

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2019-001053

RECEIVED

Apr 13 2020

S.C. SUPREME COURT

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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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY )

2014-CP-26-01226

THE CYPRESS BEND CONDOMINIUM )  
ASSOCIATION AND THE CYPRESS )  
BEND HORIZONTAL PROPERTY )  
REGIME, )

Plaintiffs, )

vs. )

CENTEX HOMES, A NEVADA )  
GENERAL PARTNERSHIP, ET AL., )

Defendants, )

**Transcript of Record**  
(MOTION HEARING)

September 27, 2017

CENTEX HOMES, A NEVADA GENERAL )  
PARTNERSHIP, ET AL., )

Third-Party )  
Plaintiff, )

vs. )

CHRIS R. CLARK, AIA, ET AL., )

Third-Party )  
Defendants. )

**B E F O R E:**

Honorable Clifton Newman  
Horry County Courthouse  
Conway, South Carolina

**A P P E A R A N C E S:**

Robert C. Calamari, Esquire  
**Attorney for Selective Insurance  
and Nationwide Insurance**

Christy Mahon, Esquire  
Susan Hogan, Esquire, Pro Hac Vice  
**Hartford Casualty Insurance**

Lawrence M. Hunter, Jr., Esquire  
**BITCO General Insurance**

Robert M. Kennedy, Jr.  
**Catalina London Limited**

Sarah E. Wetmore Butler, Esquire  
**Steven Bosch, d/b/a The Roofer Man**

Brian P. Crotty, Esquire  
**Liberty Mutual Fire Insurance**

Neil S. Haldrup, Esquire  
**Clarendon National Insurance**

Robert W. Buffington, Esquire  
David R. Sligh, Esquire  
**Carolina Drywall**

Theodore L. Manos, Esquire  
**RWG, Inc.**

Stephen L. Brown, Esquire  
Phillip C. Thompson, Esquire  
**Martin Masonry and Martin Mata**

Theodore Parker, III, Esquire  
Jacqueline D. Phillips, Esquire  
**Stock Building Supply**

Thomas C. Hildebrand, Jr., Esquire  
Laura F. Locklair, Esquire  
**Centex Homes**

**ALSO PRESENT:**

Robert Wylie, Esquire  
Amy L. Neuschafer, Esquire

**TAKEN BY:**

Dixie C. Eubank  
**Circuit Court Reporter**

**PREPARED BY:**

Kay H. Richardson  
**Circuit Court Reporter**

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E X H I B I T SNo.IDEV

(No exhibits were marked or admitted.)

1     **(SEPTEMBER 27, 2017)**

2     BY THE COURT:

3             THE COURT: Thank you. Good afternoon. Please be  
4 seated.

5             MR. CALAMARI: Good afternoon, Your Honor.

6             THE COURT: Okay. What do we have? Who's talking first?

7             MR. CALAMARI: Your Honor, we have a motion to intervene.

8             THE COURT: Yes, sir. Mr. Calamari?

9             MR. CALAMARI: Thank you. May it please the Court?

10            THE COURT: Yes, sir.

11            MR. CALAMARI: Your Honor, I'm -- my name is Bob Calamari  
12 and I'm here today on behalf of Selective Insurance Company  
13 and Nationwide Insurance Company. All of the Insurance  
14 Counsel in this case have collectively decided that I would go  
15 ahead and present our position and they would incorporate that  
16 into their arguments and then they would comment as necessary,  
17 if I left something out or something -- some different nuance  
18 in their particular motion.

19            THE COURT: Okay.

20            MR. CALAMARI: So we're all incorporating our comments  
21 into each other's arguments.

22            THE COURT: Okay. First let me have everyone say who's  
23 here and why you're here and you represent and all that.

24            MR. CALAMARI: Yes.

25            THE COURT: Okay. Very good.



1 MS. MAHON: Christy Mahon here. I'm here for Hartford and  
2 we have Sue Hogan here, who is seeking to be admitted Pro Hac  
3 Vice. I asked Centex and the Plaintiff's lawyer if they had  
4 an objection and they do not. May we have Your Honor execute  
5 the Pro Hac Vice?

6 THE COURT: Okay.

7 MS. MAHON: This is Susan Hogan.

8 MS. HOGAN: Sue Hogan.

9 MS. MAHON: We're here for Hartford Casualty Insurance  
10 Company.

11 THE COURT: Okay.

12 MS. MAHON: And Christy Mahon is M-A-H-O-N.

13 THE COURT: Have you been admitted on some other cases or  
14 no?

15 MS. HOGAN: I was admitted in Edgewater, Your Honor, and  
16 the Cypress Bend DJ.

17 THE COURT: Okay. Okay. So this is a repeat sort of.  
18 Okay. Good.

19 MS. MAHON: Thank you, Your Honor.

20 MS. HOGAN: Thank you, Your Honor.

21 MS. MAHON: If I may? Thank you, Judge.

22 THE COURT: All right. So admitted Susan M. Hogan.

23 MS. HOGAN: And we'll see you again tomorrow.

24 THE COURT: Okay, good.

25 MS. HOGAN: Thank you, Your Honor.

1 THE COURT: All right.

2 MR. HUNTER: Your Honor, I'm Lawrence Hunter for BITCO  
3 General Insurance.

4 THE COURT: All right.

5 MR. KENNEDY: Your Honor, Robert Kennedy here on behalf  
6 of Catalina London Limited.

7 THE COURT: Okay.

8 MS. WETMORE BUTLER: Good afternoon, Judge Newman. Do  
9 you want everybody who is are here on all the motions to stand  
10 up and introduce themselves?

11 THE COURT: Well, just tell me why you're here.

12 MS. WETMORE BUTLER: I'm not here on the one Mr. Calamari  
13 is arguing, but I'm here. Sarah Wetmore Butler.

14 THE COURT: All right. Sarah?

15 MS. WETMORE BUTLER: Sarah Wetmore Butler.

16 THE COURT: Sarah Wetmore/Butler.

17 MS. WETMORE BUTLER: You got it.

18 THE COURT: Okay.

19 MS. WETMORE BUTLER: I'm here on the Cypress Bend matter  
20 representing Bosch doing business as The Roofer Man.

21 THE COURT: Okay.

22 MR. CROTTY: Your Honor, Brian Crotty here on behalf of  
23 Liberty Mutual Fire Insurance Company and I'm just here on the  
24 intervention.

25 MR. HALDRUP: Neil Haldrup here for Clarendon National

1 here on the motion to intervene.

2 MR. WYLIE: Since I'm sitting here, Robert Wylie, I'm  
3 just an interested observer.

4 THE COURT: Okay.

5 MS. NEUSCHAFER: Amy Neuschafer, same for me.

6 MR. MCCUTCHEN: Your Honor, Luther McCutchen, I represent  
7 the Plaintiff, Cypress Bend in this matter. Thank you.

8 THE COURT: Yes, sir.

9 MR. BROCKINGTON: Bobby Buffington, I represent Carolina  
10 Drywall, Inc.

11 MR. SLIGH: David Sligh, also on behalf of Carolina  
12 Drywall.

13 MR. MANOS: Teddy Manos, for RWG, Inc.

14 MR. BROWN: Stephen Brown on behalf of Martin Masonry and  
15 Martin Mata doing business as Martin Masonry.

16 THE COURT: I've spent a lot of time in here with Mr.  
17 Brown.

18 MR. BROWN: Bad flashbacks, Your Honor, bad flashbacks.

19 MR. THOMPSON: Your Honor, Philip Thompson, just another  
20 interested observer.

21 MR. PARKER: Good afternoon, Your Honor. Theodore Parker  
22 and Jackie Phillips on behalf of Stock Building Supply.

23 THE COURT: All right.

24 MR. PARKER: Nice to see you.

25 THE COURT: Yes, sir.

1 MR. HILDEBRAND: I think we're the last ones, Your Honor,  
2 Tom Hildebrand here for Centex Homes, with Laura Locklair and  
3 Lisa Vascovich who is an associate who's worked on this file  
4 and some others; she's here as well. Thank you.

5 THE COURT: All right.

6 MR. HILDEBRAND: Thank you.

7 THE COURT: Mr. Calamari?

8 MR. CALAMARI: Thank you, Your Honor. Your Honor, this  
9 is a motion to intervene.

10 THE COURT: I'll introduce my new law clerk since she's  
11 -- we've had a changing of the guard. Nancy Paul, she's --  
12 she's one month in and trying to figure what this is all  
13 about.

14 MR. CALAMARI: She's in for a good one.

15 MOTION TO INTERVENE:

16 MR. CALAMARI: Your Honor, Bob Calamari again. The Court  
17 Reporter asked us to say our name when we -- when we speak.  
18 I'm here on behalf of Nationwide and Selective and we're  
19 moving to intervene into this action as a non-named party for  
20 the limited purpose of assisting the Court in allocating  
21 damages. Should damages be awarded in this case, all the  
22 various carriers have insurance that are in this case and  
23 we're asking that the Court undertake the process to take  
24 those damages and allocate them into categories that can be  
25 used later in an insurance coverage action to determine

1 whether damages are covered by the insurance policy or not  
2 covered by the insurance policy.

3       Alternatively, if you deny that motion, and only if you  
4 deny that particular portion of the motion, we're asking that  
5 you issue a protective order and protect all of the parties in  
6 the case saying that the carrier, saying that if the verdict  
7 results in a general verdict, a mixture of covered and non-  
8 covered damages, that the carrier will not be prevented from  
9 offering evidence and the Court deciding an apportionment of  
10 those damages to find out what is the cost of the work of the  
11 insured and what is the cost of repairing damages caused by  
12 that work. So, we're asking that in alternative fashion, but  
13 only if that first portion is denied.

14       Your Honor, the reason that we're here today is it is now  
15 abundantly clear in South Carolina from the *Newman v. Auto*  
16 *Owners* case, the *Crossman v. Harleysville* case and the recent  
17 *Heritage v. Harleysville* case, that our supreme court is  
18 mandating that the trial court in a construction defect matter  
19 must allocate damages so you can use that allocation in the  
20 subsequent insurance action to determine covered and non-  
21 covered damages.

22       It is not just the burden on the insurance company to do  
23 this. I want to be very clear about that. We are making  
24 every effort we can, but the supreme court has said we need to  
25 do it. The plaintiff in these cases has third-party rights,

1 so they need to do it. The insured in the case, in order to  
2 protect their rights, they need to do it. The defense counsel  
3 for the insureds, for the subcontractors, the general  
4 contractor, they all need to do it. And I would dare say,  
5 that even if all of us said no, I'm thinking maybe the Court  
6 needs to do it anyway because the supreme court has made it  
7 clear that once notice is given, which we're doing today and  
8 we have another forums that we'll talk about -- once that  
9 happens, you need to have some finding of fact in this action  
10 to allocate those damages. Now whether that's the best way to  
11 do it or not, I have no comment on that. Subsequent action  
12 has been suggested before, but my reading of those cases is  
13 that we need to do this in this particular action. Coupled  
14 with case law across the country, it seems to me that if any  
15 party opposes this motion or prevents allocation from  
16 occurring, they are then going to be the ones prevented from  
17 attacking a mixed verdict and if the burden stays with the  
18 insured, or the Plaintiff, the judgment holder, and they're  
19 the ones that prevented allocation and prevented the Court  
20 from being able to decide between covered and non-covered  
21 damages, then there won't be any recovery under the policy.  
22 The *Duke v. Hopp* (spelled phonetically) case, which was in the  
23 1970's, talked about a burden shifting and they talked about  
24 whether initially that the insured bears the burden of proving  
25 damages unless it's entirely controlled by the insurance

1 company. And then we fast forward to the Heritage decision in  
2 July of this year where they said if the insurance company is  
3 in complete control, then they need to allocate -- they need  
4 to take steps to allocate. Well, everyone here is in control  
5 of this. Everyone here will have a say as to whether or not  
6 this should be allocated and we submit that if people argue  
7 against it and oppose this and there is no allocation, the  
8 Court later may say we're not gonna allocate this because it's  
9 a mixture; we can't tell what the jury did.

10 I want to talk about how easy this is because in these  
11 construction defect lawsuits, the statement has been made that  
12 this is way too difficult for a jury to take and figure this  
13 out. I don't think that's true. I think in these  
14 construction defect cases, the jury comes in on October 16th  
15 and is gonna be told for the first time in their lives about  
16 lintels, about weep holes, about brick cavities, about  
17 fasteners, which I grew up calling nails, about flashing,  
18 about Tyvek, about building wrap, about roof wall  
19 intersections, about slope, about rowlock, about all these new  
20 terms, and they're gonna have one expert to say, we went and  
21 tested 20 windows and 15 of them were good and 5 of them were  
22 bad. Therefore, that's 20 percent, so there's 7,000 windows  
23 on the project. We extrapolate that. So, the jury is gonna  
24 have to guess. The Defense is gonna stand up and say it's not  
25 gonna cost 5,000,000 to fix this; it's gonna cost 300,000.

1 And, the jury is gonna have to estimate, based on estimations  
2 from other people, on very, very complicated issues. So, in  
3 this case, we have the Plaintiff, the Cypress Bend Homeowner's  
4 Association, they sued Centex only. They didn't sue any of  
5 the subs. So, Centex in turn sued the subs individually.  
6 Said if we lose, you're paying your portion, you're paying  
7 your portion, you're paying your portion, and down the line.  
8 So, the jury's already gonna say, if they have a verdict, if  
9 there's a verdict, the jury's gonna say X against Centex, and  
10 if Centex can say it's not from our supervision, not from our  
11 design, not from our problems, they're gonna pass that off to  
12 the subcontractors, and the jury's already gonna have to say  
13 -- for example, Martin Masonry, who I represent, or is the  
14 insured for the insurance companies that I represent --  
15 they're gonna have to say, okay, Martin Masonry, of that  
16 verdict against Centex, here's your portion. Why is it so  
17 difficult to take one more step? And I'm gonna hand up, I've  
18 already handed a copy to Mr. Hildebrand, a sample of -- of  
19 what I would think an interrogatory would look like and it  
20 would simply have the caption, the first line says answer only  
21 if you found damages against Martin Masonry; if you found no  
22 damages against Martin Masonry, stop and do not proceed  
23 further. Easy enough. Number two, if you found damages  
24 against Martin Masonry, list the total amount of damages on  
25 the following line and it said this should be the same number



1 in the former verdict sheet in the claim by Centex against  
2 Martin Masonry. We've already found that number. Now three,  
3 here's the only extra steps that we're doing, three and four.  
4 Divide the number in Item 2 into the following categories; the  
5 cost of removing and replacing the work of Martin Masonry, if  
6 you so find it needs to be removed; and B, the cost of  
7 repairing the portions of the building damaged by -- from the  
8 work of Martin Masonry. And it says C, just to remind them,  
9 the total of A and B should equal the damage number found in  
10 Number 2. And then another step would be for the damages in  
11 Line 3(b), these resulting damages, which would -- would be  
12 the property damage. Identify whether those damages are  
13 progressive and continuing today. Because a lot of experts  
14 will get up and say there's a leak in the roof; it's been  
15 leaking from day one and it's leaking today. Depending on  
16 coverage, they may argue different things. So, for the  
17 damages in Line 3(b), identify whether those damages are  
18 progressive and continue today, circle yes or no. And then if  
19 no, identify the date on which the progressive damages  
20 stopped. You got your time on risk period.

21 Now there will be other arguments, coverage arguments,  
22 but there's pretty much, they're legal arguments. You know,  
23 there may be a claim during trial of something that brings up  
24 an exclusion, we ask a question on an exclusion. But, you  
25 know, how many people are in the room, how many parties do we

1 have? We're probably talking about eight or nine of these  
2 sheets for a two-week trial where they're dealing with  
3 millions of dollars, dealing with extraordinarily complex  
4 construction issues and they're gonna be asked to figure this  
5 out in about three hours. So, I think that -- I think they  
6 easily can do it. The reason I think they easily can do it,  
7 is because I looked at the damage estimates -- and I've got  
8 one right here from Cypress Bend, and I'll flip yours over to  
9 the second page, and you can see item 3.03. This is an expert  
10 report that's already done and it says remove, replace the  
11 brick for repairs. Total cost 302,000, 720,000; it's already  
12 done. So for them to say, oh, this is gonna completely  
13 confuse everyone, we're not gonna be able to do this, it's too  
14 difficult, the experts don't have that evidence -- now as long  
15 as between now and then, they don't go and manipulate that  
16 evidence and move all that into a resulting damage category, I  
17 think we've got have some good faith in this case. So, I  
18 think it's a relatively easy process.

19 Now, I want to address why we are here, why we're at this  
20 point where we are in South Carolina jurisprudence.  
21 Typically, in any insurance policy, the insured, the person  
22 purchasing the policy, is responsible of approving that the  
23 damages being sought against them fall within the insuring  
24 agreement. So they have to approve occurrence, they have to  
25 prove resulting damage, property damage or bodily injury, and

1 they have to prove that it occurred during the policy period  
2 in order to trigger coverage. So, the cases in the country  
3 that I eluded to earlier, said, well, the insured might not be  
4 the best person to do that. The insured might not be the one  
5 to say, hey, I know you're paid by the carrier, you're doing  
6 your defense, how about let's apportion this, so I can figure  
7 out what's covered and what's not covered. I can tell you my  
8 share of what I have to pay. Because an insurance policy is a  
9 transfer of a portion of the risk in return for a premium.  
10 Some of the risks stays with the insured. Our supreme court  
11 had said repeatedly, removing and replacing your defective  
12 work, is not a risk transferred to the insurance company. So,  
13 but they, the Courts have said, well, if the carrier is  
14 handling everything, how are we gonna get that, that done.  
15 The carrier maybe needs to come in and do this. Well, I'm not  
16 so sure the burden shifts in this case, because we've got  
17 Centex, the national builder. Centex has a national council  
18 that does insurance coverage work. We have written insurance  
19 letters, reservation of rights letters, we have filed  
20 declaratory judgment actions. I filed a declaratory judgment  
21 action naming Centex, the party that sued our insured, and our  
22 insured in October -- October 26th of 2016, outlining all  
23 these issue in federal court and we've agreed to put that on  
24 hold while the state court actions are pending for the  
25 additional insured information.

1           Now in all of the other cases, because Mr. -- the party  
2           -- the Plaintiff's lawyers represent the other Plaintiffs in  
3           those cases, filed a cross claim for reformation. I filed a  
4           cross claim and counterclaim for allocation issues for all  
5           insurance coverage issues that you would typically see in a  
6           declaratory judgment action. So, everyone in the state that  
7           does construction knows about Heritage. The Plaintiffs'  
8           lawyers do, the Judges, defense lawyers, everyone. It's very  
9           difficult for anyone to say we're not on notice of what we're  
10          asking you to do today.

11          Now in the Heritage case, the law was evolving. We had  
12          some variations on whether a construction defect was an  
13          occurrence or not an occurrence, we had a couple of  
14          reservation of rights letters and that's all that was before  
15          the Court up until the time of trial and then a DJ action was  
16          filed. That's not what we have in this case. We have  
17          coverage lawyers, we have letters, we have DJ actions and we  
18          have this hearing today, which puts them on notice and if  
19          their answer is, we're not ready, even though their expert  
20          reports would seem to indicate otherwise -- if they say we're  
21          not ready and we need more time, we can give more time for  
22          them to go in and do this, but somebody needs to allocate  
23          this.

24          Now I did have one of the judges say, why are you  
25          intervening; you can't intervene; you can't intervene; you've

1 got to be a party; you have to -- you can't have limited  
2 intervention. If you're intervening, we're gonna put you in  
3 front of a jury -- we're not gonna let you do it. That's --  
4 that's not the limit -- that's not the only way to intervene.  
5 There are some cases and some of the other attorneys will talk  
6 about those cases, where limited intervention for specific  
7 issues that affect you. Now, if our supreme court didn't want  
8 us to intervene, I don't think they would've said what they  
9 said in Heritage, that we need to go ahead and have this  
10 allocation.

11 An insurance policy has two general obligations by the  
12 carrier in a broad sense. The first is the duty to defend.  
13 The second is the duty of indemnity. Indemnity is not  
14 triggered until there are damages found against you or  
15 settlement occurs and you owe the money. That has not  
16 happened yet in any of these cases, but that is the subject of  
17 the declaratory judgment actions that are pending or will be  
18 filed or referenced in letters and motions.

19 So right now, we only have the duty to defend. Our sole  
20 and distinct duty is we are defending our insureds. So if  
21 we're defending the insureds, how can the carrier come in --  
22 we're no different than some of the interested parties here,  
23 anybody on the street come in and start asking you questions  
24 because we don't have any other avenue to speak. So if there  
25 was rule, a new rule of civil procedure that said carriers

1 under Rule 98, can come in and ask to have allocation, we  
2 would go under that rule, but we don't have any other rule.  
3 The only rule that allows us to speak, that allows me to stand  
4 before you today that we can think of, is Rule 24 and we think  
5 we meet all of the provisions of Rule 24. We've put everybody  
6 on notice a long time ago. We made the timely motion prior to  
7 trial, we're only asking to participate in the jury  
8 instructions to ask for progressive damage instructions, your  
9 work, you know, those types of things, and then to submit  
10 something as harmless as a damage allocation sheet as the one  
11 that I proposed, which I'm sure everyone will have a comment  
12 and back and forth, but so that's a -- maybe a long way or a  
13 short way, given the complexity of these issues, of saying we  
14 believe the Court should grant our motion to intervene as a  
15 non-party for the limited purpose of participating in the jury  
16 charges and in the damage calculations through special  
17 interrogatories and we so move respectfully. Thank you.

18 THE COURT: And what did the supreme court say in the  
19 last case?

20 MR. CALAMARI: You know, they didn't say carriers shall  
21 intervene and participate, but they said carriers have the  
22 duty and responsibility if the burden shifts. Well, we won't  
23 know if the burden shifts until such time as in a later case  
24 when the Judge says, okay, I think you did enough or you  
25 didn't do enough. And if it does shift, and there's no waiver

1 involved, then they say, well we need to step in and have this  
2 allocation. But, I think they went a little bit further. You  
3 know, there was some confusion and there still is about  
4 whether the carriers are supposed to do this or the lawyer  
5 hired by the carrier to defend the insured is supposed to do  
6 it, or the insured is supposed to hire its own lawyer to do  
7 it. And they even went so far as to say in that specific  
8 situation, they said it's the exception, not the rule. But  
9 they found that the judgment holder had rights to recover and  
10 it said Harleysville had waived those rights by the -- by the  
11 reservation of rights letters and they said, therefore, they  
12 were gonna give rights, third-party beneficiary rights, to the  
13 Plaintiff in that case. So, if the Plaintiff has these  
14 rights, and I don't think the Plaintiff can sit on their  
15 rights and come back and say we oppose intervention, we don't  
16 think you can do it, it's not right, there's too many  
17 problems, too complicated, and then later say that's a mixed  
18 verdict, you can't go behind a mixed verdict. And then the  
19 carrier should be able to say, well it's a mixed verdict. We  
20 tried and you can't go behind the verdict now, so therefore  
21 there's nothing covered.

22 Thank you very much, Your Honor.

23 THE COURT: Yes, sir.

24 MS. HOGAN: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

1 MS. HOGAN: Can you hear me?

2 THE COURT: Yes.

3 MS. HOGAN: Okay. I represent Hartford Casualty  
4 Insurance Company. I am not gonna back and repeat what Mr.  
5 Calamari just presented to the Court. Hartford adopts Mr.  
6 Calamari's argument and his briefs.

7 I just have a couple of follow-up points for the record.  
8 Hartford issued policies to Carolina Drywall and we're  
9 defending under reservation of rights. We're also  
10 participating in the defense of Centex pursuant to a  
11 reservation of rights. So, I want to be specific in that  
12 Hartford's asking to submit, if the Court decides it's  
13 appropriate for a carrier to do so, special interrogatories  
14 with respect to any judgment entered against Carolina Drywall  
15 and/or Centex.

16 And to follow-up on a couple of points that Bob made and  
17 anticipate arguments that I have heard that Plaintiffs'  
18 Counsel may make, neither Hartford or, to my knowledge, any  
19 other carrier here today has sought to intervene as a party to  
20 the lawsuit and that's an important distinction that needs to  
21 be made. We don't want to be a party; we're not asking to be  
22 a party. We are asking for limited intervention and there are  
23 cases that support under South Carolina law, limited  
24 intervention. To further that point, we're -- we're -- Your  
25 Honor has broad discretion to determine the nature of an



1 intervention, whether it be limited or as a party, and perhaps  
2 equally important, the carriers do not believe it's  
3 appropriate and it will prejudice them and possibly their  
4 insureds if the jury were to be aware or know of our existence  
5 and that would definitely be the case if we were a party to  
6 the lawsuit.

7 Those are my only follow-up comments as to Mr.  
8 Calamari's ---

9 THE COURT: What are the primary cases again that permit  
10 limited intervention ---

11 MS. HOGAN: There are two cases ---

12 THE COURT: --- in the State of South Carolina?

13 MS. HOGAN: --- yes, that I found, Your Honor. The first  
14 is called *Stoney v. Stoney* ---

15 THE COURT: *Stoney v. Stoney*?

16 MS. HOGAN: Right. It's 417 S.C. 345.

17 THE COURT: It's pretty new, isn't it?

18 MS. HOGAN: Yes, that's a 2016 case. The other case that  
19 we've found, Your Honor, is *Davis v. Jennings*, 304 S.C. 502.

20 THE COURT: *Davis v.* ---

21 MS. HOGAN: *Jennings*.

22 THE COURT: --- *Jennings*.

23 MS. HOGAN: That's a 1991 case. Now neither of these  
24 cases pertain ---

25 THE COURT: I'm currently handling *Stoney v.* -- I don't

1 know if it's *Stoney v. Stoney* or some other brothers or ---.  
2 The case in general, not the family court, but the -- stemming  
3 from The Boat House Restaurant.

4 MS. HOGAN: Well, this -- this case pertains to divorce  
5 proceedings where the brother of, of the couple that was  
6 seeking ---

7 THE COURT: Well, I'm now handling it in the civil court.

8 MS. HOGAN: Okay.

9 THE COURT: Involving some of the same people. So, I  
10 need to read that one for sure.

11 MS. HOGAN: Right. The point of that case, there -- to  
12 my knowledge, Your Honor, there's no case law that talks about  
13 limited intervention in the context of what we're here to do  
14 today and that's -- I think primarily because Harleysville,  
15 too, came out in July. So, but both of these cases go to the  
16 -- go to the issue and in one case in *Stoney v. Stoney*, the  
17 Court did allow the brother to intervene because there was  
18 nobody in the lawsuit that could protect his rights.

19 THE COURT: The brother to intervene in his brother's  
20 divorce case?

21 MS. HOGAN: Correct.

22 THE COURT: All right.

23 MS. HOGAN: I think there was some dispute about business  
24 earnings and property.

25 So, in one case the court allowed the limited

1 intervention and in another case the court also allowed the  
2 intervention, but the intervenor became a party and the  
3 appellant court noted that the trial court judge not only had  
4 full discretion in deciding the level of intervention, but in  
5 this particular case, should have limited the intervention.  
6 So, my only point, Your Honor, is you may hear today from  
7 Plaintiffs' counsel or somebody, you have Centex that if we're  
8 going to intervene, we have to be a party and it's our  
9 position that's absolutely not the case and then there are the  
10 evidentiary concerns that we have that would result from the  
11 party -- from the carriers becoming parties, which would  
12 obviously would prejudice the jury, prejudice the insurers and  
13 the insureds if the juror were to be aware of the fact that  
14 there was (a) insurance coverage available, and perhaps (b) a  
15 dispute.

