STATE OF SOUTH CAROLINA

COUNTY OF HORRY

The Tanglewood Condominium Association,

Plaintiff,

vs.

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,

Defendants.

Centex Homes, a Nevada General Partnership,

Third-Party Plaintiff,

vs.

Stock Building Supply, LLC f/k/a Carolina Builders Corporation, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., Builders FirstSource-Southeast Group, LLC, Builders FirstSource-Atlantic Group, LLC, A.C. Construction, Inc., Elcio Canedo de Souza a/k/a Elcio C. Souza, Ajax Construction, LLC, Affordable Construction, LLC f/k/a Affordable Drywall, LLC f/k/a Castro Construction, Inc., Hardworkers Construction Company, LLC, Hardworkers Construction, LLC, Mario Garcia Moreno d/b/a Garcia Construction, Garcia Construction, LLC, Gary Hunnell d/b/a Grand Strand Roofing & Siding, Atlantic Building Components & Services, Inc., Col-Cor Industries, Inc. a/k/a Active Glass & Mirror, Coastal Contract Hardware, Inc., Martin Masonry, Inc., JS Elite Flooring Company a/k/a J.S. Elite Tile Company, Tri-City Insulation & Building

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL DISTRICT

Case No.: 2015-CP-26-2718

CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP, CENTEX CONSTRUCTION COMPANY, INC., CENTEX CONSTRUCTION, LLC, CENTEX-ROONEY CONSTRUCTION, CO., INC., CENTEX-ROGERS, INC., BALFOUR BEATTY CONSTRUCTION, LLC F/K/A CENTEX CONSTRUCTION, LLC'S MEMORANDUM OF LAW IN OPPOSITION TO CLARENDON'S MOTION TO INTERVENE

Products of Myrtle Beach, Inc., Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc., Carolina Drywall Contractors, Inc., Cohen's Drywall Company, Inc., Cohen's Construction Co., Inc., Capital Construction, Capital Construction Group, Inc., RJM Plumbing, Inc., Morningstar Consultants, Inc., LPM Enterprises, Inc. d/b/a LPM Home Inspections, Inc. f/k/a Loss Prevention Management, Inc., All Heating and Cooling Service Corp., Carolina Cool, Inc. f/k/a Carolina Cooling and Plumbing, Inc. f/k/a Carolina Cooling, Plumbing and Mechanical, Inc., Jayco, Inc., Michael Dawson Construction, Inc., Noe Hernandez a/k/a Noe Hernandez Zuniga d/b/a Speedee Concrete, Speedee Concrete, Inc., General Landscape Maintenance, LLC, General Landscape Group, LLC, EOB Concrete, Inc. a/k/a Boyzo's Concrete, Trebor Industries, Inc., Creative Touch Interiors, Inc. f/k/a Floors, Inc. f/k/a Rice Planter Carpets, Inc., Essential Protective Coatings, LLC, Plantscapes, Inc., Plantscapes SC, Inc, The Weintraub Organization, Ltd., Weintraub Engineering, P.C., Rast & Associates, Inc., Miller Design Services, P.A., and Jeld-Wen, Inc. successor to and/or merger with Craftmaster Manufacturing, Inc. d/b/a CMI, AC Construction, Inc.

Third-Party Defendants.

Defendants Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction, Co., Inc., Centex-Rogers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC (collectively, "Centex") submit this Memorandum of Law in Opposition to the Motion to Intervene ("Motion") filed by Clarendon National Insurance Company as Successor by

Merger to Clarendon America Insurance Company ("Clarendon") in the above-captioned matter.

EXECUTIVE SUMMARY

Clarendon lacks standing to intervene because it does not have an interest in the property that is the subject of this action nor does it have an interest in the underlying transaction that is the subject of this litigation. Further, South Carolina case law does not provide the carriers the right to intervene, and this Court recently denied virtually identical motions to intervene filed by several carriers, including Clarendon, in another lawsuit involving a multi-family project in the same neighborhood. Moreover, intervention sought by Clarendon in this matter would be unfairly prejudicial to Centex as it would complicate and change the introduction of evidence and arguments by Centex's counsel and would likely confuse the jury. In addition, intervention by Clarendon must be denied in order to avoid irreconcilable conflicts of interest. Finally, numerous courts in other states have denied similar attempts to intervene sought by insurance companies.

