THE STATE OF SOUTH CAROLINA
In the Supreme Court

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FEB 28 2020

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

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-26-04514
Appellate Case No. 2019-001053

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.

INITIAL BRIEF OF RESPONDENTS THE HAVENS CONDOMINIUM ASSOCIATION, THE RIVER CROSSING CONDOMINIUM ASSOCIATION, VINCENT J. TAMBURRO, THE TANGLEWOOD CONDOMINIUM ASSOCIATION, AND THE WOODLANDS CONDOMINIUM ASSOCIATION

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S.C. SUPREME COURT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court properly held that South Carolina law neither permits nor requires a liability insurer to intervene in a tort action to protect its rights to contest coverage.

STATEMENT OF THE CASE

This consolidated appeal arises from the denial of several liability insurance carriers' attempts to intervene in the trial of four separate construction defect tort actions pending in Horry County before the Honorable Clifton Newman. The pending actions include: The Havens Condominium Association v. Centex Homes, a Nevada General Partnership, et al., Case No.: 2015-CP-26-00118; The River Crossing Condominium Association and Vincent J. Tamburro, on behalf of himself and others similarly situated, v. Centex Homes, a Nevada General Partnership, et al., Case No.: 2015-CP-26-00279; The Tanglewood Condominium Association v. Centex Homes, a Nevada General Partnership, et al., Case No.: 2015-CP-26-02718; The Woodlands Condominium Association v. Centex Homes, a Nevada General Partnership, et al., Case No.: 2015-CP-26-04514 (hereinafter, collectively, "the Construction Defect Actions" or "the Actions").

Each of the Construction Defect Actions was brought in 2015 on behalf of each respective Condominium Association (Association Plaintiffs hereinafter referred to collectively as "Respondents"). The Actions were brought against the contractors and subcontractors responsible for the construction of the condominium and townhome buildings comprising each project and allege damage as a result of faulty construction.

Appellant insurers American Empire Surplus Lines Insurance Company, BITCO General Insurance Corporation, Clarendon National Insurance Company, Successor by Merger to Clarendon America Insurance Company, Harleysville Insurance Company n/k/a Nationwide Insurance Company, Selective Insurance Company, Crum & Forster Specialty Insurance Company, First Mercury Insurance Company, Hartford Fire Insurance Company, and Hartford Casualty Insurance Company (hereinafter, collectively, "the Appellant Insurers" or "Appellants")

have insured various contractor and subcontractor defendants to each of the Construction Defect Actions since their inception.

Among themselves, Appellants filed a total of twenty-two (22) motions to intervene in some capacity in the Construction Defect Actions. Following a consolidated hearing on all motions in all cases, the Honorable Clifton Newman entered an Order denying all motions in all actions on June 21, 2019. In its Order, the Circuit Court ruled that the Insurers did not have the requisite standing to intervene in the underlying tort actions, that the Insurers could protect their interests in a separate action, that the existing caselaw in South Carolina does not require intervention, that intervention would result in a conflict of interest, and that the special interrogatories or verdict forms the Insurers requested would be confusing to the jury and prejudicial to other parties. Order Denying Mots. to Intervene 5-7. This appeal followed.

STANDARD OF REVIEW

In reviewing the denial of a Rule 24 motion, an appellate court must determine whether the lower court abused its discretion. *S.C. Tax Com. v. Union County Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988); *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007); *Ex parte State ex rel. Wilson*, 391 S.C. 565, 579, 707 S.E.2d 402, 410 (2011).

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY HELD THAT SOUTH CAROLINA LAW NEITHER PERMITS NOR REQUIRES A LIABILITY INSURER TO INTERVENE IN A TORT ACTION TO PROTECT ITS RIGHT TO CONTEST COVERAGE.

Appellant Insurers, by their own admissions, moved to intervene in these ongoing Construction Defect Actions to protect their interests out of an abundance of caution based on confusion about existing caselaw. This Court should confirm that recent developments in South Carolina law do not require intervention by a liability insurer in this context and should clarify that an insurer can contest coverage of a general verdict in a separate action after defending its insured in a construction defect lawsuit. In so holding, this Court should also affirm the Circuit Court's ruling that Appellant Insurers' intervention in these Actions would be inappropriate because Appellants lack proper standing to intervene, and also because intervention would result in a severe conflict of interest, confuse the jury and prejudice other parties, and infringe upon other parties' due process rights.

A. South Carolina jurisprudence does not mandate intervention by insurers in construction defect actions and should be clarified to reflect insurers' responsibilities when contesting coverage.

Though Respondents disagree with the conclusions Appellants have reached based on their interpretations of recent opinions and contend this Court should render a holding contrary to Appellants' positions, perceived conflict through the history of South Carolina caselaw led to Appellants' attempts to intervene.

