the Court should grant certification, Hartford leaves it to the Court's discretion whether to consolidate these appeals with *Ex parte Builders Mutual* for purposes of briefing and/or

argument. Because Hartford has previously briefed these issues, it is prepared to comply with an expedited schedule if necessary.

For these reasons, Hartford requests Rule 204(b) certification for immediate review by this Court.

July 12, 2019

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EXHIBIT A

STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	**IN THE COURT OF COMMON PLEAS** **FOR THE FIFTEENTH JUDICIAL CIRCUIT**
THE HAVENS CONDOMINIUM ASSOCIATION, **Plaintiff,** **v.** **CENTEX HOMES, et al.** **Defendants.**	**CASE NO.: 2015-CP-26-0118** **ORDER DENYING MOTIONS TO INTERVENE**
THE RIVER CROSSING CONDOMINIUM ASSOCIATION, AND VINCENT J. TAMBURRO, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, **Plaintiffs,** **v.** **CENTEX HOMES, ET AL.,** **Defendants.**	**CASE NO.: 2015-CP-26–00279**
THE TANGLEWOOD CONDOMINIUM ASSOCIATION, **Plaintiff,** **v.** **CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, ET AL.,** **Defendants.**	**CASE NO.: 2015-CP-26-2718**

THE WOODLANDS CONDOMINIUM ASSOCIATION,	)	**CASE NO.: 2015-CP-26-04514**
Plaintiff,	)	
v.	)	
CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, ET AL.,	)	
Defendants.	)	

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

River Crossing v. Centex; Case No. 2015-CP-26-00279

1) American Empire Surplus
2) BITCO General Insurance Corporation
3) Clarendon National
4) Harleysville Insurance Company n/k/a Nationwide Insurance Company
5) Hartford Casualty Insurance Company
6) Hartford Fire Insurance Company
7) Scottsdale Insurance Company
8) Selective Insurance Company

Tanglewood v. Centex; Case No. 2015-CP-26-02718

9) Harleysville Insurance Company n/k/a Nationwide Insurance Company
10) Hartford Casualty Insurance Company
11) Hartford Fire Insurance Company
12) Selective Insurance Company
13) American Empire Surplus
14) Clarendon National

Woodlands v. Centex; Case No. 2015-CP-26-04514

15) BITCO General Insurance Corporation
16) Harleysville Insurance Company n/k/a Nationwide Insurance Company
17) Selective Insurance Company
18) American Empire Surplus

19) Clarendon National

Havens v. Centex; Case No. 2015-CP-26-00118

20) Crum & Forster Specialty Insurance Company and First Mercury Insurance Company
21) Harleysville Insurance Company n/k/a Nationwide Insurance Company
22) Selective Insurance Company

American Empire Surplus, BITCO General Insurance Corporation, Clarendon National, Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Scottsdale Insurance Company, Crum & Forster Specialty Insurance Company, and First Mercury Insurance Company have acknowledged that Centex Homes, a Nevada General Partnership ("Centex") qualifies as an additional insured and have agreed to participate in the defense of Centex and their respective named insured(s) with respect to one or more of the above-referenced actions.

The present actions are separate complex construction defect cases. In each of their Complaints, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the named Defendants for damages allegedly caused by its alleged negligent and defective work.

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 defective workmanship originally performed by each individual subcontractor;

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the 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 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 damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

These matters have been pending since 2015 and a date certain trial is not yet scheduled except for Havens for 2020.

DISCUSSION OF THE LAW

"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, SCRCP." 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.

BACKGROUND

Each of the Insurers stated that they did not wish 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, the documents in the Stipulation and Agreement of Record for Hearing on Motions to Intervene, 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 ("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) 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, including the declaratory judgment action that is currently pending captioned: Centex Homes, a Nevada General Partnership v. The Cypress Bend Condominium Association, et al., C.A. No. 2016-CP-26-6670 (the "Declaratory Judgment Action"). The Declaratory Judgment Action concerns the defense and indemnity obligations allegedly owed by insurers and seek declarations regarding, among other things, regarding whether damages claimed in this action "are covered under the [policies issued by the Insurers]". 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 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 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 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 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 is Denied.

AND IT IS SO ORDERED.

_____

Honorable Clifton Newman, Presiding Judge

_____, 2019

_____, South Carolina

Horry Common Pleas

Case Caption: Tanglewood Condominium Association , plaintiff, et al VS Centex Construction Company Inc , defendant, et al

Case Number: 2015CP2602718

Type: Order/Intervene

So Ordered

s/ Clifton B. Newman, 2127

EXHIBIT B

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL**
COUNTY OF HORRY	)	**CIRCUIT**
	)	
	)	
Harbour Cove Condominium Association, et al.,	)	**Civil Action No.: 2014-CP-26-7634**
	)	
Plaintiffs,	)	**ORDER DENYING MOTION OF INSURERS FOR LIMITED INTERVENTION**
	)	
v.	)	
	)	
Centex Homes, et al.,	)	
	)	
Defendants.	)	

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

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 defective workmanship originally performed by each individual subcontractor;

cw

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the 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 moving parties seeks 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 damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"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, SCRCP." 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.

BACKGROUND

Each of the Insurers stated that they did not wish 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 ("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.E2d 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.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
BEACH VILLAS AT OCEAN KEYES PROPERTY OWNERS ASSOCIATION, INC., Plaintiff, vs. 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 CONSTRUCTION, 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 CLARKWESTERN DIETRICH BUILDING SYSTEMS, LLC, Defendants.	CASE NO. 2014-CP-26-6573 **AMENDED ORDER DENYING MOTION OF INSURERS FOR LIMITED INTERVENTION**
OCEAN KEYES DEVELOPMENT, LLC AND KEYE CONSTRUCTION CO., INC., Third-Party Plaintiffs, vs. 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.	

THIS MATTER comes before this Court upon Motions of Canopius US Insurance Inc. ("Canopius"); Hartford Fire Insurance, Hartford Casualty Insurance Company and Hartford Underwriters Insurance Company (collectively "Hartford"); and Selective Insurance Company of

South Carolina ("Selective") seeking to intervene in the trial of this matter for the limited purpose of submitting special interrogatories to the jury regarding issues related to insurance coverage.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

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 defective workmanship originally performed by each individual subcontractor;

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the 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 moving parties seeks 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 damaged by the work

of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"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, SCRCP." 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.

BACKGROUND

At the outset of the hearing in this matter, counsel for Plaintiff agreed to allow each of the Insurers to fully intervene as named parties in the case and allow counsel for each of the Insurers to participate in the actual trial, including the questioning of witnesses and making of arguments to the jury. Each of the Insurers stated that they did not wish 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.

Additionally, counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action. The Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action.

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 ("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 Beach Villas 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 Beach Villas 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.E2d 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.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

EXHIBIT D

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Trial Court Case No. 2014CP2606573
Trial Court Case No. 2014CP2607634
Appellate Case No. 2017-02146

In Re Motions to Intervene in:
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., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, 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, Lundy Dowell 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,

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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 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 are the Appellants,

AND

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.

MOTION TO CERTIFY TO THE SOUTH CAROLINA SUPREME COURT UNDER RULE 204, SCACR

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, Hartford Fire Insurance Company ("HFIC"), Hartford Casualty Insurance Company ("HCIC"), and Hartford Underwriters Insurance Company ("HUIC") (collectively, "Hartford") move to certify this case for immediate review by this Court.[1]

Transferring jurisdiction to this Court "is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." Rule 204(b), SCACR. This Court has granted certification in cases presenting recurring questions affecting liability insurers and policyholders with respect to construction defect litigation. *See Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 332, 803 S.E.2d 288, 294 (2017) ("*Harleysville*"); and *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 190, 684 S.E.2d 541, 542 (2009). This Court has also certified cases involving insurers' attempts, in other contexts, to

[1] Hartford anticipates that other insurers will be joining this motion or filing similar motions.

intervene in lawsuits to protect their interests. *Ex parte Gov't Employee's Ins. Co. (GEICO)*, 373 S.C. 132, 134, 644 S.E.2d 699, 700 (2007).

Hartford and other insurers moved to intervene in two underlying construction defect lawsuits against their insureds due to the uncertainty stemming from *Harleysville* as discussed *infra*. The Circuit Court entered orders denying the motions to intervene. The insurers have appealed those orders to seek clarification regarding their rights and obligations under South Carolina law. The appeals present at least two questions that are recurring in construction defect litigation and will continue to recur:

1. Does a liability insurer have a right or obligation to intervene in an underlying construction defect action to request an allocated verdict under *Harleysville*?
2. What are an insurer's appeal rights if a trial court denies its request to intervene for the limited purpose of requesting an allocated verdict under *Harleysville*?

Hartford seeks certification so that the Court can resolve the issue over *Harleysville*'s meaning.

Uncertainty Regarding *Harleysville*

Harleysville addressed coverage in a construction defect action seeking both the cost to repair faulty workmanship itself (which is not covered "property damage") and the cost to repair resulting damage to otherwise non-defective components (which may qualify as "property damage"). 420 S.C. at 335, 803 S.E.2d at 296. In requiring the insurer to pay for both types of repair costs, the Court held that the insurer's reservation of rights "letters were not sufficiently specific to put [its insured] on notice of [the insurer's] specific defenses, particularly as to the need for an allocated verdict." *Id.* at 342, 803 S.E.2d at 299.

The Court further stated that the "'right to control the litigation carries with it certain duties,' including 'the duty not to prejudice the insured's rights by failing to request special

interrogatories or a special verdict in order to clarify coverage of damages.'" *Harleysville*, 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)). In a footnote, the Court stated:

> 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.

Hartford's Motions to Intervene

Hartford, along with other insurers, sought intervention in two sets of underlying litigation in which Hartford was defending its insureds under reservations of rights:

- *Harbour Cove Condominium Association, et al. v. Centex Homes, et al.*, Civil Action No. 2014-CP-26-7634 (HFIC and HCIC's insured: Coastal Plaster, Inc.); and
- *Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al.*, Civil Action No. 2014-CP-26-06573 (HFIC, HCIC, and HUIC's insured: First Exteriors, LLC).

Before moving to intervene, Hartford advised each insured in writing that, because of the potential for a general verdict, the insured could itself submit a special verdict form or special interrogatories seeking an allocation of damages between covered and uncovered damages. When its insureds did not seek allocated verdicts, Hartford (and other insurers) sought intervention in both suits for the limited purpose of requesting such allocated verdicts.

The Circuit Court denied all of the insurers' motions for intervention. In the *Harbour Cove* action, it held:

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 ... 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 ... 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.

Harbour Cove Order Denying Motion of Insurers for Limited Intervention, pp.3-4 (Oct. 12, 2017) (attached as Exhibit A); *Beach Villas* Amended Order Denying Motion of Insurers for Limited Intervention, pp.4-5 (Oct. 13, 2017) (attached as Exhibit B). The *Beach Villas* order further noted that "counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action," and that the "Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action." *Id.* at p.4.

Hartford and other moving insurers filed notices of appeal, and the Circuit Court stayed the cases accordingly. In the *Harbour Cove* matter, the condominium association moved in the Court of Appeals to dismiss the insurers' appeals—broadly contending, contrary to *Ex parte Johnson, in re Rutledge v. Tunno*, 63 S.C. 205, 207–08, 41 S.E. 308, 309 (1902), that an order denying intervention is not an immediately appealable order. *See* Exhibit C (Motion to Dismiss Appeal) and Exhibit D (Hartford's Return to Motion to Dismiss Appeal). In the *Beach Villas* matter, the property owners association contends that Hartford has no appeal rights, but it has not moved to dismiss the appeals in the appellate court. Instead, the association has moved in the Circuit Court to lift the automatic stay. *See* Exhibit E (Motion to Lift Automatic Stay). It asserts a slightly more nuanced view, that Hartford has no appeal right because Hartford did not seek to become a *party* to the *Beach Villas* litigation.