FACTUAL AND PROCEDURAL BACKGROUND

This is a construction defect claim involving a twenty-five (25) building condominium project called Tanglewood located in the Barefoot Resort development in North Myrtle Beach, South Carolina, which is the subject of this litigation (the "Project"). Centex contracted with subcontractors to provide labor and materials for construction of the Project. On October 19, 2016, Centex Homes also separately filed a declaratory judgment insurance coverage action in the case *Centex Homes, A Nevada General Partnership v. The Cypress Bend Condominium Association, et al.*, Case No.: 2016-CP-26-6670, seeking a declaratory judgment and adjudication concerning, among others,

Clarendon's obligations and liabilities to Centex Homes and the rights of Centex Homes as an additional insured under the insurance policies issued by, among others, Clarendon with respect to, among other things, the claims asserted by Plaintiff in the above-captioned construction defect action against Centex (the "Declaratory Judgment Action").

By filing its motion to intervene in this matter, Clarendon has moved to submit a "special jury verdict form" or "special jury interrogatories", or some other form of special jury instructions, to the jury to determine the basis of the jury's verdict.

ARGUMENTS

I. CLARENDON LACKS STANDING TO INTERVENE AND DOES NOT MEET THE REQUIREMENTS FOR INTERVENTION.

Clarendon lacks the necessary standing to intervene and does 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 South Carolina Supreme Court affirmed the family court's denial of insurer's motion to intervene and held that an insurer, which had denied its insured's claim to stack coverage on the grounds that the claimant was not a Class I insured, could not intervene in the family court proceeding in which the insured sought an order validating his common law marriage so that he could stack coverage as

a Class I insured. Id. Our Supreme Court held that GEICO did not have standing because it did not have "an interest relating to the property or transaction which is the subject of the action," as required by Rule 24(a)(2), SCRCP, and instead found that "GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court," which interest was "insufficient to warrant GEICO's intervention." Id. at 138-39, 644 S.E.2d at 702.

As was the case in GEICO, Clarendon does not have an interest in the property that is the subject of this action, the Project. Nor does Clarendon have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Project. The real interest at stake in this matter is whether Clarendon's named insureds and the other defendants and third-party defendants in this action were negligent and/or breached warranties in performing construction work at the Project and the amount of damages suffered as a proximate result thereof. By contrast, Clarendon's interest arises **solely** out of its contract of insurance with its insured and is, therefore, merely peripheral and not part of the real interest at stake. Because intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case, Clarendon's interest is not appropriate to be litigated or interjected into this construction defect suit.

In light of Clarendon's lack of standing to intervene, Clarendon's Motion should be denied.

II. CONTRARY TO CLARENDON'S ASSERTION, SOUTH CAROLINA CASE LAW DOES NOT PROVIDE CLARENDON THE RIGHT TO INTERVENE.

Clarendon's reliance on Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) in support of its proposition that it should be allowed to

intervene is misguided. Contrary to Clarendon's assertion, the decision in Harleysville does not stand for the proposition that Clarendon has a right to intervene to ask special interrogatories or request special verdict forms. In Harleysville, the South Carolina Supreme Court merely held that an insurer's reservation of rights letters must disclose to its insured the potential bases for denying coverage. Id. at 298-99. At most, the court indicated that where an insurer defends under a reservation of rights, the insurer must inform its insured of the potential need for an allocated verdict as covered versus uncovered damages. Id. The South Carolina Supreme Court in Harleysville did **not** declare that insurers in all such cases have a right to intervene and ask a jury to respond to questions. Rather, our Supreme Court simply held that an insurer was obligated to indemnify its insured for the entire amount of the jury's verdict where the insurer failed to sufficiently reserve its right to contest actual damage in its reservation of rights letter to the insured prior to undertaking the defense. See id..

To the extent that Clarendon also relies on Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), such reliance is likewise misguided. A critical comment by the South Carolina Supreme Court in Newman was that "it 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 . . . ." Id. at 198, 684 S.E.2d at 547 (emphasis added). The South Carolina Supreme Court merely concludes that it did not have an adequate factual record before it to determine what the replacement cost of stucco was. There is no indication that Auto Owners developed any record in the declaratory judgment action, asked for a finding of fact, deposed the arbitrator, or took other action to make its record. All we know is that Auto Owners did not have a properly developed record *in that case*. The

South Carolina Supreme Court in Newman did **not** declare that insurers in all such cases have a right to intervene and ask a jury to respond to questions. In addition, the manifest differences between an arbitration and a matter in litigation counsel against applying Newman to this case.[1]

Importantly, the Court recently denied Clarendon's and other insurance carriers' motions to intervene in the lawsuit captioned *The Harbour Cove Condominium Association v. Centex Homes, et al.*, Case No.: 2014-CP-26-7634[2], that involves a condominium project called Harbour Cove which, similar to the Tanglewood Project that is the subject of this action, is also located in the Barefoot Resort development in North Myrtle Beach, South Carolina. A copy of the Court's Order is attached hereto as Exhibit A.