1. The safety of *Sims*.

Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 85, 145 S.E.2d 523, 524 (1965), provided insurers a safety net by holding factual determinations rendered in a tort action did not effectively decide a liability insurer's coverage responsibilities. *Sims* involved an insurer that refused to

defend its insured on the grounds that the car accident at issue had been caused by an intentional act, which was not covered under the policy, and the insurer's attempt in a subsequent action to introduce evidence of intent to defeat coverage. *Id.* at 84, 145 S.E.2d at 523.

In reaching its decision, this Court relied heavily on the decision rendered in *Farm Bureau Mutual Ins. Co. v. Hammer et al.*, 4th C.C.A. 177 F. (2d) 793 (4th Cir. 1949), quoting the Fourth Circuit's "unassailable logic" that the notion an indemnitor is bound by facts established against an indemnitee when the indemnitor has notice and opportunity to defend and indemnify the indemnitee functions, only when the indemnitee and indemnitor have identical interests. *Sims*, 247 at 86-7, 145 S.E.2d at 525. As indicated in *Sims*, the *Farm Bureau* court further supported that position by its reference to Section 107 of the Restatement of the Law of Judgments, which provided an indemnitor and indemnitee are bound by the existence and extent of liability of the indemnitee, but a "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 87, 145 S.E.2d at 525 (quoting *Farm Bureau*, 4th C.C.A., 177 F. (2d) 793 (citing Restatement of Judgments § 107(a) (1942))). The current version of Restatement of Judgments (2d) Section 58, cited by the *Farm Bureau* court, clarifies this premise, stating "[t]he 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 (2d) of Judgments, §58 (1)(b) (1982) (emphasis added).

Because this Court in *Sims* determined that the insurer's involvement in the underlying trial would create a "clear conflict of interests between insurer and insured," it reasoned that Nationwide was neither precluded from contesting its responsibility to indemnify its insured in a

separate action, nor bound by facts found against its insured in the underlying tort action. *Sims*, 247 at 87-8, 145 S.E.2d at 525-6. Until very recently, *Sims* provided justification for liability insurers to contest the coverage of verdicts rendered against their insureds without imposing procedural prerequisites like intervention, allocated verdicts, and special interrogatories to jurors. The perceived abrogation of *Sims* in recent caselaw likely spurred the influx of motions to intervene in tort actions.

2. *Newman* provides additional framework for contesting coverage.

Despite its holding in *Sims*, in a 2009 decision interpreting standard insurance policy provisions, this Court narrowed an insurer's ability to contest coverage, specifically in a construction defect action. In *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), this Court examined policy language regarding covered damages in the context of a tort action involving the improper installation of stucco and resulting damage. In *Newman*, insurance company Auto Owners filed a declaratory judgment action against a homeowner who had been awarded damages at arbitration for defective installation of stucco by Auto Owners's insured. *Id.* at 187, 684 S.E.2d at 541. Auto Owners sought a determination of whether its policy covered the damages awarded to the homeowner under various policy provisions, including under its definition of "occurrence" and exclusion for "intended or expected" property damage. *Id.*

Though this Court affirmed the arbitrator's findings that the negligent installation of stucco resulted in an "occurrence" that caused "property damage" covered under the applicable insurance policy, Auto Owners contended the damages related to the removal of the defective stucco itself were not covered by the policy. *Id.* at 197, 684 S.E.2d at 546. On that count, this Court sided with Auto Owners, holding that the terms of the policy "unambiguously" prohibited recovery for the cost of removing the insured's work itself, stating that "a claim solely for economic losses resulting

from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover." *Id.* at 198, 684 S.E.2d at 546.

Despite siding with the insurer in part, this Court did not overturn the arbitrator's award because it found insufficient evidence in the record to parse out damages awarded for removal of the defective stucco itself. *Id.* at 198, 684 S.E.2d at 547. Without explicitly saying so, the *Newman* opinion seemed to suggest that insurers stood a greater chance of successfully reducing their indemnification liability if they were able to parse out judgments against their insureds to separate damages awarded for replacing defective work from damages to repair and replace consequential damage.

3. *Harleysville* leads to varied understandings of insurer responsibilities.