Appropriateness of Certification

Uncertainty regarding *Harleysville*'s meaning compelled Hartford to seek intervention in these construction defect cases. Hartford would prefer to leave all coverage questions for a subsequent action, and it believes that any reference to insurance coverage would be improper and prejudicial before the jury. *See Todd v. Joyner*, 385 S.C. 509, 514, 685 S.E.2d 613, 616 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009). But until this Court resolves uncertainty regarding its holding in *Harleysville*, insurers will continue to seek intervention to request allocated verdicts.[2]

The Circuit Court cited *Sims*, *supra*, in both of its Orders for the proposition that "to avoid impermissible conflict determining coverage issues, this state requires a separate action." Order ¶ 4. Its orders also cited *In re GEICO*, *supra*, as disfavoring intervention by insurers in non-insurance cases. The issue is that these holdings resemble the *Harleysville* dissent. Citing *Sims*, the dissent in *Harleysville* stated: "Moreover, there is no suggestion how [the insurer] could have intervened in these lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law." *Harleysville*, 420 S.C. at 363, 803 S.E.2d at 311 (Pleicones, Acting Justice, dissenting).

The *Harleysville* majority did not address the tension between its holding and *Sims* or *In re GEICO*. The majority opinion stated that an insurer has a "duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages." 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum*, 36 F.3d at 1498). But

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[2] *See, e.g., Beresford Commons Homeowners Ass'n, Inc. v. Portrait Homes-South Carolina, LLC, et al.*, Case No. 2013-CP-08-179. In that case, the Court of Appeals denied the plaintiff association's motion to dismiss the appeal, while allowing the parties to raise appealability issues in their briefs. The case has not been addressed on the merits and, although it is still pending, the parties have notified the Court of Appeals of a settlement.

Harleysville did not involve the situation where an insurer advises its insured of the option to seek a special verdict and the insured does not request one.

The Court's citation to *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972), would indicate that the insurer discharges any duty by advising the insured that the decision belongs to the insured: "Once [the insurer's] counsel disclosed the situation, the insureds, represented by their own retained counsel, would be entitled to make the decision whether to seek an allocated verdict." *Duke*, 468 F.2d at 979. If the insured decides against an allocated verdict, the insured (or its successor) will bear the "burden ... to prove the precise [covered] portion of the unallocated verdict" in a subsequent coverage action. *Id.* at 977. Still, *Duke* did "not explore the situation in which the insured does not have his own counsel." *Id.* at 979 n.4. In such a situation, it stands to reason that the construction defect plaintiffs' awareness of the potential for an allocated verdict—and their resulting ability to request an allocated verdict themselves—would cure any potential problem. *See Harleysville*, 420 S.C. at 337, 803 S.E.2d at 297 (noting that association succeeded to defunct insured's rights following entry of final judgment).

Even if such conclusions are implicit in *Harleysville*, as Hartford believes, they are not explicit. If Hartford and the other insurers had not moved to intervene, and then appealed from the order denying intervention, the trials would have gone forward to unallocated verdicts. It makes eminent sense to resolve these issues regarding *Harleysville*'s meaning before trial, and the most efficient way to resolve *Harleysville*'s meaning is certification under Rule 204(b).

If the Court grants certification, it can address the associations' procedural and jurisdictional objections as part of merits briefing. The associations' various objections boil down to the proposition that *Harleysville* does not contemplate insurers intervening to request allocated verdicts, and that Hartford's motion for intervention and subsequent appeal did not

assert rights protected by the rules governing intervention and immediate appeals. In other words, the procedural and jurisdictional objections are intertwined with the substantive question of what *Harleysville* means. Whether framed as a substantive or a procedural question, an opinion by this Court would bring necessarily clarity regarding *Harleysville*.

For these reasons, Hartford requests Rule 204(b) certification for immediate review by this Court.

Respectfully submitted,

November 8, 2017

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EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Harbour Cove Condominium Association, et al., Plaintiffs, v. Centex Homes, et al., Defendants.	)	Civil Action No.: 2014-CP-26-7634 ORDER DENYING MOTION OF INSURERS FOR LIMITED INTERVENTION

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

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 defective workmanship originally performed by each individual subcontractor;

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the 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 moving parties seeks 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 damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"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, SCRCP." 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.

BACKGROUND

Each of the Insurers stated that they did not wish 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 ("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.E2d 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.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
BEACH VILLAS AT OCEAN KEYES PROPERTY OWNERS ASSOCIATION, INC., Plaintiff, vs. 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 CONSTRUCTION, 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 CLARKWESTERN DIETRICH BUILDING SYSTEMS, LLC, Defendants.	CASE NO. 2014-CP-26-6573 AMENDED ORDER DENYING MOTION OF INSURERS FOR LIMITED INTERVENTION
OCEAN KEYES DEVELOPMENT, LLC AND KEYE CONSTRUCTION CO., INC., Third-Party Plaintiffs, vs. 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.	

THIS MATTER comes before this Court upon Motions of Canopius US Insurance Inc. ("Canopius"); Hartford Fire Insurance, Hartford Casualty Insurance Company and Hartford Underwriters Insurance Company (collectively "Hartford"); and Selective Insurance Company of

South Carolina ("Selective") seeking to intervene in the trial of this matter for the limited purpose of submitting special interrogatories to the jury regarding issues related to insurance coverage.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

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 defective workmanship originally performed by each individual subcontractor;

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the 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 moving parties seeks 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 damaged by the work

of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

"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, SCRCP." 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.

BACKGROUND

At the outset of the hearing in this matter, counsel for Plaintiff agreed to allow each of the Insurers to fully intervene as named parties in the case and allow counsel for each of the Insurers to participate in the actual trial, including the questioning of witnesses and making of arguments to the jury. Each of the Insurers stated that they did not wish 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.

Additionally, counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action. The Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action.

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 ("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 Beach Villas 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 Beach Villas 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.E2d 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.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

Clifton Newman
Presiding Judge

(6)

EXHIBIT C

84854

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company, and National Fire & Marine Insurance Company.....Appellants,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, 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, Lundy Dowell 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 Interiots, 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., ...Respondents,

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MOTION TO DISMISS APPEAL

COMES NOW the above-named Respondent Harbour Cove Condominium Association (hereinafter "Respondent Harbour Cove"), by and through its undersigned counsel, and herewith moves this Court for an Order dismissing the appeal filed by Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company (hereinafter collectively "Appellant Hartford").

BACKGROUND

This appeal arises from a construction defect case commenced by Respondent Harbour Cove against various defendants. Appellant Hartford is an insurer of defendant Coastal Plaster Systems, Inc. Appellant Hartford filed a Motion to Intervene in the underlying action on August 7, 2017. By Order entered October 13, 2017, the Court ruled that Appellant Hartford's Motion to Intervene was denied. Appellant Hartford filed its Notice of Appeal immediately thereafter. This action was set for trial to begin on October 16, 2017.

To better understand the improper nature of Appellant's appeal, it is important at the outset to note certain indisputable facts. Prior to trial, Appellant filed a written motion requesting a special verdict form or special interrogatories. However, Appellant is not a party to the litigation. Respondent Harbour Cove asserted no claims whatsoever against Appellant, and Appellant does not appear as a party in the caption of its own motion from which this appeal arises. This appeal follows.

LAW AND ANALYSIS

The South Carolina Court of Appeals may only entertain appeals of final orders. S.C. Code Ann. § 14-3-330 (1991). If there is some further act of the court which must be done in order to determine the rights of the parties, an order is interlocutory. *Mid-State*

Distribts. V. Century Imps., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993) (citing *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884)) (a ruling on a Motion to Dismiss under Rule 12(b)(2) has no real finality because it leaves open issues for trial and is interlocutory and therefore not appealable). An order that determines issues of law while leaving open questions of fact is not a final order. *Bone v. United States Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012) (citing *Good v. Hartford Accident and Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)) (an order containing provisions where the court remanded a matter for further proceedings was not a final order and not appealable). Specifically, the South Carolina Supreme Court has analyzed the issue of whether an appeal of a ruling on a Motion to Intervene was permissible, and concluded it was an improper interlocutory appeal. *Dorn v. Cohen*, 418 S.C. 126, 139, 791 S.E.2d 313, 319-20 (*See Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 485, 449, S.E.2d 580, 580 (1994).) (holding an appeal from an order of the circuit court granting a guardian ad litem's motion to intervene was interlocutory and was therefore not immediately appealable).

The Court's ruling on Appellant's Motion to Intervene is not an appealable final order as the entirety of the trial on the facts of the case has yet to commence and several factual issues remain. Respondent, the Harbour Cove Condominium Association, and its residents have been waiting since 2014 to bring this case to a resolution; which may be jeopardized with Appellant's attempts to appeal a decision by the Court that is interlocutory and not appealable.

On these grounds, the Court's denial of Appellant's Motion is not a final judgment as to all the claims or parties and furthermore, is not an immediately appealable interlocutory order.

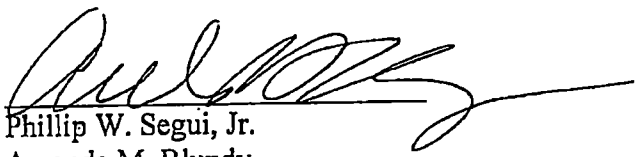
As applied to this case, the foregoing authorities are clear and unambiguous in their message: The Court of Appeals does not have jurisdiction to hear this interlocutory appeal.

As such, Appellant's appeal must be dismissed.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondent Harbour Cove respectfully requests an Order of this Honorable Court dismissing Appellant Hartford's appeal in its entirety.

FOR RESPONDENT HARBOUR COVE CONDOMINIUM ASSOCATION:



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I hereby certify that I have this day served counsel for the opposing party(s) with a copy of the within and foregoing pleading by ***electronic mail*** properly addressed to the following, to insure proper delivery to the following:

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This 11 day of October, 2017

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EXHIBIT D

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2014-CP-26-7634

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Selective Insurance Company of South Carolina, Harleysville Insurance Company, American Empire Surplus Lines Insurance Company, Bitco General Insurance Corporation, and National Fire & Marine Insurance Company ..... Appellants,

Of whom Catalina London LTD ..... is an Intervenor,

v.

The Harbour Cove Condominium Association, Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, 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, Lundy Dowell 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. ..... Respondents.

HARTFORD FIRE INSURANCE COMPANY AND HARTFORD CASUALTY INSURANCE COMPANY'S RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively, "Hartford"), submit this return in opposition to the Motion to Dismiss Appeal filed by Respondent Harbour Cove Condominium Association ("the Association"). The Association has moved to the dismiss the appeal on the grounds that Hartford was not a party, and the Order denying the motion to intervene was an interlocutory order and not a final order and therefore not immediately appealable. Under the settled meaning of S.C. Code § 14-3-330(2), Hartford has a right to an immediate appeal, and the Court should therefore deny the Motion to Dismiss Appeal.

Background

Hartford moved to intervene in the underlying action which was denied. Hartford appeals the denial to seek clarification regarding its rights and obligations, following the Supreme Court's ruling in *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017). *Harleysville* addressed coverage for a construction defect action seeking both the cost to repair faulty workmanship itself (which is not covered "property damage") and the cost to repair resulting damage to otherwise non-defective components (which may qualify as "property damage"). *Id.* at ___, 803 S.E.2d at 296. In requiring the insurer to pay for both types of repair costs, the Supreme Court held that the insurer's reservation of rights "letters were not sufficiently specific to put [its insured] on notice of [the insurer's] specific defenses, particularly as to the need for an allocated verdict." *Id.* at ___, 803 S.E.2d at 297.

In *Harleysville*, the Supreme Court stated that the "right to control the litigation carries with it certain duties, including the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages." *Id.* at ___, 803 S.E.2d at 299 (internal quotations and citations omitted). The Court additionally noted that in "addition to finding Harleysville's attempted reservation of rights to be insufficient, the Special Referee also found 'the Court has no basis upon which to make a logical assessment of the jury's

purpose when it awarded the general verdict' as to the negligent construction, breach of warranty, and breach of fiduciary duty claims, and the Special Referee refused to 'engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making.' *See [Auto Owners v.] Newman*, 385 S.C. [187] at 198, 684 S.E.2d [541] 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)." *Harleysville*, 420 S.C. at ___n.11, 803 S.E.2d at 300 n.11.

Here, Hartford issued primary and excess liability insurance policies to Coastal Plaster, Inc., which is one of many subcontractors whom the Association brought claims against for alleged construction defects. Hartford is defending Coastal under a reservation of rights. Hartford advised Coastal in writing that, because of the potential for a general verdict, Coastal may itself submit a special verdict form or special interrogatories seeking an allocation of damages between covered and uncovered damages. Hartford (and other insurers) also sought intervention for the limited purpose of requesting such an allocated verdict. The Circuit Court denied intervention, and Hartford filed this appeal. The Association has moved to dismiss the appeal as not immediately appealable.

