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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

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Trial Court Case No. 2015-CP-26-00279
Trial Court Case No. 2015-CP-26-00118
Trial Court Case No. 2015-CP-26-02718
Trial Court Case No. 2015-CP-2604514
Appellate Case No. 2019-001053

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Ex. Parte: Hartford Fire Insurance Company, Hartford Casualty Insurance Company, American Empire Surplus Lines Insurance Company, BITCO General Insurance Corporation, Clarendon National Insurance Company, Harleysville Insurance Company n/k/a Nationwide Insurance Company, Selective Insurance Company, Crum & Forster Specialty Insurance Company, and First Mercury Insurance Company, Appellants,

In Re: The Havens Condominium Association, Plaintiff,

v.

Centex Homes, et. al., Defendants.

The River Crossing Condominium Association, and Vincent J. Tamburro, on Behalf of Himself and Others Similarly Situated, Plaintiffs,

v.

Centex Homes, et. al., Defendants.

The Tanglewood Condominium Association, Plaintiff,

v.

Centex Homes, A Nevada General Partnership, et. al., Defendants.

The Woodlands Condominium Association, Plaintiff,

v.

Centex Homes, a Nevada General Partnership, et. al., Defendants.

Of Which, The Havens Condominium Association, The River Crossing Condominium Association, Vincent J. Tamburro, The Tanglewood Condominium Association, The Woodlands Condominium Association, and Centex Homes, A Nevada General Partnership, are the Respondents.

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**INITIAL BRIEF OF APPELLANTS HARTFORD FIRE INSURANCE COMPANY AND HARTFORD CASUALTY INSURANCE COMPANY**

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DOES A LIABILITY INSURER HAVE A RIGHT OR OBLIGATION TO INTERVENE IN AN UNDERLYING CONSTRUCTION DEFECT ACTION TO REQUEST AN ALLOCATED VERDICT UNDER *HARLEYSVILLE V. HERITAGE*?

## STATEMENT OF THE CASE

This consolidated appeal involves five actions in which The Honorable Clifton Newman entered an order denying motions by various insurers to intervene for the limited purpose of requesting special interrogatories or special verdict sheets. (Order Denying Motions to Intervene, p.7.) Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively, "Hartford") filed intervention motions in *River Crossing v. Centex*, Case No. 2015-CP-26-00279, and *Tanglewood v. Centex*, Case No. 2015-CP-26-02718, on December 8, 2017. (Hartford Motions to Intervene.)

The Circuit Court denied all of the insurers' motions for intervention by order entered June 21, 2019:

> 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.

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, pp.5-7.)

Hartford filed timely notices of appeal on June 27, 2019. (Hartford Notices of Appeal.) This Court granted certification under Rule 204(b), SCACR, on September 26, 2019.

## STATEMENT OF FACTS

The River Crossing Condominium Association and a unit owner (as a putative class representative) sued Centex Homes on January 13, 2015, alleging that defective construction caused various damages, including from water intrusion. (River Crossing Complaint, p.27.) Centex Homes filed a third-party complaint against various subcontractors, including the following

Hartford policyholders: Carolina Drywall and Interiors, Weather Protection Systems, Inc., and Michael Dawson Construction. (River Crossing Third-Party Complaint; Hartford River Crossing Motion to Intervene, pp.2–3). The plaintiffs then filed an amended complaint that named Weather Protection Systems, Inc. as a defendant. (River Crossing Amended Complaint, p.11.)

The Tanglewood Condominium Association sued Centex Homes on April 10, 2015, alleging that defective construction caused various damages, including from water intrusion. (Tanglewood Complaint, p.9.) On April 16, 2015, Centex Homes filed a third-party complaint against various subcontractors, including the following Hartford policyholders: Carolina Drywall and Interiors, Capital Construction Group, Inc., Col-Cor Industries Inc. DBA Active Glass and Mirror Co., General Landscape Maintenance, LLC, JS Elite Flooring Company Inc., Michael Dawson Construction, Speedee Concrete, and Noe Hernandez. (Tanglewood Third-Party Complaint; Hartford Tanglewood Motion to Intervene, pp.3-5.)

Hartford, in its capacity as an insurer participating, under reservations of rights, in the defense of its policyholders and of Centex as a putative additional insured, moved for limited intervention in both actions to request a special verdict sheet or special interrogatories to distinguish between uncovered and potentially covered damages. (Hartford Motions to Intervene.)