With suggestions, derived from the *Newman* opinion, apparently eating away at the protection provided by *Sims*, insurers received more perceived encouragement to allocate verdicts with *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017). *Harleysville* appears to have been the catalyst for the recent influx of motions to intervene in construction defect actions, as insurers drew their own conclusions about this Court's holding. *Harleysville* involved directed verdicts rendered in favor of plaintiff property owners' associations, as well as trials on the appropriate amount of damages where juries returned general verdicts in actual damages and punitive damages. *Id.* at 331, 803 S.E.2d at 293. After the jury verdicts, Harleysville filed a declaratory judgment action seeking partition of the general verdicts into damages for the removal of the defective work itself (which it contended were not covered under its liability policies), and removal and repair of materials damaged as a result of the improper work (covered damages). *Id.* The Special Referee deciding the matter found the costs to remove the defective work itself were not covered under Harleysville's policies, but would not speculate as to

how much of the general verdicts were covered, and thus concluded Harleysville was responsible for the full amount of damages. *Id.* at 332, 803 S.E.2d at 294.

Though Appellants and insurers across the state read *Harleysville* as carte blanche authority for intervention in a tort action to protect their own interests, with respect to contesting coverage, the *Harleysville* opinion focused on whether the insurer's reservations of rights were sufficient for the insurers to even have the ability to contest coverage. This Court in *Harleysville* concluded that "generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method) [was] not sufficient" to put the insured on notice that the insurer intended to raise defenses to coverage or pursue a declaratory judgment on coverage issues. *Id.* at 338, 803 S.E.2d at 297. Essentially, this Court clearly delineated an insurer's reservation of rights must be sufficiently specific as to put the insured on notice the insurer "intend[s] to litigate the issues of whether any damages resulted from acts meeting the definition of occurrence, whether any damages occurred during the applicable policy periods . . . what damages were attributable to non-covered faulty workmanship," and that a potential conflict of interest exists such that the insured should seek an allocated verdict. *Id.* at 342-3, 803 S.E.2d at 300. Rather than require an insurer to intervene in a tort trial to protect its rights to contest coverage, this Court in *Harleysville* merely stated that a generic "we may contest coverage at a later date" on the part of an insurer is insufficient to put the insured on notice that it may need to seek an allocated verdict for any damages to be covered under its policy.

Further, footnote 11 of the *Harleysville* opinion discusses the refusal of the Special Referee to allocate the juries' general verdicts, citing to *Newman*, 385 S.C. at 198, 684 S.E.2d at 547, and also discusses the idea courts cannot and will not speculate about the motives behind a jury award in order to allocate an award for coverage purposes. *Harleysville*, 420 at 343, 803 S.E.2d 300 n.

11. Appellants and, presumably, countless insurers in this state, interpret this footnote to require some iteration of an allocated verdict (and the presentation of evidence to support it) as the only way to determine whether a jury award falls within coverage limits. This, of course, leads to Appellants' attempts to intervene to seek such an allocation.

Nowhere in the *Harleysville* majority opinion is the word "intervene" mentioned. In fact, it is only mentioned in Justice Pleicones's dissent wherein he states insurers' intervention in this situation would be inappropriate because of the resulting conflict of interests. *Id.* at 363, 903 S.E.2d at 311 (Pleicones, J., dissenting). While of course the dissent is not the controlling law, it is the only portion of the *Harleysville* opinion that addresses intervention. This fact, as well as the majority's failure to specify the means by which an insurer can protect its ability to contest coverage, contributes to the range of the opinion's interpretations.

Though one may read between the lines of the opinion and draw different conclusions, *Harleysville* seemed to confirm *Newman*'s deviation from *Sims*, to further suggest that the safest way to protect an insurer's interests and ability to contest coverage was to properly reserve specific rights, advise its insured of a conflict of interests and need for allocated verdict, and, to be abundantly cautious, intervene and seek the allocation itself. However, despite this version of interpretation, Respondents take the position that had this Court desired to overturn *Sims*, it would have done so. *See Hutto v. Southern Farm Bureau Life Ins. Co.*, 259, S.C. 170, 173, 191 S.E.2d 7, 9 (1972) (holding "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 a case and not mentioned in the opinion'"); *Coleman v. Page's Estate*, 202 S.C. 486, 491, 25 S.E.2d 559, 560 (1943) ("A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon

reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside."). By glossing over the issue and refusing to provide an instruction manual on how to contest coverage, *Harleysville* provided no authority for insurers across the state to immediately flood the courts with motions to intervene in construction defect actions. Accordingly, the Circuit Court in this matter properly denied Appellants' motions.

4. The need for clarity.

If there is one matter on which Appellants and Respondents agree, it is that all would benefit from this Court's clarification of the necessary prerequisites to an insurer's coverage challenge of a general verdict. In particular, Respondents request this Court clarify its decisions in *Newman* and *Harleysville* to specifically provide that a distinction between covered and noncovered portions of a general verdict rendered in a construction defect tort action may be litigated in a separate declaratory action, provided the insurer at issue has properly reserved its rights via specific correspondence to that effect and provided a defense to its insured. Returning to the *Sims* principle that an insurer can contest coverage of a general verdict in a separate action, because a general verdict does not determine indemnification responsibilities, would serve to simplify construction defect actions and maintain the status quo of their prosecution.