Governing Law on the Right to Immediate Appeal

"An order affects a substantial right and is *immediately appealable* when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action ...." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (quoting S.C. Code § 14-3-330(2)) (emphasis added).

Interpreting precisely the same statutory language,[1] the Supreme Court held that an order denying a motion to intervene was immediately appealable—even though "the merits of the action hereinbefore mentioned [had] not been determined and as the trial of that action will still be necessary"—because insofar "as the rights of the [putative intervenor] are involved, the order [denying intervention] affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken." *Ex parte Johnson (Rutledge v. Tunno)*, 63 S.C. 205, __, 41 S.E. 308, 309 (1902). *See also* 15 S.C. Jur. Appeal and Error § 23 South Carolina Jurisprudence (September 2017 Update) ("The refusal of a petition to intervene is directly appealable '[i]n so far as the rights of appellant are involved, the order affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken.'"); *Ex parte Wells*, No. 2012-MO-002, 2012 WL 10906587, at *1 & n.1 (S.C. Sup. Ct. filed March 7, 2012) (allowing immediate appeal of an order denying a request to intervene in an abuse and neglect action) (citing *Johnson/Rutledge*) (please note that this is opinion states "[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by rule 268(d)(2), 8(d)(2), SCACR"); *Ex parte Carter v. L.C.*, No. 2015-001006, 2017 WL 164493, at *2 (S.C. Ct. App. filed January 13, 2017) (citing *Johnson/Rutledge* with favor that "an order denying a motion to intervene is immediately appealable") (please note that this is

[1] *Johnson/Rutledge*, 63 S.C. at __, 41 S.E. at 309 ("Section 11 of the Code provides that 'the supreme court shall have exclusive jurisdiction to review upon appeal *** an order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.'"). The current statute, S.C. Code Ann. Section 14-3-330, provides identically under (2): "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: ... (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken...."

opinion states "[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by rule 268(d)(2), SCACR").

Instead of citing this controlling authority, the Association cites cases holding that "an order *granting* a motion to intervene is not immediately appealable." *Duncan v. Gov't Employees Ins. Co.*, 331 S.C. 484, 486, 449 S.E.2d 580, 580 (1994) (emphasis added); *see Dorn v. Cohen*, 418 S.C. 126, 139, 791 S.E.2d 313, 320 (Ct. App. 2016) (order adding a party was not immediately appealable where it "had the effect of an order granting a motion to intervene"). An order granting a motion to intervene is analogous to an ""an order making a third party a defendant," which does not put any party out of court and creates no immediate appeal right. *Duncan*, 331 S.C. at 485, 449 S.E.2d at 580. An order permitting intervention, in contrast with an order denying intervention, is not an order that "determines the action," that "prevents a judgment from which an appeal might be taken, or that "discontinues the action" as to the intervenor or any other party. *See* S.C. Code § 14-3-330(2).

Hartford's Right to an Immediate Appeal

The order denying Hartford's motion to intervene "in effect determine[d] the action and prevent[ed] a judgment from which an appeal might be taken," within the meaning of *Johnson/Rutledge*, 63 S.C. at __, 41 S.E. at 309. Hartford therefore has a right to an immediate appeal under S.C. Code § 14-3-330(2) as has been established in this State.

In a case pending before this Court, an insurer appealed the denial of an intervention motion, and the homeowner's association moved to dismiss. *See* Motion to Dismiss Appeal, *Beresford Commons Homeowners Ass'n, Inc. v. Portrait Homes-South Carolina, LLC, et al.*, Case No. 2013-CP-08-179 (filed Feb. 6, 2017) (attached as Exhibit A). There, the homeowners association argued that the order was not immediately appealable under *Johnson/Rutledge* because the circuit court found the motion untimely and did not rule on the merits. *Id.* Even with that added

argument against jurisdiction, this Court ordered: "The motion to dismiss is denied at this time. Nothing in this order prevents the parties from arguing the issue of appealability in their briefs" Order, *Beresford Commons Homeowners Ass'n, Inc. v. Portrait Homes-South Carolina, LLC, et al.*, Case No. 2013-CP-08-179 (Mar. 7, 2017) (attached as Exhibit B).

In the present matter, the Circuit Court ruled on the merits, and therefore the case is clear that the denial of the motion to intervene is immediately appealable. *See Ex parte Johnson (Rutledge v. Tunno), supra.* The question of whether Hartford has any right or obligation to intervene is inextricably intertwined with the merits of the controversy, which turns on what *Harleysville* means. The Court should deny the Association's Motion to Dismiss and permit this case to proceed to merits briefing.

October 26, 2017

SWEENY, WINGATE & BARROW, P.A.

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February 6, 2017

Via Federal Express and electronic mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
jkitchings@sccourts.org

RE: Beresford Commons Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC, et al
Case No.: 2013-CP-08-179

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Respondent Beresford Commons Homeowners Association, Inc.'s Motion to Dismiss Appeal as well as this firm's check in the amount of $25.00 for the applicable filing fee. If you would, please file this motion with the Court and return a file-stamped copy thereof to my office in the enclosed, self-addressed, stamped envelope.

Should you have any questions or require any additional information, please don't hesitate to contact me.

Sincerely,

Amanda M. Blundy

AMB/esm
Enclosure
cc: John T. Chakeris, Esquire (w/enclosure)
J.R. Murphy, Esquire (w/enclosure) - via U.S. mail and electronic mail
Adam J. Neil, Esquire (w/enclosure) - via U.S. mail and electronic mail
Timothy J. Newton, Esquire (w/enclosure) - via U.S. mail and electronic mail
Albert A. Lacour, III, Esquire (w/enclosure) - via U.S. mail and electronic mail

EXHIBIT
tabbies
A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

Nationwide Mutual Fire Insurance Company, ...Appellant,

In Re:

Beresford Commons Homeowners Association, Inc., ...Respondent,

v.

Superior Solution, LLC, ...Respondent.

MOTION TO DISMISS APPEAL

COMES NOW the above-named Respondent Beresford Commons Homeowners Association, Inc. (hereinafter "Beresford HOA"), by and through its undersigned counsel, and herewith moves this Court for an Order dismissing the appeal filed by Appellant Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide").

BACKGROUND

This appeal arises from a construction defect case commenced by Beresford HOA against various defendants, including Superior Solution, LLC. Nationwide is an insurer of Superior Solution, LLC. Nationwide filed a Motion to Intervene in the underlying action.

By Form 4 Order entered January 31, 2017, the Court stated that "Nationwide Mutual Fire Company's Motion to Intervene on behalf of Superior Solutions, LLC filed January 26,. 2017, was not heard. Motion was filed after pretrial deadline." Subsequently, Nationwide filed a Motion for Reconsideration on February 3, 2017. This action was set for trial to begin on this date, February 6, 2017. All remaining parties to the case appeared in court to try the matter, at which time the Court reiterated to Nationwide that its Motion to Intervene had not been denied and as such, there was nothing to reconsider, but noted that the Court would consider hearing the Motion before charging the jury. At this time, the jury panel was qualified, witnesses were present in court, and on a break Nationwide filed its Notice of Appeal. The Court has informed all parties that the jury is being held until Wednesday, February 8, 2017 in hopes that it would not have to release a jury panel that has been set aside for this two-week date certain trial.

To better understand the improper nature of Nationwide's appeal, it is important at the outset to note certain indisputable facts. Prior to trial, Nationwide filed a written motion to intervene for the purpose of requesting a special verdict form or special interrogatories. *(See **Exhibit A** attached)*. Nationwide is not a party to the litigation. Beresford HOA asserted no claims whatsoever against Nationwide, and Nationwide does not appear as a party in the caption of its own motion from which this appeal arises. After the filing of the motion at issue, Beresford HOA noticed the Rule 30(b)(6) deposition of Nationwide for purposes of determining and narrowing the issues related to Nationwide's special interrogatories and any that may be requested by Beresford HOA, which Nationwide moved to quash. The Circuit Court ruled the Motion as untimely, as noted in Nationwide's Notice of Appeal. This appeal follows.

LAW AND ANALYSIS

In order for an issue to be appealed, it must have been ruled upon by the Court. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (upholding the dismissal of an appeal as interlocutory when the appealed order was not intended to be a final ruling). "An appeal ordinarily may be pursued only after a party has obtained a final judgment. *Hagood v. Sommerville*, 362 S.C. 191, 194-95, 607 S.E.2d 707, 708 (2005) citing *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; Rule 201(a), SCACR. A ruling which does not determine the rights of the parties in a matter is interlocutory and not immediately appealable. *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 573-74, 698 S.E.2d 856, 859-60 (Ct. App. 2010).

The Court did not rule on Nationwide's Motion to Intervene, it simply refused to hear it because it was filed past the pretrial deadline. There has been no appealable final judgment because there has been no judgment – no decision regarding the merits of Nationwide's Motion has been made. There has not been a judgment that determines the rights of any parties in this matter because there has not been any judgment, and a trial on the facts of the case has yet to be completed.

Further, the decision that Nationwide's Motion to Intervene was not timely does not give Nationwide any rights to stay the case, and permitting this appeal will prejudice Beresford HOA's rights. Nationwide filed a declaratory judgment action against its insured, Superior Solution, LLC, to determine insurance coverage in February of 2016, and coincidentally, has taken this exact position when Beresford HOA attempted to

appeal a ruling of Nationwide placing their own insured in default. Citing directly from Nationwide's brief:

> Finally, allowing this appeal to go forward prejudices Nationwide's rights. This declaratory judgment action was filed in February 2016. The underlying case is set for trial the first week of February 2017.
>
> *Nationwide's Reply Memorandum in Support of Motion to Dismiss Appeal dated December 19, 2016 in United States Court of Appeals, Fourth Circuit*

Nationwide acknowledges the trial date in the brief to the United States Court of Appeals, Fourth Circuit and discusses the prejudice an appeal would have on their right as the insurance company. However, Respondent, the Beresford Commons Homeowners Association, has been waiting since 2013 to bring this case to a resolution, which may be jeopardized with Nationwide's attempt to appeal a decision by the Court that is interlocutory and not appealable.

While Nationwide is relying on the recent case law, *Harleysville Group Ins. v. Heritage Cmties, Inc.*, et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017)(Shearhouse Adv. Sh. No. 2 at 21, 36 n.11) in order to justify its failure to file a Motion to Intervene in a timely manner, there is no case law prior to the *Harleysville* case preventing it from doing so. In fact, there is no case law in South Carolina that overturns *Auto Owners Insurance Co. Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) and the concept of allowing a carrier to intervene in this type of case has been fully briefed by another carrier who intervened in this exact matter. Nationwide and Beresford HOA's counsel have been litigating this coverage matter since February 10, 2016, when the declaratory judgment action was filed. The coverage issues have been at issue for a year and Nationwide could have filed a Motion to Intervene in this action at any time prior to the eve of trial. Specifically, Nationwide could have moved to intervene immediately

after the *Harleysville* decision, but chose to wait more than two weeks to file its Motion. In fact, Selective Insurance Company moved to intervene prior to even filing a coverage action, which was granted by Judge Nicholson. Selective moved to intervene in October 2016 in time to have a hearing and a determination prior to trial.

On these grounds, the Court's determination that the Motion was untimely and would not be heard is not a final judgment as to all the claims or parties, and is not an immediately appealable interlocutory order.

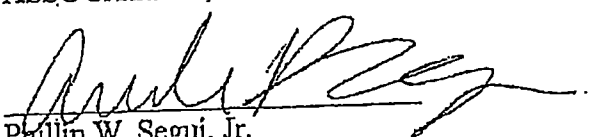
As applied to this case, the foregoing authorities are clear and unambiguous in their message: The Court of Appeals does not have jurisdiction to hear this interlocutory appeal.

As such, Nationwide appeal must be dismissed as an impermissible interlocutory appeal.

CONCLUSION

In light of the arguments and authorities set forth herein, Respondent Beresford HOA respectfully requests an Order of this Honorable Court dismissing Appellant Nationwide's Appeal in its entirety.