## ARGUMENTS

### UNCERTAINTY IN THE LAW COMPELLED HARTFORD TO MOVE TO INTERVENE, BUT MANDATORY INTERVENTION IS NOT IN ANY PARTIES' INTEREST AND SHOULD NOT BE THE LAW OF SOUTH CAROLINA TO PRESERVE COVERAGE ISSUES.

Hartford issued commercial general liability insurance policies to businesses that are defendants in numerous cases over alleged construction defects ("CD litigation" or "CD actions") in South Carolina. Hartford moved for intervention in these CD actions because some litigants interpret this Court's decisions in *Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), and *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009), as requiring insurers to intervene in CD litigation involving their insureds to request allocated verdicts for the insurers to preserve their right to allocate between covered and uncovered damages. Builders Mutual Insurance Company, for example, advances this argument in *Ex parte Builders Mutual (In re Palmetto Pointe v. Island Pointe)*; Appeal No. 2019-000238, currently pending before this Court.[1] At least one Circuit Court judge, moreover, has granted an insurer's intervention motion based on that reading of *Harleysville* and *Newman*. *See Ingram v. Lauderdale Bay Developers, LLC*, Civil Action No. 2017-CP-26-2854 (Horry County Cir. Ct. Oct. 18, 2018) (Seals, J.).[2]

Hartford does not believe this "mandatory intervention" reading of *Harleysville* and *Newman* to be correct. But that reading is plausible enough—and the consequences are so dire if an insurer is found not to have taken necessary steps to preserve its right to allocation—that, in an

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[1] The Court can take judicial notice of the briefs in that action, in which Hartford has filed an amicus curiae brief.

[2] Hartford does not cite this unreported trial court opinion as precedential or persuasive, but only to illustrate the uncertainty in the law. A copy of this opinion was attached to Hartford's motion for certification in this appeal, and as an appendix to Hartford's amicus curiae brief in *Ex parte Builders Mutual*.

abundance of caution, Hartford moved for intervention in this case and others, and has appealed from the denial of intervention.

A. The Court Did Not Explicitly Decide the Intervention Question in *Harleysville.*

The Court in *Harleysville* addressed coverage in a CD action that concerned both the cost to repair faulty workmanship (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 Newman*, 385 S.C. at 198, 684 S.E.2d at 546. In requiring the insurer to pay for both types of repair costs, *Harleysville* agreed with the Special Referee 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." *Harleysville*, 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.'" *Id.* 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 Footnote 11, 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).

*Harleysville*, 420 S.C. 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, *Newman* 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, the arbitrator in *Newman* suggested that the insurer could have taken some action—perhaps intervention—to obtain an allocated award, and the failure to do so obligated the insurer to pay all damages, even those which were expressly not covered under the policy. Indeed, the Special Referee in *Harleysville* in its decision 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."[3] *Harleysville v. Heritage*, S.C. Sup. Ct. No. 2013-001281, Consolidated Record on Appeal, p.56. Nevertheless, because Footnote 11 in *Harleysville* did not expressly approve or disapprove the Special Referee's interpretation of *Newman*, tension has arisen over the Court's intent in its citation to *Newman*.

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." *Harleysville*, 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. As noted above, at least one trial court has granted intervention on that theory. *See Ingram, supra*. Here, as discussed below, the Circuit Court rejected this reading of *Harleysville*.

B. The Order Under Review Cited Compelling Reasons Why Intervention Is Neither Necessary Nor Desirable.

The Circuit Court held that *Harleysville* "does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms." (Order, p.5.). It cited four other reasons why, in its judgment, South Carolina law generally prohibits and does not require intervention for allocation of covered versus uncovered damages pursuant to an insurance policy: (1) an insurer lacks standing to intervene under Rule 24, SCRCP; (2) a declaratory judgment proceeding is better-equipped to make a post-verdict allocation; (3) injecting coverage-related

[3] *Available at* http://ctrack.sccourts.org/public/document/view.do?documentID=195246. 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*.

allocation issues into the CD trial puts defense counsel in a difficult position; and (4) there is too great a potential for jury confusion or unfair prejudice to the parties.

1. *Ex parte GEICO* Holds That an Insurer Lacks Standing to Intervene in an Underlying Case Under Rule 24, SCRCP.

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*"). (Order, p.4.) 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 134–35, 644 S.E.2d at 700. GEICO had denied coverage because the claimant was not its insured's spouse, and it sought to intervene 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 138–39, 644 S.E.2d at 702 (applying *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)).

Drawing an analogy to *Ex parte GEICO*, the Circuit Court held in these cases that Hartford'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." (Order. pp.4–5.) That analogy on this issue, however, is not perfect because *Harleysville* suggests the insurer's interest is more than financial.