For these additional reasons, Clarendon's Motion should be denied.

III. INTERVENTION BY CLARENDON MUST BE DENIED IN ORDER TO AVOID IRRECONCILABLE CONFLICTS OF INTEREST.

Long standing precedent in this state requires a separate action to determine coverage issues in order to avoid impermissible conflict. See Sims v. Nationwide Mut.

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[1] The United States District Court for the District of South Carolina denied a similar motion to intervene filed by Selective in the case Del Webb Communities, Inc. v. NewCourse Golf, Inc. et al., Case No. 9:11-2190-RMG, by its Order filed on March 12, 2013. Similarly, in Lewis v. Excel Mech., LLC, No. 2:13-CV-281-PMD, 2013 WL 3762904 (D.S.C. July 16, 2013), the South Carolina district court denied an insurance carrier's motion to intervene. The court found that the insurer did "not have a direct, substantial, and legally protectable interest in the subject matter of this action to intervene as of right." Id. at *2. The court found that the insurer had "nothing more than a contingent interest in the present action as there has yet to be an adverse coverage determination by this Court in the declaratory judgment action filed by [the insurer]" and that this "maritime tort action [was] not the proper place to raise substantive issues of insurance law." Id. at *2. Further, the court declined to permit the insurer to intervene permissively because "intervention would delay and prejudice adjudication of the rights of the Parties to this action." Id. at *4.

[2] The Court's denial was appealed by the insurers but subsequently dismissed in *In Re Motions to Intervene in The Harbour Cove Condominium Association v. Centex Homes et al.*, Appellate Case No. 2017-02146 (Nov. 8, 2017).

Ins. Co., 247 S.C. 82, 145 S.E2d 523 (1965). As was the case in Sims, "[t]he type of situation presented here places an insurer in a dilemma of conflicting interests. It cannot possibly defend the state court action and protect both its own interests and interests of its insureds." Id. at 88, 145 S.E.2d at 526 (citation omitted) (internal quotation marks omitted).

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 be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured. For this additional reason and in order to avoid impermissible conflict of interest, Clarendon's Motion should be denied.

IV. CLARENDON'S MOTION SHOULD BE DENIED BECAUSE INTERVENTION BY CLARENDON WOULD BE UNFAIRLY PREJUDICIAL TO CENTEX.

A. The requested special interrogatories, verdict forms and/or instructions would confuse the jury and be unfairly prejudicial to Centex.

In Clarendon's Motion, it requests that a variety of special interrogatories, verdict forms, and/or instructions be presented to the jury to assess coverage concerns. By requiring interrogatories or special jury verdict forms, it stands to reason that Centex would be required to introduce evidence and make arguments to the jury as to how it should complete the verdict form or answer interrogatories. This additional burden on Centex outside of its obligation to defend against Plaintiff's allegations of construction defects and prove its breach of contract, breach of warranty, indemnity and negligence claims against its subcontractors is unfairly prejudicial. Effectively, Clarendon requests

that this case be transformed from an already complex construction case into a complex construction and coverage case. This is not only unfairly prejudicial and unduly burdensome, it is also unnecessary as there already exists a coverage case pending regarding the same issues Clarendon seeks to inject in this action. In addition, the special interrogatories and/or instructions will necessitate additional levels of proof that are legally unnecessary to the construction defect case, that no party to this construction defect action should have to consider at this late stage in the litigation, nor likely can they, and/or that are beyond the scope of this trial.

As a further detriment to Centex, Clarendon does not even present with any specificity what special verdict form or special interrogatories it would suggest be presented to the jury. Such a request by Clarendon puts Centex at a significant disadvantage in preparing its claims and defenses for trial.

Not only would Clarendon's request create an unfair burden and prejudice to Centex, it would unnecessarily and exponentially complicate the case and confuse the jury. Even as a construction case, this matter is complicated: involving a significant number of parties, numerous claims against and by Centex, covering many scopes of work on 25 different buildings. That the matter will already be difficult for a jury to understand is supported by the designation of this case as "complex" by the parties and the Court. If Clarendon's Motion is granted, it stands to reason that the jury would be confused by injecting complicated coverage issues, at new parties, and multiple policies for each trade potentially covering policies periods from 2004 to 2018 into an already complex construction case. With no explanation of why such questions and arguments were being made, the jury would be further confused and would undoubtedly speculate as to what was going on.