FOR RESPONDENT BERESFORD COMMONS HOMEOWNERS ASSOCATION, INC.:



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February 6, 2017
Mount Pleasant, South Carolina

- AND -

John T. Chakeris
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Email: john@chakerislawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party(s) with one (1) copy of the foregoing "Motion to Dismiss Appeal" by ***electronic mail*** and by depositing a copy of same in the ***United States mail*** in an envelope properly addressed to the following, with adequate postage thereon to insure proper delivery to the following:

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Albert A. Lacour, III, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
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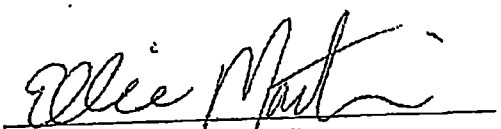
This 6th day of February, 2017.

BY: 

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The South Carolina Court of Appeals

Ex Parte:

Nationwide Mutual Fire Insurance Company, Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,
Respondent,

v.

Superior Solution, LLC, Respondent.

Appellate Case No. 2017-000202

ORDER

The motion to dismiss is denied at this time. Nothing in this order prevents the parties from arguing the issue of appealability in their briefs.

James E. Lockemy
FOR THE COURT

Columbia, South Carolina

cc:
John Robert Murphy, Esquire
Adam J. Neil, Esquire
Timothy J. Newton, Esquire
Phillip Ward Segui, Jr., Esquire
Amanda Morgan Blundy, Esquire

FILED
March 7, 2017

EXHIBIT
R

Albert A. Lacour, III, Esquire
The Honorable Kristi Lea Harrington

EXHIBIT E

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
BEACH VILLAS AT OCEAN KEYES PROPERTY OWNERS ASSOCIATION, INC., Plaintiff/Applicant, vs. 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 CONSTRUCTION, 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 SYSTEM n/k/a CLARKWESTERN DIETRICH BUILDING SYSTEMS, LLC, Defendants.	CASE NO. 2014-CP-26-6573 **PLAINTIFF/APPLICANT BEACH VILLAS PROPERTY OWNERS ASSOCIATION, INC.'S MOTION TO LIFT AUTOMATIC STAY**
OCEAN KEYES DEVELOPMENT, LLC AND KEYE CONSTRUCTION CO., INC., Third-Party Plaintiffs, vs. 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.	

TO ALL PARTIES AND COUNSEL OF RECORD AND TO NON-PARTIES HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY INSURANCE COMPANY AND HARTFORD UNDERWRITERS INSURANCE COMPANY

You will please take notice that within ten (10) days or as soon thereafter as counsel for the Plaintiff Beach Villas Property Owners Association as Applicant can be heard, Plaintiff/Applicant will move before this Honorable Court pursuant to the South Carolina Rules

of Civil and Appellate Procedure to lift the automatic stay. Plaintiff/Applicant moves pursuant to SCACR 241 to lift the automatic stay for a Notice of Appeal filed on October 13, 2017 by non-party insurers Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company (hereinafter collectively referred to as "Hartford Insurance or Hartford Insurers").

BACKGROUND

The Hartford Insurers, who are not parties to this action, filed a Motion to Intervene with this Court specifically for the purpose of submitting Special Interrogatories, Jury Instructions and/or Verdict Form(s) as well as to participate "behind the scenes" and without the jury's knowledge of their participation in the trial. The Hartford entities did not make a motion to intervene to become parties to the action and communicated that they did not want to become parties to the action.[1] On October 12, 2017, the Court denied the insurers' requests to submit special interrogatories, jury instructions and verdict form and participation in the trial as an unnamed party. On October 13, 2017, non-party Hartford filed a Notice of Appeal from the trial court's order. Because the Hartford entities are not parties to the action (and specifically declined becoming parties to the action), the Harford insurers as *non-parties* cannot appeal from any matter arising from the underlying trial, and the Plaintiffs move this Court for an Order lifting the automatic stay. SCARP 201.

ANALYSIS

Insurers Hartford are not parties to the action and specifically declined to become parties

[1] Insurers Selective Insurance and Canopius Insurance also filed separate Motions to Intervene as non-parties to submit special interrogatories, jury instructions and verdict forms. At the outset of the hearing in this matter, counsel for Plaintiff agreed to allow each of the Insurers to fully intervene in this action as named parties in the case and allow counsel for each of the Insurers to participate in the actual trial, including the questioning of witnesses and making of arguments to the jury. Insurers stated that they did not wish to intervene in this case as parties to the action. The insurers have asked to intervene as non-parties. .

to the action. Pursuant to SCACR 201(b), "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." Ex Parte Condon, 354 S.C. 634, 642, 583 S.E.2d 430, 434(2003)("The Attorney General is required, like everyone else to formally intervene and become a named party before he can file an appeal."); *See also* Teseniar v. Professional Plastering & Stucco, Inc. (S.C. Court of Appeals Order filed April 9, 2014 dismissing the Notice of Appeal filed by National Fire & Marine Ins. Co. because National Fire was not a party to the action). The Hartford entities are not parties to the action and have specifically requested that they not be made parties to the action. Thus, Rule 201(b) bars the insurers from filing a Notice of Appeal and therefore the automatic stay should be lifted. The Hartford insurers have not requested to become a party to the action, have not been denied becoming a named party to the action and therefore cannot appeal the Order denying their requests for special interrogatories, jury instructions and/or verdict forms as a non-party to the action. *See* SCACR 201, SCACR 241, SCRCP 24.

Because the Hartford insurers did not request to intervene as named parties, the denial of the motion to intervene to submit special interrogatories, jury instructions, and verdict forms is not a final issue as they can file declaratory judgment actions to resolve coverage related issues.

CONCLUSION

Because Hartford Insurers, are not parties to the action and have not even requested to become parties to the action, they are barred from filing a Notice of Appeal pursuant to SCACP. As such, Plaintiffs respectfully requests this court to lift the automatic stay so that this case can proceed to trial.

Respectfully Submitted,

MULLEN WYLIE, LLC

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ATTORNEYS FOR PLAINTIFF/APPLICANT

Myrtle Beach, South Carolina
October 26, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Clifton Newman, Circuit Court Judge

Trial Court Case No. 2014CP2606573
Trial Court Case No. 2014CP2607634
Appellate Case No. 2017-02146

In Re Motions to Intervene in:
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., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, 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, Lundy Dowell 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,

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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 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 are the Appellants,

AND

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.

PROOF OF SERVICE

I certify that I have served the Motion to Certify to the South Carolina Supreme Court Under Rule 204, SCACR, on Respondents and counsel of record from both Trial Court Case No. 2014CP2606573 and Trial Court Case No. 2014CP2607634 (now combined Appellate Case No. 2017-02146), by depositing a copy of them in the United States Mail, postage prepaid, November 8, 2017 addressed to their attorneys of record, listed as follows:

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Attorneys for Respondents Ocean Keyes Development, LLC, and
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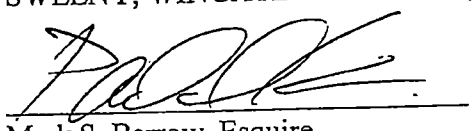

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VIA HAND DELIVERY
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RE: In Re: Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Clarendon National Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company

Harbour Cove v. Centex v. Hartford
Civil Action No.: 2014-CP-26-7634
Beach Villas v. Ocean Keyes Development
Civil Action No.: 2014-CP-26-6573
Appellate Case No. 2017-002146
Our File: 4760-11126

Dear Ms. Kitchings:

Enclosed please find two (2) copies of Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company Motion to Certify to the South Carolina Supreme Court Under Rule 204, SCACR with the Proof of Service file-stamped by the South Carolina Supreme Court in the above-referenced matter. Please file one copy and return a file-stamped copy with the Courier.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance in this matter. Should you have any questions or concerns, please do you hesitate to contact me.

Yours truly,
SWEENY, WINGATE & BARROW, P.A.

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EXHIBIT E

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 23 2018
S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Trial Court Case No. 2014-CP-26-07634
Appellate Case No. 2017-002146

Ex Parte:

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company f/k/a Harleysville 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, Lundy Dowell 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,

Of whom The Harbour Cove Condominium Association, is the Respondent.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DOES A LIABILITY INSURER HAVE AN OBLIGATION, AND THEREFORE A RIGHT, TO INTERVENE IN AN UNDERLYING CONSTRUCTION DEFECT ACTION TO REQUEST AN ALLOCATED VERDICT UNDER *HARLEYSVILLE*?

2. WHAT ARE AN INSURER'S APPEAL RIGHTS IF A TRIAL COURT DENIES ITS REQUEST TO INTERVENE FOR THE LIMITED PURPOSE OF REQUESTING AN ALLOCATED VERDICT UNDER *HARLEYSVILLE*?

STATEMENT OF THE CASE

Harbour Cove Condominium Association filed this lawsuit on November 13, 2014, suing for alleged construction defects. On August 7, 2017, Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively, "Hartford"), as the insurers of defendant Coastal Plaster Systems, Inc., moved 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 that addresses factual issues related to the indemnity coverage." (R. p. 41.)

The Circuit Court heard Hartford's motion, along with similar motions to intervene filed by other insurers, on September 28, 2017. (R. pp. 315–501.) The Circuit Court denied all of the insurers' motions for intervention by order entered October 12, 2017:

> 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 ... 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 ... 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.

(R. pp. 3–4.)[1]

On October 13, 2017, the day after the denial of its motion to intervene, Hartford filed and served the notice of its appeal. (R. p. 112-13.)

[1] In the consolidated *Beach Villas* appeal, discussed *infra*, the Circuit Court further noted that "counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action," and that the "Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action." (R. pp. 9–10).

On October 25, 2017, the Court of Appeals entered an order consolidating the *Harbour Cove* appeals, along with the appeals from the denial of intervention in *Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al.*, Civil Action No. 2014-CP-26-06573. *Beach Villas* is an action alleging construction defects, filed October 7, 2014. Hartford (including Hartford Underwriters Insurance Company) moved to intervene on September 18, 2017. The Circuit Court heard the motions to intervene on September 28, 2017. It denied them by order entered October 12, 2017, and then by amended order entered October 13, 2017. Hartford served a notice of appeal on October 13, 2017, followed by Canopius US Insurance Inc. (Oct. 27, 2017) and Selective Insurance Company of South Carolina (Oct. 30, 2017).

On January 24, 2018, the Court of Appeals denied motions to dismiss the appeals filed by the plaintiffs in *Harbour Cove* (Oct. 17, 2017) and *Beach Villas* (Dec. 19, 2017). It held: "Nothing, however, prevents Respondents from raising the issue of appealability in their briefs." (R. p. 14.) This Court granted certification under Rule 204(b), SCACR, on February 1, 2018.

Following certification, all claims against Hartford's insured in the *Beach Villas* action were resolved. For that reason, Hartford's brief addresses only its *Harbour Cove* appeal.

FACTS

The Association's operative complaint alleges that it has "the duty to repair and maintain the common elements of the Project known as Harbour Cove consisting of (90) units in (5) buildings and a pool house located in Horry County, South Carolina." (R. p. 244.) The Association sued the general contractor, Centex Homes, and numerous subcontractors. (R. pp.243–73.) Those subcontractors included Coastal Plaster Systems, Inc., which allegedly "installed and/or supervised the installation of the stucco and related flashings." (R. p.253.) The Association alleged that Coastal Plaster was negligent in "improperly installing the stucco facade in violation of the building code, standard building practices and accepted construction industry standards and

practices" and in "constructing the condominiums and/or buildings which fail to provide sufficient barriers against the intrusion of water into the wall system and an adequate avenue for exit of water that gets into the system resulting in damage to the units and buildings." (R. pp. 258–59.)

As a result, the Association alleges, 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 the Association "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." (R. p.263.)

As set forth in the Statement of the Case, Hartford, as the insurer defending Coastal Plaster, moved 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 that addresses factual issues related to the indemnity coverage." (R. p. 41.) The Circuit Court denied that motion. (R. pp. 1-5.).

ARGUMENTS

I. UNCERTAINTY IN THE LAW COMPELLED HARTFORD TO SEEK INTERVENTION TO REQUEST AN ALLOCATED VERDICT.

Hartford was compelled to seek intervention because litigants have argued that this Court's recent rulings on insurance coverage, in the context of litigation over alleged construction defects ("CD litigation" or "CD actions"), require insurers to intervene to request verdicts or special interrogatories that allocate between covered and uncovered damages. Failure to intervene may

result in serious potential consequences for insurers, namely in the insurers bearing responsibility for the uncovered portions of verdicts. In denying Hartford's motion, the Circuit Court concluded intervention is not mandatory or even permissible, and further ruled that a separate declaratory judgment action adequately protected the carriers' rights to dispute coverage. However, the difference in opinion, and the significant potential consequences, create tension between the Circuit Court's order and this Court's recent rulings, thus prompting Hartford to seek intervention for the limited purpose of requesting an allocated verdict.