16 THE COURT: That issues seems to be coming up quite  
17 frequently involving settling parties even for setoff purposes  
18 and per of the joint tortfeasors statute. We're getting a lot  
19 of those issues being -- coming -- issues these days involving  
20 the rights of those who've already settled to participate  
21 somehow or another in the interrogatories to the jury.

22 MS. HOGAN: That's all I have, Your Honor.

23 THE COURT: All right.

24 MS. HOGAN: Unless you have any questions?

25 THE COURT: Thank you.

1 MS. HOGAN: I will pass the baton. Would Your Honor like  
2 a copy of the case law?

3 THE COURT: Yes, please.

4 MR. CALAMARI: There's three copies of each. I'm sorry  
5 about that.

6 THE COURT: Okay. Yes, sir.

7 MR. HUNTER: Your Honor, I'm Lawrence Hunter for BITCO  
8 General. We are also an insurer of Martin Masonry, such as  
9 the insurers that Mr. Calamari mentioned. I'd have very  
10 little to add to what's already been said other than to join  
11 in the relief that's been requested already and to repeat that  
12 we feel like we're here because we have to be under the  
13 Heritage Rule. We think it's, as Bob said, there's just too  
14 much jeopardy in us not making this motion that we feel like  
15 we have to do it. But, other than that, I'd have nothing else  
16 to add to what's previously been said.

17 THE COURT: So, does Phillip Thompson have standing to  
18 argue anything in this case? He said he was an interested  
19 spectator?

20 MR. CALAMARI: Yes, we would love to hear from him.

21 MR. THOMPSON: I don't think I care to respond to that,  
22 Your Honor.

23 THE COURT: All right.

24 Mr. Kennedy?

25 MR. KENNEDY: Your Honor, Bob Kennedy for Catalina

1 London. I just adopt the arguments of my esteemed colleagues.

2 Thank you.

3 THE COURT: All right.

4 MR. CROTTY: Your Honor, Brian Crotty, Liberty Mutual  
5 Fire. I have nothing to add. I join in all the arguments  
6 presented.

7 THE COURT: Okay. Yes, sir.

8 MR. HALDRUP: Your Honor, Neil Haldrup for Clarendon  
9 National, insurer for RWG, and I join in seeking the same  
10 relief as counsel that preceded us.

11 THE COURT: Yes, Ms. Locklair?

12 MS. LOCKLAIR: Your Honor, I believe that is -- that  
13 leaves it to me to argue against the motion to intervene.  
14 Again, Your Honor, I'm Laura Locklair here today on behalf of  
15 Centex Homes. I appreciate your time.

16 Centex is today arguing against the motion to intervene.  
17 Your Honor, I'm not a coverage attorney yet. There are, I  
18 think, six esteem legal minds to my single construction brain,  
19 but I will tell you the little bit I do know about coverage  
20 and the reasons that Centex thinks intervention would be  
21 inappropriate in this case.

22 Your Honor, Mr. Calamari raised Rule 24 with regards to  
23 the intervention, the standing to intervene. We would argue,  
24 Your Honor, that the carriers have no standing to intervene in  
25 this case. To have standing, one must have an interest in the

1 property or the transaction. Here the property in this case  
2 that we've been litigating now for three years, is the Cypress  
3 Bend Condominiums. That would be the property. Certainly the  
4 insurers don't have an interest in that. And the transaction  
5 that this case is about is the design and construction of the  
6 Cypress Bend Condominiums. The parties that are in the case,  
7 involved in those aspects of construction are the parties and  
8 have an interest in that transaction, we would argue that the  
9 carriers do not have that.

10 One case I would bring to your attention in that regard,  
11 Your Honor, is the *Government Employees Insurance Company*, 373  
12 S.C. 132. In that case, Your Honor, the carrier moved to  
13 intervene to dispute the existence of a common law marriage,  
14 effectively to present -- prevent stacking of insurance. The  
15 Court, in that case, concluded that there was no standing  
16 pursuant to Rule 24 because there was no interest in the  
17 property or the transaction. It was a financial interest, a  
18 tangential financial interest, which is what we would argue  
19 the insurers have in this case. It is a financial interest.

20 THE COURT: Tangential financial interest?

21 MS. LOCKLAIR: I'm not certain if that is the quoted  
22 language, Your Honor, but I'll certainly take a look at that  
23 and make sure I'm not misquoting. I believe the Court says  
24 that the interest is in the "financial implications of the  
25 family court's decision", which is peripheral to the subject

1 matter before the Court and so we would argue in this case,  
2 Your Honor, which is a construction defect case, the issues of  
3 who effectively has to pay for the damages is a -- an interest  
4 that is financial in nature and peripheral to the subject  
5 matter before the Court.

6 THE COURT: The GEICO case is another family court case?

7 MS. LOCKLAIR: I believe it is, Your Honor. It concerns  
8 again an automobile accident. The supreme court took that  
9 case up from ---

10 THE COURT: It's from 1999?

11 MS. LOCKLAIR: Yes, sir, the underlying family court,  
12 that's correct.

13 The other part of that Rule 24, Your Honor, is that a  
14 motion to intervene ---

15 THE COURT: Let's see who was on the supreme court in  
16 1999? How many of them are still living?

17 MS. LOCKLAIR: Well, I believe Chief Justice Toal wrote  
18 the opinion and I can see that Justice Pleicones was on the  
19 bench at that time as well. So, there may have been some  
20 turnover but we think that rule still remains and would  
21 preclude intervention in this instance.

22 THE COURT: It was Toal, Moore, Waller, Burnett, and  
23 Finney.

24 MS. LOCKLAIR: Sounds like a great group, Your Honor. I  
25 bet they sure knew what they were doing while they were there.

1 That would be our position.

2       The, the other aspect of intervening under Rule 24 that  
3 we would bring to the Court's attention is that the  
4 intervention needs to be timely. I'll address this a little  
5 bit more later, Your Honor, but we believe that the motion is  
6 not timely. At the outset of these cases, Your Honor, back in  
7 in 2014, we believe that the individual subcontractors put the  
8 insurance companies on notice of the claims against them. I  
9 can tell, Your Honor, that on behalf of Centex, I put the  
10 insurance companies on notice of actions both against the  
11 trades and then the action against Centex as an additional  
12 insured. So those were issued three years ago that the  
13 carriers were on notice of the issues in this case. Some even  
14 issued reservations of rights letters. So the existence of  
15 coverage, whether or not coverage was going to be there, and  
16 the allocation of damages has certainly been on the table for  
17 three years at least before a motion to intervene was even  
18 filed. So, if they wanted to intervene, Your Honor, we would  
19 -- we would argue that they should've done it long ago. At  
20 least then there could've been discovery to the extent they  
21 claim it needs to happen in this case, it could've happened in  
22 this case.

23       THE COURT: Well, one of the cases we did, the -- someone  
24 sat through the entire trial and -- for the purpose of wanting  
25 to participate in, in how the verdict form should be written



1 and that counsel was here representing a carrier and didn't  
2 file to intervene or at least announce to the Court why he was  
3 here and, in the end, he wanted to, you know, weigh in on what  
4 kind of verdict form the jury should get. And as I started  
5 listening to the arguments here, my first thought was this is  
6 premature. I thought we were here for motion hearings and  
7 we're here for a verdict form and we haven't had a trial. So  
8 ---

9 MS. LOCKLAIR: I'm right along with you here.

10 THE COURT: So, to think it would be ---

11 MS. LOCKLAIR: I'm with you, Your Honor and ---

12 THE COURT: --- but to think that of it not be timely ---

13 MS. LOCKLAIR: Well, I think there is -- there's a little  
14 bit of -- of both, Your Honor. If we could've sorted these  
15 issues out three years ago, that would've been a great time to  
16 do it, even four months ago when these motions were filed,  
17 before our motions hearing that we had on May 17th. But,  
18 given that they were not sorted out, we would agree with Your  
19 Honor that determination today is premature. So, you're just  
20 beating me to my punch at the end.

21 THE COURT: Oh, when you say timely, you don't mean late,  
22 you mean early. I thought you meant it was too late since you  
23 they had been on notice for three years.

24 MS. LOCKLAIR: I have uncanny ability to speak out of  
25 both sides of my mouth, Your Honor, so -- I have been told

1 that before. But as far as filing the motion, the filing of  
2 the motion was untimely. Should, should the motion, the  
3 application for intervention, if it was going to be filed, we  
4 would argue it should've been filed, you know, at the outset  
5 when the carriers were put on notice of the case. Now that it  
6 has come before the Court for a determination, we believe  
7 there are issues given the procedural posture of the case and  
8 where we are now that would counsel against making a decision  
9 here today given, again, where we are in this case.

10 One other case that I would point Your Honor to is in the  
11 Sims case. That would *Sims v. Nationwide Mutual Insurance*  
12 *Company*, that's 247 S.C. 82. I think, Your Honor, that case  
13 presents some issues that are applicable here. So, that was a  
14 car wreck case where the insurer moved to intervene to put  
15 into evidence at trial that its insured's actions were  
16 intentional. So if that evidence comes in, certainly it would  
17 reduce the amount of coverage available to the insured and the  
18 court there ---

19 THE COURT: It would eliminate coverage if acts were  
20 intentional

21 MS. LOCKLAIR: Absolutely and, and so where -- in that  
22 case, the court concluded that whereas here the interests of  
23 the insurer and the insured or the client, are in conflict,  
24 intervention would be inappropriate. So here we are having  
25 attempted intervention and special interrogatories that are

1 being offered to reduce or eliminate completely the coverage  
2 that would be available to the insured. So I think that ---

3 THE COURT: How does it do that? Tell me how -- what do  
4 you mean?

5 MS. LOCKLAIR: Sure. So, if we look at Mr. Calamari's  
6 special interrogatories here -- and you're asking me to put on  
7 a coverage hat and argue for him and so I'm gonna try and do a  
8 bad job when I do it. But, the, the special interrogatory in  
9 3(a), the cost of removing and replacing the work of Martin  
10 Masonry. The interest of the carriers are such that they  
11 would -- be encouraged to make that number greater. That  
12 would be an uncovered damage. Whereas the costs to repair the  
13 portions of the building damaged by the work of Martin  
14 Masonry, I believe the carriers would want that to be a  
15 smaller number as that is a covered damage. That would be the  
16 exact opposite of the interest of Martin Masonry. For Martin  
17 Masonry's purposes, it wants more of the damages to be covered  
18 than not covered. So, I, I think this sample interrogatory  
19 kind of highlights for us a little bit why the intervention in  
20 this case and the special interrogatories would be  
21 problematic.

22 THE COURT: But as it relates to Centex, how does it -- I  
23 guess your argument is that it prejudices you some type of  
24 way?

25 MS. LOCKLAIR: Yes. Yes, Your Honor. Well, certainly

1 Centex is in the interesting position here, too, of being an  
2 additional insured on policies issued to Martin Masonry. So,  
3 you know, to the extent that the carriers take the position  
4 that Centex would only be covered to the extent that Martin  
5 Masonry is covered, that could be prejudicial to Centex as  
6 well. That point Centex does not concede.

7 And what the Court in Sims said is, is you can bring a  
8 separate action to determine these coverage issues. And  
9 again, I'll get to this in just a moment, but we would submit  
10 to you, Your Honor, that the DJ provides an opportunity for  
11 the carriers to do that. They don't have to bring a separate  
12 action; we already have one that, that has been filed. So,  
13 those are ---

14 THE COURT: I'm looking -- that's 1965?

15 MS. LOCKLAIR: Yes, sir. Yes, sir. Good cases stay  
16 around for a long time, right, in this case?

17 Your Honor, I would also argue that there are some really  
18 practical reasons why intervention in this case would be  
19 problematic and should not be the case. You heard Mr.  
20 Calamari talk about the issues that are going to be before the  
21 jury in this case. This case has already been designated by  
22 the parties and the Court as a complex construction case. The  
23 issues before the jury are already difficult. I've been at  
24 this for seven years, so, you know, talking about flashings,  
25 and building wrap, and fasteners, and roof-to-wall

1 intersections, those are going to be issues that will be  
2 confusing to the jury and that the attorneys have worked now  
3 for three years to try and suss out during discovery.

4 THE COURT: Do you believe it's also -- the issues are  
5 confusing to the supreme court?

6 MS. LOCKLAIR: I would not -- I would not presume to --  
7 presume to determine that.

8 THE COURT: Well, if you take the, what year was Heritage  
9 tried? Mr. Thompson?

10 MS. LOCKLAIR: I may phone a friend on that, Your Honor.

11 THE COURT: What year was it?

12 MR. THOMPSON: 2003 was the construction case. 2009 was  
13 the DJ case.

14 MR. CALAMARI: 2009 is when it was tried. They're both  
15 tried -- the two cases in Heritage were tried in 2009.

16 THE COURT: All right.

17 MR. CALAMARI: The DJ action was tried the first time in  
18 2010, and then because of a supreme court change, we waited a  
19 year and tried the second part of it in 2011.

20 THE COURT: And how many revisions or how many times has  
21 the supreme court said something different about it?

22 MR. CALAMARI: There were lots of back and forth which  
23 lead to a lot of problems with Mr. Thompson and I in that  
24 case, yes, different, different issues.

25 MS. LOCKLAIR: The ---

1           THE COURT: The reason I'm asking the question with all  
2 of this including the years of the cases and, you know, you've  
3 given me one from 1965, from 1999, then the progression  
4 through with the supreme court and what seemed to be, you  
5 know, their -- you know they continue to write opinions about  
6 the same case as -- it all seems to be evolving so much and, I  
7 don't know, is it at a point where the law is now settled or  
8 not settled or, or are they grasping for -- not grasping for  
9 straws, but the question is as Mr. Thompson argues, the trial  
10 court should have a role in trying to help sort this out so  
11 you don't get so many opinions or at least you get a -- at  
12 least someone gives them some basis to make the appellant  
13 court's job a little simpler as opposed to them continuing to  
14 issue opinions and write about it and they weren't in the  
15 trial court. I mean, they weren't here to listen to any of  
16 the facts.

17           MS. LOCKLAIR: I certainly understand that, Your Honor,  
18 but permitting intervention would create, I think, just as  
19 many, if not more, issues for the appellant court as  
20 prohibiting it in this instance. Giving the ability to  
21 intervene would also, you know, give rights and standing. If  
22 the carriers are contending that they have standing to  
23 intervene along with those rights and standing would  
24 potentially confer a right to appeal if they felt that the  
25 court didn't ask the right special interrogatory, asked too

1 many, not enough, disclose something to the jury that they  
2 shouldn't have. Or, if there is another error, that could  
3 result in reversals and retrials and it's, it's my  
4 understanding that -- that something similar may have recently  
5 occurred before Judge Harrington and that there is a matter on  
6 appeal concerning or an appeal has been filed concerning  
7 intervention in a case before Judge Harrington.

8 THE COURT: That's not her windows case, is it?

9 MS. LOCKLAIR: I'll be honest with Your Honor, I have no  
10 idea.

11 THE COURT: The one where the windows expert or someone  
12 was -- it was one of Judge Harrington's. Do we have a windows  
13 person here today? I think it was Anderson Windows. It's not  
14 that one though.

15 MS. LOCKLAIR: So certainly, Your Honor, I think  
16 permitting intervention may create just as many issues for the  
17 appellant court and prolong this case.

18 THE COURT: So your view generally is that the jury can  
19 decide all the issues, whatever they are, in this case or that  
20 they're just to determine the general damages, what existed  
21 without special interrogatory forms to ---

22 MS. LOCKLAIR: I think the jury is ---

23 THE COURT: --- to narrow it down as requested by Mr.  
24 Calamari or -- I'm just trying to understand.

25 MR. HILDEBRAND: May I ---

1           THE COURT:   Sure.

2           MR. HILDEBRAND:   --- this, Your Honor?  I don't usually  
3 like to double-dip, but ---

4           THE COURT:   That's okay.

5           MR. HILDEBRAND:   Listening to what Mr. Calamari said and  
6 knowing how these cases are kind of going, it is very  
7 confusing, and I'm kind of conflicted about how they should  
8 proceed.  And, I'm in a quandary somewhat because I know that  
9 in at least one case, or I'm told, that where a Judge denied a  
10 motion to intervene, the carriers immediately appealed and  
11 then everything has to be stayed.  So, everybody was ready to  
12 get tried to try the case and, on the eve of trial, it got  
13 appealed and who knows when it's gonna be tried.  So, in one  
14 instance, I would want you to reserve judgment until we find  
15 out who's actually in the case when we get ready to try it  
16 because we might be arguing a moot point.  But on the other  
17 hand, as I'm sitting here listening to the arguments, what I'm  
18 thinking is, maybe we need to think a little bit out of the  
19 box and do this a little bit differently.  Mr. Calamari says,  
20 look we don't want to -- we don't want to be in the case; we  
21 don't want to argue to the jury; we don't want to be a named  
22 Plaintiff.  Well, then maybe what we should do if you're  
23 inclined to grant the motion to intervene, say, look, I'm not  
24 going to adversely affect the Plaintiffs' right to put on the  
25 case like they want to so that they don't have to introduce



1 evidence of this is consequential, this isn't consequential;  
2 they can put it on like they want to. I, representing Centex,  
3 can defend the case like I want to without having to argue  
4 these insurance issues and then have the jury come back with  
5 the usual verdict form and then they fill it out and we find  
6 so much. And then after that, hold the jury and say, okay,  
7 now you're gonna hear evidence from the Plaintiff's -- if they  
8 find that there are damages, you're gonna hear evidence from  
9 the Plaintiff's attorney about what might comprise those  
10 damages and you're gonna hear evidence from Centex as to how  
11 -- what goes into those damages, and then you will return a  
12 separate verdict as to each one of these people.

13 Mr. Calamari says he doesn't want any part of the case,  
14 so I -- my, my suspicion is, they're not gonna like that  
15 verdict because I think that Mr. -- that Mr. McCutchen is  
16 gonna argue there's a lot of consequential damages; I think  
17 that we're gonna argue that it's basically all consequential  
18 damages that isn't covered, but if taking them at their word,  
19 if that's what they want, then I would say okay, let them  
20 intervene, if you're inclined to do that. They don't say  
21 anything during the trial, we get a verdict, and then I don't  
22 think that their defense counsel can argue that, hey, this is  
23 only consequential and that's not consequential because I  
24 think that puts them in the conflict position and would put  
25 him in, in a very squeamish position relative to his insured

1 trying to argue that. But, if that's what they want, I say  
2 let the jury come back and then let the Plaintiffs argue and  
3 let Centex argue as to how the verdict that they returned, how  
4 those damages should be issued and then they would have to  
5 live with it.

6 THE COURT: But after they've been here a week or a week  
7 and a half, whatever period of time it takes, then -- and  
8 they've come back with a verdict, then I say wait a minute, we  
9 have more work for you to do. How long would that second  
10 phase take to get them -- to get that to them?

11 MR. HILDEBRAND: I don't see any other way to do it  
12 unless we ---

13 THE COURT: Depends on -- how long would it take?

14 MR. HILDEBRAND: I think it would be pretty -- I think  
15 that that part would be pretty simple, because I think that  
16 everybody would have the same interest. I think Luther and I  
17 would both have the same interest. Call probably one expert,  
18 their expert or mine, and say how much of answering this  
19 question, what do you think the cost of repairing the portions  
20 of the building damaged by the work of Martin Masonry is and  
21 have the expert testify about it. I think that we would agree  
22 on it and I'm guessing that it would be fairly quick. It's  
23 not a retrial of all the issues; it's just hearing a couple of  
24 experts opine on those issues and I think it would be largely  
25 unopposed. But I don't see any other way to get around this

1 unless, if you do move to allow the intervention, then Mr.  
2 McCutchen, because he wants to find coverage obviously, and  
3 Centex wants to find coverage for its subs, I would be forced  
4 into the position of introducing all that evidence in the  
5 normal trial that I normally would not because I just -- a  
6 general verdict is returned, so I would then have to change  
7 the way I'm trying the case. Mr. McCutchen would have to  
8 change the way he's trying the case to have -- and the jury is  
9 gonna be saying why are they -- what is up with this? But,  
10 he's gonna have to get his -- if you rule that they need to  
11 intervene, I think he's gonna have to get his expert on there,  
12 put a up a big chart and say, okay, here are the costs to  
13 repair, here's what -- expert, can you tell me the costs of  
14 repairing the portions of the building damaged by the work of  
15 Martin Masonry? And then you would highlight that on the --  
16 on the form and then I think Centex would need to do the same  
17 thing in order for the jury to answer those questions. It  
18 would change somewhat the way the case is tried. Maybe it's  
19 workable. Maybe another way to do it is at the end, like I  
20 suggested but, as I'm thinking about it, I'm not so sure that  
21 the results of that might favor coverage.

22 THE COURT: All right.

23 Mr. McCutchen?

24 MR. MCCUTCHEN: I just -- Your Honor, I'm agreeing -- I  
25 have a job to do; prove my case, get damages. That's what it

1 -- what's occurred -- what's happening here is a re-alteration  
2 of how the case is tried. Is what -- my job is X, to do X and  
3 Y, and then if you're gonna have all these players putting --  
4 and I sued Centex, Your Honor, so, and Centex sued everybody  
5 else, but the flavor of the game is changing. And what I have  
6 to do to prove my case based on duty, breach, liability,  
7 damages, I mean, that's what I'm gonna do. And then I prove  
8 -- that's what I'm trying to prove at the end of the day, and  
9 then all these other matters are coming in, which I think  
10 alter how the case is being tried and how it unfolds.

11 One other point, 3.03 that he gave you, I think that's  
12 the Watkins' estimate. That's the defense number at the end  
13 of the day; that's not my number. So, what you're looking at  
14 is a piece of the defense.

15 Your Honor, this is -- I -- I'm frustrated because I -- I  
16 don't know how this changes the game for me or any other  
17 Plaintiff's attorney on how we prove the case. What do we do?  
18 Do we have to modify it inside a new box where there are gonna  
19 be countless interrogatories that they're gonna try to respond  
20 to while the case is being proven. And I'm sorry, I just  
21 wanted to put that in there, Your Honor.

22 THE COURT: All right.

23 Ms. Locklair?

24 MS. LOCKLAIR: Yes, thank you, Your Honor. I think that  
25 Your Honor asked how much -- how long it would take to, to

1 address these coverage issues after the fact, after the  
2 initial verdict is determined, and I would certainly argue,  
3 Your Honor, it wouldn't take any longer to do it then that it  
4 would have during the case in chief. So, certainly we  
5 wouldn't be asking the jury to stay any longer; it would just  
6 be at the end rather than in the beginning.

7 THE COURT: They're just usually ready to go once they  
8 reach their verdict ---

9 MS. LOCKLAIR: I can -- I can imagine we will all be  
10 ready to go at the end of it, Your Honor. But it does inject  
11 more complexity as Mr. Hildebrand and Mr. McCutchen eluded to.  
12 It injects -- and the burden shifts then to -- to the  
13 Plaintiff and to Centex to argue for the carriers who are not  
14 in the case what those coverage issues are. There would be  
15 multiple carriers for multiple parties, different types of  
16 coverage, policy periods from 2000 to 2017 potentially. Then  
17 you're dealing again with obligations to direct insureds, the  
18 Martin Masonry's and then to Centex as the additional insured.

19 I raise also, Your Honor, the potential for inconsistency  
20 here. While the carriers were able somewhat to condense their  
21 arguments before Your Honor here today, I don't think there  
22 was any agreement on the intervention. Some carriers have  
23 moved to intervene, others may not. I don't know that there  
24 is an agreement to be bound by the factual determinations  
25 requested. The special interrogatories, some want it to say

1 one thing, some may want it to say the other. And I think one  
2 other point, Your Honor, I'd like to make about -- about all  
3 of this, and confusion to the jury, and the potential for  
4 inconsistent verdicts is, there's even been a request that the  
5 jury not be told why it's making these determinations. So, in  
6 a vacuum, you're asking them questions about is damage  
7 progressive, when did it start, when did it stop, what's  
8 covered, what's not, and I think ---

9 THE COURT: Well, they can't be told the insurance  
10 company wants to know.

11 MS. LOCKLAIR: Well, I, I, I agree. Certainly, that,  
12 that creates problems for all of us. But, the jury certainly  
13 will speculate during the case in chief, if those issues are  
14 presented to them. And again, Your Honor, I would take us  
15 back to the fact that the carriers here are not without  
16 recourse. The, the case, the construction defect case that is  
17 going to be argued before you in two weeks will create a  
18 record. Many of the -- the issues will be discussed and  
19 addressed and the carriers are permitted then in the DJ action  
20 to evaluate that, to discuss the coverage that they've had  
21 discovery on in that case, issues of damages, exclusions, the  
22 propriety of policies. Again, the ethical concerns have been  
23 raised as an issue, the ability of defense counsel to protect  
24 the interests of their client and being hired by the insurance  
25 company. I think that's particularly important here, Your

1 Honor, where we have at least two defendants that the  
2 principals are deceased or not present in the country. So you  
3 have entities that are not going concerns, where counsel has  
4 been appointed by, by the carriers.

5 So for those reasons, Your Honor, we would argue that  
6 intervention is inappropriate in the case. If Your Honor is  
7 inclined to, to take this issue up and rule on the  
8 intervention as Mr. Hildebrand mentioned, we would counsel  
9 that Your Honor take this under advisement up and to the time  
10 of trial as we may be dealing with different parties,  
11 different carriers. Some of these folks may fall out. We are  
12 trying very hard to get this off your docket before October  
13 16th.

14 THE COURT: Do you have more mediations scheduled or is  
15 this it?

16 MS. LOCKLAIR: We are continuing to work with the  
17 mediator, Mr. Elmore has been diligent about working with all  
18 of us, albeit remotely to get that done. And again, if Your  
19 Honor is inclined to make a ruling on this motion either today  
20 or at the outset of trial, we would request that if  
21 intervention is granted and special interrogatories, verdict  
22 forms, or instructions are given, those be given after the  
23 jury returns its normal verdict.

24 THE COURT: Well, just the issue that the supreme court  
25 in many cases, seems to be harping on that the trial court

1 didn't make findings or the record below is inadequate for  
2 them -- for them to make -- do a proper appellant review. So  
3 it seems as if Mr. Calamari is saying that it's incumbent upon  
4 the trial court or at the time of trial to have things such as  
5 this determined. Is that ---

6 MR. CALAMARI: Yes, Your Honor, and I have a couple that  
7 I would like to respond to.

8 THE COURT: Okay. Before you respond, I just want to ask  
9 Mr. Parker back there. Are you in on this issue? I know you  
10 all probably see this out in Las Vegas or some other state  
11 somewhere. Tell me about your thoughts.

12 MR. PARKER: We have seen this, Your Honor. This is --  
13 it's problematic from the Court's position, because I believe  
14 that doing it the way Mr. Hildebrand suggested brings into  
15 question a second trial which requires experts who have not  
16 particularly prepared their reports to distinguish between  
17 consequential and resulting damage from -- as well as looking  
18 at time periods in terms of commencement of damage. They've  
19 not prepared those reports that way. So, what typically  
20 happens when something like this is allowed in the last two  
21 weeks of trial where case is now, we're trying to prepare our  
22 experts to be able to address those concerns. So, I  
23 understand what Ms. Locklair saying and Mr. Hildebrand is  
24 saying in terms of preparation, but I also have seen it on the  
25 backend, and I quite rather be involved up front than have to



1 deal with this on the appeal side. So, I agree with what's  
2 being said in terms of having it ferreted out from the  
3 district court or the trial court perspective first. That way  
4 you give the appeal court something to actually deal with,  
5 with findings of fact and conclusions of law. So that would  
6 be -- unfortunately, that would be my preference because I'd  
7 rather deal with it here than deal with it on the appellant  
8 side, but I do agree with Mr. McCutchen and Mr. Hildebrand  
9 that to have our expert prepared to do it in two weeks would  
10 potentially put this jury in a position where it's trying the  
11 case twice.