In light of the substantial unfair burden on Centex and the almost certain confusion to the jury, Centex would be unfairly prejudiced if Clarendon's Motion is granted.

B. Intervention would create inconsistent results.

Intervention, and ultimately the presentation of special verdict and/or special interrogatories or jury instructions, will result in significant inconsistencies should it be allowed. Clarendon's Motion seeks factual determinations by the jury, all of which would require the jury to determine issues which are not being litigated in this action. Numerous other insurance carriers who issued applicable insurance policies and whose named insureds are involved in this case have not sought to intervene nor agreed to be bound by the factual determinations requested by Clarendon by way of special verdict interrogatories. As a result, any such determinations would not bind the other insurers who have not sought to intervene. This could, and likely would, result in inconsistent factual and legal determinations and judgments. To that end, Clarendon's requested intervention and use of special interrogatories, verdict forms, and/or instructions certainly would not be an efficient use of the Court's, the jury's, or the parties' time. Absent complete agreement by all insurers, the findings in this case will not resolve any factual issues relevant to all parties and their insurers, and will likely lead to inconsistent determinations.

To the contrary, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action. As evidence of this point, Clarendon in its Motion specifically purports to reserve its rights to contest coverage issues in the Declaratory Judgment Action. It is clear that Clarendon may attempt to use this as another bite at the apple, as Clarendon

has indicated its unwillingness to be bound by those same factual determinations it now specifically requests in this action. As a result, permitting intervention here will only create issues, duplication of effort and inconsistent results when these same issues are addressed in the coverage action.

In addition, "official" intervention by Clarendon in this action would necessarily give Clarendon certain rights and standing. Presumably, Clarendon would be able to appeal if it felt that this Court did not submit the "correct" questions to the jury, or if it felt the trial judge committed some other alleged error. This could result in a potential reversal of the trial judge and requirement for a retrial of all of the issues, to the prejudice of Centex. For the additional reason that intervention is likely to create inconsistent results, Clarendon's Motion should be denied.

C. Intervention would frustrate continuing settlement attempts and further delay adjudication.

In addition to being unfairly prejudicial to Centex, intervention by Clarendon could frustrate and/or deter settlement and could create a conflict of interest because, upon information and belief, Clarendon has supplied counsel to at least some, if not all, of its named insureds in this action. Further, Clarendon owes a duty to defend Centex as an additional insured. Permitting Clarendon to intervene would only serve to stall efforts to resolve the case as parties spend their time preparing to determine which of the damages would be covered.

In addition to stalling settlement negotiations to the detriment of all parties to the action, intervention would also further delay adjudication. Permitting intervention, deciding which, if any, questions should be asked of the jury, determining the vehicle for asking such questions (i.e. special interrogatories, special verdict forms, and/or special

instructions), and other issues relating to Clarendon's Motion are likely to gum up the Court's docket and further delay the disposition of this case.

As a result, it would be unfairly prejudicial to Plaintiff, Centex and the other parties to delay resolution of this case by settlement or adjudication. For these additional reasons, Clarendon's Motion should be denied.

D. Clarendon already has a vehicle to address its concerns in the pending Declaratory Judgment Action.

If the Court denies Clarendon's Motion, which Centex argues the law, facts and the interests of justice support, Clarendon is not without recourse. To the contrary, these issues are ripe for disposition in the Declaratory Judgment Action that is pending before the Court. Moreover, all necessary parties to the determination have been named in the Declaratory Judgment Action. The issues raised by Clarendon (i.e. issues as to what damages would or would not be covered) would be entirely speculative in this action, but they are the subject of proper research, discovery and motions practice in the Declaratory Judgment Action. Further, the court in the declaratory judgment action will have a record of the trial and any subsequent fact finder can consider whatever evidence the court in the declaratory judgment action feels is appropriate. In addition, as noted above, Clarendon is already, at a minimum, contemplating presenting these issues in the Declaratory Judgment Action as well.

Because Clarendon can and will argue the applicability of coverage and which issues and damages are and are not proper under the respective policies in the Declaratory Judgment Action, the Court would be further justified in denying the Clarendon's Motion in this action.

V. COURTS IN OTHER STATES HAVE DENIED SIMILAR ATTEMPTS TO INTERVENE SOUGHT BY INSURANCE COMPANIES.

Courts in other jurisdictions have denied motions by insurance companies to intervene in similar situations.

In Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871 (2nd Cir. 1984), the general liability insurer for the defendant moved to intervene to submit to the court proposed interrogatories on damages for the jury to answer in the event that the jury returned a verdict for the plaintiff. The insurer retained counsel for the insured and provided a defense, but informed the insured that it did not have any duty to indemnify for intangible losses. The insurer argued "that a general verdict would make difficult, if not impossible, a precise determination as to the allocation of the jury's award and alleged that its intervention would not delay or impede the action." Restor-A-Dent, 725 F.2d at 873. The plaintiff opposed the motion, arguing that the insurer knew of the lawsuit almost from inception since it was defending the defendant, yet had remained silent until all discovery was completed and the pre-trial order submitted. The plaintiff also claimed "that it would be 'grossly' prejudiced if intervention were permitted since if 'special interrogatories are added to the list of items that the jury must address . . . the burden to reach a just verdict will become excessive, falling entirely on the shoulders of the plaintiff.'" Id. at 873.

The insurer in Restor-A-Dent sought both intervention of right and permissive intervention under the Federal Rules of Civil Procedure, and the Second Circuit Appellate Court denied both requests. The court denied the insurer's intervention of right because the insurer did not have an interest relating to the property or transaction that was the subject matter of the action. The court found that the insurer's "interest, on the other hand, [was] in the amount it [would] have to pay [the defendant] if [the plaintiff] wins. Accordingly, [the insurer] d[id] not have an interest in the subject matter of the

action between [the plaintiff] and [the defendant]." Id. at 875. In addition, the court noted that "the interest asserted by [the insurer] depend[ed] upon two contingencies." Id. "The first [was] a jury verdict for [the plaintiff], for only then [would] the question of [the insurer's] liability become relevant." Id. "The second contingency [was] a finding in litigation not yet even commenced between [the insurer] and [the defendant] that [the insurer was] not responsible for indemnification of certain types of losses under the terms of the policy." Id. The court denied the permissive intervention motion because the plaintiff "should not be burdened at this late stage in the litigation with the responsibility of introducing the evidence that will settle the potential differences between" the insurer and the defendant. Id. at 876 (internal quotation marks omitted). The appellate court held the trial court properly denied the motion for additional reasons, including: (1) that the insurer had no great need for the relief it sought; (2) that there was no assurance that the main action would not be delayed; and (3) that the intervention by an insurer who supplied the insured's attorney could deter a settlement or could create a conflict of interest. Id. at 877. The court emphasized that "[a]llowing the insurer to intervene even for limited purposes might, as a practical matter, deter a settlement and may well exacerbate a potential conflict of interest for the attorney furnished by [the insurer] to represent [the defendant]." Id.

In Vanguard Ins. Co. v. Townsend, 544 So. 2d 1153 (Fla. Dist. Ct. App. 1989), receded from on other grounds by Higgins v. State Farm Fire & Cas. Co., 894 So. 2d 5 (Fla. 2004), the defendant's insurance company sought to intervene in a suit for damages to determine whether any or some of the damages sought by the plaintiff as a result of a shooting were covered (as a result of negligence) or uncovered (as a result of an intentional act). Id. at 1154. The court recognized the inherent conflict of interest

that exists between the insurer and its insured should the jury be asked to make such a determination. Id. at 1155. In addition to the trial court's reasoning, the appellate court found that allowing the insurer to intervene in this instance would inject new issues, including coverage issues, which were not involved in the tort suit. Id. at 1155. Secondly, the appellate court disallowed the insurer's intervention because at the time of the intervention, another suit was already pending which involved the same issues which would allow the insurer to seek the relief it sought. Id.

In High Plains Coop. Ass'n v. Mel Jarvis Constr. Co., Inc., 137 F.R.D. 285 (D. Neb. 1991), the insurer of the defendant moved to intervene to submit special interrogatories to the jury on the issue of damages. The purpose of the motion was to "submit special interrogatories to the jury which will distinguish whether any award of damages against [the defendant] is based upon 'damage to the structure itself caused by the negligent acts of [the defendant]' or 'resulting or consequential damages suffered by the plaintiff.'" High Plains, 137 F.R.D. at 287. The insurer in that case sought permissive intervention under the Federal Rules of Civil Procedure. In denying the insurer's request to intervene, the appellate court noted: "There is . . . precedent for the proposition that courts may deny intervention by insurers for even the limited purposes sought here." Id. at 288. The insurer "did not have any 'great need for the relief sought' because the trial judge would likely require a separate verdict for each of the three causes of action brought by the plaintiff." Id. There "was no assurance that the intervention would not unduly delay the main action, and an appeal of the court's failure to submit the requested interrogatories as framed by the insurer may likely complicate an appeal of the main action." Id. The court noted that the defendant "was being represented by counsel provided by the insurer/intervener which 'may well exacerbate a