It is not uncommon for construction defect lawsuits to contain upward of ten to twenty or more parties and a complicated combination of complaints, defenses, causes of action, counterclaims, and third-party complaints. With insurance companies financing the bulk of recoveries in these actions, insurance coverage will always be a crucial component to consider. Notwithstanding this, the direct injection of insurance carriers and positions into a construction defect trial itself would serve to unnecessarily complicate and confuse what is already one of the more complicated tort genres.

Further, requiring an insurer to intervene at trial or requiring an insured to request an allocated verdict would not be practicable. Insurer participation in a trial would prejudice all parties, confuse the jury, impose an impossible conflict of interests on defense counsel, and infringe upon the parties' due process rights (see discussion in Section B., *infra*). In addition, it likely would be equally problematic to place upon the insured a presumption that the entirety of a general verdict is uncovered and require the insured to seek the allocation. In a construction defect action specifically, requiring defense counsel to seek an allocated verdict could drastically alter the defenses usually asserted. Typically, the goal of defense counsel is to protect their clients from all liability by arguing that their clients' work was free of defects and could not have caused resulting damage. If defense counsel becomes obligated to seek an allocated verdict, that muddies the fundamental issue of to whom defense counsel owes loyalty. If its loyalty is to its client, the insured, defense counsel must acknowledge the possibility that a home owner plaintiff will obtain a favorable result at trial and must present arguments and defenses in order to maximize coverage of any verdict. If defense counsel's loyalty is to the insurer paying its attorney's fees, it must structure its arguments to minimize the insurer's indemnification liability. Imposing, on either party, a requirement to request an allocated verdict places defense counsel in an impossible position and may effectively prevent insurers from fulfilling their duties to defend their insureds.

South Carolina law is clear that an insurer's duty to indemnify its insured against a judgment is not triggered until a judgment is actually entered. *Howard v. Allen*, 254 S.C. 455, 460, 176 S.E.2d 127, 129 (1970) (stating that liability must be established via final judgment against the insured before an insurer is obligated to indemnify); *Canopius US Ins., Inc. v. Middleton*, 202 F. Supp. 3d 540, 546 (D. S.C. 2016) (if an insurer has a duty to defend, the court may be unable to determine the insurer's duty to indemnify until the resolution of the underlying action).

Accordingly, because Appellants cannot litigate their duty to indemnify their insureds until after the resolution of the Construction Defect Actions, it follows that a subsequent declaratory action is the most obvious and efficient forum in which that duty should be determined. Construction defect and complicated tort actions so rarely proceed to trial that judicial economy would be served by waiting until the indemnification responsibility is ripe for adjudication *before* taking steps to establish facts specifically relevant to coverage decisions.

The *Newman* and *Harleysville* opinions themselves are not the cause of the execution of various approaches to this issue. Rather, conflict in the interpretations of these opinions by various parties including insurers, defense counsel representing the insureds, and home owner plaintiffs is the cause. Respondents respectfully request this Court remove all doubt and specifically clarify that *Newman* and *Harleysville* do not overturn *Sims*, an allocated verdict is not necessary to contest coverage, and the burden is on the insurer to contest coverage in a separate declaratory action filed after a judgment is entered against an insured.

B. Because intervention is not a mandatory prerequisite to contests of coverage, the Circuit Court was correct in its denial of Appellants' Motions to Intervene.

Having established that *Newman* and *Harleysville* do not stand for the premise that intervention and allocation are required for a successful contest of insurance coverage, the Circuit Court's denial of Appellants' Motions to Intervene was correct because Appellants lack proper standing to intervene and their intervention would create an impermissible conflict of interests, confuse the jury, prejudice other parties to these Actions, and infringe upon other parties' due process rights.

1. Appellants lack standing to intervene under *Ex Parte GEICO* and South Carolina Rule of Civil Procedure 24.

Binding law demonstrates that Appellants are required to have standing to intervene in an ongoing tort action, and here, that standing is lacking. Rules of Civil Procedure 24(a) and 24(b) provide intervention of right and permissive intervention, respectively. Rule 24, SCRCP. Rule 24(a) provides that "anyone shall be permitted to intervene" when they have an interest in the property or transaction at issue in the lawsuit, those interests may be impeded by the disposition of the action, and those interests are not protected by existing parties to the action. *Id.* Alternatively, subsection (b) of Rule 24 allows intervention when an applicant's claim or defense has a question or law of fact in common with the subject matter of the action. *Id.* As detailed below and discussed in *Ex Parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 644 S.E.2d 699 (2007) ("*GEICO*"), Appellants meet the requirements for neither type of intervention.

a. Appellants do not have standing to intervene as of right.