12       What will happen -- I know that they're trying to  
13 compartmentalize how the case would be handled, but what would  
14 happen is we'd put on the trial the way it's already prepared.  
15 Then, if we put in the second step or bifurcated type version,  
16 Your Honor, we would have to actually have perhaps homeowners  
17 come in and say, when did you first notice any problems,  
18 because that's tricky and that may be done through some type  
19 of, of annual reserve study they may've done as homeowners  
20 association, or it may be someone having some problems they've  
21 seen on the inside of a window sill. So, we would necessarily  
22 have to have some witness on the stand to give us some context  
23 of the when the issues began and then, after that, have our  
24 experts come in and perhaps self-servingly from each of us  
25 individually, say I believe that it's all consequential, is

1 all resulting damage because as the defense attorneys we want  
2 it to be covered. And so that's the problem you're faced  
3 with, Your Honor.

4 I think if you're looking at, if you do it the way Mr.  
5 Hildebrand is suggesting, you're looking at potentially  
6 increasing the length of the trial by at least a third because  
7 those experts and potentially lay witnesses will be called in  
8 to set up trigger dates and then consequential damage dates  
9 and that's the concern I would have if I was sitting with Mr.  
10 Hildebrand's chair, Ms. Locklair's chair and I do agree with  
11 Mr. McCutchen that he didn't prepare his case that way and no  
12 plaintiff's attorney does. They want the general decision,  
13 they want the general verdict because they don't have to  
14 ferret out covered from uncovered. So the only way I think  
15 the Court can do it to manage the concerns from both the  
16 appellant standpoint and from the trial preparation standpoint  
17 is you have to make a decision first that gives everyone  
18 enough time to prepare their case. And, if you do it in a  
19 bifurcated manner, if you require the Plaintiff to be able to  
20 put on -- you allow us to put on the Plaintiff's lay witness  
21 testimony to establish dates which, of course, the insurance  
22 companies would like to know.

23 Those are the balancing act that we ---

24 THE COURT: All right. Anyone else?

25 Yes, sir, Mr. Manos?

1 MR. MANOS: Your Honor, Teddy Manos for RWG, Inc.

2 One other issue that I'd bring up just for the Court's  
3 consideration, Mr. Parker, on behalf of Stock Building Supply,  
4 has made a motion to bifurcate Centex's claims against Stock.  
5 I represent RWG. I'm going to be making one of my own. In  
6 this case, the way it has been discovered, Plaintiff's expert  
7 has basically testified generally that there are deficiencies  
8 and damages flowing therefrom and that those are the  
9 responsibility of Centex.

10 Centex has then brought third-party claims for breach of  
11 contract, negligence, warranties, and contractual indemnity.  
12 Their expert, Richard Moore, has testified to certain things.  
13 There is going to be argument to Your Honor that there should  
14 be a bifurcation of those third party claims by Centex. As  
15 this case procedurally sits now, you've already got, if it all  
16 gets tried together, one main trial where Luther is trying to  
17 prove liability against Centex, that's the developer, general  
18 contractor, and seller. And then you've got a trial or a  
19 bunch of mini trials within the underlying trial where Centex  
20 is gonna have to put up different evidence to show that all  
21 the subs breached their contracts, were negligent, breached  
22 warranties which is different evidence. So, that is a  
23 consideration when Your Honor decides to consider this motion  
24 to intervene. About how complex all this is; that's another  
25 issue that I think Your Honor, I hope, will consider when

1 making his decision.

2 THE COURT: All right.

3 Ms. Locklair?

4 MS. LOCKLAIR: I would just like to add, Your Honor, that  
5 I think a lot of these issues are created in the record or  
6 will be addressed in the record. Mr. Parker pointed out that  
7 -- that there would be a need to submit an additional witness  
8 to say when damages began, a Representative of the HOA to show  
9 the first time that damages were observed. I think a lot of  
10 those -- those may be witnesses that we call in the case in  
11 chief to establish a statute of limitations or other defense.  
12 So it's not as if these issues don't get addressed during the  
13 trial of the construction defect case anyway and I would echo  
14 Mr. Manos' point about the complexity of the issues before the  
15 jury.

16 Thank you.

17 THE COURT: All right.

18 Mr. Calamari?

19 MR. CALAMARI: Thank you, Your Honor. I just want to  
20 point out a few things that Mr. McCutchen and Mr. Hildebrand  
21 mentioned. To say that we just want this general verdict and  
22 our plan is just for this general verdict, I think you have to  
23 prove damages for every dollar that's being recovered. I  
24 don't think you can walk into the courtroom, stand up in front  
25 of the jury and say, they were wrong, give me \$6,000,000. In

1 order to award any damages at all, you have to prove  
2 liability.

3 THE COURT: We just did a trial this morning in Kingstree  
4 and I just told the jury that the, of course it's a negligence  
5 case, but you don't have to prove damages to a mathematical  
6 certainty. Of course that's an injury case.

7 MR. CALAMARI: Yes.

8 THE COURT: Personal injury case.

9 MR. CALAMARI: Yes.

10 THE COURT: You're saying they do have to ---

11 MR. CALAMARI: They do, and, and Mr. McCutchen brought up  
12 -- I'm sorry I didn't hand it up but if you don't mind, I'd  
13 like to hand up his expert report and I highlighted a section  
14 there that has brick veneer, so -- and he goes per building  
15 So per building, he's already done this. He's got to do this.  
16 They have got -- I'll use Martin Masonry as an example. You  
17 cannot win against Martin Masonry, unless you say their work  
18 is wrong. You have got to show that they didn't meet the  
19 code, they didn't meet the industry standards that they --  
20 that their brickwork was bad and as a result of that brick  
21 work there are other damages and your global repair costs --  
22 because Mr. McCutchen doesn't care about coverage issues  
23 against Centex. He feels like he can get it all, so he wants  
24 everything. So, he is asking by his expert report and by the  
25 Defense expert report, they are both asking for numbers that

1 include a mixture of repairing the defective work, removing or  
2 replacing that the defective work, and fixing any damage that  
3 resulted from that. So they have got to do that already. So  
4 when they stand up and say, oh, we have to have trial and it's  
5 gonna be a third as long and we have to do it after the jury  
6 comes back and now we've got to put on all this new evidence.  
7 They won't put on any new evidence. They might put on  
8 different evidence. They might have their experts come up and  
9 say, you know when I asked to replace or repair the brick for  
10 380,000, let's move that into the resulting damage category.  
11 And in our motion, when you said that would be disingenuous  
12 and you're not permitted to do that. I think in our motion we  
13 said they're not allowed to stand up in front of the jury for  
14 the special interrogatory and say, you're gonna get a special  
15 interrogatory, please put all the damage in this box. You  
16 can't do that because it's got to be based on the evidence  
17 before them. You can't argue in a -- in a closing argument or  
18 an opening statement that the evidence that you saw was X, but  
19 I want you to put it all in this box, because that's not fair  
20 and I don't think that will hold up in a coverage action  
21 afterwards if they do such a thing. I don't think that we can  
22 have a trial and then a second trial where the only people  
23 that speak stand up and say, put it all in this box, put  
24 everything here in consequential damages, therefore, now it's  
25 all covered. I don't think that's gonna hold up. That's

1 gonna create a lot of appeals and problems in that subsequent  
2 action. They've got to be honest. To some extent, you've got  
3 to be honest in front of a jury. You can't say a big chunk of  
4 our damage is removing and replacing the brick. However, when  
5 it comes time to fill these boxes, please put it in this one,  
6 wink, wink, we know why. The jury is not gonna know why, but  
7 we do not want a second phase trial. I don't think the  
8 supreme court in this state talks about second phase trials.  
9 They talk about having the jury answer these questions. And  
10 maybe another line to that is, can you answer this question?  
11 No. And then maybe we all go and we do it in a subsequent  
12 action. I don't know, but it's a pretty simple process and  
13 I've handed you both expert reports that they've got to have  
14 their expert testify to that and they've got to say the work  
15 was improper and it costs this to remove it and this to  
16 replace it properly and then, as a result, it costs this much  
17 here.

18 Now, the comment Mr. Parker made about well we'll have to  
19 call homeowners and find out when they first noticed this  
20 damage. That's not time on risk. Time on risk is the expert  
21 standing up there, and our supreme court said it in the  
22 Crossman case that the way to do this is 30 days after CO and  
23 the day of the verdict unless they can find something else.  
24 Unless they can say, the expert will say this defective  
25 condition existed at the time of construction. We found water

1 infiltration -- it's reasonable to believe that water  
2 infiltration happened at the first rain event and that first  
3 rain event was probably within the first 30 days. So that's  
4 when water intrusion started; there's your start point. Your  
5 end point is whenever the damage did -- whenever the damage  
6 stopped. So if it hasn't been fixed, it's continuing through  
7 the date of the, of the trial and that's the question on  
8 there. And if the jury says no, this damage, you know,  
9 something came along and plugged the hole, it completely  
10 washed it all away -- whatever it is they say, we believe the  
11 damage happened earlier and they're -- that one is going to be  
12 difficult, but there's evidence. The experts are gonna  
13 testify, but they've got to testify as to liability and  
14 liability is improper work, which is not a covered loss.  
15 They've got to give a damage figure for that and they've got  
16 to give a damage figure for resulting damages.

17 THE COURT: So, if you're allowed to intervene, what  
18 would you and Hartford and what's the other ---

19 MR. CALAMARI: BITCO.

20 THE COURT: --- and BITCO, what would you all do during  
21 the trial?

22 MR. CALAMARI: We would monitor the trial, we would pay  
23 attention and at the end, we would say, Judge, we'd like you  
24 to charge on progressive damage, we'd like you to make a  
25 charge explaining to the jury the difference between the



1 insured's work and the damage that happens after. You don't  
2 have to call it property damage, you call it resulting damage  
3 or different damage, and then submit interrogatories very  
4 similar to what we asked and the jury goes back and maybe add  
5 a line, can you do this. If the answer is no, stop. If the  
6 answer is yes, fill in those blanks. But they've got to put  
7 that evidence in. Mr. McCutchen can't stand up there and say  
8 this place is a disaster, give me \$6,000,000, and Mr.  
9 Hildebrand can't say this was awful -- and if they do that,  
10 they can't get a verdict; they can't get anything. So it's  
11 already in there. So to say let's find out if there's a  
12 verdict and then we'll stand up and put it in a different box  
13 -- I just don't think that's the result at all. Thank you.

14 THE COURT: All right.

15 Mr. Hildebrand?

16 MR. HILDEBRAND: Your Honor, if I may?

17 THE COURT: Yes, sir.

18 MR. HILDREBRAND: I disagree completely. Mr. McCutchen  
19 just has to prove his damages and ask the jury to return a  
20 verdict for whatever damages and it's always a general  
21 verdict. He doesn't have to stand in front of the jury and  
22 say, okay, now this is the cost to repair, this is  
23 consequential damages, these are that, and this is how it's  
24 all broken out. He can make that argument, but they -- he can  
25 lump it altogether and he doesn't have to have his expert say

1 this is -- answer these particular questions and put in  
2 evidence to it. So, what I would suggest, if we're required  
3 to do that and if he is asking you to ask the jury to answer  
4 those questions, then of course, I'm going to -- if I know the  
5 jury is gonna be answering these questions, I've got to change  
6 the way that I try the case to say, okay, jury, normally I  
7 would just argue against all the damages and have our expert  
8 say that the cost to prepare is very minimal as for these few  
9 issues and this is it. If I've got to answer all those  
10 questions, then I'm gonna have to go through with the  
11 Plaintiff's expert and say, okay, now break out -- let me put  
12 this big chart in front of you and of all these damages, can  
13 you tell me how much would be consequential and all this. I  
14 don't want to try the case that way. That's not what I want  
15 -- how I want to flavor this to the jury. The same with my  
16 expert, I would just have him fairly simply say, the damages  
17 are limited, the costs to repair is this. If I've got to go  
18 the second mile and have the jury answer all these breakouts  
19 and that's what he's asking for. He doesn't want a general  
20 verdict. He wants it all broken out and he wants the jury to  
21 answer all these things broken out. If they're gonna answer  
22 that, then I've got to put on evidence for them to do that and  
23 I'm gonna have to change the way I put up my case to have  
24 them, if you find this, jury, here's what the blanks would be.  
25 It messes up my case. So what I would simply suggest is if --

1 have the jury come back with the general verdict and then I'm  
2 not saying that there's any disingenuousness on my part, but  
3 it is -- there would be some argument as to what is the costs  
4 of repairing portions of the building damaged by the work of  
5 Martin Masonry. I mean it's -- I can ask -- maybe it is just  
6 a factual question that we ask an expert and have him ---

7 THE COURT: Well, it seems to me as if I'm being asked in  
8 a sense to determine the verdict form in advance of the trial.  
9 Mr. Calamari says they'll monitor the trial and then weigh in  
10 at the end as to what the jury should be asked to decide. And  
11 we are a month -- a month out from the trial. I have no clue  
12 how the verdict form will end up looking. It's generally  
13 determined based on the evidence presented at the trial. Mr.  
14 Manos says, well, this is real complex and, of course, I  
15 haven't heard the -- these motions for bifurcation and all,  
16 but we all know that it's complex. That's why most of these  
17 cases are, are resolved because in some instances, they're too  
18 complex to try or to reasonably try. So, of course, the  
19 complex -- the complexity of it weighs on you all who have to  
20 try it. You know, I make judgment calls but all of the -- how  
21 are you gonna try the case and what's necessary to be put into  
22 evidence and how the Court will interpret a supreme court's  
23 decision and as that may relate to what evidence is relevant  
24 and admissible or not admissible. Those are decisions that  
25 you all have to decide.

1           The aspect about monitoring the trial and then weighing  
2 in on the verdict form, I think that's been done before. I  
3 believe it might have been an indemnity type of case, but it's  
4 not -- and the question is whether the lawyer had standing to,  
5 to be involved or to make suggestions at the end of the case  
6 and the only -- the thing that this motion seems to be -- the  
7 point of it is so that you'd have standing to speak and say  
8 something at the time when it's time to weigh in on the  
9 verdict form. You know, it's a lot to consider and I'll --  
10 unless there's something else to say about it, I'll take it  
11 all in and consider it all. Again, we're a month out. I  
12 don't know that the Court needs to declare at this point, the  
13 -- how the trial is going to be managed or whatever that you  
14 need to offer, what evidence the law requires, how definite  
15 your damages must be. So, I'm happy to take it under  
16 advisement and to receive anything else that anyone else wants  
17 to submit in the form of a proposed order. That's probably  
18 the best way for you to summarize and put it all a single  
19 document as to what you think I should determine. I think as  
20 the law evolves and as the court evolves, you know, in 1965 or  
21 whatever year that was when that case came out about  
22 intervention, I doubt that construction defects litigation  
23 existed. So, we have to -- we have to try to keep pace with  
24 the evolving nature of things. That's why I asked what are  
25 they doing in other places.

1           Out in Las Vegas, a friend of mine, Judge Gonzales, she's  
2 -- she was gearing up for, I think she said she would be in  
3 trial for the next year on one of these big, big things, and I  
4 believe that it fortunately got resolved at some point prior  
5 to that, but she was gearing up to just have a one-year trial  
6 and it was gonna be in a gymnasium or ---

7           MR. PARKER: It was, Your Honor. That was a ---

8           THE COURT: Yeah, so she -- that's just the nature of the  
9 beast, and she was gearing up and ready for it and it got  
10 settled. So the courtroom couldn't hold all the litigants.  
11 So, we'll gear up and be ready for this if -- if and when the  
12 time comes.

13          All right.

14          MR. PARKER: I have one question.

15          THE COURT: Yes, sir.

16          MR. PARKER: Let's say that the case went on the way Mr.  
17 McCutchen and Mr. Hildebrand said, what would the insured --  
18 the insurer retained counsel to get a general result, they sat  
19 here the entire time, the reports are what the reports are,  
20 and then they want to weigh in. The evidence has been  
21 presented, they can't change the evidence. So, Mr. --  
22 presumably Mr. Hildebrand can say, this is our number. Mr.  
23 McCutchen could say, this is our number. And the jury comes  
24 back with a number. Because they've only sat back and  
25 monitored, they cannot weigh in on what the evidence, how the

1 evidence was presented and how the cases were handled. So  
2 what do they do then? And so my question -- and I was a  
3 little surprised by the comment there. The expert reports,  
4 the way they're prepared, I will agree that they are somewhat  
5 detailed in terms of the repairs, but they're not detailed at  
6 all in terms of resulting damage versus the work product and  
7 that certainly -- I assume, I have not seen a reservation of  
8 rights letters, but I'm assuming that there's a work product  
9 exclusion versus a result in damage potential award. So, Mr.  
10 McCutchen and Mr. Hildebrand are fine with the general award  
11 verdicts. What will the insured retained counsel do then  
12 because the jury is gonna deal with the evidence that's  
13 presented. And so I -- the comment to me just a little while  
14 ago didn't address that situation because they can't fashion  
15 the expert reports. I've seen in some ultra-complex cases  
16 where the insured has retained their own experts and tried to  
17 intervene with the use of their own experts to distinguish  
18 between the resulting damage. Well, that's not done here;  
19 it's too late to do that now given the proximity of the trial.  
20 So, if the reports do not provide for a separation of those  
21 damages, something that the insurance companies would like,  
22 how do they handle that then?

23 THE COURT: Would not the -- what the jury -- the jury  
24 listening to the facts of each item of damages, something has  
25 to be -- well, this is what Mr. Calamari says is the jury has

1 to be given the basis to determine damages and, of course, the  
2 question to Ms. -- we're dealing with apportionment, do the  
3 jury apportion the damages on the verdict form versus just a  
4 lump sum. This building is -- will take \$3,000,000 to fix.

5 MR. CALAMARI: Yes, sir, Your Honor. And to answer the  
6 question, no, the carriers don't come in with an expert. We  
7 don't get involved in this trial. I don't know that that  
8 would be proper. Although, maybe the next supreme court  
9 opinion will say so. But what they have said and what it  
10 seems to be pretty clear is that everyone in this room has a  
11 duty in this regard and we're the ones asking to do it. We've  
12 provided a simple way to do it and, if others prevent that  
13 from happening or don't present the evidence, because as we've  
14 shown, the evidence exists right now. So when those experts  
15 -- you're not just handing in the report. There's gonna be an  
16 expert testify and he's gonna say I find you have to remove  
17 the brick. I have -- you have to replace the brick, and I  
18 find you have to put this much sheathing on or these studs or  
19 whatever and he's got -- someone's got to give a dollar cost  
20 for that scope of repair. So that answers that question and  
21 it gives them the ability to do so. Is it a perfect system?  
22 Maybe/maybe not, but our supreme court has said in Heritage,  
23 we want allocation to occur and if they -- if they prevent  
24 allocation, how can they come back later and say, okay, now  
25 it's all covered. That's our point. Thank you.

1           THE COURT: All right. Well, I would see Mr. Thompson  
2 from time to time and ask him what's going on with Heritage,  
3 and they're still waiting and different comments he'd say.  
4 What is the status of it at this point, Mr. Thompson?

5           MR. THOMPSON: We finally got the check.

6           THE COURT: After how many years?

7           MR. THOMPSON: Fourteen and a half since we filed the  
8 case. Checks in full, too, with the exception of time on  
9 risk.

10          THE COURT: So, what's your view of what the Supreme  
11 Court did with it on all of these issues that we're talking  
12 about?

13          MR. THOMPSON: They didn't address it. That's just the  
14 whole problem here, they didn't address it. They didn't  
15 address intervention. You know, it's unfortunate, I think --  
16 I saw Bob's motion for intervention and showed it to Pat Henry  
17 and we both agreed, he did exactly what he was supposed to do.  
18 It's unfortunate that it's so close to trial here to where,  
19 you know, if you knew whether intervention was gonna be  
20 allowed or not, then you can deal with your experts ahead of  
21 time and get that testimony, get them to know what they're  
22 gonna have to testify to. But a month before trial, you know,  
23 they -- what do you do? That's the unfortunate part about it  
24 and the supreme court just hadn't addressed that. They just  
25 haven't addressed intervention.



1           THE COURT: So is Mr. Calamari reading between the lines  
2 or he's thinking ahead of them or it's his spin on it or ---

3           MR. THOMPSON: He's reacting to the supreme court's  
4 decision. He's reacting to it. And like I say, it's  
5 unfortunate it's a month before trial, but I think he's  
6 reacting to it. I think it was a good motion and if it was  
7 allowed then he asked the question in that motion, well, what,  
8 what are we gonna ask the jury. So, if you know that ahead of  
9 time, then you can get with your expert and say, all right,  
10 here's what we're gonna have to go over and there it is, but  
11 ---

12          THE COURT: Okay.

13          MR. THOMPSON: I'm with Mr. McCutchen; what do you do?  
14 How do you try your case?

15          MR. CALAMARI: In theory, your expert should be honest  
16 and give the numbers for the costs based entirely on the scope  
17 of work. So there wouldn't be this, well, I needed six months  
18 or a year to have my expert produce a report that heavily  
19 weigh the damages in the consequential section. You would  
20 only have your expert say, this is the cost to remove and  
21 replace the brick and this is the cost to fix the damage. So  
22 ---

23          THE COURT: How do the experts address consequential  
24 damages?

25          MR. CALAMARI: In the expert reports I handed up, there

1 are items that we believe that the jury would say, this is to  
2 replace damaged sheathing, this is to replace studs, other  
3 things that are in there already, and they've got to present  
4 that evidence anyway. That's typically the bulk of these  
5 cases is to say the defects were so bad, look what they did,  
6 look at all this rot, look at all these studs that need to be  
7 replaced, look at this moisture meter, look at these -- look  
8 at the problems we have inside; all that needs to be replaced.  
9 So they've got to put up damages to say this needs to be replaced  
10 and they've already, as we've shown, put up damages to say  
11 what it costs to remove and replace the brick.

12 THE COURT: Well, what else are they trying to get in the  
13 general category called consequential?

14 MR. CALAMARI: I don't know. I don't know what else  
15 they're trying to get in there because those are the only  
16 damages. It's either what our work ---

17 THE COURT: Because you only had -- you've shown me a  
18 line that says 302,000. I'm sure they're looking for 10 times  
19 that amount or ---

20 MR. CALAMARI: I don't know.

21 THE COURT: --- Or twenty times or ---

22 MR. CALAMARI: We -- to correct one error, we all want  
23 those numbers to be zero, except for Mr. McCutchen. So, no,  
24 there are other -- other subs that are gonna come in and say  
25 okay, this is my number; this is my number; this is the line

1 for me and these are the things, and the jury will be able to  
2 decide it because they are gonna pick between those numbers.  
3 Maybe they're gonna pick one, maybe they're gonna pick the  
4 other, but chances are they're gonna pick between those  
5 numbers and they're gonna say this is what the cost to fix  
6 this project is. And they've got to have some basis for that  
7 number; they can't just randomly pick it.

8 THE COURT: I recall that we had Mr. Thompson and Mr.  
9 Brown and Mr. Thompson said, said 15,000,000 and how much  
10 money were you trying to get in the Heritage?

11 Mr. THOMPSON: What we end up getting?

12 THE COURT: No, you were trying to get -- you asked the  
13 jury for?

14 MR. THOMPSON: We got eight-and-a-half million and a  
15 five-and-a-half million dollar verdict between the two. So  
16 that was 14 and then had a setoff of what, two-and-a-half.

17 THE COURT: But the jury, I think you must have asked the  
18 jury for ---

19 MR. THOMPSON: We were asking for nine and one and the  
20 defense was asking for two-and-a-half.

21 THE COURT: Yeah, so you -- that and then Mr. Brown  
22 wanted two-and-a-half and what did the jury do?

23 MR. THOMPSON: The jury gave us on that one, gave us  
24 \$6,000,000 actual and, and \$2,000,000 punitive -- six-and-a-  
25 half and 2,000,000 punitive.

1 MR. BROWN: I had dinner -- Your Honor, accidentally  
2 after this case, I was sitting at Ruth Chris and I ran into  
3 Your Honor in Columbia just sitting at the bar and this lady,  
4 IF you recall the school teacher from Conway ---

5 THE COURT: Right.

6 MR. PARKER: --- that taught special needs students there  
7 just happened to be sitting at the bar. She said I know you  
8 from somewhere. She was one of our jurors.

9 THE COURT: We go there after the Gamecocks game ---

10 MR. PARKER: Being that I'm part Tiger, I can't use that  
11 excuse.

12 THE COURT: Okay.

13 MR. PARKER: But in any event, we -- I asked her about it  
14 because the case was over, it was on appeal. There was no --  
15 she said I thought your number was, was made up and crazy, and  
16 we thought their number was made up and crazy. So we averaged  
17 them.

18 THE COURT: After all that time.

19 MR. PARKER: After all that time.

20 MR. THOMPSON: They were a little bit more on our side.

21 MR. PARKER: Somebody let in a bunch of bad evidence  
22 about other values, but other than that, it was pretty close  
23 to an average.

24 THE COURT: Still arguing that case, huh?

25 MR. PARKER: Just a little bit.

1 MR. MCCUTCHEN: Your Honor, just -- it's two-and-a-half  
2 weeks; it's not a month.

3 THE COURT: Two-and-a-half weeks. Okay.

4 MR. MCCUTCHEN: October 16th is the date so.

5 THE COURT: Okay. Yeah, all right. I'm sorry.

6 MR. MCCUTCHEN: There's some pressure on the timeframes.

7 THE COURT: I think when I scheduled this motion it was  
8 about that time.

9 MR. MCCUTCHEN: Yes, sir.

10 THE COURT: That's why we scheduled the motion, so we  
11 could see what's out there before -- hopefully when we roll in  
12 here on the 16th, we'll be ready to go.

13 MR. MCCUTCHEN: Yes, sir, thank you.

14 THE COURT: In fact the -- there's nothing else going on  
15 here for two weeks. So, we want to clear out all the  
16 underbrush and be ready to roll on that day. And we have this  
17 case is the number one and then Mr. Wylie, you're number two?

18 MR. WYLIE: Yes, sir.

19 THE COURT: Wylie is number two with each Beach Villa.  
20 Harbor Cover number three. And what's that number four? Then  
21 Luke Rankin has one that he wants us to do if all of these or  
22 some of these resolve. And they're bringing in a separate  
23 jury panel the next Monday so that if Mr. Elmore and others  
24 are successful, I'll have something to do that next week.  
25 They're bringing a separate panel. So, I'm ready for whenever

1 things might happen, contingencies and other stuff.

2       Regarding, so I have this motion under advisement and  
3 what about the other things that we have to consider today on  
4 this case?

5       MR. PARKER: I think it's a motion for summary judgment.  
6 And I don't know if the Court's inclined to get a motion for  
7 bifurcation, Your Honor?