potential conflict of interest for the attorney furnished by [the insurer] to represent [the defendant],' and could deter settlement as well." Id. The court hesitated to allow an insurer to intervene in an action simply on the basis of an assertion in its brief that the policy at issue excludes coverage for the negligent acts of the insured. Id. at 290. An "applicant for intervention must first show that its 'future defense' in a coverage dispute has 'questions of fact in common with the main action.'" Id.

In Universal Underwriters Ins. Co. v. E. Cent. Alabama Ford-Mercury, Inc., 574 So. 2d 716 (Ala. 1990), the defendants' insurer sought to intervene in the suit for the sole purpose of submitting special interrogatories or a special verdict form to the jury. The insurer was attempting to resolve any coverage questions that might be involved in the case without making its presence as an insurer known to the jury. The insurer argued its interest would not be adequately protected unless it was allowed to intervene for the limited purposes. The insurer sought intervention of right and permissive intervention under the Alabama Rules of Civil Procedure and asserted that it had an interest relating to the subject matter of the action that, under the rules of fairness and equity, gave it a right of intervention, or, in the alternative, that permissive intervention should be allowed. The court noted that it had previously "held that an insurer does not have an interest when that interest is contingent upon the recovery in another action." Id. at 723. The court found "that [the insurer] d[id] not have a direct, substantial, and protectable interest." Id. Because the insurer lacked such an interest, the court held that it could "not intervene as of right." Id. The court found that permissive intervention was within the broad discretion of the trial judge. "In the present case, we find no abuse of discretion in the trial court's order denying intervention." Id.

In Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Bakker, 917 F.2d 22 (4th Cir. 1990) (Unpublished Disposition), the insurer sought to intervene for the limited purpose of proposing special interrogatories, verdicts, and/or instructions to the jury to resolve a potential insurance coverage question. The insurer wanted a jury finding in the underlying case which would distinguish whether any award entered was based on dishonesty of the defendants or on their negligence, because acts brought about by or contributed to by dishonesty were excluded from coverage. The district judge denied the motion, observing that the motion was filed only two months before the commencement of trial, and the Fourth Circuit Court of Appeals affirmed the district court's denial. The appellate court explained that in "addition to the complicating impact on the continuing litigation, with which the district judge was obviously concerned, if [the insurer] were allowed to intervene in the underlying action in which its insureds are parties, we would be concerned with its intolerable position in the litigation that is potentially hostile to its own insureds." Bakker, 917 F.2d at *1. The court further noted that if the insurer's "motion to intervene were denied, its interest to resolve insurance coverage issues would not be prejudiced, because open issues, if any, could be litigated at a later time." Id.

For the above reasons, Clarendon's Motion should be denied.

CONCLUSION

In light of the foregoing, Centex respectfully requests that the Court deny Clarendon's Motion to Intervene. If the Court is inclined to allow the Motion to Intervene, Centex would respectfully suggest the following:

1. That, should Clarendon be permitted to intervene, it be named as a party, appear on the caption of the pleading, and be required to have counsel of record appear, respond to discovery, and participate in this action as a party.

2. That the Court not have the jury answer the special verdict form until after the normal verdict has been returned.

3. That the Court allow Centex's counsel to introduce evidence and argument after the normal verdict related to the issues that Clarendon wants answered and that it be permitted to explain to the jury the basis for the requested information (e.g., that Clarendon needs it for a coverage determination) and the reasons why the jury should find one way or the other.

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April 24, 2019

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SWEENY WINGATE & BARROW P.A.

July 11, 2019

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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:

Per your request in the letter dated July 9, 2019 for a copy of a pleading or order with the complete caption, enclosed please find a Motion previously filed in the circuit court in the above-referenced matter.

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.

Christy E. Mahon

CEM/mha
Enclosure

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Attorney for Respondent Centex Homes, a Nevada General Partnership; Centex Construction Company, Inc.; Centex Construction, LLC; Centex-Rooney Construction Co., Inc.; Centex-Rodgers, Inc.; and Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC
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S·W·B

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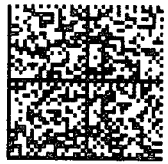

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Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29202