Appellants have no standing to intervene as of right under Rule of Civil Procedure 24(a) because they do not have sufficient interests at stake in these Construction Defect Actions. *GEICO* involved an insurer's attempt to intervene in a family court declaratory judgment action that sought to establish a common law marriage for stacking purposes. *GEICO*, 373 S.C. at 134, 644 S.E.2d at 700. This Court in *GEICO* affirmed the lower court's refusal to permit the insurer's intervention by concluding the insurer had no standing to intervene as of right under Rule 24(a)(2). *Id.* at 138, 644 S.E.2d at 702. In reaching its decision, this Court began by discussing the proposition that even though the rules of intervention should be applied liberally in the interests of judicial economy, intervention still requires standing under the rules. *Id.* (citing *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327). A party has standing to intervene if it has a "personal stake" in the subject matter of a lawsuit and is a real party in interest with real, actual, material, or substantial interest

in the subject matter of the action - an interest which is merely "peripheral and not the real interest at stake" does not warrant intervention. *Id.* In affirming the lower court's ruling, this Court reasoned that the insurer's interest was merely in the effects of the family court's decision and concluded that "the subject matter of the family court action in the instant case is the validity of a common law marriage, which does not involve a determination of insurance benefits." *Id.* at 139, 644 S.E.2d at 703.

The holding and opinions of this Court in *GEICO* are easily applied to the facts of the instant appeal in that Appellants do not have standing to intervene under Rule 24(a) because they are not real parties in interest. The only interest Appellants have in the subject matter of the litigation is whether or not any award entered against their insureds is covered under their insurance policies, and such interest is purely financial. Appellants have no interest in the subject matter of the construction defect action, and to paraphrase this Court in *GEICO* – the subject matter of this action is the validity of Respondents' construction defect claims, which do not involve a determination of insurance benefits. Accordingly, Appellants do not have standing to intervene as of right under Rule 24(a).

b. Appellants do not have standing to intervene under the permissive intervention rules.

Rule 24(b) permits intervention when a potential intervenor's claim or defense has questions of law or fact in common with those at stake in the ongoing action. Rule 24(b)(2), SCRCP. A trial court has complete discretion to allow or deny permissive intervention, and the decision will only be reserved upon a showing of abuse of discretion. *S.C. Tax Com. V. Union County Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988). "A reversal of a denial of permissive intervention has been termed 'so unusual as to be almost unique.'" *Id.* at 262, 368 S.E.2d at 75 (citing *New Orleans Public Service, Inc. v. United Gas Pipeline Co.*, 732 F. (2d) 45

(5th Cir. 1984), *cert denied*; *Morial v. United Gas Pipe Line Co.*, 469 U.S. 1019, 105 S. Ct. 434, 83 L. Ed. (2d) 360 (1984).). In *S.C. Tax Com.*, the Court of Appeals addressed whether the South Carolina Tax Commission could intervene to determine whether a tax exemption applied to a company that had sued the Union County Treasurer to collect taxes paid under protest. *S.C. Tax Com.*, 295 at 258, 368 S.E.2d at 73. The Tax Commission had sought to intervene under both Rule 24(a) and 24(b) and the Court of Appeals affirmed the lower court's denial of intervention on both counts. *Id.* In evaluating whether the Tax Commission could permissively intervene, the Court analyzed Rule 24(b)(2) and opined that permissive intervention is premised on the theory that when claims or defenses share common questions of law or fact, judicial economy supports the disposition of all of them in one action via intervention. *Id.* at 263, 368 S.E.2d at 75. The Court further stated that "[t]he typical situation for which the Rule was designed is one where the prospective intervenor might institute or be called upon to defend a separate proceeding that would *substantially duplicate* the one in question." *Id.* at 263, 368 S.E.2d at 75-6 (emphasis added).

The Court of Appeals made it clear in *S.C. Tax Com.* that permissive intervention is only practical when it would effectively eliminate the need for a duplicative proceeding. Applying the conclusions reached by the court in that case to the facts at issue here, permissive intervention is entirely improper for the appellants in this case. First, Appellants have shown no abuse of discretion on the part of the trial court, and therefore, no reversal is warranted here. *See id.*. at 262, 368 S.E.2d at 75. Further, permitting Appellants to use the permissive intervention rules has no bearing on judicial economy here because there is already a separate coverage action pending,[1] and because the allocated verdict Appellants seek merely establishes the basis for Appellants'

[1] *Centex Homes, a Nevada General Partnership v. The Cypress Bend Condominium Association, et al.*, No. 2016-CP-26-6670 (filed October 29, 2016).