A. The Mandatory-Intervention Reading of *Harleysville*

The Court, in *Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), addressed coverage in a CD action that concerned both the cost to repair faulty workmanship itself (which is uncovered) and the cost to repair resulting damage to otherwise non-defective components (which may qualify as covered "property damage"). *Id.* at 335, 803 S.E.2d at 296; *see Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009)). In requiring the insurer to pay for both types of repair costs, *Harleysville* held that the insurer's reservation of rights "letters were not sufficiently specific to put [its insured] on notice of [the insurer's] specific defenses, particularly as to the need for an allocated verdict." 420 S.C. at 342, 803 S.E.2d at 299.

The Court further stated that the "'right to control the litigation carries with it certain duties,' including 'the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.'" *Harleysville*, 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)). In a footnote, the Court stated:

> 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.

The Court made no express reference to the intervention issue, and cited to *Newman*, without explanation. *Newman*, which involved an arbitration of a defective-stucco claim, held that the policy's terms "prohibit[ed] recovery for the cost of removing and replacing the defective stucco—even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy," and that "any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy." 385 S.C. at 198, 684 S.E.2d at 546. However, the Court found it was "not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages." *Id.* at 198, 684 S.E.2d at 547. The insurer "had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits." *Id.* Although recognizing that the insurer defended its insured "with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding," the Court held the insurer responsible for the entire award because when "the arbitrator determined damages, [the insurer] did not seek review of or otherwise contest the damages award." *Id.* at 198 n.5, 684 S.E.2d at 547 n.5. Thus, *Newman* suggested that the insurer could have taken some action—perhaps

intervention—to obtain an allocated award, and failure to do so obligated the insurer to pay all damages, even those which were expressly not covered under the policy.

The Special Referee in *Harleysville* concluded that, under *Newman*, one of the reasons the insurer could not "relitigate" the allocation of damages was its "decision not to file a motion to intervene or otherwise seek an allocated verdict as it could have done under Rules 24 and 49, SCRCP."[2]

Responding to *Harleysville*'s citation to *Newman*, the dissent wrote that "there is no suggestion how Harleysville could have intervened in these lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law." 420 S.C. at 363, 803 S.E.2d at 311 (Pleicones, Acting Justice, dissenting) (citing *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965)).

Footnote 11 in *Harleysville*, when read in conjunction with *Newman* and with the *Harleysville* dissent, has led some litigants to conclude that insurers must intervene to request a special verdict if the parties do not request one. For a perfect example, Ocean Keyes Development, LLC, the developer in *Beach Villas*, told the Circuit Court:

> Under prior South Carolina law, insurance coverage issues were separated from tort issues; when an insurer reserved its rights as to coverage issues, it retained defense counsel whose loyalty was solely to the insured, and the liability insurer then retained separate coverage counsel to represent the insurer's interest in protecting its coverage position. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP*, 336 F. Supp. 2d 610, 615-16 (D.S.C. 2004). The *Harleysville* opinion radically changed the landscape of South Carolina law by holding that an insurer

[2] *Harleysville v. Heritage*, S.C. Sup. Ct. No. 2013-001281, Consolidated Record on Appeal, p.56, *available at* http://ctrack.sccourts.org/public/document/view.do?documentID=195246. "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (quoting *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984)); *see* Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding."). Hartford cites the docket materials not for the truth of any statement in those materials, but to examine what was (and was not) reviewed, argued, and decided by this Court in *Harleysville*.

> has not only a right, but a duty to intervene in the underlying proceedings. *Harleysville*, 803 S.E.2d at 294 (finding that a liability carrier may not relitigate damages in a separate coverage action.)
>
> As a result, the Insurers were forced to seek intervention in this action based upon the Supreme Court's directive. The Insurers' right to intervene includes a right to attend and participate in the trial because the evidence presented at trial may affect the special interrogatories and/or special verdict forms needed for findings of fact as to the Insurers' coverage. The Court's reasoning in *Harleysville* makes sense only if the liability insurer participates in the underlying action.

(R. pp. 59–60)

Hartford moved to intervene in this action given that interpretation of *Harleysville* and in an abundance of caution.[3] Nevertheless, other reasonable interpretations of *Harleysville* suggest that the Court did not intend to change the litigation landscape by requiring insurers to intervene. As discussed in greater detail below, Hartford moved to intervene in *Harbour Cove* to avoid losing its right to allocate between covered and uncovered damages should coverage litigation become necessary, if the mandatory-intervention reading of *Harleysville* was this Court's intention. However, Hartford seeks a ruling that under *Harleysville* and other existing case law, an adequate reservation of rights letter is sufficient preserve the right to allocate between uncovered and covered damages in a separate declaratory judgment action without intervention in the underlying construction defect action.

B. The Intervention-Neutral (Reservation of Rights) Reading of *Harleysville*

Harleysville can reasonably be read as a decision grounded in the adequacy of an insurer's reservation-of-rights letter, and one that did not reach the question of intervention. Thus, intervention is not mandatory when a carrier has properly and adequately reserved its rights. This

[3] The exception is that Hartford does not see any reason to conclude that the "Insurer's right to intervene includes a right to attend and participate in the trial." (R. p. 60). In the few cases where insurers have intervened, the insurer has not been an "active litigant." *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1325 (S.D. Ala. 2003). As discussed in section I.D, *infra*, general intervention would be unworkable.

reading finds support from the face of the *Harleysville* opinion, the briefing in that case, prior South Carolina law, and in broader legal principles.

First, the Court's entire discussion of the issue, at section III.A of its opinion, was under the heading "Reservation of Rights to Contest Coverage." *Harleysville*, 420 S.C. at 336, 803 S.E.2d at 296. It cited the principle that a "reservation of rights is a way for an insurer to avoid breaching its duty to defend and seek to suspend operation of the doctrines of waiver and estoppel prior to a determination of the insured's liability." *Id.* at 338, 803 S.E.2d at 297 (citing 14 Couch on Ins. § 202:38). The Court held that "there is evidence in the record to support the Special Referee's finding that Harleysville's reservation letters were insufficient to reserve its right to contest coverage of actual damages, and therefore, we affirm." *Id.* at 343, 803 S.E.2d at 300. That holding sufficiently resolved whether the insurer needed to pay the award of actual damages, without deciding whether the insurer could have or should have intervened.

Second, the *Harleysville* respondents did not actually contend that the insurer was entitled to intervene. The insurer offered substantial reasons for why it did not move to intervene:

- "In a similar lawsuit involving the same insured that reached trial several years before these actions, Harleysville filed a motion to intervene, which was strongly opposed by the insureds. Accordingly, in that instance, Harleysville withdrew its motion."[4]
- "An intervention by Harleysville would have resulted in an adversarial relationship between insured and insurer." *Id.*

[4] *Harleysville v. Heritage*, No. 2013-001281, Appellant Brief p.9, *available at* http://ctrack.sccourts.org/public/document/view.do?documentID=192921. As discussed in footnote 2, *supra*, the Court can take judicial notice of the briefs on its docket in *Harleysville* for the purpose of examining what arguments were before the Court. *See Wise*, 394 S.C. at 601, 716 S.E.2d at 122 Rule 201(f), SCRE. The parties' arguments are relevant to identifying what issues the Court determined within the rule of stare decisis. *See Hutto v. S. Farm Bureau Life Ins. Co.*, 259 S.C. 170, 173, 191 S.E.2d 7, 8–9 (1972).

- An "intervention by Harleysville would have revealed the presence of liability insurance in contravention of Rule 411, SCRE." *Id.* at p.10.
- *Newman* involved "an arbitration, not a jury trial, and thus the *Newman* Court had no reason to consider the various disincentives and prohibitions—for example, Rule 411, SCRE or the potential for confusing the jury—that prevented Harleysville from intervening in the underlying actions here." *Id.* at p.13.

The plaintiffs (who succeeded to the insured's rights) did not argue that the insurer actually could have intervened. Instead, they argued that nothing prevented from the insurer from *moving* to intervene—regardless of whether the insured would have opposed the motion or the trial court would have been compelled to deny it:

- "*Newman* gives the insurance carrier the incentive to take all legal avenues including intervention, submission to the Court of special interrogatories, or in the very least, informing its insured of the need for an allocated verdict."[5]
- "There is nothing in the record to even imply that Harleysville was in some way prevented from filing a motion to intervene." *Id.* at p.14.
- "They had an obligation to their insureds to at least attempt to intervene or to advise them and counsel of the need for an allocated verdict and the catastrophic loss of coverage or protracted litigation that may result from an unallocated verdict." *Id.* at p.21.

[5] *Harleysville v. Heritage*, No. 2013-001281, Respondent Brief p.9, *available at* http://ctrack.sccourts.org/public/document/view.do?documentID=188562. *See supra* n.2 (judicial notice).

- "Whether Harleysville would be allowed to intervene is not decided by the lawyers, it is decided by the Trial Judge based upon the Rules of Civil Procedure. Harleysville made a conscious decision not to intervene and its reasons are irrelevant." *Id.* at p.50.

Given the *Harleysville* plaintiff's arguments, it would have made sense for the Court to decide not to reach the Special Referee's intervention holding.

Third, this Court generally decides important questions expressly, not by implication. The Court decided *Harleysville* without expressly mentioning intervention in the majority opinion, and without any party affirmatively arguing that the insurer could have intervened. "It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.'" *Hutto v. S. Farm Bureau Life Ins. Co.*, 259 S.C. 170, 173, 191 S.E.2d 7, 8–9 (1972) (quoting 20 Am. Jur. 2d Courts § 190 (1965)).[6] That principle is particularly true where any such implicit holding might conflict with other precedents. *Coleman v. Page's Estate*, 202 S.C. 486, 491, 25 S.E.2d 559, 560 (1943). As discussed in the next section, it is not easy to reconcile the mandatory-intervention reading of *Harleysville* with the Court's precedents on intervention.

C. The Circuit Court's Ruling Denying Intervention

The Circuit Court, consistent with the analysis in section I.B *supra*, held that *Harleysville* "does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms." (R. p.4 ¶ 3.) It cited four other reasons why, in its judgment, South Carolina law generally prohibits such intervention, and does not require intervention for subsequent allocation of covered versus uncovered damages pursuant to an insurance policy.

[6] That American Jurisprudence entry has been renumbered as § 130, and further states that "a case is not a binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced." 20 Am. Jur. 2d Courts § 130 (Supp. 2018).

1. Rule 24, SCRCP and *Ex parte GEICO*

The Circuit Court began by focusing on this Court's decision in *Ex parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007) ("*Ex parte GEICO*"). There, GEICO moved to intervene in a proceeding to validate a common law marriage between its named insured and an individual making a claim under GEICO's policy. *Id.* at 134–135, 644 S.E.2d at 700. GEICO had denied coverage because the claimant was not its insured's spouse, and it sought to intervention because "the family court's decision on the parties' common law marriage would impact GEICO's ability to protect its interests under the insurance policy." *Id.* This Court found no standing to intervene under Rule 24, SCRCP, because "GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the [family] court." *Id.* at 138–139, 644 S.E.2d at 702 (applying *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)).

Analogizing this case to *Ex parte GEICO*, the Circuit Court held that an insurer's "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." (R. pp. 3–4.) That analogy, however, is not perfect because *Harleysville* suggests the insurer's interest is more than financial.

It is true that this is a CD action, not an insurance coverage action. But *Newman* faulted the insurer for *not* raising the allocation issue "when the issue of damages was litigated before the arbitrator." 385 S.C. at 198, 684 S.E.2d at 547. *Harleysville* held that an insurer has a "'duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.'" 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum*, 36

F.3d at 1498). This passage arguably suggests that an insurer's interest in an allocated verdict is not merely a financial interest, but part of a duty to protect its insured from prejudice.