8       THE COURT: Okay. Why don't we take a short break and  
9 then we'll come back and talk about the next thing.

10 **(RECESS.)**

11 **\*\*\*\*\*OFF THE RECORD\*\*\*\*\***

12 **(On the Record.)**

13       THE COURT: All right. Thank you.

14       MR. PARKER: Judge, I would like to put on the record ---

15       THE COURT: Okay. Good. All right.

16       Mr. Parker?

17       MR. PARKER: Yes, Your Honor.

18       THE COURT: Yes, sir.

19 MOTION TO BIFURCATE:

20       MR. PARKER: Your Honor, I had an off-the-record  
21 conversation with Mr. Hildebrand regarding the motion to  
22 bifurcate. We'd like to make it a little easier on you and  
23 your staff, Your Honor, by perhaps holding that motion in  
24 abeyance. We're still involved in some settlement  
25 negotiations, Your Honor, and we believe we'll be able work

1 our differences out. As a result, we'd ask that the motion to  
2 bifurcate be delayed a little, Your Honor, and if we cannot  
3 resolve our differences, we'd ask that we be able to bring it  
4 back to the Court before the date of trial.

5 THE COURT: Okay. Mr. Hildebrand; is that right?

6 MR. HILDEBRAND: I apologize. Yes, Your Honor.

7 THE COURT: Okay. Mr. Manos, does that apply to your ---

8 MR. MANOS: I did not file a motion, so I really don't  
9 have a say in it. I am gonna file one tomorrow, Your Honor.  
10 I'll be happy to wait ---

11 THE COURT: Okay. Very good. Well, that one will be  
12 held in abeyance.

13 MR. PARKER: Thank you, Your Honor.

14 THE COURT: Okay.

15 MOTION FOR SUMMARY JUDGMENT:

16 MR. PARKER: Your Honor, we received and I don't know if  
17 the Court received it, but we received a -- an opposition to  
18 our motion late yesterday evening. Did the Court receive it  
19 as well?

20 THE COURT: An opposition to Stock's motion?

21 MR. PARKER: Yes, Your Honor.

22 THE COURT: Yeah, I read that earlier today, actually.

23 MR. PARKER: And we also received an amended motion for  
24 summary judgment by Centex, which in part joins in our motion,  
25 in the event our motion is successful. Did the Court read

1 that as well?

2 THE COURT: I didn't see that one.

3 MR. PARKER: I have a copy, Your Honor. May I approach?

4 THE COURT: Yes, sir. Thank you.

5 MR. PARKER: You're welcome. I would ask the Court to  
6 take a look at it before we begin, Your Honor.

7 THE COURT: All right. Okay.

8 MR. PARKER: Your Honor, I'd like to start off in talking  
9 about the single windows, and the reason why, because we  
10 attached to our motion as Exhibit 3 -- I'm sorry, Exhibit 0,  
11 Your Honor -- the portions of the transcript from the last  
12 hearing in this matter, which was May 17th, 2017, and that is  
13 also the same day we received the affidavit, our opposition of  
14 our last motion and so the Court was kind enough to give us  
15 some additional time to address it. And during that hearing,  
16 it's my belief, and we've attached the transcript for the  
17 Court's review, that Ms. Locklair, on behalf of Centex, agreed  
18 that the single windows were protected or a part of the class  
19 settlement with MI Window federal class action settlement,  
20 Your Honor. And I refer the Court to Page 17, 18, and 28,  
21 which we attached to the -- to our motion, Your Honor. In  
22 particular, Ms. Locklair says, Your Honor, our position would  
23 be that Centex would also be protected and it does apply --  
24 the class action does apply to any builder as well as any  
25 installer of single windows. So, if Stock is entitled to



1 summary judgment on single window claims, it would be our  
2 position, Your Honor, that Centex would also be entitled  
3 summary judgment, which I believe is consistent, Your Honor,  
4 with our position and consistent with the additional motion or  
5 amended motion for summary judgment filed by Centex last  
6 night. I think all the documents we've provided, the  
7 settlement at the MDL Level, Your Honor, the federal multi-  
8 district litigation level as well as the lease agreement  
9 includes suppliers, which Stock is a supplier, and all windows  
10 manufactured by MI bearing an 8550 window type, Your Honor,  
11 which these are the windows that are part of that class  
12 action, which I believe there's no dispute.

13 So, I don't believe there's much argument that can be  
14 made, Your Honor, and I believe that Centex's papers as well  
15 as comments at the last hearing, support in terms of our  
16 motion in terms of the single window issue, Your Honor. I  
17 wanted to leave the second -- the double and triple windows  
18 were a little more argument, Your Honor, but I wanted to see  
19 the Court's position or if the Court's position after Ms.  
20 Locklair and Mr. Hildebrand argues against this issue before  
21 we go to the double and triple windows, Your Honor.

22 THE COURT: All right. To the single windows.

23 Ms. Locklair?

24 MS. LOCKLAIR: Yes, Your Honor, it's good to see you  
25 again.

1           THE COURT:   Yes.

2           MS. LOCKLAIR:   As you will recall, the last time we  
3 argued this motion for summary judgment, we had significant  
4 argument back and forth.   Mr. Parker has taken portions of  
5 that argument and presented it here before Your Honor.   I  
6 think a greater look at that transcript indicates that it's  
7 Centex's position that the class action settlement as a whole  
8 does not serve to bar Centex's claims against Stock.   We know,  
9 Your Honor, that it's our position that the class action  
10 settlement does not apply to a distributor such as Stock.   The  
11 case cited by Stock in its amended motion does not concern a  
12 supplier or distributor.   And it is our understanding from MI  
13 Windows counsel that there's not been an application of a  
14 class action settlement to a downstream distributor or other  
15 party.

16           I do agree with Mr. Parker and I did have to say in  
17 response to questions from Your Honor, that if Stock is  
18 determined to be covered by the class action settlement, I, I  
19 conceded, Your Honor, that it would apply to an installer or a  
20 builder.   Centex in this case, being a builder.   I think the  
21 class action settlement is clear.   If the Court rules that  
22 Stock is entitled to protection from the class action  
23 settlement for the single windows, then I would agree, Your  
24 Honor, that Centex would be entitled to protection from the  
25 class action in the settlement for the single windows.

1 I would like to absolutely reserve argument on the  
2 application to the double and triple windows here, but, Your  
3 Honor, I believe at the hearing, you told me that you could  
4 not or I anticipated that Your Honor would tell me you could  
5 not grant a motion I had not made. So, Counsel, Mr. Parker,  
6 had you read our motion for summary judgment. I believe Your  
7 Honor will see that is an entirely contingent motion. If the  
8 class action settlement applies to bar Centex's claims against  
9 Stock, it would also apply to bar Plaintiff's claims against  
10 Centex and we have so moved.

11 MR. PARKER: Your Honor, I appreciate what Ms. Locklair  
12 just said and for the Court's benefit, because this settlement  
13 agreement is 91 pages long. I have the portions of the  
14 settlement agreement approved by the federal court that  
15 actually addresses what Ms. Locklair just said. I'll give  
16 her a copy. If I could present it to the Court?

17 THE COURT: Yes, sir.

18 MR. PARKER: Thank you, Your Honor. Your Honor, this  
19 document, like I said before, is 91 pages long, in addition to  
20 the Court's order. Paragraph 65, and that's Page 17 at the  
21 bottom. It discusses the released parties and party and it  
22 includes -- if Your Honor would go to the fourth line from the  
23 bottom, it starts out and includes any vendor, component part  
24 supplier, distributor. So, Ms. Locklair just said it didn't  
25 include distributors. It says quite plainly here, Your Honor,

1 distributor. On top of that, dealer, developer, builder,  
2 contractor, subcontractor, person, or entity that was involved  
3 in the design, manufacturing, marketing, distribution and sale  
4 of the product, is what we did as well. So, it also includes  
5 labeling, escalation and repair for use of the MIWD product.  
6 So I'm not sure Ms. Locklair saw this paragraph, but this is  
7 Paragraph 65. We provided the full document to the Court as a  
8 part of our motion and it specifically says distributor.

9 So, Your Honor, I believe we've addressed everything that  
10 Ms. Locklair was concerned about in her opposition and,  
11 certainly, this addresses the statement she just made to the  
12 Court.

13 THE COURT: Ms. Locklair?

14 MS. LOCKLAIR: Yes, Your Honor. Again, we would refer  
15 back to the representations from MIWD's counsel that the class  
16 action settlement has never been applied to protect a  
17 distributor from the types of claims that have been alleged  
18 with respect to these windows in this case. So with that,  
19 Your Honor, that would be our position as to the single  
20 windows. And again, should the Court grant summary judgment  
21 on the single windows, Your Honor, our motion for summary  
22 judgment against the Plaintiff's claims with respect to those  
23 windows are pending and certainly Centex would be covered  
24 under that definition. I've heard Mr. Parker's presentation  
25 to the Court.

1           MR. PARKER: And finally, Your Honor, the rules governing  
2 how the Court is supposed to handle motions for summary  
3 judgment does not include non-admissible evidence like  
4 argument of counsel. Everything we've provided, Your Honor,  
5 we supported with admissible evidence. We provided the Court  
6 the order of the federal district court as well as the lease  
7 agreement, which is extensive. We provided and actually  
8 referred the Court to the specific language included in those  
9 documents. I think it's pretty clear that Stock is a  
10 beneficiary of this, this settlement, and I'm not disputing  
11 that Centex would also be covered under it, Your Honor.

12           THE COURT: Anyone else that has an interest in this  
13 particular issue who might be here who needs an opportunity to  
14 be heard?

15           Mr. McCutchen?

16           MR. MCCUTCHEN: Your Honor, I received a motion for  
17 summary judgment this morning -- I read it about 10:30 this  
18 morning -- that is a contingent -- and a contingent motion for  
19 summary judgment. I had not seen that before. We're not in a  
20 position today, Your Honor, to present positions in response  
21 to what's occurring here. I haven't had that opportunity yet.  
22 I did see it this morning for the first time and I read that  
23 motion, which I think -- Mr. Parker, did you hand up a motion  
24 for summary judgment that was filed by Centex related to the  
25 Plaintiffs?

1 MR. PARKER: That is correct, Your Honor. That is  
2 correct. That is correct, Your Honor.

3 MR. MCCUTCHEN: So, it's difficult to comment, Your  
4 Honor, today on that motion to which we have not had any  
5 chance to truly respond or delve into the issues related to  
6 distributor or whatever else it may be.

7 THE COURT: Well, in relation to Stock's motion versus  
8 Centex, not Centex's motion against you.

9 MR. MCCUTCHEN: I apologize if I was out of order or  
10 something, Your Honor. I'm sorry.

11 THE COURT: No, I think you're in order. It's just the  
12 question is how far reaching an order I should issue on this  
13 if I issue an order, Mr. Parker.

14 MR. PARKER: Your Honor, we've not asked for summary  
15 judgment against the Plaintiff, so I certainly appreciate Mr.  
16 McCutchen's position. To face a motion like this at this  
17 point would be difficult, I guess. Certainly, our motion has  
18 been pending for some time. The Court gave us, both myself  
19 and I guess Centex the ability to offer supplemental briefs.  
20 Procedurally, I understand the significance of this motion as  
21 it pertains to the Plaintiff, Your Honor. My concern is I  
22 would think Mr. McCutchen would have a right to file an  
23 opposition to Centex's motion, but would I think that we would  
24 have a right to get our decision against Centex and then they  
25 could handle it later and that's my request, Your Honor.

1 THE COURT: All right. Anything else then?

2 Ms. Locklair?

3 MS. LOCKLAIR: Yes, thank you, Your Honor. I would, with  
4 respect to Mr. McCutchen, admit freely, Your Honor, that this  
5 was filed yesterday. Although as Mr. Parker points out, these  
6 issues were discussed at the last hearing on May 17th. I  
7 would also note that Your Honor permitted counsel for Stock  
8 additional time to address this issue, mainly in the affidavit  
9 of Mr. Moore. Mr. Moore is set to be deposed again on October  
10 3rd and may have more information to add about these issues at  
11 that time. So, you know, to the extent that Your Honor wishes  
12 to hold this ruling and, again, Centex's motion would be on  
13 the same issues as Stock, until the Plaintiff has had time to  
14 digest this information and Mr. Moore has had time to testify  
15 about the affidavit that Stock has indicated it intends to  
16 question him about. We think that that would be appropriate.

17 In addition, Your Honor, I think that Mr. Parker has  
18 indicated the size and breadth of this order, the class action  
19 settlement and it's applicability and, yet, has not submitted  
20 -- our point, I think, Your Honor, is that Stock has not  
21 submitted any case law or other indication indicating that  
22 other courts have applied this order in the same way that  
23 Stock is asking you to apply it here.

24 Thank you.

25 MR. PARKER: Your Honor, the deposition that Ms. Locklair

1 is referring to is only regarding the mulling windows, it has  
2 nothing to do with the single window. In terms of the double  
3 and triple windows, if she believes that's a factor for the  
4 Court's consideration of the double and triple windows,  
5 certainly we don't mind pushing that portion of my motion till  
6 then. But in terms of the single windows, Your Honor, there  
7 is no issue, and Mr. Moore, Ms. Locklair's expert, is not  
8 being questioned upon single windows; it's just the mulling of  
9 the double and triples, Your Honor. So I think this is still  
10 ripe for the Court's determination in terms of the single  
11 windows.

12 MS. LOCKLAIR: And I certainly don't want to ask for  
13 additional time here, Your Honor, if Mr. Parker does not need  
14 it. So if he does not need to question Mr. Moore as to any of  
15 the windows, if he is content based on the information that is  
16 currently before the Court, then we think it would be  
17 appropriate for the Court to issue a ruling on all of the  
18 windows at one time. I do not, however, think it's  
19 appropriate to, if Mr. Parker intend -- his notice is not  
20 limited to double and triple windows, and that is the reason I  
21 bring that to the Court's attention.

22 THE COURT: Of course at this point, I've only heard  
23 argument regarding single windows.

24 MR. PARKER: Exactly, Your Honor, and our deposition is  
25 limited, Your Honor, to his affidavit. So, that's incorrect.



1 So, in terms of the single windows, Your Honor, we're prepared  
2 for the Court to render an opinion -- it's decision on that  
3 issue. In terms of the double and triple, I have no problem  
4 working with Ms. Locklair to complete that deposition based on  
5 the affidavit submitted by Mr. Moore, but we're ready in terms  
6 of the single windows. There's been no admissible evidence to  
7 contradict our motion, Your Honor.

8 THE COURT: I agree with Mr. Parker's position and the  
9 motion is granted as to the single windows.

10 MR. PARKER: Thank you, Your Honor. And we'll submit,  
11 after we finish Mr. Moore's deposition, Your Honor, in terms  
12 of the double and triple. I wouldn't want to waste the  
13 Court's time on that.

14 THE COURT: All right. So if you'll prepare an order  
15 granting summary judgment as to the single windows.

16 MR. PARKER: Thank you, Your Honor.

17 MS. LOCKLAIR: Your Honor, I think it would be  
18 appropriate for us to hear arguments on the double and triple  
19 windows. That is why we are, are here today and what we're  
20 prepared to address. So, I don't see any reason why that  
21 wouldn't go forward.

22 MS. PARKER: Your Honor, my concern with that is the same  
23 concern I had at the last hearing. Because Mr. Moore gave  
24 that affidavit regarding the mulling of the doubles and  
25 triples, I'd like to get his testimony and then provide the

1 Court the testimony to support our argument. I'd prefer to  
2 have the paperwork before the Court before I make the  
3 argument. Certainly, that's the reason why we noticed the  
4 deposition, Your Honor. I would rather not waste the Court's  
5 time because Mr. Moore may say something that creates a  
6 question of fact.

7 THE COURT: His deposition is next week?

8 MR. PARKER: Yes, Your Honor.

9 THE COURT: Next Tuesday?

10 MR. PARKER: Yes, Your Honor.

11 MS. LOCKLAIR: Respectfully, Your Honor, Stock asked for  
12 additional time in May of 2017. The deposition of Mr. Moore  
13 was not noticed until about a week and a half ago by counsel  
14 for Carolina Drywall. Stock cross noticed the deposition;  
15 that is correct. But, at this point, all of the information  
16 is -- is before the Court. If -- I think if Mr. Parker wishes  
17 to proceed with any of his motions, it would be appropriate to  
18 go forward with the double and triple windows. They take in  
19 -- they've had every opportunity to depose Mr. Moore from May  
20 all the way to the present and pushing a resolution of these  
21 two issues on the double and triple windows I think is  
22 inappropriate at this time. I think we are prepared to go  
23 forward and I think it would be wise to decide these issues at  
24 the time unless you prefer to withdraw your motion for summary  
25 judgment as to the double and triple windows.

1           MR. PARKER: Your Honor, again, I would not waste the  
2 Court's time. If something comes up in that deposition that  
3 actually creates an issue of fact, then I may withdraw the  
4 motion at that point. But given that the deposition is  
5 scheduled for next week, certainly if the Court decides after  
6 we submit any additional paperwork that the Court can handle  
7 it on the briefs alone, and that's fine as well, Your Honor.  
8 I just don't see the point in arguing what I know will take  
9 some time given the length of the briefs, if in fact we find  
10 out there's an issue of fact of Mr. Moore during his  
11 deposition next week. Whatever the Court's preference is, if  
12 the Court rather hear argument today, then we will do that and  
13 then supplement later, which I think only turns into be more  
14 argument. I think we can potentially avoid all the argument  
15 and simply let the deposition be completed and supplement our  
16 briefs and, if necessary, come back before the Court.

17           MS. LOCKLAIR: Respectfully, Your Honor, I think it is  
18 incumbent on Centex today to show that there is an issue of  
19 material fact that would warrant denial of Stock's motion. We  
20 are prepared today to show issues of fact irrespective of any  
21 opinions of Mr. Moore. These are issue of facts that resist  
22 regardless of his testimony. And, if those issues are here  
23 today that would be sufficient to defeat Stock's motion, we'd  
24 like to be able to get off the Court's calendar today rather  
25 than pushing these further down the road.

1           MR. PARKER: Your Honor, it can be heard at the same time  
2 the motion for bifurcation is heard if necessary. Like I said  
3 before, if Mr. Hildebrand and I are able to reach an  
4 agreement, it may not come back. I just don't see the point  
5 of arguing it given that we have already indicated to the  
6 Court, we are still working towards getting our differences  
7 resolved and we've pushed the motion for bifurcation already,  
8 which Mr. Hildebrand and I agreed to do.

9           THE COURT: All right. Anything else on this?

10          We have a lot going on with trying to resolve the case, a  
11 deposition next week, pending motions. My inclination is to  
12 hear the argument but defer ruling until after the deposition  
13 that is coming about next week. Now what impact that might  
14 have on , on the Court, I have no idea.

15          MR. PARKER: We'll proceed, Your Honor, if you'd like.  
16 The only concern is the deposition goes forward, we get  
17 information that further supports our position, then how do we  
18 handle it? Do we send supplemental briefs?

19          THE COURT: Well, if you'll let me know there's more  
20 information, than I have under consideration today, I'll hear  
21 the arguments. Ms. Locklair seems to be adamant about  
22 pressing on with this issue. But, then I would think that in  
23 the deposition, the person who may be a key witness, then the  
24 Court should defer ruling until you've had an opportunity to  
25 submit what he's provided. So, I'm splitting the baby here.

1 I've read what was submitted by Ms. Locklair and Mr.  
2 Hildebrand, and I guess it might've been what's the name back  
3 there, Ms. ---

4 MR. HILDEBRAND: Vascovich.

5 THE COURT: She did some writing on some of that?

6 MS. VASCOVICH: I helped out with drafting it, yes, Your  
7 Honor.

8 THE COURT: Right. I don't want to leave you out the  
9 equation there, Ms. Vascovich. I read that and the issue  
10 regarding mulling and how this should be distinguished from  
11 some of the other windows. So I've read that -- what has been  
12 submitted. I'll hear the arguments on, on this issue.

13 MR. PARKER: Thank you, Your Honor. Your Honor, I'd like  
14 to start out with a deposition, some deposition testimony from  
15 the expert retained by Centex, Richard Moore. He's the person  
16 we intend to depose next week. Volume 1 of his deposition,  
17 page 107, he indicates ---

18 THE COURT: I'm trying to find this. Where, where would  
19 I have it. I know I've got this email with these flash  
20 drives; is it in there?

21 MS. PHILLIPS: It should be, Your Honor, September 14th,  
22 2017 is when it was filed. So it should have been sent to you  
23 right away after that.

24 THE COURT: All right.

25 MS. PHILLIPS: And it's exhibit ---

1           THE COURT: My Clerk hasn't gotten her E-filing training,  
2 so she is -- so we spend more time trying to find this stuff  
3 through E-filing. These, the Scandisk drive as well?

4           MS. PHILLIPS: It should be, Your Honor. I believe we  
5 mailed everything over to you because it was such a large  
6 document.

7           THE COURT: Okay. Here we go. All right. So, I'll find  
8 it -- I'll catch up with you as you're arguing, Mr. Parker.  
9 You can go ahead?

10          MR. PARKER: Yes, Your Honor. Mr. Moore -- it's Exhibit  
11 N, Your Honor, I believe, to our brief. Your Honor, we're  
12 looking at Page 94 of his deposition testimony. We'll start  
13 there; that's a part of the brief. And if you want, I can  
14 give you a copy of it, Your Honor. I have a second copy.

15          THE COURT: Okay. That might be easier for me.

16          MR. PARKER: Of course, Your Honor.

17          THE COURT: Yes, sir.

18          MR. PARKER: All right. Your Honor, Ms. Locklair's  
19 position has been that there's a question of fact as to who  
20 mulled the windows, but that question only becomes important  
21 if there's a problem with the mullions between the windows.  
22 So, that question was asked of Mr. Moore. And specifically he  
23 was asked whether or not he knew where the windows were  
24 mulled. And that's simply, Your Honor, just for the Court's  
25 edification, a plastic or vinyl cap that attaches two windows.

1 There's no structural rigidity to it; there's no structural  
2 significance to it. It's simply a decorative cap that covers  
3 the space between the two windows. And he says, the question  
4 is, do you know whether or not the windows were mullied at the  
5 factory and put together on the site. His response, Line 16,  
6 is, I don't know. Does that have any difference with regards  
7 to the structural rigidity of the windows? I don't think so.  
8 Do you believe that as installed with no structural mullions,  
9 that they meet the requirements of the codes with regards to  
10 pressure? I think they do.

11 Now, Centex's position, these are the -- its expert, is  
12 that these windows meet the required code requirements, the DQ  
13 rating in particular, and that's what our motion says, Your  
14 Honor. Our motion says, there's nothing wrong with these  
15 windows. If they were mullied in the field or on -- at the  
16 factory or at our store, they still meet the required code  
17 requirements of a DP rating and thus there is no claim that  
18 you have against us. Whether or not the Plaintiff has a claim  
19 against Centex, that's a different story. Whether or not it  
20 was installed correctly, that's a different story. But in  
21 terms of the product, because we only provided the product,  
22 there are no problems with these windows be it single, which  
23 we've already dealt with, doubles or triples. For this motion  
24 it's doubles and triples. And the only difference, because  
25 they're all single windows, the doubles and triples have these

1 little vinyl caps that attach them, that's it. So, our expert  
2 says there's nothing wrong with them. Centex's expert says  
3 there's nothing wrong with them. And that's why our motion is  
4 so, I thought, very easy, Your Honor. And the only reason I  
5 suggested pushing the motion off, is because of that affidavit  
6 that came on the same day that we had this original hearing  
7 and I wanted to close a loop with Mr. Moore on this issue.  
8 But Mr. Moore has given us a lot of good testimony already  
9 that we've included with our original -- with this motion,  
10 Your Honor. So, that's why I wanted to point to that, Your  
11 Honor.

12 So, Ms. Locklair argues against her expert's position,  
13 and Ms. Locklair's arguments, just like mine, are not  
14 admissible evidence. That's I always refer the Court to some  
15 document that's admissible like sworn deposition testimony,  
16 Your Honor.

17 Now there is not a single document in this case that says  
18 these windows don't meet the required EP rating and that's  
19 because Centex has not done -- it's experts have not done any  
20 AUMA or ASTM testing on these windows. But not that they had  
21 to, I'm not being critical of Centex on this point, the  
22 Plaintiffs have not done it. And as a result, there is no  
23 information, no admissible evidence that something is wrong  
24 with the double or triple windows at all. So our motion,  
25 again, is not against the Plaintiff because the Plaintiff may



1 have its own independent issues with Centex's performance on  
2 this project, it's the installation of the windows or the  
3 flashing of windows or the weather barrier used for these  
4 buildings. But in terms of just the product, there are no  
5 product complaints because there have been no product testing.  
6 And Ms. Locklair can get up, but she will not be able to point  
7 this Court and I challenge her to, to one ASTM approved or  
8 AUMA test performed on a single window on this project, on any  
9 of them. And the doubles and triples are no different than  
10 the singles except for this mull cap, and their own expert has  
11 said there's no structural significance to the mull cap and he  
12 does not find a problem with these double and triple windows  
13 as a product. In fact, he's not even calling for them to be  
14 replaced as a part of this repair. Let me see if I can cite  
15 to that, Your Honor. Page 1, I think it's 108, Your Honor,  
16 which we may not have included in our brief. Here we go, Your  
17 Honor. It starts at Page -- it's 108, it's Line 17, Your  
18 Honor. After I read it into the record, can I just give it to  
19 Your Honor?

20 THE COURT: Yes, sir, certainly.

21 MR. PARKER: It said ---

22 THE COURT: I guess when I scan this, I'm putting it in  
23 and they want me to install it and put in passcodes --  
24 passwords ---

25 MS. PHILLIPS: I'm sorry, Your Honor.

1 THE COURT: --- and you've got to give me the key to  
2 finding this stuff.

3 MR. PARKER: Well, let me tell, Your Honor ---

4 THE COURT: All right. Go ahead?

5 MR. PARKER: --- there's no one more technologically  
6 challenged than I am, Your Honor.

7 THE COURT: Oh, I am.

8 MR. PARKER: Don't feel bad. So the question is, your  
9 current opinion is that there is no reason, forensic reason,  
10 why the windows should be removed for the repair protocol on  
11 the triple windows. Well, there is a reason today to take  
12 them out as stated in there. If there is water damage around  
13 the perimeter of the window, then the window has to come out  
14 because you can't make -- physically you can't make repairs to  
15 the wall -- to the wall framing if it's damaged with the  
16 windows in place. But if the window framing around the window  
17 is not water damaged, then you leave the window in place and  
18 do the structural repairs that I've outlined.

19 There are no callouts by Mr. Moore for the removal of the  
20 windows, only if there's a problem around the windows because  
21 of installation or framing, but nothing due to the product  
22 itself, Your Honor. That's their expert's testimony. I'm not  
23 even using our expert's testimony in this regard; I'm using  
24 Centex's expert's testimony in support of our motion. So, I  
25 really can't find anything in the record, Your Honor, be it a

1 report from Centex's expert or deposition testimony from a lay  
2 witness that these windows, the window product itself, is  
3 causing a problem for these -- for these buildings, Your  
4 Honor. And that's typically -- that's generally our position  
5 on the windows, being the doubles and the triples, Your Honor.  
6 And in fact, he further says, if it's water damaged, you take  
7 the window out, then you make your framing repairs, then you  
8 reinstall the windows. This is line -- this is Page 109, Line  
9 17 through 19. So, Your Honor, not only does Mr. Moore agree  
10 that there's nothing wrong with the windows, he's having the  
11 repairs made and then putting the windows back in, the same  
12 windows that Ms. Locklair in argument is complaining about,  
13 and I'll give the Court page 109 of his deposition testimony.