defenses to coverage that must be litigated in a subsequent coverage action[2]. Even if this Court determined judicial economy was served by permitting intervention, the Appellants have no questions or law or fact in common with the parties in these tort actions, and any subsequent declaratory action would not "substantially duplicate" these construction defect lawsuits. The questions of law and fact at issue in the construction defect actions involve whether certain contractors and subcontractors violated building codes, industry standards, and manufacturers' instructions in the construction of condominium and townhome buildings; yet, the questions raised in a declaratory judgment action about insurance coverage wholly relate to the insurers' policy provisions and their applicability to any award. An action centered around the appropriate installation of siding, trim, roof shingles, and other building materials is not substantially duplicated in an action surrounding an insurance policy's definition of "occurrence." There is no commonality among the claims of Appellant insurers and the tort issues in these construction defect actions for purposes of Rule 24(b).

Rule 24(b) also requires this Court to consider whether permissive intervention will unduly delay or prejudice the adjudication of the rights of the existing parties. Rule 24(b), SCRCP. The insurers seeking to intervene have been defending these Actions since their inception in 2015, and only moved to intervene in the months prior to the first trial date set by the Circuit Court; thus, any intervention will not be timely. Further, permitting their intervention will prejudice the parties by inserting improper questions of insurance into the trial of this matter and infringe upon the Respondents' Due Process rights. *See infra* Section E.

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[2] Initial Brief of Appellants 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 at 33.

c. Courts in other jurisdictions have affirmed denials of limited intervention under identical circumstances.

In *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2nd Cir. 1984), an insurer moved to intervene to submit proposed interrogatories regarding damages to the jury, in the event it returned a verdict for Plaintiff. *Restor-A-Dent*, 725 at 873. 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. *Id.* 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." *Id.* The plaintiff in that matter opposed the motion, arguing the insurer knew of the lawsuit almost from inception as it was defending the Defendant, yet had remained silent until all discovery was completed and the pre-trial order submitted. *Id.* 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.*

The insurer in *Restor-A-Dent* sought both Intervention of Right and Permissive Intervention under the Federal Rules of Civil Procedure. *Id.* 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. *Id.* at 875. The insurer's "interest, on the other hand, is in the amount it will have to pay [Defendant] if [Plaintiff] wins." *Id.* Accordingly, [the insurer] does not have an interest in the subject matter of the action between [Plaintiff] and [Defendant]." *Id.* The Court further reasoned any potential interest asserted by the insurer depended upon two contingencies: (1) a jury verdict for plaintiff; and (2) a finding in a litigation not yet commenced between insurer and insured that insurer is not responsible for certain losses under the policy terms. *Id.* The court

denied the permissive intervention motion because 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 Defendant. *Id.* at 876 (internal quotation marks omitted). The Second Circuit Court of Appeals 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.

High Plains Coop. Ass'n v. Mel Jarvis Constr. Co., Inc., 137 F.R.D. 285 (D. Neb. 1991), was a nearly identical situation. A defendant's insurer sought permissive intervention to submit special interrogatories to the jury on the issue of damages. In denying the insurer's request to intervene, the 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.* Defendant "was being represented by counsel provided by the insurer/intervenor 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.

In *Universal Underwriters Ins. Co. v. E. Cent. Alabama Ford-Mercury, Inc.*, 574 So. 2d 716 (Ala. 1990), a defendant's insurer sought to intervene for the sole purpose of submitting special interrogatories or a special verdict form to the jury, attempting to resolve any coverage questions that might be involved in the case without making its presence known to the jury. The insurer argued its interest would not be adequately protected unless it was allowed to intervene for the limited purposes, and asserted it had an "interest relating to the subject matter of the action that, under the rules of fairness and equity, gave it a right to intervention, or, in the alternative, that permissive intervention should be allowed." *Universal Underwriters Ins. Co.*, 574 at 718-9.

In affirming the trial court's denial of the motion to intervene, the Court reasoned "when an insurer refuses to defend or defends under a reservation or rights, the insurer is not precluded from determining the coverage issue in a declaratory judgment action either before or after the resolution of the underlying action." *Id.* at 722. The "insureds would be prejudiced by further delay if [the insurer] were allowed to intervene at such a late date in the proceedings." *Id.* "This Court has 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 held the insurer did not have a "direct, substantial, and protectable interest," and thus had no right to intervene. *Id.* In assessing the trial court's denial of the motion to intervene under the permissive intervention rules, the court held that permissive intervention is within the broad discretion of the trial judge and found no abuse of discretion. *Id.*