That does not fully answer the question of how far any such a duty goes—especially whether the duty extends so far as to require intervention when the insured does not request an allocated verdict and may not desire an allocated verdict. Still, the mandatory-intervention reading of *Harleysville* and *Newman* is in tension with *Ex parte GEICO*'s interpretation of Rule 24, SCRCP. *Newman* involved an arbitration, not subject to the strictures of Rule 24. And in *Harleysville*, the Court declined to opine as to how the insurer could have intervened under that rule. *Supra* § I.B. It stands to reason that the Court would have expressly addressed *Ex parte GEICO* in *Harleysville* or *Newman* if it had sought to give insurers clear standing to intervene under Rule 24, SCRCP. *See Coleman*, 202 S.C. at 491, 25 S.E.2d at 560. In sum, *Ex parte GEICO* leans against intervention, but does not preclude the possibility that the Court intended to require intervention.

2. Reservation of Issues for Separate Coverage Actions

The Circuit Court further reasoned that the insurers "can satisfactorily protect any purported interests they may have in a separate declaratory judgment action," and that "to avoid impermissible conflict determining coverage issues, this state requires a separate action." (R. p 4 ¶¶ 2, 4) (citing *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965)).

Sims addressed coverage under an automobile liability policy. 247 S.C. at 83, 145 S.E.2d at 523. The judge in the tort action held that "the defendant was negligent in passing [the automobile in which the plaintiff was riding] and colliding with same, but the defendant was not willful." *Id.* at 84, 145 S.E.2d at 524. The insurer, which had declined to defend its insured based on an intentional-injury exclusion, introduced evidence in the subsequent coverage action that the insured intentionally ran the automobile off the road and shot the driver. *Id.* This Court held that

the insurer could introduce the evidence to disprove coverage. Although recognizing the general principle that "where an indemnitor has notice of and opportunity to defend an action against the indemnitee, he is bound by material facts established against the indemnitee," the Court adopted the "unassailable" logic of an exception for conflicts of interest:

> It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance. "If it cannot do this," as was said in the dissenting opinion in [*Stefus v. London & Lancashire Indem. Co. of Am.*, 166 A. 339, 341 (N.J. 1933)], "it is at the mercy of every unscrupulous litigant who, regardless of his facts, sees fit to falsely allege a claim on which the insurance company would be liable and thereunder establish another claim on which no liability could attach, and forsooth collect because the insurer cannot show the true facts."
>
> In accord is Restatement of the Law of Judgment, Section 107(a), where the rights of indemnitee and indemnitor inter se after judgment against one of them are set out, and it is stated that if the third person has obtained a valid judgment against the indemnitee, both indemnitor and indemnitee are bound as to the existence and extent of the liability if the indemnitor has been given reasonable notice of the action and requested to defend; but in Comment (g) it is stated that this rule is binding only as to issues relevant to the proceeding; and that the judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the circumstances under which he was required to give indemnity do not exist.

Id. at 86–87, 145 S.E.2d at 525 (quoting *Farm Bur. Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949)). *Sims* has been the law of the state for five decades, and it seems unlikely that the Court intended to abrogate it *sub silentio*.

The Restatement (Second) of Judgments offers a potential means of reconciling *Harleysville* with *Sims*.[7] The section that replaced § 107 of the first Restatement (cited in *Sims*)

[7] This Court has looked to other provisions of the Restatement (Second) of Judgments regarding a judgment's preclusive effect. *See Catawba Indian Nation v. State*, 407 S.C. 526, 536, 756 S.E.2d 900, 906 (2014); *Judy v. Judy*, 393 S.C. 160, 168, 712 S.E.2d 408, 412 (2011).

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). Such a "conflict of interest" arises "when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not." *Id.* § 58(2). The accompanying commentary notes that the "indemnitor may be required to manifest this differentiation by a reservation of its right qua indemnitor when it assumes the defense of the indemnitee." *Id.* § 58 cmt. a.

Through that lens, *Harleysville* did not abrogate *Sims* when it held that the insurer could not challenge coverage in the separate declaratory judgment action, even though a conflict of interest arose between the insurer and its insured. In *Sims*, the insurer did not defend. In *Harleysville*, the insurer did defend, but its reservation of rights was inadequate. Consistent with the § 58 commentary, the insurer in *Harleysville* could not litigate that issue in the coverage action because it did not adequately advise the insured of the differentiation giving rise to a conflict of interest.

Still, it is not clear that the Circuit Court's reading of *Sims* was correct. *Harleysville* did not cite the Restatement, and only the dissent cited *Sims*. *Newman* noted the insurer's "reservation of rights and [the] understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding"—but, without finding that reservation inadequate, held that it was "not the purpose of this declaratory judgment action" to "determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco." 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5. If, however, this Court adopts

Restatement (Second) of Judgments § 58 in this appeal, the Circuit Court's decision was almost certainly correct.

3. Defense Counsel's Situation

The Circuit Court held 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." (R. p.4 ¶ 4). It reasoned that "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." *Id.*

Sims and the Restatement favor separate resolution of coverage questions where a conflict of interest exists between insurer and insured. *Supra* § I.C.2. If a plaintiff put on evidence unreasonably weighted toward consequential damages, with an eye to maximize coverage, defense counsel's paramount loyalty to the insured would restrict or prevent a challenge to the plaintiff's allocation.

There are other reasons, apart from coverage, that may persuade defense counsel, in the best interests of their client (the insured), not to challenge an unreasonable allocation. "One of the hardest decisions defendants in civil cases have to make, in both personal injury and commercial cases, is whether to argue liability only, or to argue both liability and damages." Thomas A. Mauet, TRIALS: STRATEGY, SKILLS, AND THE NEW POWER OF PERSUASION 480 (Aspen 2015). "Views differ. Some defense lawyers believe that you cannot credibly argue both liability and damages, and that if you do, you essentially concede liability." *Id.* Although others, acknowledging that choice can be difficult, still "believe that you can credibly argue both issues if you set it up carefully," *id.*

If allocation issues are in tension with counsel's other goals at trial, it is far less likely that the jury can produce a reliable allocation of damages. Trial is fundamentally a truth-seeking process. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251–252, 489 S.E.2d 472, 477 (1997); Rule 102, SCRE; Rule 1, SCRCP. Preclusion rules assume that the adversarial process will ascertain the truth of contested matters. Restatement (First) of Judgments § 82 ("The rules of res judicata are based upon an adversary system of procedure which exists for the purpose of giving an opportunity to persons to litigate claims against each other."); *cf. Nance v. Ozmint*, 367 S.C. 547, 551, 626 S.E.2d 878, 880 (2006) (criminal context). For a judgment to conclude an issue, the issue must ordinarily have been actually litigated and essential to the judgment. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (adopting Restatement (Second) of Judgments § 27). At least one outside court has denied intervention in large part because of concerns regarding defense counsel's situation. *High Plains Co-op. Ass'n v. Mel Jarvis Constr. Co.*, 137 F.R.D. 285, 290–291 (D. Neb. 1991).

Authority cited in *Harleysville* indicates that the solution is to give the final decision to the insured, rather than compelling insurer intervention. The Court's discussion of the allocated-verdict issue relied principally on *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972).[8] *See Harleysville*, 420 S.C. at 341–343, 803 S.E.2d at 299–300. *Duke* began by adopting the weight of authority that, where a verdict includes both covered and uncovered damages, the "burden of apportioning these damages is on the party seeking to recover from the insurer." 468 F.2d at 977 (quoting *Universal Underwriters Ins. Corp. v. Reynolds*, 129 So. 2d 689, 691 (Fla. Dist. Ct. App. 1961), and collecting

[8] *Magnum*, also quoted by the Court on that issue, in turn quoted from *Duke* but did not involve an allocation between covered and uncovered damages. *See Magnum*, 36 F.3d at 1498 (finding, based on jury instructions in underlying action, that punitive damage verdict was entirely uncovered). The other cases cited in section III.A of *Harleysville* addressed reservation-of-rights letters generally, not the allocated verdict issue in particular.

other authorities). Because of this burden, *Duke* reasoned that the insurer "of course" has "an interest in the verdict's not being allocated which is in conflict with the insureds' interest that covered damages be segregated," and that by failing to request an allocation the insurer "protected its interest and secured for itself an escape from responsibility at the expense of the insureds." *Id.* at 979.

Duke's solution to that situation was *not* to require insurers to take all possible measures to ensure allocated verdicts in all cases, nor did *Duke* automatically require the insurer to pay the entire amount of an unallocated verdict. Instead, *Duke* held that the insurer's duty was to give "a sufficient notification to the insureds that they should protect their interest by requesting an appropriate verdict," and "the insureds, represented by their own retained counsel, would be entitled to make the decision whether to seek an allocated verdict." 468 F.2d at 979.[9]

If an insured expresses its opposition to a special verdict sheet, the Court may well conclude that the insurer should not move intervene, and that defense counsel must request no special verdict sheet. *See* Rule 5.4(c), RPC, Rule 407, SCACR ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

However, it is not uncommon to find a situation where, despite a reservation of rights advising it of the allocation issue, the insured does not respond to the insurer and gives no instruction to defense counsel. An insured may be "defunct," *Harleysville*, 420 S.C. at 337, 803 S.E.2d at 297, or lack personal counsel separate from the counsel retained by the insurer. In holding that "the insureds, represented by their own retained counsel, would be entitled to make the

[9] If the insurer failed to give sufficient notice to its insured, *Duke* held that the only consequence was that the burden in a separate coverage action would fall on the insurer to show the uncovered portion of the verdict. 468 F.2d at 979–980, 984.

decision whether to seek an allocated verdict," *Duke* expressly did "not explore the situation in which the insured does not have his own counsel." 468 F.2d at 979 & n.4.

When the insured lacks personal counsel, a motion to intervene does make a record that the trial judge and all of the parties—including the plaintiff—were on notice of the potential benefits of an allocated verdict. *See Duke*, 468 F.2d at 980 (discussing *Morris v. W. States Mut. Auto. Ins. Co.*, 268 F.2d 790 (7th Cir. 1959) (burden fell on judgment-creditor plaintiff to establish the amount of a general verdict within coverage, where insurer suggested an allocated verdict at trial, and the plaintiff opposed it)); *see also Uvino v. Harleysville Worcester Ins. Co.*, 708 F. App'x 16, 20 (2d Cir. 2017) (insurer's motion to intervene gave plaintiffs notice and "ample opportunity to present evidence distinguishing between covered and non-covered damages"). Still, although a motion to intervene puts all parties on notice of the benefits of an allocated verdict vis-à-vis insurance coverage, the same objective can be achieved by disclosure of the insurer's operative reservation of rights letter.

4. Potential for Confusion and Prejudice Before Jury

Finally, the Circuit Court held that the allocated verdict "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." (R. p.4 ¶ 5).

The Court's discussion of allocated verdicts in *Harleysville* assumed that an allocated verdict would be a viable option in CD litigation. *Duke*, cited in *Harleysville*, found that allocated verdicts would more likely than not prove workable:

> The risks to the insurer in requesting an allocated verdict are of no such magnitude, if of any consequence at all. A request for identification of the two types of damages reveals neither the presence of insurance nor the amount of coverage. Assuming as

> we must that the jury will follow instructions and make a correct allocation, the insurance company loses no benefit to which it is validly entitled from having the jury earmark the losses. Arguably the jury might, while complying with instructions, at its option throw damages into that category which it will speculate is insured. This is too tenuous to deserve more than mention. There may, however, be some awkwardness in argument to the jury, but this is nominal when balanced against the consequences to the insureds.

Duke, 468 F.2d at 979.

The Circuit Court's rulings in both *Harbour Cove* and *Beach Villas*, suggest that allocated verdicts will not be workable in the typical CD trial. The decision whether to submit a special verdict form or interrogatories to a jury is committed to a Circuit Court's discretion. *See* Rule 49, SCRCP; *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 906 (2007). Judge Newman, as the Presiding Judge over CD litigation throughout the South Carolina coast, draws from a deep well of experience in exercising discretion under Rule 49, SCRCP. The Circuit Court is familiar with how evidence is ordinarily presented in CD actions, including whether a jury is likely to have evidence sufficient to make an allocation.

Evidence of a defendant's liability insurance, moreover, is highly prejudicial and inadmissible. *See* Rule 411, SCRE; *Todd v. Joyner*, 385 S.C. 509, 514, 685 S.E.2d 613, 616 (Ct. App. 2008), *aff'd,* 385 S.C. 421, 685 S.E.2d 595 (2009). The jury could not be told the reason for the allocation. *Duke*, 468 F.2d at 979. Still, the Circuit Court noted the potential for confusion if the jury does not have the evidence to make an allocation.