14 The rest of the argument in terms of opposition, Your  
15 Honor, is related to the contract. I don't think we even get  
16 there if the Court decides factually there's no argument  
17 between Centex and Stock with regards to the windows  
18 themselves, doubles and triples. In terms of the contract,  
19 there is no contract for this project. Ms. Locklair did not  
20 include a contract in her opposition. She simply included  
21 deposition testimony from a witness who said he never saw a  
22 contract, never read a contract, has no understanding of the  
23 contract, and she is speaking of a blanket contract that may  
24 cover costs of items but it has nothing to do with the Cypress  
25 Bend project. She's not produced the Cypress Bend contract

1 for this Court to review.

2 And what Ms. Dixon is telling me, Ms. Phillips is telling  
3 me that in other later projects, there is a project actual  
4 contract. The contract that this gentleman was referring to,  
5 Mr. Goodman, which Ms. Locklair refers to in her opposition,  
6 is a blanket contract, like I was saying before, that has  
7 nothing to do and does not mention the Cypress Bend. In fact,  
8 he's never seen a contract and he says that in his deposition  
9 testimony. I think that's Exhibit -- it's Exhibit P, Your  
10 Honor, and I'll give this to the Court after I read it into  
11 the record, Your Honor. It's Page 61 of his -- of his  
12 deposition, Your Honor. And I asked Mr. Goodman, did you  
13 negotiate the contract? His answer is, no, sir. Was that  
14 above your pay grade? Yes, sir. Did you ever see the  
15 contract? No, sir. Did you ever read the contract? No, sir.  
16 So, the terms of the blanket contract, you aren't familiar  
17 with those and did not negotiate it? That's correct.

18 So, the only opposition that Ms. Locklair presented in  
19 the form of potentially admissible evidence, is to offer  
20 testimony that ultimately the Court would not allow because  
21 there's no foundation for it, because this gentleman never saw  
22 the contract, never read it, and didn't negotiate it, and has  
23 nothing to do with Cypress Bend. So, I still am, am  
24 challenged to find anything in the opposition that satisfies  
25 the requirements of Rule 56 in terms of what you need to do to

1 oppose a motion for summary judgment like this, Your Honor.

2 THE COURT: Is this where the burden shifting comes in?

3 MR. PARKER: Exactly, Your Honor.

4 THE COURT: All right.

5 Ms. Locklair?

6 MS. LOCKLAIR: Yes, Your Honor. Thank you very much for  
7 your time. With respect to the double and triple windows, I  
8 think the Court recognizes the unique position that a general  
9 contractor is in. We heard many times today about the role of  
10 the general contractor to both defend against the Plaintiff's  
11 claims and then pursue the subcontractors. In this case,  
12 Centex has asserted claims against Stock as a subcontractor, a  
13 material supplier, of breach of contract, breach of warranty,  
14 negligence, and indemnity. I would, Your Honor, bring to your  
15 attention that there most certainly are claims in the case and  
16 allegations of defects with respect to the mulling of the  
17 windows in this case. We have included in our opposition to  
18 Stock's motion, which I'm happy to approach and present the  
19 Court with a copy of if you don't have one handy to turn to.  
20 Your Honor, I would turn your attention to Exhibit Number 5,  
21 that would be Plaintiff's expert report in this case, Page 19  
22 of 24 of that report, and item EW-4 notes that the manner in  
23 which these units were mulled, precludes these assemblies from  
24 meeting minimum design pressure requirements. Based on our  
25 discussions with the window manufacturer, the manner in which

1 these units were field mulled precludes these assemblies from  
2 meeting minimum design pressure requirements. Therefore, we  
3 recommend all double and window assemblies on buildings to be  
4 replaced.

5 THE COURT: Which expert is this again?

6 MS. LOCKLAIR: This is Plaintiff's expert, Your Honor.

7 THE COURT: What his name?

8 MS. LOCKLAIR: This is Jody Gaskins of CSE.

9 MR. PARKER: I'm sorry. Ms. Locklair, what page are you  
10 on again?

11 MS. LOCKLAIR: Exhibit Number 5 to our memorandum in  
12 opposition, Page 19 of 24.

13 MR. PARKER: Thank you.

14 MS. LOCKLAIR: And note EW-4, it's the next to the last  
15 sentences.

16 CSE reiterates their opinions in Exhibit Number 4, which  
17 is a subsequently released report. CSE states on Page 2 of 2  
18 of Exhibit 4, Mr. Gaskins confirms his opinion regarding the  
19 inadequate design pressure ratings for the multiple window  
20 assemblies. He indicates that his opinions regarding the need  
21 for removal and replacement of those windows remains  
22 unchanged. His opinions, as borne out by the deposition  
23 testimony and reflected in these documents is that the windows  
24 need to be removed and replaced due to insufficient design  
25 pressure ratings. Those design pressure ratings as indicated

1 by Mr. Gaskins are due to the manner in which the units were  
2 mulled.

3 MR. PARKER: I'm sorry, what page is that? You're moving  
4 pretty quickly; I'm sorry, Ms. Locklair. What page are you  
5 reading from?

6 MS. LOCKLAIR: Sure. Exhibit Number 5.

7 MR. PARKER: Okay. I have that.

8 MS. LOCKLAIR: It is Page 19 of 24 of CSE's report.

9 MR. PARKER: Thank you.

10 THE COURT: Is that ---

11 MS. LOCKLAIR: I'm happy -- I can ---

12 MR. PARKER: No, I have that. I thought you referred to  
13 a deposition and I didn't see a deposition as an exhibit yet.  
14 So, I was wanting to know which testimony you were reading  
15 from.

16 MS. LOCKLAIR: I think certainly it is reflected in the  
17 expert report that the manner in which the units were mulled  
18 precludes the assemblies from meeting the design pressure  
19 requirements ---

20 THE COURT: You're reading verbatim, Exhibit Number 5?

21 MS. LOCKLAIR: I am, Your Honor.

22 THE COURT: Page?

23 MS. LOCKLAIR: Page 19 of 24, I'm reading verbatim based  
24 on ---

25 THE COURT: What part of that page are we looking at?

1 EW?

2 MS. LOCKLAIR: EW-4.

3 THE COURT: 4, all right.

4 MS. LOCKLAIR: Not the first paragraph; the second ---

5 THE COURT: All right. Exterior walls?

6 MS. LOCKLAIR: Yes, sir. So, if we read down to the  
7 third paragraph, about halfway through, the sentence begins  
8 based. Based on our discussions with the window manufacturer,  
9 the manner in which these units were field mulled, precludes  
10 these assemblies from meeting minimum design pressure  
11 requirements. Therefore, we recommend all double and triple  
12 unit window assemblies on these buildings to be replaced.

13 Your Honor, this is certainly more than a scintilla  
14 Of evidence in the record that the mulling of the windows is  
15 an issue in this case. It's a central issue in the case and  
16 the requirement to have the windows removed and replaced.  
17 This is the opinion of Plaintiff's expert. In this case,  
18 should Plaintiffs recover from Centex, based on Mr. Gaskin's  
19 opinions, Centex is, is able and intends, based on its claims  
20 against Stock, to recover from Stock for issues related to the  
21 mulling.

22 THE COURT: And they were field mulled by Stock here in  
23 Conway?

24 MS. LOCKLAIR: And this is the entire issue of fact here  
25 is how the windows were mulled, how and by whom. It's a



1 central issue of fact in the case. There, I believe, is  
2 agreement of the experts that the windows were not factory  
3 mulled by MI Windows. That's the opinion of Rick Moore and  
4 that is the discovery responses from MI.

5 THE COURT: Your motion includes some excerpts saying  
6 they were field mulled here in Conway.

7 MS. LOCKLAIR: I think of it in kind of three buckets.  
8 So, factory mulled by the manufacturer.

9 THE COURT: Right.

10 MS. LOCKLAIR: The windows could be store mulled by the  
11 distributor, in this case, Stock, or they could be field  
12 mulled by the window installer on site. I believe, and  
13 counsel can correct me if I'm wrong, there is agreement here  
14 that the windows were not factory mulled. That is Mr. Moore's  
15 opinion in his affidavit. That opinion is confirmed by MIWD  
16 Windows saying the windows were not factory mulled. So, we  
17 take that out. The issue of fact is were they -- were they  
18 mulled in the store in Stock's facility where the testimony is  
19 they had -- they have mulling capacity capabilities. I asked  
20 Mr. Goodman about mulling. That's something he testified that  
21 Stock did for Centex on multi-family projects prior to Cypress  
22 Bend, after Cypress Bend, at the time of Cypress Bend. He  
23 just couldn't say one way or another whether that happened at  
24 Cypress Bend. And, Your Honor, the other testimony, the other  
25 side of it, is that the windows were not field mulled by the

1 window installer. Here we have the testimony of RWG's  
2 representatives that state that they did not field mull the  
3 windows. So, there is certainly, I believe there's enough  
4 evidence from Mr. Goodman's testimony from which a jury could  
5 determine that Stock muller the windows in their facility in  
6 Conway. At a minimum, there is an issue of fact as to who  
7 muller the windows. I think there's no greater evidence that  
8 Stock agrees with me that there's an issue of fact that would  
9 preclude their summary judgment motion. That's why I'm here  
10 arguing this point so vehemently, Your Honor. There's nothing  
11 about Rick Moore's testimony that could impact Stock's motion  
12 as to the double and triple windows.

13 Counsel is here arguing that Rick Moore says the windows  
14 are okay, what's the problem. So, it remains for me to be  
15 seen how Rick's testimony could impact Stock's motion. But  
16 here, Stock has, has indicated in their RTA responses for  
17 requests for Centex's requests for admission, that there is an  
18 issue of fact. We asked Stock to admit that the double and  
19 triple window assemblies installed at Cypress Bend were not  
20 muller by third-party defendant, MI Windows. Stock responds,  
21 discovery in this matter has failed to show who muller the  
22 double and triple window assemblies at the Cypress Bend  
23 project. Stock itself admits that this is an issue of fact,  
24 who muller the windows assemblies. So, while the Court may  
25 not be prepared to grant a motion if Centex were to make it to

1 say that 100 percent, these windows were mulled by Stock at  
2 their facility, there is an issue of fact. There is evidence  
3 from which a jury could reasonably infer that the windows were  
4 mulled by Stock and, at a minimum, Stock has conceded there is  
5 an issue of fact as to how the windows were mulled. And this  
6 -- this is a sufficient issue to cause the Court to decline to  
7 grant Stock's motion for summary judgment. It shouldn't even  
8 remain on the Court's roster for further adjudication. There  
9 is no other testimony that would take this issue off the  
10 table. It, it just -- I don't see it, Your Honor. There is  
11 an issue of fact about who mulled the windows and it is clear  
12 from Plaintiff's expert report that's been submitted into  
13 evidence in this case that the mulling of the windows is one  
14 of the central, if not the central reason as to why the  
15 windows need to be removed and replaced.

16 Thank you.

17 THE COURT: All right.

18 MR. PARKER: Your Honor, can I start off with Ms.  
19 Locklair -- Ms. Locklair's reliance on the Plaintiff's expert  
20 report, I think simply helps our position. And the Court  
21 caught this quickly in Ms. Locklair's opposition remarks. It  
22 says at EW-4, Page 19 of 24, that the Plaintiff's expert  
23 believes -- and this was confirmed in the deposition -- based  
24 on our discussions with the window manufacturer, the manner in  
25 which these units were field mulled -- not shop mulled like

1 one of the baskets that Ms. Locklair referred to -- not  
2 factory mulled like the second -- the first basket Ms.  
3 Locklair referred to, but field mulled. So, if Ms. Locklair  
4 is gone live and die by the Plaintiff's expert report, that's  
5 what it says, that they were mulled in the field and not by  
6 Stock when it delivered them.

7 Now ---

8 THE COURT: Now field mulled, what does that mean?

9 MR. PARKER: Let me explain it to Your Honor. Factory  
10 mulled means that it was done where MI Windows office is  
11 located. Shop mulling means it was done in Stock Building  
12 Supplies shop, shop mulled. Field mulling means single,  
13 double, and triple windows were delivered on site and an  
14 installer took those windows, put mull caps them and lifted  
15 them together and placed them in the opening where the windows  
16 go.

17 THE COURT: And you all would not be responsible for  
18 field mulling?

19 MR. PARKER: We had no labor component whatsoever on this  
20 project, none. So when the Plaintiff's expert says field  
21 mulled, that means it was done at the job site on the field  
22 and not in the shop, not at Stock Building Supplies shop, not  
23 at MI Windows factory.

24 Now, that takes care of Ms. Locklair's reliance on the  
25 Plaintiff's expert report, because it does not help her in

1 opposing our motion for summary judgment. It simply helps us.

2 THE COURT: So Page 19 of 24, that's no her expert, it's  
3 that's your expert.

4 MR. PARKER: It's Plaintiff's expert. I'm relying -- our  
5 motion relies primarily on Centex's own expert's report, Mr.  
6 Moore, who says there's nothing wrong with the windows, they  
7 meet code compliance. Plaintiff's expert has said that the  
8 windows were mulled in the field. Again, saying that Stock  
9 had nothing to do with them. So, then you're left with Ms.  
10 Locklair's retreat to argument as opposed to evidence. Let me  
11 explain it why I say that, Your Honor. Our motion is not  
12 against the Plaintiff; our motion is against Centex. Centex  
13 is obliged, pursuant to the rule, as the Court pointed out,  
14 because the burden shifts. They come back with admissible  
15 evidence that says Stock mulled the windows or the windows are  
16 mulled in a way that causes a code problem. That's not been  
17 done. In fact, Ms. Locklair has not proven or provided any  
18 evidence to this Court to hang a hat on from its own experts  
19 or even the Plaintiff's expert that we mulled the windows.  
20 Instead she points to disclaimers in responses to written  
21 discovery. Our written discovery says we didn't do it and we  
22 don't know who did it. That doesn't help her position in  
23 terms of opposing our motion. It doesn't create a question of  
24 fact. A true question of fact would be, you did it, and I  
25 say, no, you did it. That's a question of fact, opposing

1 positions on an issue. There is no question of fact because  
2 she has not, Ms. Locklair and Centex has not pointed to a  
3 dispute that sets forth that Stock did it. Her expert doesn't  
4 know, and that's how I started this part of our argument, by  
5 pointing out in his deposition testimony, sworn testimony,  
6 that he does not know. Plaintiff's expert said it was done in  
7 the field. So, where is the dispute? There is no dispute in  
8 the evidence in this case.

9 THE COURT: Based on your argument, it seems as if Ms.  
10 Locklair should be wanting more time ---

11 MR. PARKER: Exactly and that's where I started. I said,  
12 Ms. Locklair, I will give you more time to finish Mr. Moore's  
13 deposition. That's where I started thinking that it was  
14 actually a benefit to close out this case, this issue.  
15 Because for some reason, they -- Mr. Moore may say something  
16 that creates a question of fact. At this point, there are no  
17 questions of fact. Mr. Moore says there's no issue with the  
18 mulls. Plaintiff said they were field mulled. Where are the  
19 documents are the evidence that disputes our motion for  
20 summary judgment? There is none, period.

21 Now, I would again in respect to these proceedings and  
22 wanting to close the loop fully, I would again give Centex the  
23 opportunity to allow for the completion of his deposition and  
24 then the Court can then decide the motion. That's what I  
25 suggested up front because I was not inclined to waste a lot

1 of the Court's time and for some reason this is some epiphany  
2 that happens during his deposition that creates a question of  
3 fact. But up to now, there is no question of fact and, in  
4 fact, the requirement is a material issue of fact. Centex's  
5 argument is not supported by its own expert's position with  
6 the Court. Again, Ms. Locklair's attempt to rely upon the  
7 Plaintiff's expert relative to whether there's a mull issue  
8 doesn't support her opposition against our case against  
9 Centex. If we had a claim against -- a motion for summary  
10 judgment against the Plaintiff, it'd be a different story, but  
11 that's not we're here today on. Plaintiff's expert said they  
12 were field mulled, which excludes Stock. Mr. Moore's  
13 testimony is that there are no problems with these windows.  
14 So, what's the Court left to do? I truly don't see that there  
15 is a material dispute of fact in this case, Your Honor.

16 THE COURT: All right.

17 Ms. Locklair?

18 MS. LOCKLAIR: Yes, Your Honor. I appreciate Mr.  
19 Parker's grace in agreeing to continue the motion until  
20 following Mr. Moore's deposition. If the Court is so inclined  
21 to do so, we appreciate that accommodation by Mr. Parker and  
22 we'll respect the Court's decision if that is what it's  
23 inclined to do.

24 With respect the Plaintiff's conclusions, with respect to  
25 the windows, Centex is not required to rely entirely on the

1 Plaintiff's expert opinions with respect to who mulled the  
2 windows. What Plaintiff said is the manner in which the  
3 windows were mulled that creates the DP issue here. It's the  
4 manner that the windows were mulled. I think the designation,  
5 respectfully, between factory mulled, shop mulled, and field  
6 mulled, is my own. If there is a ---

7 THE COURT: The manner in which they were mulled after  
8 they left the control of the -- of Stock?

9 MS. LOCKLAIR: That would certainly be Stock's position,  
10 but that is not Centex's position in the case and it's not  
11 necessarily consistent with the deposition testimony that has  
12 been included in our motion, Your Honor. Again there's  
13 testimony of RWG's representatives that they did not field  
14 mull the windows; that agreement that the windows were not  
15 factory mulled and testimony from RWG that was the windows  
16 were not field mulled supports the testimony of Mr. Goodman  
17 that the windows could have been mulled on site, mulled at  
18 Stock's facilities. So, here the experts can rely on  
19 circumstantial evidence but the, the expert here indicates --  
20 Plaintiff's expert indicates that the manner of the mulling is  
21 what caused the problem.

22 THE COURT: The manner of the mulling in the field or he  
23 don't know where?

24 MR. LOCKLAIR: And he doesn't know where. Respectfully,  
25 Your Honor, I believe the, the designations again are, are my



1 own. So, the difference between factory mulled and field  
2 mulled is what left the manufacturer versus what was  
3 ultimately installed in the field. Here we know that a third  
4 party, an intermediary, Stock, we know received the windows  
5 from the manufacturer and ultimately delivered windows to the  
6 field and we believe there is sufficient evidence and an issue  
7 of fact as to whether or not Stock did more to those windows,  
8 mulled them, joined them together, or otherwise.

9 THE COURT: All right. Well, the moving party has the  
10 burden so the moving party gets the final word.

11 MR. PARKER: Thank you, Your Honor. The last comment Ms.  
12 Locklair made referred to the deposition testimony of Mr.  
13 Goodman. He was a representative and employee of Stock  
14 Building Supply, Your Honor. Mr. Goodman did not say what Ms.  
15 Locklair reported. He has said -- in fact said, and this is  
16 Page 47, his deposition again is Exhibit P, I believe, of our  
17 brief, Your Honor. Is it fair to say, sir, that if Stock or  
18 Carolina Builders mulled the windows at the store, that it  
19 would include all of the manufacturers mulling materials? His  
20 answer is, yes. Now and further -- the question goes further.  
21 Because it was Carolina's practice to include the mull kit  
22 material sent by the manufacturer when it mulled the windows  
23 at the store location? His answer is, yes. Have you ever  
24 been made aware of the fact or it's been alleged that Stock  
25 Building Supply or Carolina Builders did not include the

1 mulling materials with windows that it agreed to mull? No.  
2 Those are questions during the deposition of Mr. Goodman,  
3 which was taken by Ms. Locklair. So, the testimony from Mr.  
4 Goodman is if we store a mulled window, we include the entire  
5 mull kit. The concern raised by Plaintiff's expert is that it  
6 did not include all of the mull kit materials, that being the  
7 foam insert, a mull strip and a mull cap. This testimony is  
8 completely -- completely supports our opposition and I think  
9 diminishes anything Ms. Locklair has just said. This is a  
10 deposition that she noticed. He is saying that if it missed  
11 any part, that wouldn't have come from, from Stock because the  
12 practice and the protocol was to include the entire mull kit.

13 Now, we know we didn't do any labor on the project and  
14 there's no dispute about that. Plaintiff's expert said these  
15 were field mulled. She's trying to pick and choose portions  
16 of this report in an attempt to oppose this motion, Your  
17 Honor. She has to take the good with the bad. This expert  
18 said that there was an issue with the mulling that was done in  
19 the field and he says that in more than one location in that  
20 report. There's no indication whatsoever from anyone that  
21 these windows were mulled at the store. And Ms. Locklair  
22 pointed to you that any testimony from any percipient witness  
23 that the windows, the triples and doubles, were mulled  
24 anywhere except on the field or in the field, Your Honor. So  
25 she can't reverse the burden by saying we have to prove that

1 we didn't do it. Our expert, our percipient witness says it  
2 wouldn't have come from us unless it included the entire mull  
3 kit. Plaintiff's expert said it was mulled in the field. She  
4 has no one to say it was mulled at our shop. Again, there is  
5 no dispute. For her to create a dispute that would preclude  
6 this Court from granting this motion, she has to show some  
7 testimony that says we shop mulled it and she does not have  
8 that testimony, Your Honor.

9 THE COURT: All right.

10 MR. HILDEBRAND: Your Honor, can I address the Court?

11 THE COURT: Okay.

12 MR. HILDEBRAND: Very briefly. This is real simple.  
13 Everybody agrees it wasn't done at the factory. The installer  
14 of the windows on the job says I didn't field mull them.  
15 Circumstantial evidence is that it had to've been done by  
16 Stock and Stock's expert, Stock's witness' testimony is in the  
17 record saying, yes, we did do that at our shop. So, there is  
18 for purposes of this motion, ample circumstantial evidence  
19 that it was Stock. All we have to do is to -- certainly  
20 Centex's expert does not agree with Plaintiff's expert's  
21 allegations. We say, no, most of these are not problems; we  
22 disagree with the Plaintiff's expert. But if the Plaintiff's  
23 expert is correct, that this is a problem, then that is  
24 evidence in the record that we have submitted that there's a  
25 problem with the mulling as articulated by Ms. Locklair and

1 the expert's report and there's evidence, circumstantial  
2 evidence, that Stock mulled them. So I think when you look at  
3 both of those, there is evidence in the record that we have  
4 submitted that they did mull them, circumstantial evidence,  
5 and there's direct evidence from the Plaintiff's expert that  
6 the mulling was a problem. I think it's very simple.

7 THE COURT: And we do base summary judgment rulings on  
8 circumstantial evidence?

9 MR. HILDEBRAND: Yes, Your Honor, absolutely. There is  
10 -- circumstantial evidence is often as good as direct  
11 evidence. If I walk into a room and there's only one door in  
12 and out and somebody is in there and you hear a shot and I  
13 walk out and then you got in there and the person's dead, the  
14 circumstantial -- nobody -- there's no direct evidence I shot  
15 them.

16 THE COURT: I tell juries that all the time. I'm saying  
17 on a summary judgment, do I ---

18 MR. HILDEBRAND: It's even a more relaxed standard than  
19 it is a trial. I mean, circumstantial evidence is -- it's  
20 rare that even in who installed all this work, if there's not  
21 often direct eyewitness testimony that Centex was out there --  
22 it's all circumstantial with contracts and such, absolutely, I  
23 think so.

24 THE COURT: Yes, sir, Mr. Parker?

25 MR. PARKER: I keep thinking I get the last word, so I'll

1 gone keep going until they stop.

2 THE COURT: You definitely get the last word.

3 MR. PARKER: I don't know if they're gonna bring someone  
4 else off the bench, I'm gonna have three people to talk to,  
5 Your Honor.

6 But my, and I said that tongue in cheek, Your Honor, but  
7 my concern is the rules -- the Rule 56 is set up so that the  
8 Court can look at and review admissible evidence. This  
9 argument now about circumstantial evidence, the first thing it  
10 doesn't work in this case for several reasons. I challenged  
11 up front over an hour ago that there would be no contract that  
12 they would present to this Court showing that there was a  
13 contract between Stock and Centex for this project. That  
14 challenge went unmet. I indicated to you that there was no  
15 sworn testimony that Stock actually mulled these windows.  
16 They've not provided any testimony saying that Stock did. So  
17 now as a last ditch effort to try to save this opposition, Mr.  
18 Hildebrand suggests circumstantial evidence. But to introduce  
19 circumstantial evidence, unlike the scenario we just  
20 explained, Your Honor, you'd actually have -- they'd have to  
21 have certain evidence surrounding that evidence to bring it in  
22 as circumstantial evidence, admissible evidence that supports  
23 the circumstantial evidence coming in. Right now, they have  
24 not provided this Court any admissible evidence for what -- to  
25 even bootstrap circumstantial evidence and this is one of the

1 reasons why. They don't have anyone either expert or a lay  
2 person that says that Stock mullied the windows. In fact, we  
3 have testimony to the contrary and a report to the contrary,  
4 Ray Goodman, the Plaintiff's expert. On top of that, the  
5 framer in this case has indicated that there was a third --  
6 another subcontractor installing windows on this project that  
7 Centex has not brought into this case. Now, if we want to  
8 talk about circumstantial evidence, allow them to find that  
9 other window installer, because we know we were not paid to  
10 install any windows, and Centex has not provided any evidence  
11 that we provided any labor in this project, which I would  
12 suggest to you, Your Honor, mulling windows on site or in the  
13 field as suggested by Plaintiff's expert in his report, would  
14 be labor on site. But they have no evidence to provide this  
15 Court to even support that allegation of circumstantial  
16 evidence. They've given this Court nothing in the form of  
17 that other than argument. Everything that we've said, Your  
18 Honor, and we have the binder to prove it, we did it with  
19 documentary evidence, admissible evidence under the rule.  
20 When the burden shifted, what you've gotten, Your Honor, is a  
21 reference to a Plaintiff's expert that supports our position,  
22 their own expert that supports our position, lay witness  
23 testimony in the form of depositions that support our  
24 position, and now the last effort is circumstantial evidence  
25 that because no one else -- we can find no one else that did

1 it, perhaps Stock did it. That's not enough to get to a jury,  
2 Your Honor. That's not admissible evidence. What that really  
3 means is Centex hasn't figured out who they paid to install  
4 the windows, that's it, and that's their problem. Again, my  
5 claims are not against the Plaintiff in this case.

6 THE COURT: I would like review some cases on, if they  
7 exist, the court's basing summary judgment rulings on  
8 circumstantial evidence.

9 MR. PARKER: We'd be more than happy to do that, Your  
10 Honor.

11 THE COURT: You know, I'm not saying it doesn't exist.  
12 I, you know, we have a lot -- we can start typing in --- and  
13 she's found a blog, is circumstantial evidence sufficient to  
14 survive summary judgment in products liability cases. I'll  
15 read that and anything else you all send to me.

16 MR. PARKER: We'll look it up, Your Honor. Would you  
17 like us to provide that briefing after we finish the Moore  
18 deposition; that way you can have everything.

19 THE COURT: I think so. I've indicated that I will  
20 withhold ruling in this case until after the Moore deposition.  
21 I think that's -- it's appropriate especially in light of the  
22 arguments I've heard here today.

23 MR. PARKER: Yes, sir.

24 THE COURT: And I'll look to hear you all supplement the  
25 arguments, but after taking Moore's deposition, supplementing

1 the record.

2 MR. PARKER: Yes, Your Honor.

3 MR. HILDEBRAND: Thank you, Your Honor.

4 MS. LOCKLAIR: Thank you, Your Honor.

5 THE COURT: Thank you all.

6 All right. What's next? Mr. Brown?

7 MOTION TO COMPEL:

8 MR. BROWN: Thank you, Your Honor. I want to first of  
9 all, ask Your Honor's indulgence.

10 We filed discovery requests throughout this case as we do  
11 standard in any case that when an entity who is involved in  
12 suing us, especially for indemnity, contractual and/or  
13 equitable breaches of settlement with other parties that we  
14 get a copy of the settlement and they have refused to give us  
15 any of the settlements that they have reached. They said that  
16 they are either confidential and we have a confidentiality  
17 order in place in this case.