It is true that these actions are CD actions, not insurance coverage actions. 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* cited authority stating 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). It is unclear if this passage 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.

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 a jury trial. And in *Harleysville*, the Court did not mention intervention or opine as to how the insurer could have intervened under that rule. Because the Court did not expressly address *Ex parte GEICO* in *Harleysville* or *Newman*, it stands to reason that insurers do not have clear standing to intervene under Rule 24, SCRCP. Furthermore, for the other reasons discussed below, an insurer does not need to intervene in the underlying CD action to preserve its coverage defenses for subsequent coverage litigation.

2. Reservation of Issues for Separate Coverage Actions Are to the Benefit of All Parties, and Mechanisms Exist to Protect All Parties' Rights, Including Declaratory Judgment 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." (Order p.5.) (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:

> 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 this state for five decades, and it seems unlikely that the Court intended to abrogate it *sub silentio* in *Harleysville.*

In addition, the Restatement (Second) of Judgments offers a potential means of reconciling *Harleysville* with *Sims*.[4] The section that replaced § 107 of the first Restatement 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

[4] 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).

which is not." *Id.* § 58(2). The accompanying commentary notes that a reservation of rights may be necessary. *Id.* § 58 cmt. a. Under this persuasive authority, so long as an insurer has advised its insured of the distinction between covered and uncovered damages in a reservation-of-rights letter, the final judgment rule does not bar subsequent litigation over the scope of the insurer's indemnity obligation. If the Court follows this persuasive authority, it can confirm that the determination of coverage and the allocation of covered versus uncovered damages should be addressed in a separate declaratory judgment action.

3. Mandatory Intervention Creates Unnecessary Tension between Underlying Liability Issues and Coverage Issues.

The Circuit Court further held, in denying the insurers' motions, 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." (Order, p.5.) 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* § B.2. If a plaintiff puts 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. *See High Plains Co-op. Ass'n v. Mel Jarvis Constr. Co.*, 137 F.R.D. 285, 290–291 (D. Neb. 1991) (denying intervention, based in part on concerns regarding a conflict of interest for defense counsel).

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.* Defense counsel should be able to make that strategic decision whether to argue damages, without fear of potential consequences for coverage.

4. There is Significant Potential for Confusion and Prejudice Before a Jury.

Finally, the Circuit Court found that an 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." (Order, p.5.)

These findings suggest that allocated verdicts will not be workable in the typical CD trial. The decision whether to allow the submission of 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). 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 insurance should not come in as evidence of a defendant's liability insurance 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). In addition, the

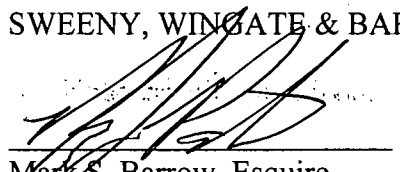
Circuit Court noted the potential for confusion if the jury does not have the evidence to make an allocation which would likely be the case, since there may be very little to no evidence presented for an allocation. Furthermore, the evidence necessary for an allocation between covered and uncovered damages may require a different analysis from what a jury conducts in terms of allocating liability among defendants. Particularly because the final judgment rule does not bar a subsequent allocation, *supra* § B.2, asking the jury to opine on issues and allocations that may not be part of the evidence presented could unnecessarily complicate the jury's task and could even impede their final resolution.

## CONCLUSION

Hartford asks the Court to conclude that intervention in an underlying construction defect action is not mandatory, and that a reservation of rights letter issued in accordance with *Harleysville* is sufficient to preserve the right to allocate between covered and uncovered damages in a separate declaratory judgment action.

December 4, 2019

SWEENY, WINGATE & BARROW, P.A.

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## PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants Hartford Fire Insurance Company and Hartford Casualty Insurance Company, on Respondents and the other parties of record by depositing a copy of it in the United States Mail, postage prepaid, on December 4, 2019 addressed to their attorneys of record, listed as follows:

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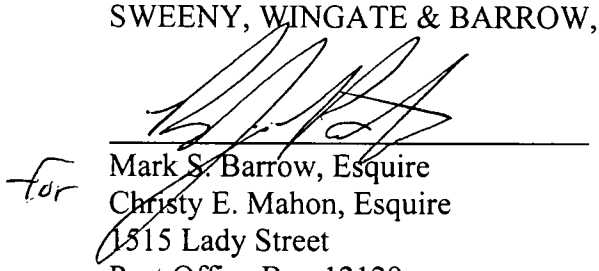

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