The posture of *Harbour Cove* and *Beach Villas*—jury trials on both liability and damages—may make it easier to reconcile the Circuit Court's holdings with *Newman* (an arbitration) and *Harleysville* (a damages-only trial). When the fact-finder is an arbitrator, as in *Newman*, "unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards[.]" Construction Industry Arbitration Rules and

Mediation Procedures, Am. Arb. Ass'n, R-47(b).[10] There was a breakdown in *Newman*, but it was "not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco[.]" 385 S.C. at 198, 684 S.E.2d at 547. In the less formal setting of an arbitration before an experienced CD arbitrator, it is much more reasonable to conclude that an insurer could have asked the arbitrator to provide a further breakdown—without the same level of risk of prejudice or confusion that exists with a jury. It is similarly more reasonable to conclude that the arbitrator would have sufficient independent expertise to make an allocation, even if the evidence was not completely clear.

Ultimately, however, the most straightforward way to reconcile the Circuit Court's ruling with *Harleysville* and *Newman* is for the insurer and defense counsel to abide by the insured's choice whether to request an allocated verdict. Upon such a request, a trial judge would still need to determine after the close of the evidence whether the allocated verdict would be appropriate and workable under Rule 49, SCRCP.

D. The Present Appeal

Hartford would prefer to leave all coverage questions for a subsequent coverage action under *Sims*, for largely the same reasons articulated by the Circuit Court. But, as set forth above, there is a tension created by *Sims*, *Newman* and *Harleysville*, and the suggestion that insurers must intervene if no party requests an allocated verdict, or lose its right to allocate between covered and uncovered damages. If the Court concludes that "the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of

[10] Available at https://www.adr.org/sites/default/files/Construction%20Rules.pdf. If the Court wished to mandate allocated verdicts, it could amend Rule 49, SCRCP, to impose a similar requirement in CD cases.

damages," *Harleysville*, 420 S.C. at 341, 803 S.E.2d at 299, includes a duty to intervene, Hartford was correct to move to intervene, and the Circuit Court's denial of intervention was improper.

Hartford could not safely rely on any agreement or consensus among the parties that the coverage issue should be reserved for a subsequent action under *Sims*. (R. p. 534, lines 7–8) (Centex argument, in opposition to intervention, that *Sims* allowed insurers to "bring a separate action to determine these coverage issues"). In *Newman*, the Court held that it was the insurer's responsibility to obtain a further itemization from the arbitrator, even though the insurer defended its insured "with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding." 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5; *see also Harleysville v. Heritage*, No. 2013-001281, Appellant Brief p.43 (citing insurer's evidence of "agreement" to postpone coverage disputes for later action). For that reason, Hartford moved to intervene and has appealed the order denying intervention. Only this Court can settle *Harleysville*'s meaning.

If the Court holds that insurers are obligated to intervene to preserve their right to allocate between covered and uncovered damages when the parties to the CD action do not request an allocated verdict, the Court should reverse and remand with directions to grant intervention.

II. IF HARTFORD HAD AN OBLIGATION TO INTERVENE, APPELLATE JURISDICTION EXISTS.

A. Appellate Jurisdiction Over Orders Denying Intervention

Before this Court certified this appeal, the Court of Appeals denied the Association's motion to dismiss the appeal. The denial of the motion was without prejudice to consideration of the issues at the merits stage. The Association argued that an order denying intervention is not immediately appealable. That objection is without merit.

"An order affects a substantial right and is *immediately appealable* when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action ...." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (quoting S.C. Code § 14-3-330(2)) (emphasis added).

Interpreting precisely the same statutory language,[11] this Court held that an order denying a motion to intervene was immediately appealable—even though "the merits of the action hereinbefore mentioned [had] not been determined and as the trial of that action will still be necessary"—because insofar "as the rights of the [movant] are involved, the order [denying intervention] affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken." *Ex parte Johnson, in re Rutledge v. Tunno*, 63 S.C. 205, 208, 41 S.E. 308, 309 (1902); *see* 15 S.C. Jur. Appeal and Error § 23 (September 2017 Update) ("The refusal of a petition to intervene is directly appealable '[i]n so far as the rights of appellant are involved, the order affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken.'").

The Association cited cases holding that "an order *granting* a motion to intervene is not immediately appealable." *Duncan v. Gov't Employees Ins. Co.*, 331 S.C. 484, 486, 449 S.E.2d 580, 580 (1994) (emphasis added); *see Dorn v. Cohen*, 418 S.C. 126, 139, 791 S.E.2d 313, 320 (Ct. App. 2016) (order adding a party was not immediately appealable where it "had the effect of an

[11] *Ex parte Johnson*, 63 S.C. at 207–208, 41 S.E. at 309 ("Section 11 of the Code provides that 'the supreme court shall have exclusive jurisdiction to review upon appeal *** an order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.'"). The current statute, S.C. Code Ann. Section 14-3-330, provides identically: "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: ... (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken...."

order granting a motion to intervene"). An order granting a motion to intervene is analogous to an ""an order making a third party a defendant," which does not put any party of out court and creates no immediate appeal right. *Duncan*, 331 S.C. at 485, 449 S.E.2d at 580. An order permitting intervention, in contrast with an order denying intervention, is not an order that "determines the action," that "prevents a judgment from which an appeal might be taken, or that "discontinues the action" as to the intervenor or any other party. *See* S.C. Code § 14-3-330(2).

The order denying Hartford's motion to intervene "in effect determine[d] the action and prevent[ed] a judgment from which an appeal might be taken," insofar as Hartford was concerned, within the meaning of *Ex parte Johnson*, 63 S.C. at 208, 41 S.E. at 309. It was therefore immediately appealable under S.C. Code § 14-3-330(2).

B. Hartford's Standing to Appeal Order

The plaintiff in *Beach Villas* challenged whether Hartford had standing to appeal under SCACR 201(b) ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."). Because the Court reviews questions of jurisdiction regardless of whether parties raise them, *see Amisub of S.C., Inc. v. Passmore*, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994), Hartford will address this jurisdictional objection, notwithstanding the *Beach Villas* settlement.

"There is no material distinction in general standing principles juxtaposed to the ability of an 'aggrieved party' to appeal pursuant to Rule 201(b) of the South Carolina Appellate Court Rules." *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008) (Kittredge, J.) (citing *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301–303, 551 S.E.2d 588, 589 (Ct. App. 2001) (Hearn, C.J.)); *see Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) ("an aggrieved party," for purposes of appellate jurisdiction, "is a person who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly

upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation").

Thus, if Hartford had standing to intervene under Rule 24, SCRCP, it follows that Hartford is an aggrieved party entitled to appeal the denial of that motion under Rule 201(b), SCACR. The *Beach Villas* plaintiff cited this Court's decisions in *Ex parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003), and *Ex parte S.C. Dep't of Motor Vehicles (SCDMV)*, 390 S.C. 457, 702 S.E.2d 568 (2010). Both decisions make clear, however, that the Court was dismissing the appeals because the appellant never filed a motion to intervene under Rule 24, SCRCP. *See Ex parte SCDMV*, 390 S.C. at 457, 702 S.E.2d at 568 (SCDMV attempted to appeal order to issue a driver's license, but the Court dismissed appeal because at "no time did SCDMV file a motion to intervene under Rule 24, SCRCP"); *Ex parte Condon*, 354 S.C. at 642, 583 S.E.2d at 434 (Attorney General sought to contest and appeal an award of attorney's fees in a class action, but the Court "dismiss[ed] th[e] appeal based on the Attorney General's failure to move for intervention as required by Rule 24, SCRCP"). Hartford, in contrast with the appellants in *Ex parte Condon* and *Ex parte SCDMV*, moved to intervene under Rule 24, SCRCP, before noting an appeal.

The *Beach Villas* plaintiff suggested that Hartford, to qualify as an "aggrieved party" under Rule 201(b), SCACR, needed to intervene as a party-defendant for all purposes. But the only procedure for intervention under the South Carolina Rules of Civil Procedure is Rule 24, which imposes no requirement that an intervenor become a party-plaintiff or party-defendant. *See* Rule 24, SCRCP. In the handful of cases where federal courts have permitted insurers to intervene to request special verdict sheets, applying the similarly worded Rule 24, Fed. R. Civ. P., they have done so under the understanding that insurer "is not seeking to interpose any claims against anyone in this action," that "no claims have been asserted against it," and that the insurer "will not and

should not be an active litigant." *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1325 (S.D. Ala. 2003); *see id.* at 1327 (listing restrictions, citing *Fid. Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 44 (D. Nev. 1984)).

Even if the mandatory intervention reading of *Harleysville* is correct, Hartford does not see any reason to believe that the Court meant that an insurer must move to intervene as a *party* before the jury at trial, giving a plaintiff the opportunity to make use of the well-known prejudicial effect from a jury's belief (correct or incorrect) that there is insurance that will pay a potential verdict. *See Todd*, 385 S.C. at 514–516, 685 S.E.2d at 616–617. Except where required by statute, insurers are not to be joined in tort actions against their insureds. *Major v. Nat'l Indem. Co.*, 267 S.C. 517, 519–520, 229 S.E.2d 849, 849–850 (1976). A limited intervention, for purposes of asking the Circuit Court (outside the jury's presence) to submit an allocated verdict form to the jury, is the only form of intervention that could even arguably be consistent with *Harleysville* and South Carolina law. *See Thomas*, 297 F. Supp. 2d at 1325–1327.

It is, however, possible that the Circuit Court was correct in holding that *Harleysville* imposes no obligation, and confers no right, upon insurers to intervene to request allocated verdicts, and that the denial of intervention has no impact on Hartford's ability to seek a separate declaration of coverage. *See supra* § A. In that case, Hartford would have no interest that would warrant intervention under Rule 24, SCRCP, the denial of Hartford's motion would not affect a substantial right under § 14-3-330(2), or aggrieve Hartford under Rule 201(b), SCACR. Either way, the question of standing under Rule 201(b), SCACR, depends on the ultimate merits question of what *Harleysville* means.

CONCLUSION

To the extent that the Court determines that Hartford was obligated to intervene in the underlying construction defect action to request an allocated verdict, to preserve its right to allocate

between covered and uncovered damages in a subsequent declaratory judgment action, the Court should reverse and remand with directions to grant Hartford's motion to intervene. If, however, the Court determines that intervention in an underlying construction defect action is not mandatory, and an adequate reservation of rights letter is sufficient to preserve the right to allocate between covered and uncovered damages in a separate declaratory judgment action, the Court should affirm the decision below, with any coverage issues to be determined in a separate coverage action.

July 23, 2018

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 23 2018

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Trial Court Case No. 2014-CP-26-07634
Appellate Case No. 2017-002146

Ex Parte:

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company f/k/a Harleysville 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, Lundy Dowell 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,

Of whom The Harbour Cove Condominium Association, is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
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Of whom The Harbour Cove Condominium Association, is the Respondent.

APPELLANTS HARTFORD FIRE INSURANCE COMPANY AND HARTFORD CASUALTY INSURANCE COMPANY'S PROOF OF SERVICE OF FINAL BRIEF AND FINAL REPLY BRIEF

I certify that I have served Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company's Final Brief and Final Reply Brief on Appellants and Respondents by depositing a copy of each in the United States Mail, postage prepaid, on July 23, 2018 addressed to their attorneys of record, listed as follows:

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EXHIBIT F

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SC Court of Appeals

The Supreme Court of South Carolina

In Re Motions to Intervene in:

The Harbour Cove Condominium Association, Plaintiff,

v.

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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 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 are the Appellants,

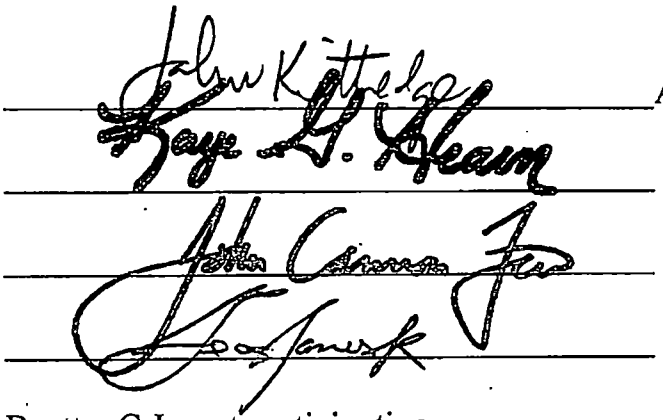
AND

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. 2017-002318

ORDER

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, National Fire & Marine Insurance Company, and BITCO General Insurance Corporation move this Court to certify the appeals pursuant to Rule 204(b), SCACR. The motion is granted.