18 THE COURT: Confidentiality approved by the Court?

19 MR. BROWN: I believe the confidentiality order in this  
20 case was approved by the Court; was it not?

21 MR. HILDEBRAND: Your Honor, basically no, there's not  
22 been a confidentiality order. We did that in Edgewater after  
23 the fact. We have basically had a -- had some settlements  
24 that have confidentiality provisions and I would be happy to  
25 stipulate that at trial, the remaining defendants would get a



1 setoff for any settlement amounts that have been reached. I  
2 would respectfully submit that we delay a ruling on that and  
3 then in the production of what, at this point, is confidential  
4 settlement, if we go and get to trial, then they can ask us to  
5 submit the evidence which we can do for the setoff.

6 MR. BROWN: It's very difficult though, Your Honor, for  
7 me to evaluate the case and what a potential setoff may be and  
8 what steps I would take towards a potential settlement myself  
9 and I don't know what they've done over here.

10 THE COURT: You need know how much they've gotten to  
11 determine how much you might pay?

12 MR. BROWN: Yes, sir. They're seeking indemnification  
13 from me, so it certainly a number that would come in and I  
14 think all the other named defendants with regard to Centex has  
15 sued would also be interested in those numbers.

16 THE COURT: They're seeking indemnity. Well, how can you  
17 agree to indemnify without knowing what is ---

18 MR. BROWN: I have an idea of what my number is in the  
19 case.

20 THE COURT: All right.

21 MR. BROWN: And I would have an idea of what they've  
22 received and that would give me some idea of the range I need  
23 to be in. But, Your Honor, I'll be honest with you, I've  
24 never -- it's become a recent thing. I just dealt with it  
25 with Judge Hyman a couple of weeks ago and he agreed. If you

1 settle a case, you need to tell everybody else what you're  
2 getting for the settlements so they can evaluate where they  
3 are in the case. The fact that they've put a confidential  
4 clause in their settlement agreement, doesn't mean that I, as  
5 a party, cannot and should not be able to find out that  
6 amount. I thought we had a confidentiality order; if we  
7 don't, I'll be glad to submit one, but I was told by Catherine  
8 we did and she generally is more on top of these things than I  
9 am. So, that's the whole ---

10 THE COURT: I'm saying from the Court's perspective, we  
11 only respect confidentiality orders approved by the Court.

12 MR. BROWN: Understood, Your Honor. So any  
13 confidentiality provision they have in their settlement  
14 agreement, though, has not been court approved.

15 THE COURT: Because of all the public policy  
16 announcements on the issue?

17 MR. BROWN: I think mainly because they just don't want  
18 us to know, Your Honor. I don't think it's public policy or  
19 anything else, I'll be honest. To be perfectly frank, I  
20 believe they may be close to a very gentlemen's settlement  
21 with Mr. McCutchen right now. I take their word as officer's  
22 of the Court ---

23 THE COURT: Is that why he's sitting back like this?

24 MR. BROWN: Listen, he's the quietest Plaintiff I've ever  
25 heard with a big case up in two and a half weeks, but I think

1 I'm entitled to the settlements they have reached, Your Honor.

2 THE COURT: Okay.

3 How about it, Mr. Hildebrand?

4 MR. HILDEBRAND: Well, I think there's a -- gosh, I wish  
5 I had brought it, a recent case about setoffs and such, and  
6 the court said that if a party -- a party can decide to settle  
7 and if they do, then they kind of control their own destiny;  
8 if they don't, then they kind of take the consequences of  
9 that. And here, some parties have settled and there's a  
10 mutual confidentiality agreement. I don't see any prejudice  
11 to the non-settling parties just like they would have at the  
12 beginning of any mediation. And certainly, if this  
13 information, which we will be having to provide at trial for  
14 purposes of setoff, then I think that's the appropriate time  
15 and you can accomplish both objectives. But I, I don't think  
16 that them having not participated in the settlement at this  
17 point, should contravene the settlement agreement that we've  
18 had with the settling parties and it can be addressed later.

19 Thank you.

20 MR. BROWN: I think that was a case out of the Court of  
21 Appeals where they were going back and forth about whether or  
22 not the non-settling parties had a right for input in how they  
23 allocated the settlement. That wasn't with regard to the  
24 production of settlement documents and I don't know of any  
25 case or rule, Your Honor, that says if it's relevant at trial

1 I'll give it to you and agree it's relevant at trial. It  
2 wouldn't make it relevant two and a half weeks before trial  
3 when we're trying to resolve the case.

4 THE COURT: How long can you wait?

5 MR. BROWN: I beg your pardon, Your Honor?

6 THE COURT: How long can you wait?

7 MR. BROWN: I've waited -- I've waited this long; I'd  
8 like to have them now as we make our final push towards it.

9 THE COURT: You know, I did the trial against Aiken --  
10 Aiken Regional Hospital that resulted in \$10,000,000. The  
11 jury came back with a \$10,000,000 against the hospital. And  
12 moments before the jury came out, the lawyers said, we've  
13 agreed on a high and low. The hospital had a hospital defense  
14 team out of Denver and they had agreed on a low of 4,000,000  
15 high of 8,000,000, I believe, and the jury came back with  
16 10,000,000 or 12,000,000, I believe. But before we started  
17 the trial the week before, we had some doctors trying to  
18 settle to get out of the case and they were objecting --  
19 opposing the settlement, a party settling because it would  
20 affect their setoff rights. And you know, it's -- I just say  
21 that because this entire thing is it's a quagmire trying to  
22 figure out where the law is, what the law requires, whose  
23 entitled to what. So, you know, you end up massaging this  
24 thing -- these things to try to, you know, somehow or other to  
25 get to the home stretch of a case. I don't know what you're

1 entitled to. I mean, it would seem to be that you would be  
2 entitled to disclosure of information, but your disclosure may  
3 hamper someone else's ability to get the case resolved. You  
4 know, my desire certainly is for you all to resolve the case,  
5 if you can resolve it and considering all of that and  
6 considering everything I'm hearing today, as we get closer and  
7 closer and closer to that vexing date.

8 MR. BROWN: Unlike Aiken though, Your Honor, I'm not --  
9 don't get me wrong, I'm not trying in any way to impact or  
10 affect any settlements he has, to protest against them or  
11 anything of that nature. I just want to see them and know the  
12 amounts.

13 THE COURT: Well, that doctor wanted me to not approve  
14 the settlement unless he could be put on a verdict form  
15 specifying this and that about setoff; it was really ---

16 MR. BROWN: None of those issues.

17 THE COURT: But it comes in different forms. This is  
18 just a different form of the same confusion. So, your motion  
19 is to compel them to ---

20 MR. BROWN: Produce just copies of any settlements  
21 agreement that they have as of this date.

22 THE COURT: And you represent?

23 MR. BROWN: I represent the brick mason.

24 THE COURT: Because you're normally in here carrying the  
25 heavy weight, representing the ---

1 MR. BROWN: I got a little nobody, Your Honor.

2 THE COURT: All right.

3 How about, Mr. Hildebrand?

4 MR. HILDEBRAND: Well, Your Honor, the other aspect is  
5 that we have in our -- all of our negotiations, we're highly  
6 sensitive that there are a number of other cases behind this  
7 one arising out of condominium projects in the same  
8 neighborhood. And as with the Edgewater case, we will insist  
9 that the Plaintiffs agree that we can make a motion to the  
10 Court for you to decide and it will be up to your discretion  
11 whether you would grant it or not, but we would hope that you  
12 would, based on a joint motion, say yes, we -- I will agree  
13 that this will remain confidential and can't be divulged to  
14 other homeowners to insight them to litigate or whatever, but  
15 it's real important to my client to try to cobble these -- put  
16 as much ---

17 THE COURT: Did we sign an order on that in Edgewater?

18 MR. HILDEBRAND: Yes, sir. Yes, sir. To -- we want to  
19 be generous to try to get these things settled without it  
20 coming back as a club against us in other -- in this other  
21 litigation. So that's -- that's an important part of this to  
22 us, so I would -- that's a large reason for the settlement  
23 amounts individually and cumulatively not to be divulged. So  
24 I think ---

25 THE COURT: I think that they're talking about opening up

1 Pandora's box?

2 MR. HILDEBRAND: Right, Your Honor, and then ---

3 THE COURT: And he's not concerned about that.

4 MR. HILDEBRAND: He's not. I think there's probably a  
5 good chance like most construction case will be settled and  
6 then we'll hopefully file a joint motion to have it -- the  
7 settlement sealed and if we -- so I would say that there's no  
8 harm in delaying a ruling and you can decide ---

9 THE COURT: So, when I said how long can he wait -- how  
10 long can he wait or should he be made to wait?

11 MR. HILDEBRAND: I would ask that it be addressed at  
12 trial and he would be entitled to a setoff and he can ask us  
13 to stipulate to those amounts so that it would be in evidence  
14 for them to get that settled.

15 THE COURT: All right.

16 Mr. Brown?

17 MR. BROWN: Judge, we can keep going, but that's two-and-  
18 a-half weeks from now after a two-week trial and I understand  
19 all the issues that Your Honor is coming up with and having to  
20 address and we're all faced with verdict forms and other  
21 people bringing suit and confidentiality orders and all that  
22 good stuff. I would simply express -- I think this 24th year  
23 of doing it, I've never not been able to get a settlement  
24 order -- settlements in a case I was in where I was a co-  
25 defendant or a defendant that had claims made against me by

1 somebody and especially for indemnity claims.

2 THE COURT: How many of these cases do I have out there?  
3 I have six of these cases and I, you know, your motion may be  
4 the number 1 of 50 that was granted.

5 MR. MANOS: You hearing the same one tomorrow by me, Your  
6 Honor, a little different context though, because Centex  
7 settled in that one.

8 THE COURT: I'll take it under advisement.

9 MR. HILDEBRAND: Thank you, Your Honor.

10 THE COURT: Thank you.

11 (ADJOURNED.)

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY ) 2014-CP-26-06573

BEACH VILLAS AT OCEAN KEYES )  
PROPERTY OWNERS ASSOCIATION, )  
INC., )

Plaintiff, )

vs. )

OCEAN KEYES DEVELOPMENT, LLC, )  
ET AL. )

Defendants. )

**Transcript of Record**  
(MOTION HEARING)

September 28, 2017

---

OCEAN KEYES DEVELOPMENT, LLC. )

Third-Party )  
Plaintiff, )

vs. )

RENAISSANCE STEEL )  
INSTALLATION, LLC, ET AL. )

Third-Party )  
Defendants. )

**B E F O R E:**

Honorable Clifton Newman  
Horry County Courthouse  
Conway, South Carolina

**A P P E A R A N C E S:**

Robert L. Wylie, IV, Esquire  
James E. Lady, Esquire  
**Attorney for Beach Villas**

Robert Kennedy, Esquire  
Carrie A. Fox, Esquire  
**Attorney for Richard's Framing**

Neil S. Haldrup, Esquire  
**Clarendon National**

Ross A. Appel, Esquire  
**American Empire**

Christopher Clark, Esquire  
**Keye Construction**

James H. Elliott, Esquire  
**First Exteriors**

John L. McCants, Esquire  
**National Fire & Marine Insurance**

Jeffrey A. Ross, Esquire  
**Coastal Stucco**

G. Michael Smith, Sr., Esquire  
**Carefree Exteriors, Beach Villas  
and Dunn Plumbing**

Lawrence M. Hunter, Esquire  
**BITCO**

Robert C. Calamari, Esquire  
**Selective Insurance**

N. Keith Emge, Jr., Esquire  
Patrick McDonald, Esquire  
David Miller, Esquire  
**Ocean Keyes Development**

Joseph K. Cunningham, Esquire  
**Russ Baltzer**

**A P P E A R A N C E S:**

Peter H. Dworjanyn, Esquire  
**Canopus U.S. Insurance**

Christy Mahon, Esquire  
Sue Hogan, Esquire  
**The Hartford**

**ALSO PRESENT:**

Anna P. Cathcart, Esquire  
Jennifer Sosa, Esquire

**TAKEN BY:**

Dixie C. Eubank  
**Circuit Court Reporter**

**PREPARED BY:**

Kay H. Richardson  
**Circuit Court Reporter**

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E X H I B I T SNo.IDEV

(No exhibits were marked or admitted.)

1     **(SEPTEMBER 28, 2017)**

2     BY THE COURT:

3             THE COURT: Thank you. Good morning. Please be seated.

4             All right. Good morning. Beach Villa. Okay. We'll  
5 have everyone introduce themselves for the record and tell us  
6 who you represent.

7             MR. WYLIE: Robert Wylie representing the Plaintiff,  
8 Beach Villas Homeowners Association.

9             MR. LADY: Jim Lady, for the Plaintiffs.

10            MR. KENNEDY: Good morning, Your Honor.

11            THE COURT: Good morning.

12            MR. KENNEDY: Robert Kennedy here for Richard's Framing.

13            THE COURT: All right.

14            MS. CATHCART: Anna Cathcart of Phelps Dunbar just  
15 observing today.

16            MS. FOX: Carrie Fox, also here for Richard's Framing.

17            THE COURT: Is it Richard's Framing? All right.

18            MR. HOLDRUP: Neil Haldrup for Clarendon National. I'm  
19 here observing this hearing and really here for the 11 o'clock  
20 hearing in Harbour Cove.

21            THE COURT: All right.

22            MR. PELLA: Good morning, Your Honor.

23            THE COURT: Good morning.

24            MR. PELLA: Austin Pella here for American Empire, one of  
25 the carriers in the Harbour Cove case.

1 MR. CLARK: Chris Clark, Keye Construction.

2 MS. SOSA: Jennifer Sosa (spelled phonetically) here from  
3 The Hartford just observing.

4 MR. ELLIOTT: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. ELLIOTT: James Elliott, I represent First Exteriors,  
7 LLC.

8 THE COURT: First Exteriors. Mr. Elliott, I saw David  
9 Anderson and I said I got an email from one of your lawyers,  
10 not it wasn't David, it was Les Cotter, and her name is --  
11 well, as it turns out, she wasn't a lawyer, but she sends the  
12 emails. I was calling her a lawyer, and he said, I don't know  
13 that lawyer.

14 MR. ELLIOTT: Was it Carol Fore. I think his secretary  
15 is Carol Fore. He's in Columbia so I don't pay much attention  
16 to that.

17 THE COURT: Later on, he said no, that's a paralegal,  
18 that's a secretary. All right.

19 Yes, sir.

20 MR MCCANTS: Good morning, Your Honor. I'm John McCants  
21 and I'm here on behalf of National Fire and Marine Insurance  
22 for the Harbour Cove case.

23 MR. ROSS: Good morning, Your Honor. Jeff Ross here for  
24 Coastal Stucco for this case.

25 MR. SMITH: Mike Smith for Carefree Exteriors in Beach

1 Villas and for Dunn Plumbing in Harbour Cove.

2 MR. HUNTER: Lawrence Hunter for BITCO General Insurance.  
3 I'm here in the Harbour Cove case.

4 MR. CALAMARI: Bob Calamari for Selective Insurance  
5 Company in this case.

6 MR. EMGE: Your Honor, I'm Chip Emge. I'm here for Ocean  
7 Keyes Development in the Beach Villas case.

8 MR. MCDONALD: Good morning, Your Honor. Patrick  
9 McDonald here for Ocean Keyes Development in Beach Villas.

10 MR. MILLER: Good morning, I'm David Miller. I represent  
11 Ocean Keyes in the related coverage actions.

12 MR. CUNNINGHAM: Good morning. Joe Cunningham, I  
13 represent Russ Baltzer in his capacity as an architect in this  
14 case.

15 MR. DWORJANYN: Good morning, Judge Newman. I'm Pete  
16 Dworjanyn and I represent Canopus U.S. Insurance, Inc., the  
17 one that filed the motion to intervene.

18 MS. MAHON: Good morning, Your Honor. Christy Mahon here  
19 again for the Hartford. Sue Hogan also present for the  
20 Hartford.

21 MS. HOGAN: Good morning, Your Honor.

22 MS. MAHON: And we have another admission Pro Hac Vice.  
23 I asked the Plaintiffs and also Ocean Keyes and they have no  
24 objection and I haven't heard an objection from any other  
25 party.

1 THE COURT: Okay.

2 MS. MAHON: Thank you, Your Honor.

3 THE COURT: Do they have standing to object?

4 MS. MAHON: We will talk about that later, right, Your  
5 Honor.

6 THE COURT: All right.

7 MS. MAHON: We've read all the cases again last night.

8 THE COURT: She'll be admitted pro hac vice.

9 MS. MAHON: Thank you, Your Honor, I'll have it filed.

10 THE COURT: Okay. Who's first? The motion to intervene,  
11 is that first?

12 MR. CALAMARI: However you want to do it, Your Honor.

13 THE COURT: Okay. Very good.

14 MOTION TO INTERVENE:

15 MR. CALAMARI: Thank you, Your Honor. Bob Calamari for  
16 Selective Insurance. I'll talk a little bit about this motion  
17 to intervene. I know we argued it yesterday, a very similar  
18 motion in another case. This is a different case, different  
19 lawyer. So, forgive me if I repeat some of the things that I  
20 said yesterday.

21 Just like in the case yesterday, I'm speaking on behalf  
22 of Selective Insurance Company and our insureds in this case  
23 are ---

24 THE COURT: Let me ask you ---

25 MR. CALAMARI: Sure.



1           THE COURT: She's trying to get Mike Locklear up to speed  
2 on finding stuff on the -- through the E-filing System. Do  
3 you have a -- she has my computer -- do you have a copy of the  
4 motion? Does anyone have a copy of it?

5           MR. CALAMARI: Here's a copy of our motion.

6           THE COURT: All right. Thank you.

7           MR. CALAMARI: Here is the motion by Hartford and  
8 National Fire.

9           THE COURT: Okay. Yes, sir.

10          MR. CALAMARI: Oh, thank you, Your Honor. The -- this is  
11 a motion to intervene on behalf of Selective as a non-party to  
12 submit special interrogatories to the jury for the purpose of  
13 allowing the verdict in this case to be apportioned into  
14 categories that can later be used in an instructive manner in  
15 the coverage actions to determine what portion of this verdict  
16 is covered. And we're asking that we be allowed to intervene  
17 as a non-party. We don't want to come in and give the jury  
18 our name with insurance. We don't believe that would be  
19 proper. But we want to come in and participate and say --  
20 present special interrogatories that the jury can use to  
21 allocate this verdict such that it can be used in the other  
22 action.

23          THE COURT: Would you be identified to the jury?

24          MR. CALAMARI: I don't believe so. I don't think that  
25 would be proper.

1 THE COURT: Okay.

2 MR. CALAMARI: I think ---

3 THE COURT: Then they will identify you as the insurance  
4 representative.

5 MR. CALAMARI: Exactly, Your Honor. We think that that  
6 would interject insurance into the case which would be  
7 improper.

8 As a second, if you deny the first portion of the motion  
9 and do not allow any intervention to the point where we're  
10 allowed to submit these special interrogatories, we are asking  
11 that you order in a protective fashion to say that in the  
12 subsequent declaratory judgment action, that the carriers in  
13 this case be permitted to submit any evidence that is  
14 necessary or can be used by a trier of fact to break down a  
15 general verdict, if that's what happens, into categories of  
16 covered and non-covered damages and that no one would be  
17 allowed to claim a general verdict and the parties can't look  
18 behind the general verdict because we're making an effort now  
19 to somewhat eliminate that problem.

20 Now we're wondering why are we -- why are we here today,  
21 why are we asking this, why are we filing a motion to  
22 intervene. Well, it's abundantly clear that the supreme court  
23 in the *Newman v. Auto Owners*, *Harleysville v. Crossman* and  
24 most recently in the *Heritage v. Harleysville* case, that the  
25 supreme court wants allocation to take place in the underlying

1 action in a construction defect matter. They have made very  
2 clear in *Auto Owners v. Newman* that they would have been able  
3 to allocate, they would've been able to save the costs of  
4 removal and replacement of the insured as not a covered damage  
5 if there had been allocation in the underlying action. But  
6 they commented that the carrier did not make an effort to  
7 perform allocation. That was reiterated in the Crossman  
8 decision, where they talked about a general verdict and that  
9 in *Newman*, you need to allocate. But most recently in the  
10 Heritage opinion, the court addressed notice and understanding  
11 of whether these things should be allocated and they noted  
12 that there was no effort by Harleysville at that time to ask  
13 for special interrogatories to allocate the verdict. And in  
14 that case, in the Heritage case, we believe they said as long  
15 as the parties are on notice, if they're on notice of this  
16 issue, then they need to come in and they need to allocate.  
17 And it's not just the carriers. We believe that every party  
18 in this case from the Plaintiff's lawyer to the general  
19 contractor, to the architect, the subcontractors, product  
20 manufacturers, everyone -- we believe everyone in this case  
21 has an obligation and a duty to request coverage or request an  
22 allocated verdict that apportions damages into categories that  
23 can be used in a later coverage action.

24 Now some may oppose and we've heard some arguments  
25 yesterday, but we don't know about this. We don't know about

1 this. I don't think there's a lawyer that practices  
2 construction litigation in South Carolina that can stand up  
3 and say, we've never heard about allocation, or we don't know  
4 anything about this, and if they didn't send a reservation of  
5 rights letter five years ago when this all initiated saying  
6 that they were going to appear and ask us to allocate, we  
7 don't know about it. Likewise, I don't think they would say  
8 if they did send that letter that, of course, we would have to  
9 come in here and allocate, but they -- the key is in the  
10 Heritage decision that is there notice, is there notice to the  
11 insured, is there notice to the Plaintiff. Heritage gave the  
12 Plaintiff some third-party rights. Heritage said they have  
13 third party rights and they can rely on whether this notice  
14 was given. Well, if there's notice given in anything, there's  
15 notice given in South Carolina of this obligation to allocate  
16 damages. We also believe that anyone who opposes this and  
17 anyone who prevents the court from performing allocation is  
18 going to be estopped from later in the coverage action, coming  
19 back and saying, you're not allowed to allocate that verdict.  
20 I know you tried to allocate it. I know you tried to put it  
21 in categories, and I know I prevented you from doing it, and  
22 now, you're not allowed to allocate that, I get a hundred  
23 percent of the coverage. Because I think in listening to  
24 yesterday's arguments and reading the briefs for today's  
25 arguments and generally examining this issue, what the goal is

1 from the carrier side, is to fairly pay for what's covered  
2 under the policy. What the goal is from the insureds, the  
3 Plaintiff's side, is to make the carrier pay for things that  
4 are not covered under the policy. It's kind of a gotcha, you  
5 didn't send the right letter, you didn't file a motion at the  
6 right time. If you intervene you have to come in as a party,  
7 you didn't intervene right. The rule for intervention doesn't  
8 allow you to do this and, therefore, 100 percent is covered.  
9 All of the opposition to allocation, the ultimate goal is 100  
10 percent of everything is covered, even things that are not  
11 specifically not covered by the policy. Those cases I  
12 mentioned, Newman, Crossman, Heritage, they all reiterate that  
13 the work of the insured that is defective and needs to be  
14 removed and replaced is not a covered damage.

15 What the Plaintiffs and what the other parties want in  
16 this case, is they want that to be covered because of a  
17 gotcha, because you didn't give us notice, you didn't tell us  
18 about it. Well, we're telling everyone about it now. There's  
19 a DJ action filed in this case. There's three DJ actions  
20 previously filed by the general contractor. We filed one on  
21 behalf of Selective for Carefree Exteriors and Coastal Stucco.  
22 We're not gonna burden anyone with answering it before this  
23 trial goes on, but it's out there, it's noticed. There were  
24 letters written, there were conversations with insureds. I  
25 don't know how many times the parties got together for

1 mediation in this matter, but a discussion has gone on  
2 frequently between insurance professionals, insurance lawyers,  
3 lawyers for the other parties in this case. It would be  
4 interesting for someone to say that they can't -- they didn't  
5 know about this, this was a shock, we didn't prepare our case  
6 this way.

7       They talk about in the cases that this is gonna be too  
8 difficult. It's gonna be very difficult to allocate a verdict  
9 in this case. So, let's think about these cases as we talked  
10 yesterday. And we heard some additional information yesterday  
11 that was even -- even more complex. This is a complex case.  
12 It's a two-week trial. There are no more complex cases in  
13 South Carolina than construction defect cases. The jury is  
14 gonna come in, they're gonna be selected, gonna put 12 in the  
15 box, an alternate, and they're gonna say to the jury, we're  
16 gonna talk to you about expansion joints and exterior  
17 insulated finishing systems for stucco, whatever that is, hard  
18 coat versus EIFS. We're gonna talk to you about mullions.  
19 Yesterday, we heard all about mullions. I represent some  
20 window manufacturers. I'm not sure what a mullion is. But,  
21 they not just talked about mullions, because mullion  
22 apparently is a noun, but mull is a verb and the jury is gonna  
23 learn all about these issues. They're gonna hear about  
24 fasteners, nail screws. They're gonna hear about weep screed.  
25 They're gonna hear about weep holes in brick. They're gonna

1 hear about vinyl siding. They're gonna have experts come in  
2 and talk about code violations. These experts can recite that  
3 code from front to back. They've been studying it for many  
4 years. Plaintiff's expert, Peter Sherrit has been doing this  
5 for 25, 30 years, hundreds of cases, and they're gonna explain  
6 everything to the jury. They're gonna talk about  
7 manufacturers guidelines, industry standards, everything. And  
8 that jury at the end of two weeks of hearing complicated issue  
9 after complicated issue and what needs to be repaired, what  
10 doesn't need to be repaired, what needs to be removed, the  
11 global 8', 9', \$10,000,000 estimate, the counter of a  
12 \$1,000,000 estimate, \$2,000,000 dollars, whatever those  
13 numbers are, they're gonna get about an hour of the law of  
14 what the law is in this case, and then they're gonna have  
15 about three hours to go back in the room and say what on earth  
16 are we going to do. And so the argument that what I'm asking  
17 is way too difficult for that jury in comparison to what  
18 they're doing overall; that doesn't seem to mesh well with  
19 that argument.

20 The other point is that the Plaintiffs and the parties in  
21 this case, I anticipate are going to say, well, this changes  
22 everything. Our experts now are going to have to testify  
23 differently and we only have two-and-a-half weeks till the  
24 trial. Well this is actually number 2 on the roster. I know  
25 there's motions to stay and other things, so we might have six

1 months before this case goes to trial. But so the parties are  
2 gonna offer expert testimony in this case and they're gonna  
3 present an expert to you and they're gonna say this guy has  
4 got 25/30 in construction; he's built buildings left and  
5 right; he's got this structure, that structure; he's testified  
6 in court -- he's been sworn in as a construction expert; but  
7 good God, if he has to tell you how much it costs to repair --  
8 to remove and replace the brick and how much it costs to pay  
9 for the damage that was caused that; that's way outside of  
10 anything he could do. That just doesn't seem very logical to  
11 me.