In *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Bakker,* 917 F.2d 22, 1990 U.S. App. LEXIS 18390 (4th Cir. 1990) (Unpublished Disposition), the insurer sought to intervene for the limited purpose of submitting special interrogatories, verdicts, and/or instructions to the jury to resolve a potential coverage question. The insurer wanted a jury finding which would distinguish whether any award entered was based on Defendants' dishonesty or negligence, and argued acts

brought about by or contributed to by dishonesty were excluded from coverage. *Id.* The district judge denied the motion, observing that the motion was filed only two months before the commencement of trial. *Id.* "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 at 22. 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.*

2. State law requires a separate action to avoid an impermissible conflict of interests.

South Carolina law is clear that an insurer cannot defend its insured and assert its own defenses to coverage in the same action. *Sims*, 247 at 85, 145 S.E.2d at 524. In its discussion of the insurer's options, this Court opined that it was "perfectly obvious" that the insurer could not defend the insured in the tort action and assert its defenses to coverage in the same action without creating a "clear conflict of interests between insurer and insured." *Id.* at 85, 145 S.E.2d at 524. Further, when referencing the *Farm Bureau* opinion, this Court looked to the discussion of Section 107 of the Restatement of the Law of Judgments, which has now been replaced by Section 58 of the Restatement (Second) of the Law of Judgments. *Id.* Section 58 provides that in an indemnitee/indemnitor setting, a conflict of interest "exists 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." Restatement (Second) of Judgments § 58 (1982).

In this action the insurers seek to distinguish, one way or another, between covered and non-covered damages. Specifically, they seek a determination of what portion of a potential jury

award is for the removal of defective work versus repair of components damaged by defective work, with the assumption that costs for removal of defective work itself are not covered by their policies. The insured has great interest in establishing that the entirety of any damage award be covered by its policy, and the insurer obviously has an interest in showing the damages are not covered. As the insurers in this case have agreed to defend and indemnify their insureds in the trial of this action, counsel supplied by the insurers to their insureds would presumably orient their case at trial towards a finding that any potential damages are covered. Applying the logic of *Sims* and the Restatement (2d) of Judgments, the insurers in this case cannot represent the interests of their insureds while presenting their own defenses to coverage in the same action.

Further, because of the insured's interest in having the majority of a jury award covered by its insurance policy, the defense strategy of the insured's counsel has now transitioned from "the defendant violated no standards of care, and if he did it caused no damage" to "the defendant did violate the standard of care and it caused significant damage" or "the defendant violated no standards of care but somehow proximately caused significant consequential damages." This shift in position is a prime example of the conflict of interest created by intervention of an indemnitor in a tort action, as the insurer's intervention now prevents the insurer from fulfilling its duty to indemnify its insured. Rather, the insurer is now forcing the counsel it hired to defend its insured to concede liability on some front to keep the insured from being personally liable for a potential verdict in the millions of dollars. The result is a clear conflict of interest, which should not exist.

3. The injection of insurance issues in a construction defect trial would confuse the jury and add to Respondents' burden of proof.

If Appellants are permitted to intervene, even in a limited capacity, the confusion to the jury and undue burden on the existing parties would outweigh any benefit derived from an allocated verdict. Appellants seek to partially intervene for the limited purpose of submitting

interrogatories and/or a special verdict form to the jury allocating any award between damages to remove faulty work and damages to repair components damaged by faulty work. Despite Appellants' contentions that this limited involvement would do nothing to alert the jury to the insurers' presence or further complicate the trial of this construction defect action, the submission of special verdict forms and interrogatories to the jury requires the proffer of additional evidence and places an undue burden on the current parties to the action.

In addition to the relatively straightforward issue of allocating any award between consequential damages and repair of defective work, there are a myriad of other directly related policy provisions both in the main policies and various endorsements that may necessarily have to be examined in addition to the larger coverage issues. It is expected that in a typical construction defect action with multiple defendants, each party may have multiple policy variations from year to year and quite often different insurance carriers year to year with drastically different policy provisions and endorsements. The complexity of these potential insurance questions to be answered multiplies when, as in this case, there could potentially be multiple parties involved in an action. This would result in an inordinate number of determinations necessary for a fair and just determination of the more basic coverage issues. With multiple parties, insurance carriers, policies, and endorsements at play, any interrogatories or special verdict form submitted to a jury could likely require many pages to adequately address these complex matters.