A.C.J.

J.

J.

J.

Beatty, C.J., not participating

Columbia, South Carolina

February 1, 2018

cc:
The Honorable Jenny Abbott Kitchings
Robert T. Lyles, Jr., Esquire
Joseph Kendrick Cunningham, Esquire
Robert L. Wylie, IV, Esquire
James E. Lady, Esquire
Andrew Preston Brittain, Esquire
G. Michael Smith, Sr., Esquire
James Lynn Werner, Esquire
Katon Edwards Dawson, Jr., Esquire
James H. Elliott, Jr., Esquire
Edward B. Davis Inabnit, Jr., Esquire
Mark Steven Barrow, Esquire

Christy Elizabeth Mahon, Esquire
Dominic Allen Starr, Esquire
Patrick J. McDonald, Esquire
Kevin Michael O'Brien, Esquire
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William Marshall O'Neil, Esquire
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Clayton B. McCullough, Esquire
Samia Hanafi Albenberg, Esquire
Peter H. Dworjanyn, Esquire
Kenneth Michael Barfield, Esquire
Robert Buchanan Hawk, Esquire

EXHIBIT G

SWB

SWEENY WINGATE & BARROW P.A.

October 17, 2018

Reply to: Main Office

Christy E. Mahon
(803) 256-2233 x7157
cem@swblaw.com

Via Hand Delivery
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

RE: Ex Parte: Hartford Fire Insurance Company In Re: The Harbour Cove Condominium Association
Appellate Case No.: 2017-002146

Dear Mr. Shearouse:

I write on behalf of Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively "Hartford"), to provide the Court information regarding this appeal, scheduled to be argued at 10:30 a.m. on October 18, 2018.

As the Court is aware, most of these consolidated appeals were previously dismissed pursuant to settlements of the underlying claims. The only remaining Appellants are National Fire Insurance Company ("National Fire") and Hartford, who both insured Coastal Plaster.

Late last night, National Fire and Hartford reached a settlement in principle with respect to the Respondent's claims against Coastal Plaster. A condition of the settlement proposal, as presented to Hartford, was that Hartford join in a motion to dismiss this appeal. Hartford has agreed to the settlement and the motion to dismiss because Hartford has concluded that the settlement is in the insured's best interest, notwithstanding Hartford's strong interest in obtaining guidance from this Court on the issues briefed in this appeal. The parties will be separately filing the motion to dismiss.

We sincerely apologize for the lateness of this notification.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

For Christy E. Mahon

CEM/mha

cc: **VIA ELECTRONIC TRANSMISSION AND FIRST CLASS MAIL**

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Attorney for Respondent The Harbour Cove Condominium Association

EXHIBIT H

STATE OF SOUTH CAROLINA)	
)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY)	
Michael Ingram and Diane Ingram, Bobby Horn and Donita Horn, and Bob Shropshire and Kathy Shropshire, on behalf of themselves and all others similarly situated,	Civil Action No. 2017-CP-26-2854
Plaintiffs,	
v.	**ORDER GRANTING MOTION TO INTERVENE**
Lauderdale Bay Developers, LLC, Bill Clark Homes of Myrtle Beach, LLC, L&R Plumbing, Inc., Elite Exteriors, LLC, G&F Siding and Framing, Inc. a/k/a G&F Framing & Siding, Inc., Lauderdale Bay Homeowners Association, Inc., Jeff Farrell and John Doe Defendants 1 through 5,	
Defendants,	
Bill Clark Homes of Myrtle Beach, LLC,	
Third-Party Plaintiff,	
v.	
Exterior Concepts 2, Inc. and Elizabeth Saldivar d/b/a A.S. Construction,	
Third-Party Defendants.	

This matter is before the Court upon the motion of Selective Insurance Company of South Carolina ("Selective") to intervene in this action. A hearing was held on October 9, 2018. Andrew F. Lindemann appeared on behalf of Selective, and Robert Wylie appeared for the

Plaintiffs to oppose the motion. No other party contested the motion in any written opposition or in open court. After careful consideration of Selective's motion, the written submissions by the parties, other Circuit Court orders submitted by counsel, and the arguments of counsel at the hearing, the Court grants Selective's Motion to Intervene as set forth herein.

Based upon the parties' filings, the Court is informed that the Plaintiffs filed this action against various Defendants including G&F Framing & Siding, Inc. ("G&F Framing") alleging construction defects with respect to the Lauderdale Bay condominium complex. In their current Second Amended Complaint, the Plaintiffs have alleged causes of action against G&F Framing for negligence and breach of implied warranty. In addition, the Defendant Lauderdale Bay Homeowners Association ("HOA") has filed a cross-claim for equitable indemnity against G&F Framing.

The Court further understands that Selective provides insurance coverage to G&F Framing under a Commercial General Liability (CGL) Policy with policy periods of June 15, 2007 through June 15, 2008 and June 15, 2008 through June 15, 2009. Those policies insure G&F Framing for certain risks under the insuring agreement and exclude certain risks through policy exclusions. Selective has been defending G&F Framing in this litigation under a strict reservation of rights. Selective disputes that G&F Framing is entitled to coverage for each of the causes of action or for all the claims for damages as asserted by the Plaintiffs and/or the HOA in this litigation, based upon the terms, conditions, and exclusions contained within the CGL Policy. Selective has identified a number of potential coverage issues that may be implicated by the facts of this litigation.

In order to protect its interests, Selective seeks to intervene in this action for a limited purpose. Selective seeks the ability to request that the trial judge submit a special verdict and/or

special interrogatories to the jury to determine the basis of the jury's verdict against the Defendant G&F Framing, if a verdict is returned in favor of the Plaintiffs and/or the HOA.

The Court finds that Selective's position is supported by the Supreme Court's recent decision in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017). In that case, the Supreme Court explained that "an insurer typically has the right to control the litigation and is in the best position to see to it that the damages are allocated," and as a result of that, "courts have found that where an insurer defends under a reservation of rights, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus noncovered damages." 803 S.E.2d at 297-298. The Supreme Court in *Harleysville* further ruled as follows regarding the necessity of special interrogatories or a special verdict to obtain an allocated verdict:

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

803 S.E.2d at 299.

The case of *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), is also instructive. In *Newman*, Auto-Owners Insurance Company was the general liability insurer for a homebuilder. A homeowner brought a claim for defective construction which was arbitrated. The arbitrator issued an award in favor of the homeowner. Auto-Owners then pursued a declaratory judgment action to determine which damages awarded by the arbitrator

were covered under its CGL policy. The Supreme Court reversed the trial court's ruling and found that the portion of the arbitrator's award for removal and replacement of defective stucco was not covered under the CGL policy. Yet, the Supreme Court still held Auto-Owners responsible to pay that non-covered portion of the damages because:

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

684 S.E.2d at 547. Auto Owners was not a party in that underlying litigation. Yet, the Supreme Court nonetheless explained that "Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award." 684 S.E.2d at 547, n.5.

The Supreme Court in *Newman* thus explained that a liability insurer -- even though not a party to the underlying action -- has a responsibility to seek an allocation of damages from the factfinder in that underlying action or waive the ability to "relitigate the issue of damages" in a subsequent declaratory judgment action. That was reiterated by the Court in *Harleysville*. Those decisions, therefore, require an insurer to seek an allocation of damages for coverage purposes in the underlying action, which is what Selective is attempting to accomplish with its intervention in this litigation.

Moreover, Selective has demonstrated that its interests are not adequately represented by other parties to the action. Selective has interests in this litigation separate from the actual

defense of its insured, G&F Framing. Selective also has interests with regard to its obligation to indemnify the insured, if a verdict is returned on any cause of action or any element of damages that is covered. That interest is not being protected by counsel retained to represent G&F Framing who must follow the instructions of his client with respect to the proffer of a verdict form. The Court thus finds that Selective has satisfied the elements for intervention as a matter of right under Rule 24(a)(2), SCRCP. As the Supreme Court's decisions in *Harleysville* and *Newman* make evident, Selective is entitled to intervene in this action as a matter of right to ensure that its interests are fully protected and that it satisfies its duty to obtain an allocated verdict for itself and its insured.

As outlined in its motion, Selective seeks to intervene for only a limited purpose. Selective seeks only the ability to request that the trial court submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury's verdict against G&F Framing, if a verdict is returned in favor of the Plaintiffs and/or the HOA. Selective does not seek to actively participate in the trial of this action, that is, with the limited exception of making a motion, if necessary, at the appropriate stage of the trial to submit a special verdict and/or special interrogatories to the jury. Selective is not seeking to participate in discovery. Selective is not attempting to delay the trial of this action. And finally, Selective is not seeking declaratory relief from this Court and is not asking this Court to determine any coverage issues. The jury should not even be informed that Selective has intervened or is represented in the courtroom. Selective's motion for the submission of special interrogatories or a special verdict will occur outside the presence of the jury. Hence, there will be no legal prejudice to other parties.

In granting the Motion to Intervene, the Court is not deciding whether a special verdict and/or special interrogatories must be submitted to the jury. That decision will depend on the

posture of the case at the time the case is submitted to the jury and specifically the nature of the elements of damages being presented to the jury. The Court's decision today recognizes the issues discussed by the Supreme Court in the *Harleysville* and *Newman* cases and grants Selective the standing of an intervenor to make a motion for a special verdict and/or special interrogatories to the trial judge. In sum, the decision whether to submit a special verdict and/or special interrogatories and the language to be used in any special verdict form and/or special interrogatories that are submitted to the jury are reserved to the discretion of the trial judge.

IT IS, THEREFORE, ORDERED that the Motion to Intervene filed by Selective Insurance Company of South Carolina is hereby granted as set forth herein.

AND IT IS SO ORDERED.

WILLIAM H. SEALS, JR.
Presiding Circuit Court Judge,
Fifteenth Judicial Circuit

October ___, 2018

Horry Common Pleas

Case Caption: Michael Ingram , plaintiff, et al VS Lauderdale Bay Developers LLC , defendant, et al

Case Number: 2017CP2602854

Type: Order/Intervene

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2015-CP-26-02718

RECEIVED
JUL 12 2019
SC Court of Appeals

Ex Parte: Hartford Fire Insurance Company and Hartford Casualty Insurance Company, Appellants,

In Re: The Tanglewood Condominium Association, Plaintiff,

v.

Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC, Centex Construction Co., Inc., Centex-Rodgers, Inc.; Balfour Beatty Construction, LLC, f/k/a Centex Construction, LLC, Defendants,

Of which The Tanglewood Condominium Association and Centex Homes, a Nevada General Partnership, are the Respondents.

PROOF OF SERVICE

I certify that I have served the Motion to Certify to the South Carolina Supreme Court under Rule 204, SCACR, on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 12, 2019 addressed to their attorneys of record, listed as follows:

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Mary Abigail Young, Esquire
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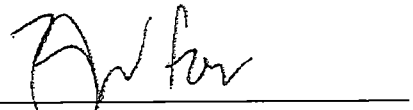
July 12, 2019

SWEENY, WINGATE & BARROW, P.A.



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Attorneys for Appellants Hartford Casualty Insurance Company and Hartford Fire Insurance Company

S·W·B

SWEENY WINGATE & BARROW P.A.

July 12, 2019

Reply to: Main Office

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VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29202

RE: Ex Parte: Hartford Fire Insurance Company (The Tanglewood Condominium Association v. Centex Homes, et al.)
Civil Action No.: 2019-001955
Our File: 4760-11321

Dear Ms. Kitchings:

Enclosed please find two (2) copies of Hartford Fire Insurance Company and Hartford Casualty Insurance Company's Motion to Certify to the South Carolina Supreme Court Under Rule 204, SCACR with the Proof of Service file-stamped by the South Carolina Supreme Court in the above-referenced matter. Please file one copy and return a file-stamped copy with the Courier.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance in this matter. Should you have any questions or concerns, please do you hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

Meredith J. Brenton

for Christy E. Mahon

CEM/mha
Enclosure

cc:
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