12       So just like in the other case yesterday, I put together  
13 a sample of a special interrogatory and I don't think it's  
14 very difficult for the jury in this case to perform this  
15 function. And again, the caption, the first question, answer  
16 only if you found damages -- for example, I used Coastal  
17 Stucco, that's one of the insureds that we have in this case  
18 -- answer only if you found damages against Coastal Stucco; if  
19 you found no damages against Coastal Stucco, stop and do not  
20 proceed further. Line two, if you found damages against  
21 Coastal Stucco, list the total amount of damages on the  
22 following line; this should be the damages only against  
23 Coastal Stucco. It should be fairly easy because at some  
24 point, the experts in this case have to say Coastal Stucco is  
25 wrong and this is what happened because Coastal Stucco was



1 wrong. And then an expert has to stand up and say, okay, let  
2 me tell you about the stucco problems. For me to fix that and  
3 to fix what's wrong is gonna cost X amount. That number has  
4 got to be in the overall general verdict if that's what it is.  
5 Then number three, here's where we come into play. We don't  
6 need any new evidence, we don't need anything different, all  
7 we do is say please divide the number into -- in Item 2 into  
8 the following categories: What's the costs of removing and  
9 replacing the stucco, the work of Coastal Stucco; and B, what  
10 is the costs of repairing the portions of the building damaged  
11 by the work of Coastal Stucco? It's already in evidence.  
12 They have to say that. They can't not come in and say that.  
13 And C, just a reminder, the total of A and B should be equal  
14 the damage found in Number 2. And then if, if need be, for  
15 the damages in Line B, if there are any, identify whether  
16 those damages are progressive and continuing today and we're  
17 gonna ask for a jury charge on progressive damages and they  
18 can circle yes or no. If they circle yes, then, you know, we  
19 have a time-on-risk period. Now we're not telling the jury  
20 that that's a time-on-risk period and this will be something  
21 that the jury identifies now, but there will be other  
22 arguments whether this is necessary or whether it's used as  
23 the time-on-risk argument in the coverage action. But that's  
24 it. That's it and how do I know or how do I think that they  
25 can do this and they've already done that. Well, I looked at

1 some of the estimates in the case and I'll hand up the one  
2 from Watkins Services and I highlighted an area -- and this is  
3 not to say this is the only item that they would consider, but  
4 it's spelled out. It's spelled out and this is Watkins  
5 Services' scope of repair and they have a general requirement  
6 section, they have a stucco section, they have a front  
7 stairway -- stair walk beam section, they have a front stair  
8 beam section, rear porches, interior, they've got a lot of  
9 detail on this that's already done. And I know J.R. Watkins  
10 and I've been in cases with him before and I, I would be  
11 shocked if J.R. Watkins would say I can do all these wonderful  
12 things. I can analyze this, I can tell you what it's gonna  
13 cost to repair, but I can't -- I can't break down the  
14 difference in costs between the removing and replacing the  
15 stucco and fixing the damage that happened. I am guessing, I  
16 don't know this for certain, but I'm sure J.R. Watkins has  
17 some sort of formula so he doesn't blindly go into projects  
18 and say I can do this repair for \$2,000,000 with no earthly  
19 idea of what it's gonna cost to do it. I'm sure he has a  
20 breakdown of man hours, of sheets of plywood. He goes out and  
21 does his own inspection. He looks at the repair or the  
22 building envelope inspection done by the experts in the case,  
23 and he comes up with what he believes to price that scope, and  
24 gives that number. It would surprise me -- and the Plaintiffs  
25 also have an expert report in this case done by John Bearden

1 and it's got detail on it. I only highlighted one section.  
2 But, just on the first building, remove and replace stucco.  
3 So, that number has already been decided. And we're not  
4 asking -- we're not asking the Court to try the coverage  
5 action in this case and I don't think that's what the supreme  
6 court is asking either. I think what the supreme court is  
7 saying, hey, when you get a verdict in these cases, itemize  
8 the damages. Itemize the damages and they can fight over them  
9 all they want in a coverage action. It might actually  
10 eliminate some of the confusion in a future coverage action  
11 and let these cases be resolved. But you've got to do  
12 something. So ---

13 THE COURT: What portion or what in the case -- in those  
14 cases did the supreme court say that causes you to believe  
15 that this is essential? Specifically what did they say in the  
16 various cases?

17 MR. CALAMARI: I don't have the exact quotes.

18 THE COURT: You can paraphrase.

19 MR. CALAMARI: But, you know, essentially what they said  
20 ---

21 THE COURT: And then maybe who's coming after you will  
22 specify.

23 MR. CALAMARI: Yes, sir. In the Newman case, they talked  
24 about -- they talked about the allocation issues and they said  
25 the first Newman came out and said 100 percent of everything

1 is covered; removing and replacing, everything is covered.  
2 The second Newman came out and interestingly -- first Newman  
3 comes out and says 100 of everything is covered and then in  
4 2009, we had the two Heritage trials which lead to the  
5 Heritage decision. So there was nothing to allocate in those  
6 cases. Newman two comes out, which is the opinion and they  
7 say, you know what, removing and replacing the stucco or  
8 whatever in the building, the work of the insured is not a  
9 covered damage. But they said, since there was nothing and --  
10 and at my age, if I try to read that, I might pass out up  
11 here. It says, nevertheless, it is not possible from the  
12 record before this court to determine what portion of the  
13 arbitrators itemized list of damages may be attributed to the  
14 removal and replacement of the defective stucco and it is not  
15 the purpose of this declaratory judgment action to re-litigate  
16 the issue of damages. It says, homeowners had an opportunity  
17 to raise this matter when the issue of damages was litigated  
18 before the arbitrator who issued a final binding award on the  
19 merits. So, this is our opportunity to, to ask. And we don't  
20 think we're the only ones that are supposed to ask, but so in  
21 -- in these cases, and we talked a little bit about it  
22 yesterday, the insured typically carries the burden of proving  
23 damages within the insuring agreement. The insuring agreement  
24 is they have to show there's an occurrence, defective work;  
25 they have to show that there's property damage, damage from

1 that defective work; and, they have to show that it occurred  
2 during the policy period. So, initially the burden is on the  
3 insured and the other parties in the case to show that that is  
4 gonna meet coverage under the policy. The insurance company  
5 has the burden on exclusions. Those are typically handled  
6 later, but that initial burden is on the insured.

7       There is case law from the 70s and we talked about very  
8 old cases yesterday, whether they apply or not or how our  
9 court would treat them, we don't know. But, those cases seem  
10 to say that in a situation where the insurer completely  
11 controls the defense of the matter, that they are gonna have  
12 some obligation to ask the Court to allocate. They don't say  
13 who. They don't say who is supposed to this. They don't say  
14 if it's me on a motion to intervene. They don't say if it's  
15 the lawyers hired to defend the action. They don't say if  
16 it's the Plaintiff's lawyer, but I think some of that was  
17 cleared up in the Heritage decision because they gave rights  
18 to the Plaintiff, the gave some third-party rights and they  
19 talked about reservation of rights letters in the sense of  
20 whether they were on notice of coverage issues. Well, I think  
21 that's a little bit of a red herring now because there's not a  
22 lawyer in the State that practices in this arena that doesn't  
23 know exactly about allocation, coverage issues, motions to  
24 intervene, and they say you have to do that. So I'm not sure  
25 the burden has shifted, because in this case we have four

1 declaratory judgment actions pending. We have coverage  
2 counsel involved for a handful of the parties in this case.  
3 The Plaintiff's lawyers are excellent coverage counsel;  
4 they've been dealing with coverage issues for a very, very  
5 long time. We have the general contractor has three carriers  
6 and they each have separate coverage counsel that has appeared  
7 at the meetings, appeared at mediation, has talked coverage  
8 issues. So, it's difficult for someone to say that that  
9 burden has shifted, has shifted to the insured because the  
10 insureds are well aware of this, and all of the lawyers in  
11 this case, including the Court, has the opportunity to say,  
12 you know what, this verdict is gonna be -- we don't want just  
13 the general \$3,000,000 or whatever the amount is. Go ahead  
14 and spell out, spell it out. You know everyone has a duty  
15 when you bring an action to the Court to prove wrongdoing,  
16 prove that there was some liability. You have to prove  
17 liability, you have to prove damages. So, the Plaintiff in  
18 this case has got to show that the stucco was improper, the  
19 stucco needs to be removed and replaced, and the stucco caused  
20 this damage, and they've got to say how much that is gonna  
21 cost. And if they're putting that number up anyway, and these  
22 reports itemize those as they are, shouldn't the jury be able  
23 to come up with that number? We believe that they do.

24       Lastly, I'm gonna talk why we filed the motion to  
25 intervene. We talked a little bit about it yesterday. The

1 supreme court made clear we have to do something. There is no  
2 other avenue. Typically, an insurance policy requires two  
3 obligations of the carrier: The duty of defense and the duty  
4 of indemnity. Indemnity is not triggered until there is a  
5 settlement or a judgment against the insured. Right now we  
6 have our duty of defense. Our duty of defense is to provide a  
7 defense to the insured for the claims brought against them.  
8 This is not a claim brought against the insured. So, the  
9 supreme court says we have to act. So, how do we do that? We  
10 can't come in here unless we have a rule or the court grants  
11 us this opportunity to come in and make these arguments unless  
12 there's some rule and we believe we meet the requirements of  
13 Rule 24. The supreme court has said, we have an interest in  
14 this action because they understand covered versus non-  
15 covered. They understand that, if it's not allocated, they're  
16 gonna hold that against somebody. We don't know who at this  
17 point. We know who they did in Heritage; we're sure who they  
18 will here. But it could be us; so we do have standing.

19 Timeliness of the motion. We have filed these motions  
20 day one when lawsuits have been filed and the courts have said  
21 get out of here, this is way too early. We're talking about  
22 -- we're talking about coverage issues for an interrogatory at  
23 the end of the trial. Yesterday, the general contractor in  
24 the case said, we're filing it too early, that we should wait  
25 until all the evidence is in, see what parties are in, and

1 then talk about what a verdict form is or what charges go to  
2 the jury. So, there's no perfect time, there's no perfect  
3 rule, but this is the only rule and the Court has wide  
4 discretion in handling this. So, we believe that we've done  
5 -- we've done what we're doing here.

6 And again, just to reiterate, our goal is to be fair and  
7 pay what is covered under the policy. We just don't want to  
8 pay for the cost of removal and replacing the defective work  
9 of the insured, which the supreme court said we don't have to.  
10 If there are exclusions that apply, we deal with those in a  
11 coverage action. If they want to talk about sufficiency of  
12 reservation of rights letters or other forms of notice that  
13 we've brought up today, that's all for the coverage action.  
14 But to pass up the opportunity to allocate the verdict here,  
15 can cause huge problems later and result in cases that last 15  
16 years like Heritage. So, we think it's prudent; we think it's  
17 right to do this. We're not asking to mess up the trial.  
18 We're not asking for any additional evidence. We're asking  
19 for some jury charges, some interrogatories to the jury that  
20 let the jury make an effort to allocate those damages, and  
21 that's our motion. Thank you, Your Honor. Some of the other  
22 insurance attorneys might want to speak.

23 THE COURT: All right. Ms. Hogan?

24 MS. HOGAN: Good morning, Your Honor.

25 THE COURT: Good morning.



1 MS. HOGAN: This morning I'm representing three Hartford  
2 entities: Hartford Fire Insurance Company, Hartford Casualty  
3 Insurance Company, and Hartford Underwriting Insurance  
4 Company. I only have a quick -- a few quick points to add to  
5 Mr. Calamari's presentation. But I want to say I think he got  
6 interrupted before he launched his argument. Mr. Calamari,  
7 like yesterday, is speaking for all the carriers. We all  
8 incorporate his arguments. We're gonna try not to be  
9 repetitive here. So, I have a few -- just a few quick things  
10 that I don't think Mr. Calamari covered.

11 We're anticipating today that the Plaintiff's bar will  
12 argue that -- that if we are to -- if we are permitted to  
13 intervene, we have to intervene as a party. We talked a  
14 little bit about this yesterday. I think there's case  
15 authority for the -- for the proposition and this is our  
16 position. Just to be clear, no carrier that I'm aware of has  
17 sought intervention as a party in this lawsuit. What we're  
18 all asking for is limited intervention. We do not want to be  
19 a party. We believe that the Court has very wide discretion  
20 as to the scope of intervention. I found two cases that talk  
21 about that, which I provided you with copies of those cases  
22 yesterday, Your Honor: *Davis v. Jennings*, 304 S.C. 503, 1991  
23 and *Stoney v. Stoney*, 417 S.C. 345, 2016.

24 I think *Davis v. Jennings* is more directly on point.  
25 That's a case, Your Honor, where the court specifically found

1 that the trial court not only has wide discretion, but  
2 specifically found that the trial court could allow and did  
3 allow rightfully a party to intervene for a very limited  
4 purpose as a non-party.

5 In *Stoney v. Stoney*, it was sort of a reverse scenario,  
6 but it still makes the same point. A party was allowed to  
7 intervene and became a party and the court said that the trial  
8 court should not bring that party in because the intervenor  
9 started to litigate the case on behalf of the initial party.  
10 So, just the main point there, Your Honor, is we'd like to --  
11 we're just anticipating this argument that we need to be a  
12 party and we don't believe that to be the case.

13 To that point, further we believe that under Rule 411,  
14 under case law interpreting the rule, if the carriers are  
15 required to, to intervene as a party, obviously that will  
16 interject the, the existence or lack thereof, coverage --  
17 well, it'll interject coverage issues and a belief, I believe,  
18 that there's liability insurance and that will prejudice both  
19 the carriers and their named insureds. So, we believe that  
20 any argument made by the Plaintiff's bar that if we intervene,  
21 we have to be a party is incorrect.

22 That's all I have, Your Honor.

23 THE COURT: Okay. Thank you.

24 MS. HOGAN: All right. Thank you.

25 THE COURT: Yes, sir.

1 MR. DWORJANYN: Good morning, Your Honor. Pete Dworjanyn  
2 and I represent Canopus U.S. I'm only going to -- because  
3 we're joining in the other arguments, I'm just gonna add a  
4 couple of thoughts.

5 Number one, one of the issues that the Plaintiffs raised  
6 is there's a lot of complexity in, in interrogatories to the  
7 jury. There's one simple interrogatory that is going to  
8 become more and more relevant in a lot of your cases and  
9 that's, when did this damage begin? That's a question that  
10 we seek -- specifically sought in our motion to be asked.  
11 When did this property damage begin, because that has  
12 implication -- that has insurance coverage implications for  
13 some of these policies and it's an easy question to answer.  
14 Everyone assumes it began the first time it rained, and a jury  
15 will likely make that decision based on the evidence before  
16 it.

17 Number -- second, one of the issues that the HOA raised  
18 was that there's a condition precedent that we send a  
19 reservation of rights letter to our insured telling them what  
20 we intend to do. It's not a condition precedent to Rule 24.  
21 That's a condition that they made up. But we sent reservation  
22 of rights letters to our insured. We were notified late of  
23 this claim. Canopus U.S. was notified late and joined in the  
24 defense with two other insurance companies. And I've got  
25 reservations of rights letters to the insured telling them

1 this is exactly what we're gonna do, which I would submit to  
2 the Court in-camera for review if you want it. I don't think  
3 the Plaintiff is entitled to them and I don't think they  
4 really belong in the Court's file, but if necessary, I'm  
5 willing to do that.

6 Finally, just agreeing quickly with what Mr. Calamari  
7 said, the person seeking coverage has the burden of proving  
8 that it exists. Here, the HOA is trying to stop us from  
9 demonstrating what's covered and isn't covered and they're  
10 doing it -- they're kind of objecting to Conopius' attempt to  
11 determine with its insured, Richard H. Construction, LLC, what  
12 part of the verdict against him is covered and what isn't  
13 covered. They're trying to stop us and the Court from saying  
14 as to this defendant, the verdict is X. How much of it is  
15 resulting damage and how much of it is repairing and replacing  
16 your own work; and that's not that complicated of a question.  
17 They talk about our standing to intervene. I don't know that  
18 they really have the standing to object to that interrogatory  
19 as to our insured. They're not parties to that insurance  
20 contract. Now if they want to agree, if they stipulate that  
21 we agree that we're not gonna try to execute this verdict  
22 against Richard H. Framing, LLC, we're gonna hold him harmless  
23 from this verdict and we stipulate that after this trial if  
24 the Court -- we don't want you, Judge, we don't want you to  
25 submit these interrogatories, but after this trial, we

1 specifically hold that we'll have a coverage action with them  
2 to determine what's covered and isn't covered and we won't  
3 raise their failure to intervene in this action, the failure  
4 to get that issue determined here. If they want to do that  
5 and agree that we're not gonna have post-judgment interest  
6 accruing why that case pends for two years, then that would  
7 solve the problem. Outside of that, the court has told us, if  
8 you don't bring it up now, if you don't solve it now, you've  
9 waived your right and that's what Rule 24 provides. Is your  
10 failure to intervene going to impede our ability to protect  
11 our rights; that's what the court said in *Auto Owners v.*  
12 *Newman*. They filed an amicus brief in that case; they know  
13 what the case says.

14 Thank you, Your Honor.

15 THE COURT: Yes, sir. Anyone else in favor of  
16 intervention who might want to say something?

17 All right. Mr. Wylie?

18 MR. WYLIE: I wanted to -- you said you were having  
19 electronic difficulties, I'll give you a copy of our memo and  
20 also a copy of this case, the *Heritage v. Harleysville* case.

21 At the outset, Your Honor, I want to make it perfectly  
22 clear for the record, that we do not oppose these insurance  
23 companies intervening in this action, if they are willing to  
24 intervene as a party to the action. We are not gonna -- Mr.  
25 Calamari said we're waiving our rights and all this stuff.

1 They can intervene in this action as a party. Mr. Calamari  
2 says they don't want to inject insurance into the trial. The  
3 entire reason that we are here is because they want to inject  
4 insurance into our trial. They're relying on the *Harleysville*  
5 *v. Heritage* case and I read this case when it first came out.  
6 I think everybody did. What in the world is going on? I've  
7 read it numerous times and it appears to me that everybody,  
8 including myself, have been reading too much into the  
9 *Harleysville/Heritage* decision. *Heritage* case is an appeal  
10 from a DJ action and -- after general verdicts were awarded at  
11 the trial, *Harleysville* filed DJ actions to attempt to  
12 allocate the verdict. A special referee found that it was  
13 improper to attempt to allocate the general verdict and that's  
14 what they're all upset about.

15 Why did the Special Referee say it's improper to allocate  
16 the verdict? The court, the supreme court and the special  
17 referee found that *Harleysville* failed to properly reserve the  
18 right to contest coverage. That case goes on and on about  
19 reservation of rights letters. Why are they talking about the  
20 reservation of rights letter? The lynch-pin to that case is  
21 *Harleysville* did not notify its insured of what they were  
22 going to try to do in regards to the allocation of the  
23 verdict. So the insureds unaware that a conflict exists  
24 between itself and the insurer. In that case, the *Heritage*  
25 case, the court says the general rule that precludes an

1 insurer from raising new ground, contesting coverage in a  
2 subsequent action, a DJ action, is justified in this context.  
3 Now the general rule -- yesterday you heard about that Simms  
4 case and you said, oh my goodness, that's from 1965. That's  
5 the exact same general rule that was set forth in the Simms  
6 case. And in Simms, they said there's an exception to the  
7 general rule about you can't contest coverage in a subsequent  
8 action and that's when the insurance company's interest and  
9 the insured's interest are at odds. That's exactly what we  
10 have here. The insured wants stuff to be covered. The  
11 insurance companies do not want it to be covered. They have  
12 an inherent conflict of interest, which is addressed in the  
13 Simms case. The Heritage case does not mention the majority  
14 decision and the word intervention is not in it. It's like 49  
15 pages long; the word intervention shows up in Justice  
16 Pleicones' dissent, where he cites the 1965 Simms case that  
17 says they are -- you can't do this because you put the insured  
18 counsel in an impermissible conflict of interest. He cannot  
19 represent his client and represent the interest of this  
20 insurance company.

21 So, the holding in -- well, one other issue in the  
22 Heritage case in regards to the timing of the reservation of  
23 rights and Mr. Calamari says everybody knows about this, we  
24 all have known about it. This case came out at the end of  
25 July, but not one time, but two times on Page 31 and Page 33

1 of this decision, this supreme court says that they have to  
2 notify the insured prior to undertaking the defense. Now, he  
3 may have an issue there with that, these carriers have not  
4 presented this Court with any evidence whatsoever that they  
5 notified their insured prior to undertaking the defense that  
6 they were going to seek an allocation of damages. And if  
7 they did not do that, we stop the entire analysis right here  
8 and right now because you end up right back in the  
9 *Harleysville v. Heritage* position. You didn't notify your  
10 insured and as a result, the Court said in *Harleysville*, we  
11 find that there is evidence in the record to support the  
12 special referee's finding, *Harleysville's* reservation of  
13 rights letters were insufficient to reserve the right to  
14 contest coverage. That's why they didn't let them contest  
15 coverage in the DJ action, he didn't properly notify the  
16 insured. So, as a threshold issue, this Court's got to be  
17 satisfied that these insurance carriers properly notified  
18 their insured before, two times they said it, before they  
19 undertake the defense. So, we've got to clear that.

20 If they had properly done that, you've got to go and look  
21 at Rule 24. Rule 24 does not allow partial intervention. It  
22 doesn't mention it. That's why I say, they're welcome to come  
23 into this case as a party, be named as a party, they can sit  
24 at counsel table, they can ask all the questions they want  
25 about Mr. Calamari's short list or the long list of some 31



1 questions he has in his brief. They can ask all those  
2 questions to my expert. They can ask all the questions to  
3 their expert. They can be in this case. If they want to  
4 participate, they need to intervene as a party. But what they  
5 want to do is sit back and try to get me to change the way I  
6 present my case, the way that these insurance coverage or the  
7 insurance defense lawyers present their case, for one reason,  
8 to benefit the insurance companies. It doesn't benefit the  
9 Plaintiffs to change my trial strategy; it doesn't benefit  
10 their insurers to change the trial strategy. Remember in  
11 Simms, the impermissible conflict of interest, they can't make  
12 the parties to the case a non-party sitting in the back of the  
13 courtroom playing Minesweeper on his cell phone for two weeks  
14 while we try this case cannot dictate the manner in which this  
15 Court tells me to present my evidence or the Defendants to  
16 present their evidence.

17 The Stoney case that was referenced, that case is  
18 different than this case and I don't think that it stands for  
19 the proposition that has been set forth. In that case, the  
20 party was allowed to intervene in Stoney -- and I know Your  
21 Honor is familiar with it. He owned one of the marital  
22 assets. He was partial owner of the East Bay location of The  
23 Boathouse restaurant. He owned a marital asset at issue in  
24 the case. He owned -- he was -- he had a substantial interest  
25 in the subject matter of the action. That's why he was

1 allowed to intervene in Stoney. In this case, and we'll talk  
2 about it more, there is no interest in the subject matter of  
3 this litigation by the carriers. And what the Court in Stoney  
4 found was that the interest of the subject matter of the  
5 action was not adequately protected due to the husband's  
6 tenuous financial condition that the brother, who was allowed  
7 to intervene, part owner of marital property, co-obligor on  
8 marital debts, and made loans to the husband. He was all tied  
9 up in it, had a very substantial interest in the subject  
10 matter of that case, which makes it entirely different than  
11 this case.

12 The Davis case, I read that this morning. I was all  
13 worried about it. They intervened to object to a motion for a  
14 protective order sealing the record. They intervened to get  
15 copies. They wanted some copies, nothing to do with the  
16 trial, no special interrogatories, not changing the way the  
17 Plaintiffs tried their case, not changing the way their  
18 insureds tried the case, they wanted some copies, and the  
19 Court said you can intervene and get some copies. That's what  
20 that case says.

21 The standing issue, I kind of touched on it with my  
22 reference to the Stoney case, but they have to have a  
23 substantial interest or a material interest in the subject  
24 matter of the litigation or the transaction. The subject  
25 matter of this litigation is the Beach Villas Condominium

1 Project. None of those insurance companies have any interest  
2 whatsoever in the Beach Villas Condominium Project, so they  
3 don't meet that qualification or requirement. The  
4 transaction, do they have a substantial interest in the  
5 transaction? The transaction is the development, design, and  
6 construction of the Beach Villas Condominium Project. None of  
7 those insurance companies by any stretch of the imagination,  
8 have any interest whatsoever in the development, design, or  
9 construction of that project. They don't meet the  
10 qualifications for standing.

11 The GEICO case, which was discussed somewhat yesterday,  
12 which is cited, you worry about it being old, it's cited in  
13 the Stoney case, which is from 2016. So, they kind of re-  
14 upped the GEICO case. That was about does the insurance  
15 company have an interest in the subject matter of that case.  
16 And the GEICO case says if a party has a personal stake in the  
17 subject matter of the lawsuit and is a real party in interest,  
18 they can intervene. And it goes back to define real party in  
19 interest, you have a real actual, material, or substantial  
20 interest in the subject matter of the action. That case was  
21 the one where they were trying common law marriage in Family  
22 Court and GEICO said, we want to come in and say this because  
23 we don't want them to be able to stack our insurance. And  
24 what the Court said, you don't have an interest in the  
25 transaction or the subject matter, you have no interest in

1 whether this guy is common law married, your interest is only  
2 in the financial impact or financial aspects of the verdict.  
3 And they held, the supreme court cited again in Stoney that is  
4 not a substantial interest and it does not qualify you to be  
5 able to intervene in that case. And that's what these  
6 insurance companies have, no interest in the underlying  
7 subject matter, no interest in the transaction. All they have  
8 is an interest in the financial implications of the verdict.  
9 And our Supreme court has said in 1999 and again in 2016, that  
10 is not sufficient. So these insurance companies do not have  
11 standing to intervene in this case under Rule 24.

12       The next issue under Rule 24 is if they have standing,  
13 somehow have standing, they also must have to be able to show  
14 that without intervention, this position of this action may  
15 impair its ability to protect that interest. So they've still  
16 got to show that, even if they have standing.

17       The Simms case, that's -- remember the general rule that  
18 was referenced in the Heritage case that was filed in July?  
19 That was a car wreck case where they wanted to introduce  
20 evidence, the insurance company wanted to introduce evidence  
21 that their insured intentionally caused the accident, which  
22 obviously is bad for the insured because then the jury is  
23 gonna say he did it on purpose and hit him even harder. The  
24 question before the Court was whether an insurance company is  
25 bound to set up its defense of the intentional act or its

1 coverage issues in the tort action or can they assert that  
2 interest letter in a DJ action. And the Court addressed the  
3 ability of the insurance company to protect its interest in  
4 the subsequent action. They recognized that the general rule,  
5 the same one set forth in the Heritage case, is the insurance  
6 company is bound by the facts established by its insured. But  
7 they said that rule doesn't apply because the interests are  
8 diverse between the insured and the insurance company, same  
9 issue we have here. The interests are clearly antagonistic to  
10 one another. So, when the general rule doesn't apply, they  
11 can raise these issues in a coverage action and a DJ action  
12 which they've -- some of them have already been filed, they're  
13 filing them as we speak, there's gonna be more filed. We have  
14 no problem whatsoever with them having and I'll agree to it on  
15 the record, they do not waive -- if they meet the requirements  
16 under the reservation of rights letter for notice, we have no  
17 objection to them contesting coverage in a subsequent DJ  
18 action. They can call my experts, they can call their  
19 experts, they can get their own experts, they can do all of  
20 this at a subsequent DJ action rather than coming in here and  
21 hijacking my trial in front of Your Honor and in front of this  
22 jury by trying to get me to change the presentation of my  
23 evidence. Mr. Calamari said it's gonna be so easy. I don't  
24 know if Mr. Calamari has tried that many of these on the  
25 plaintiff's side. It's not as easy as he thinks. I've got to

1 change the manner -- and my trial strategy and tactics. I  
2 don't think that I should have to do that for a non-party  
3 insurance company where the lawyer is sitting in the back of  
4 the courtroom, that I -- he can change my two-week trial.  
5 I've got to prove duty, breach, causation, and damages.  
6 Nowhere does it say I've got to do my damages the way the  
7 insurance company wants me to do them and I don't know that  
8 the Court can require us or should require us to change the  
9 way we present our case to this jury. We need to benefit our  
10 client, not these insurance companies by trying to answer  
11 these questions.