The submission of special interrogatories and special verdict forms requires the parties to a tort action to proffer evidence they may not normally submit, as the jury needs information and instruction to be able to answer the interrogatories and complete the verdict form. The need to establish what damages may be consequential versus which are related to correcting defective work is unduly burdensome on both the plaintiff and defendants in this action and prejudicially

adds to the plaintiff's burden of proof. Now, not only must Respondents show that Defendants breached the standard of care and proximately caused damage to the condominium buildings at issue, the injection of insurance coverage issues would require Respondents to make potentially a number of other showings with regard to the damages claimed. Further, Appellant Insurers have offered no suggestions as to how they propose the parties to this construction defect action present evidence to sufficiently equip a jury with the information necessary to answer special interrogatories or a special verdict form. The Appellants want certain questions answered, but they apparently seek to have counsel for Plaintiff and Defendants determine for themselves the best way to present their cases with insurance coverage questions in mind. At the trial court level, the grant of a motion to intervene introduces sudden insurance questions which inherently complicate the presentation of the case by all parties, and as such are prejudicial, not only to Respondents, but also to the insureds. This complication changes the presentation of evidence and conduct of the entire trial of the action and has the potential to confuse the jury to such extent that they cannot render a competent verdict.

As stated by the Circuit Court in its Order denying the insurers' Motions to Intervene, the interrogatories and verdict forms sought 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 there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

Order Denying Motion of Insurers for Limited Intervention at 7. Thus, the insurers' intervention would place an undue burden on parties to an already complicated construction defect action.

4. Intervention would infringe upon Respondents' Due Process Rights.

Appellants' intervention for the limited purpose of submitting a special verdict form and interrogatories to the jurors would infringe upon Respondents' Procedural Due Process rights to present evidence and cross-examine witnesses. South Carolina has adopted the requirements set forth by the United States Supreme Court that the rights to introduce evidence and confront and cross-examine witnesses are required elements for the satisfaction of procedural Due Process. *Vora v. Lexington Med. Ctr.*, 354 S.C. 590, 582 S.E.2d 413,416 (2003). This Court has also held that "where important decisions turn on questions of fact, Due Process requires an opportunity to confront and cross-examine adverse witnesses." *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 10011, 5 L.Ed. 287 (1970). Due Process is flexible and calls for procedural protections the particular situation demands. *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 503 (Ct. App. 2008) citing *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 C.S. 452, 485 636 S.E.2d 598, 615 (2006).

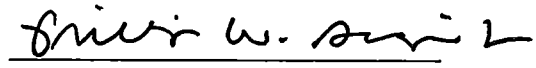
Respondents' procedural Due Process rights require that they be permitted to present evidence at the trial of this matter to support their positions as to how the jury should answer any interrogatories or complete any special verdict form in the event insurers intervene. *Olson* at 69. At that point, Respondents should be entitled to conduct some discovery on all potential insurance coverage positions raised by Appellants under South Carolina Rule of Civil Procedure 26(b)(1), as those issues would then become relevant in this tort action. Rule 26(b)(1), SCRCP. As Due Process is flexible and may be tailored to specific situations, Respondents' presentation of evidence may even conceivably require calling representatives of insurers to examine them regarding the insurance policies at issue, as coverage issues will have been injected into this

construction defect action. As addressed above regarding additional coverage matters beyond the basic consequential damages analysis, the applicability of certain other policy provisions during limited time periods may need to be presented in a constitutionally-sufficient context for a jury to properly render a meaningful verdict. Additionally, Respondents' Due Process rights would require Appellants' full intervention as parties to the construction defect action rather than limited intervention in order to allow Respondents to conduct typical discovery to prepare their cases for trial. Permitting the insurers to intervene and proceed immediately to trial prohibits Respondents from conducting discovery that has only now become relevant and as such deprives Respondents of their Due Process rights. Alternatively, insurer intervention even with some prescribed discovery period unfairly prejudices Respondents in this action, as it would extend the length of these Actions that have been pending since 2015.

CONCLUSION

At this point in evolving South Carolina tort law, insurers and litigants alike are faced with a need for confirmation and clarification of the steps an insurer must take to protect its interests. With regard to the instant case, the Court should confirm that neither *Newman* nor *Harleysville* stand for the proposition that insurers may intervene in tort actions at will and affirm the Circuit Court's ruling that a general verdict and subsequent declaratory action are sufficient to determine coverage issues and protect insurers' interests. Without an intervention or allocation requirement, the Court should affirm the Circuit Court's denial of Appellants' Motions to Intervene based on a lack of standing, impermissible conflict of interests, prejudice to the parties, and infringement upon Due Process rights.

[*signature to follow*]



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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FEB 28 2020

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

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-26-04514
Appellate Case No. 2019-001053

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.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents The Havens Condominium Association, The River Crossing Condominium Association, Vincent J. Tamburro, The Tanglewood Condominium Association, and The Woodlands Condominium Association on Appellants and the other parties of record by depositing a copy of it in the United States Mail, postage prepaid, on February 21, 2020 addressed to their attorneys of record listed as follows:

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