12       So, we don't think that they have -- one other issue and  
13 it goes back to Judge Pleicones' descent in the Heritage case  
14 where he cites the Simms case. I, as the Plaintiff's attorney  
15 have no obligation nor will I likely present evidence that  
16 goes to the particular issues of coverage. It's gonna hurt my  
17 case; it's not to the benefit of my client. Those issues need  
18 to be addressed later on in a DJ action where the insurance  
19 company is a party to it, their lawyers are there and we're  
20 all talking about coverage but I'm not gonna present -- the  
21 insurance defense counsel is, I believe, ethically prohibited  
22 from introducing evidence that is going to harm its client.  
23 His client wants it to be covered. They can't have the  
24 insurance defense lawyer trying to introduce evidence to fit  
25 into Mr. Calamari's list of questions. That is an

1 impermissible conflict of interest. And if I don't do it and  
2 the defense lawyers don't do it, you're gonna send either 10  
3 questions or his 51 questions to the jury and they're gonna  
4 not have any basis, no evidence whatsoever, to reach a  
5 decision on how to answer these questions. There's no  
6 evidence in the record. The evidence needs to go in the  
7 record in the DJ action. Newman was a DJ action appeal.  
8 There was no evidence in the DJ action record on appeal. I  
9 don't know what happened in the underlying case, but my guess  
10 is, nobody from that insurance company came in and tried to  
11 allocate the verdicts with the expert testimony and go into  
12 these categories. It's a DJ action appeal, not an underlying  
13 case appeal.

14       So, in summary, they didn't provide notice to the  
15 insureds prior to undertaking the defense. If they didn't do  
16 that, the analysis stops. Partial intervention is not  
17 allowed. If they want to come in, they need to come in as a  
18 party and participate in the trial.

19       THE COURT: As a party, Hartford is a party to the case  
20 and all the other ---

21       MR. WYLIE: Yes, sir.

22       THE COURT: --- carriers or would be parties, Conopius  
23 ---

24       MR. WYLIE: The only way we're getting evidence to the  
25 jury about these -- all these questions is for them to bring

1 it up because nobody else is going to, but they need to be in  
2 the case as a party. They want -- they said we don't want to  
3 bring in insurance, they don't want anybody to know they're an  
4 insurance company. Well, guess what? They're an insurance  
5 company, and they're trying to interject insurance coverage  
6 into my case. So, if they want to do that, come on, the water  
7 is fine; let's do it. But they need to -- they can ask their  
8 questions ---

9 THE COURT: They're going to intervene but not let the  
10 jury know about it?

11 MR. WYLIE: They want to have their cake and eat it, too.  
12 I've never seen a better example of whatever that old saying  
13 is that they want to have their cake and they want to eat it,  
14 too. They don't want anybody to know we're an insurance  
15 company. We've got all these insurance issues we want to  
16 bring up and we want you guys, whether you want to or not, to  
17 put evidence in about all these insurance issues, but don't  
18 let -- ssh, don't let anybody know there's insurance. They  
19 need to be -- if they want to be in the case, they need to be  
20 in the case. They can ask my experts all of Mr. Calamari's  
21 questions, but they need to be the ones to do it and the jury  
22 needs to know who they are. You can't submit these questions  
23 to this jury -- they're complicated questions. The damage to  
24 Coastal Stucco's work -- what Newman said is removal of the  
25 defective stucco is not covered. What if the stucco is not



1 defective? What if part of it is defective and another part  
2 of its not defective? If it's the flashings that are behind  
3 the stucco that are causing the water intrusion and not the  
4 defect -- and not the stucco itself, you got to tear the  
5 stucco off to get to the flashings. These extremely  
6 complicated issues that are gonna have to be addressed by this  
7 jury that need to be addressed in the DJ action. So, as far  
8 as them being a party, they're the ones that need to be in  
9 here asking this question. If they don't like the fact that  
10 they're an insurance company, that's really not the Court's  
11 problem. So, just for the record, the insurance carriers can  
12 protect their interest in a subsequent proceeding, the Simms  
13 case says do it. Heritage doesn't say you can't do it in a DJ  
14 action. It said they couldn't do it in this one because they  
15 didn't send the right reservation of rights letters.

16       Allowing intervention places the defense counsel in an  
17 impossible conflict of interest, it deprives the Plaintiffs of  
18 the right to present their case in the manner that best  
19 benefits them. There's not gonna be any evidence to allow  
20 this jury to even make, decide or answer these questions if  
21 they are not intervening as a complete and total party and for  
22 those reasons, we think that their motions to intervene should  
23 be denied.

24       Thank you.

25       THE COURT: All right. Anyone else -- you're on an

1 island on this or do you have -- is there someone else with  
2 the same response ---

3 MR. WYLIE: Me? As usual, Your Honor, I'm on the island.

4 THE COURT: All right. Yes, sir, Mr. Miller, yes, sir.

5 MR. WYLIE: Actually, Mr. Miller may ---

6 THE COURT: Mr. Miller, yes, sir?

7 MR. MILLER: Thank you, Your Honor. My name is David  
8 Miller. I represent Ocean Keyes in the underlying coverage  
9 action. I'm not a lawyer of record in this case. Because of  
10 that, I don't have notice of these proceedings. I wasn't here  
11 yesterday because I didn't know it went on yesterday; I  
12 would've been had I known. I heard about it ---

13 THE COURT: Well, yesterday was another case.

14 MR. MILLER: Yes, sir, and I'm coverage counsel in that  
15 one, also. That was Lakeside, was it not?

16 MR. WYLIE: That was Cypress Bend.

17 MR. MILLER: Okay. I stand corrected. I thought it was  
18 Lakeside yesterday. The problem, because of that posture is,  
19 is complex. As you heard Mr. Wylie saying, how does Patrick  
20 McDonald, who is my appointed insurance lawyer in this Beach  
21 Villas case for my client, the developer, how does he be hired  
22 by the insurance company and hire an expert to do allocations  
23 of damages that favor his insured versus the insurance  
24 company. How does he do that? That's a question everybody  
25 has been asking since the Heritage case came down. I think

1 the answer is, he can't. It is an inherit conflict. As Mr.  
2 Wylie pointed out that he can't do that. So who does? I  
3 guess I do. I guess I would need to go -- if I had been put  
4 on notice, which we have not -- had I been put on notice in  
5 reservation of rights letters, that we would need to go hire  
6 an expert witness to protect the position of the insured  
7 because the appointed counsel, I think, cannot. Now, this  
8 case is slated for trial on the 16th. Maybe it's Number 2 on  
9 the roster. I heard somebody say, I know that there's a  
10 debate about that and I think there's a motion to stay hanging  
11 out there about that.

12 THE COURT: It is Number 2 on the 16th.

13 MR. MILLER: Okay.

14 THE COURT: Yes.

15 MR. MILLER: The Heritage case has been out there a long  
16 time. We're standing here two weeks before trial talking  
17 about changing the way that the evidence is gonna be put in  
18 and I've got a lawyer representing my clients in the case, who  
19 I don't believe can ethically come in here and meet the  
20 challenge, and it's news to me. So that I would suggest, Your  
21 Honor, if you are of a mind to allow an intervention with or  
22 without becoming a party, that that would require a  
23 continuance of the underlying trial so that the insured, the  
24 primary defendant, the developer, my client, will have an  
25 opportunity to meet that evidence and I understand the

1 difference and the subtle differences between evidence as to  
2 costs versus evidence needed to repair, but how those costs  
3 are allocated becomes the bottom line. So, an expert who  
4 allocates costs to non-covered items versus an expert who  
5 allocates costs to covered items is gonna become an issue.  
6 It's gonna become an added complicator into the trial and it's  
7 gonna be one that I'm required to go investigate, I believe,  
8 hire my own expert independently and participate somehow in  
9 how that evidence comes in. I hadn't had any opportunity  
10 whatsoever to do any of that. The folks that are here making  
11 the motions to intervene are not even my insurance carriers.  
12 They're insurance carriers for sub-contractors. So, I don't  
13 have any notice to any of those things, yet make no doubt if  
14 it comes in favorably to the carriers, my carriers will be  
15 telling me this is what we've got and this is what you're  
16 gonna have to live with. So, that makes the whole thing  
17 complicated another level and I think precludes going forward  
18 in the fashion that's requested without affording all of the  
19 insureds in the case the opportunity to look at the way that  
20 the evidence is gonna come in, look at the interrogatories  
21 that are proposed, which I have not seen, propose their own  
22 interrogatories, et cetera, and participate in that level, if  
23 you're of a mind that the evidence that Heritage requires at  
24 the underlying case versus at the declaratory level, which Mr.  
25 Wylie has already developed and I won't go through that again.

1 So, Your Honor, it is -- it is my position as coverage counsel  
2 for the developer, that if Your Honor is of a mind to allow  
3 these allocation items to come into this trial one way or  
4 another, it, at a minimum, requires that the trial be  
5 continued until such time as I have an opportunity to look at  
6 and respond and participate in those matters.

7 Thank you.

8 THE COURT: Yes, sir.

9 MR. CUNNINGHAM: Your Honor, Joe Cunningham on behalf of  
10 Russ Baltzer as an architect. I've just got a couple of quick  
11 comments to make. I think Mr. Calamari takes great liberty to  
12 state how simple the process it will be to bifurcate the  
13 damages from the defective work as opposed to the damages  
14 caused by the defective work and our position is, I think Mr.  
15 Calamari is in that position to state how easy of a task that  
16 would be, just as I want an engineer or architect to argue to  
17 the Court how easy of a task it is for an attorney to argue a  
18 pleading or a motion. And it's easy for people on the outside  
19 to state how easy of a task it will be. A lot of people  
20 outside of the courtroom just think attorneys just put on  
21 suits and go to court and argue. A lot of people think that  
22 this Court will just put on a robe and sit in a chair and make  
23 decisions. But we're all informed enough to know that there's  
24 more to it than that. And, I would echo Mr. Miller's argument  
25 in that we've been running this ball down the field for quite

1 some time and here we are on the one yard line with the time  
2 ticking off the clock and if the -- Mr. Calamari and the  
3 counsel for the insurance companies want to come in at the  
4 last minute and change the field posts, then we just need some  
5 more time on the clock to analyze that. And so I'd echo Mr.  
6 Miller's concern as well.

7 Thank you.

8 THE COURT: All right. Anyone else before Mr. Calamari  
9 comes back?

10 MR. SMITH: Thank you, Your Honor.

11 THE COURT: And Mike Smith being quiet?

12 MR. SMITH: Your Honor, I'm gonna have to say something.  
13 Mike Smith for Carefree Exteriors. And, Your Honor, here's  
14 the problem that we have as insurance defense lawyers. Is  
15 when that insurance company selected who's filed the  
16 declaratory judgment action in this case against my client  
17 and, and one of the stucco manufacturers, they're gonna come  
18 in and try to say, well, this is not covered and this is not  
19 covered and this is not covered, but my duty is to protect my  
20 client to the fullest extent possible. What it's gonna do is  
21 not only change the way that I defend my case, but I'm  
22 actually now gonna have to try to target to protect my client.  
23 Those parts that are covered and funnel the evidence into  
24 what's covered versus what's not covered and, when you look at  
25 my client for example, there is one particular factual issue

1 that is, is -- causes considerable amount of damage out there.  
2 It's part of the sexy part of the case, if you will. I need  
3 all of that to be a covered item to properly defend my client  
4 and to protect my client, who is an ongoing business. To have  
5 the insurance company step in and now tell me that I've got to  
6 say, well, that may not be a covered item because of X, Y, and  
7 Z, I can't do that and adequately defend my client. That's  
8 the position I feel like I'm in and I think all of us defense  
9 lawyers are in the same position whether we say it on the  
10 record or not. But, I think that is a real conflict. It puts  
11 us in an untenable position of trying to satisfy who's paying  
12 our bill and, yet, do it at the risk of who we're trying to  
13 defend. I just want that on the record.

14 THE COURT: Very good.

15 Mr. Calamari?

16 MR. CALAMARI: You know, there have been a lot of  
17 discussion about the complexity and about reservation of  
18 rights letters and about all these other issues that will be  
19 issues discussed in the coverage actions. They are not gonna  
20 be discussed here. We are asking for something simple. We  
21 are asking for evidence preservation and that's all the  
22 supreme court has said needs to be done in the underlying  
23 action, evidence preservation.

24 If -- Heritage was my case, Mr. Henry, Mike's partner,  
25 Pat Henry, and Phil Thompson, we fought over for years whether

1 we were right not to intervene and we made all of the  
2 arguments that everyone's made today. I have talked *Simms v.*  
3 *Nationwide* until I'm blue in the face and said you can't do  
4 it, it's an adverse position, you've got divergent interest,  
5 all those reasons as to why we didn't intervene. The other  
6 reason we didn't intervene in that case is because the Newman  
7 decision, the first one came out prior to those trials, saying  
8 100 percent of everything is covered. The second Newman  
9 decision, the supreme court said, no, not the work of the  
10 insured, that's not covered and you need to allocate that  
11 though. And in that case, they didn't allocate. Pat Henry's  
12 arguments repeatedly in that case were you failed to  
13 intervene. Had you intervened and asked these questions, we  
14 would've been able to do it. At the supreme court argument,  
15 we watched it on the internet -- you can watch them on the  
16 internet now -- Justice Hearn said, you know, the carrier  
17 can't sit on its rights. It's got an interest in this action;  
18 they should file a DJ. They should come in and ask for  
19 allocation and then the parties try the case a certain way so  
20 we have these issues resolved, evidence preservation. Justice  
21 Pleicones, in his dissent, said you can't do this, you can't  
22 do this. The other justices all said, well, you should have,  
23 you should have. And they didn't -- reservation of rights  
24 letters in that case were discussed for about two seconds  
25 throughout the four or five years we talked about that case.



1 And then the decision comes out and it all addresses  
2 reservation of rights letters. You know, the, the -- and it's  
3 not a prerequisite to evidence preservation in this action. I  
4 am certain that when we get to the other actions, they will  
5 pick on whatever reservation of rights letter is out there.  
6 It could be the best reservation of rights letter ever; it  
7 will get picked on and they will say we waived our right. But  
8 the bottom line is, the argument here is we want to pay what's  
9 covered under the policy and everyone else in the courtroom  
10 says, I want to protect my person, whether it's the Plaintiff,  
11 whether it's the insured, whether it's the architect, anyone,  
12 I want to protect my person and make non-covered damages  
13 covered because I want to muddy the waters here. I don't want  
14 evidence preservation. I want a general verdict that no one  
15 can go behind and I can say if \$1 is covered, everything is  
16 covered. That's what they're looking for in this case.

17 You know -- you know, the Supreme Court has said  
18 repeatedly that you have an obligation to prove your covered  
19 damages. We are the only ones here trying to preserve  
20 evidence to allow that to be possible in the subsequent action  
21 ---

22 THE COURT: As far as the mechanics of the DJ action, I  
23 notice Judge John Milling was appointed special referee in the  
24 case that I tried. Can he receive evidence, or did he receive  
25 evidence, or in a DJ action you do not present evidence; how

1 does that work?

2 MR. CALAMARI: We presented evidence. We actually had a  
3 two-day trial and then there was some petition for rehearing  
4 by the supreme court in the Crossman case. So, we waited  
5 until that final decision, we came back and had another day of  
6 trial. We offered a bunch of evidence. We had pretrial  
7 briefs and pretrial motions in which he said, it's a general  
8 verdict, I don't care whose fault it is, I'm not gonna let you  
9 look behind it. So, we proffered a lot of evidence on it. We  
10 proffered the experts who came in and said, this is how I  
11 would break it down. We proffered other, other things. But,  
12 the reservation of rights letters were always kind of a tag-  
13 on. And, it's interesting that the very document submitted in  
14 an effort to reserve one's rights, has now been used to say  
15 you actually waive those rights by trying to reserve those  
16 rights. It's almost like they would've been better off not  
17 sending anything at all.

18 But here we are, prior to the trial, so it's very  
19 difficult for anyone in this courtroom to say, you didn't  
20 reserve your rights, you didn't do this properly. There's DJ  
21 file; there's been discussions about this repeatedly; there's  
22 letters back and forth; there's coverage analysis that's been  
23 discussed between parties; there's a motion to intervene;  
24 we're talking about this now for an hour and a half. We've  
25 done it other cases. We've all had these motions. Everyone

1 knows the notice argument can't work. There's no one in this  
2 courtroom that can say we are not on notice of these issues.

3 Now, what Mr. Smith brought up is this conflict between  
4 the parties. It very well might be a conflict, but that's not  
5 what our supreme court justices seem to say during the  
6 arguments. They said no, that's not -- that's not -- we don't  
7 know that that's a conflict. Now, they were asking questions,  
8 so this is not part of the opinion, but my reading on it was,  
9 all we're doing is preserving evidence here in this case and  
10 you've got to prove your damages, that has to come out, and  
11 all we're doing is taking that and breaking that down further.  
12 We're not trying to pin our insured -- our insured is out --  
13 one of them is out of business. A lot of times, when you get  
14 to these trials, the insured is out of business, there's no  
15 one to speak on behalf of the corporation. One of my insureds  
16 resides in Mexico now and we've only recently been able to  
17 find him and communicate with him. So, actually that's in --  
18 that's in the other case that we had yesterday. It's starting  
19 to run a little bit in my mind here. But to say that, that  
20 there's a conflict, our supreme court has said no and I have  
21 argued *Simms v. Nationwide* repeatedly saying, if there's  
22 divergent interest, then all is forgiven, you try this in the  
23 subsequent action, and I've been told absolutely not. Mr.  
24 Henry argued against it, Mr. Thompson argued against it. I  
25 feel like in this case, I would almost want Mr. Henry to be my

1 expert witness and stand here and say, well that was kind of  
2 the reason we recovered in that case because Harleysville  
3 failed to intervene and ask the Court these questions.

4 Just finally, we're just looking to pay what's covered  
5 under the policy. We're looking for evidence preservation and  
6 we're the ones asking for it. If any other party in here is  
7 preventing this from happening, later on, we will argue that  
8 they prevented it ---

9 THE COURT: Is the goal to eliminate the necessity of the  
10 DJ action or to simplify the DJ action?

11 MR. CALAMARI: I don't know that we know. You know, we  
12 know what the insurance or what Heritage said and our current  
13 supreme court has said. I don't know that anyone is  
14 absolutely bound by these numbers. I think if they get  
15 numbers for repair costs for removing and replacing defective  
16 work and if there's repair costs for removing and replacing  
17 damaged work, I am sure in the DJ action there will be  
18 arguments by each side about whether that number is accurate  
19 or should be reduced or included. But the problem is, let's  
20 say -- let's say the Plaintiff won \$10,000,000 and let's say  
21 the defense says \$1,000,000 and the jury comes back with a  
22 general verdict of \$4,000,000. So, you got \$4,000,000 in this  
23 case. They may not have given anything for the stucco; we  
24 don't know. We don't know if anything at all was given for  
25 the stucco. They might -- they have a couple of million

1 dollars for stucco, a couple million dollars for vinyl siding,  
2 a couple of million dollars for the other trades; we don't  
3 know. A case that was tried earlier this year in Charleston,  
4 the Plaintiff wanted \$21,000,000. The defense said it's gonna  
5 cost about three or four to fix it. The jury came back with  
6 \$7,000, 000. A \$10,000,000 item in that case was fastening,  
7 adding fasteners to the HardiePlank, the exterior of the  
8 buildings. It's hard to say whether any portion of that was  
9 given. Well, we moved to intervene there, the Judge denied  
10 it. General verdict, we don't know. So, you got to  
11 categorize. You got to categorize something. And what the  
12 Supreme court is telling us in Heritage is you have to  
13 categorize for that particular insured and divide costs of  
14 replacing defective work versus costs of repairing damaged  
15 work. We think that's not a difficult task. We are not  
16 asking to come in and ask questions to the witnesses and offer  
17 expert testimony. All of those issues, reservation of rights,  
18 arguing over those things, those are all for the coverage  
19 action. We are asking for evidence preservation in this by a  
20 simple interrogatory per subcontractor, per general  
21 contractor, that breaks these down and itemizes them so they  
22 can be useable ---

23 THE COURT: Well, considering Mr. Wylie says that, no,  
24 the jury will not receive any information or no testimony from  
25 either side who are now parties, for the jury to make that

1 decision on the allocation and that the only party -- the only  
2 one who can present that evidence would be you as a party, but  
3 not you as a limited party. So therefore, he has an objection  
4 to you coming in as a party, just intervening period.

5 MR. CALAMARI: You know, I don't think the supreme court  
6 gave us the right answer, but I'm fairly sure, that's not it.  
7 The -- you know, to allow the carriers to come and have me get  
8 up and say, well, okay, let's break this number down and argue  
9 back and forth and change the complexity of it, that is not an  
10 issue to be decided in the trial for this trial, for me to get  
11 up and ask those questions. But the, the Supreme court has  
12 said this is where we need to allocate these damages, so I  
13 don't think that's proper at all.

14 THE COURT: You're saying the parties must do this  
15 whether they want to or not?

16 MR. CALAMARI: Whether they want to or not seems to be  
17 what our supreme court is saying. Now, there's a couple of  
18 options. You know, the jury can say here's the costs of  
19 removal and replace defective work, here's the cost of this,  
20 or I don't know, I can't figure this out, no evidence was  
21 presented. Later on then we'll argue you should've presented  
22 that evidence. They'll argue you didn't tell us in time.  
23 They'll be an argument about that and the Supreme court will  
24 have to decide that issue.

25 THE COURT: All right.

1 MR. CALAMARI: Thank you, Your Honor.

2 THE COURT: Thank you, sir. Anyone else?

3 MR. HILDEBRAND: Your Honor?

4 THE COURT: Yes, sir.

5 MR. HILDEBRAND: I was involved in the case yesterday,  
6 I'm Tom Hildebrand.

7 THE COURT: Yes, sir.

8 MR. HILDEBRAND: --- a dog in the fight, but an example  
9 occurred to me listening to the arguments about what  
10 irreconcilable conflict there would be. If I'm representing a  
11 subcontractor, typically you want to, if I'm just representing  
12 him normally, I would say that there aren't consequential  
13 damages. If the Plaintiff points out under two windows that  
14 there is some rotted wood, I would say that's an isolated  
15 incident and doesn't occur anywhere else. That's what I would  
16 normally do. Consequential damages are what trigger coverage.  
17 We all know that. That's what the carriers look for,  
18 consequential damages. If, if the insurance company is able  
19 to use a finding, my finding where I'm trying to argue to the  
20 jury there aren't consequential damages to argue coverage,  
21 then I'm now in the inherit conflict of having to argue there  
22 are consequential damages and this is not an isolated  
23 incident, it's probably under all the windows. I just don't  
24 see how you would get out of that conflict. I would have --  
25 one, I'm trying to help my insureds and defend the case that

1 there aren't consequential damages, but there's -- to try to  
2 initiate coverage, I've got to prove that there are and I've  
3 got to prove basically the Plaintiff's case. I just don't --  
4 can't get my mind around that would not be a conflict. That's  
5 all I've got.

6 Thank you.

7 THE COURT: All right. Thank you. Mr. Wylie?

8 MR. WYLIE: Very briefly, Your Honor. Mr. Calamari said  
9 that the allocation of the damages in the case is not  
10 something that he could talk about. I submit he absolutely,  
11 positively can talk about it if his client is a party to the  
12 case. He just doesn't want to talk about it.

13 The DJ actions in Heritage, I was asking yesterday after  
14 I was here, Phillip Thompson, Did y'all call experts to  
15 discuss allocation and damages at the DJ action? He says  
16 everybody was ready to do that. Judge Milling wouldn't let us  
17 because he said we hadn't properly reserved the right to do  
18 it. So, you can do it in the DJ action, you just have to have  
19 properly reserve your rights.

20 MR. CALAMRI: Your Honor, I know that now he's bringing  
21 out and we have people not even in the case talking, talking  
22 about hearsay from Mr. Thompson in the hall. You know, that  
23 case, we presented evidence, we argued a motion in limine  
24 whether he would allow evidence on that issue. Mr. Henry and  
25 Mr. Thompson said from the beginning, we will not ever offer



1 any evidence of allocation. We did, they didn't, and Judge  
2 Milling never talked about reservation of rights letters. Pat  
3 Henry slid a line in the order and on the motion to reconsider  
4 -- we can get the transcripts if they're necessary for this  
5 particular trial, but the transcript on the motion to  
6 reconsider is -- that was never brought up. That was never  
7 raised during the trial, that's not in the testimony, that's  
8 not in the transcripts anywhere dealing with reservation of  
9 rights letters and that is not the reason he excluded it. He  
10 excluded it because he said I don't care who's right or wrong,  
11 I have a general verdict and I'm not gonna let you go behind  
12 it, but you can make that argument to the supreme court on  
13 conflict, on *Simms v. Nationwide*, on divergent interest, on  
14 everything else, but unless we're gonna put Mr. Thompson on  
15 the stand and ask him questions under oath about what he  
16 thinks happened in that case, I don't know that a conversation  
17 in the hall should support the ruling in this action.

18 Thank you.

19 MR. DWORJANYN: Judge, just briefly.

20 THE COURT: Yes, sir.

21 MR. DWORJANYN: I apologize. I don't -- I don't think  
22 that it's appropriate for us to have to submit our reservation  
23 of rights letters at this juncture just for the purposes of  
24 this motion to intervene. As Mr. Wylie suggested, we have to  
25 prove that we reserved our rights. However, I'd like to offer

1 in and proffer to the Court for in camera review, if the Court  
2 feels it necessary, letters of 4/20/17 and June 16, 2017 to  
3 Richard H. Construction, LLC.

4 THE COURT: Does this interject me into the coverage  
5 aspect of things?

6 MR. CALAMARI: Your Honor, which is why I think that's in  
7 the second action, not in this one.

8 MR. DWORJANYN: I agree that I think it's in the second  
9 action, but I don't want to hear three years from now that I  
10 waived my right.

11 MR. WYLIE: Judge, they're interjecting you into the  
12 coverage aspect of this thing as hard as they can.

13 THE COURT: Well, that's why I'm trying to draw the line  
14 between this action and other pending actions including the DJ  
15 action.

16 MR. DWORJANYN: Mr. Wylie, would you agree that any  
17 subsequent DJ, we would be -- we would not have waived our  
18 right to ---

19 MR. WYLIE: Here's what -- here's what I agree to and I  
20 think I said it before. If the reservation of rights letters  
21 properly notified the insured and satisfied what the court  
22 said in Heritage, I'm not gonna say anybody waived their  
23 rights to do all of this stuff in a DJ action. I don't think  
24 they ought to be able to do all of this in my case during my  
25 trial unless they are a party and come in and they ask the

1 questions to get the answers that they want because nobody  
2 else is gonna do it.

3 THE COURT: All right. And of course I'm happy to look  
4 at it. I don't know what affect it would really have on the  
5 issues before me.

6 MR. DWORJANYN: I don't think it probably does. Under  
7 those circumstances, I think we're all right, Your Honor, as  
8 long as it's not a condition precedent to you considering our  
9 motion to intervene.

10 Thank you, Your Honor.

11 THE COURT: Okay. All right. Well, when do you need to  
12 know?

13 MR. WYLIE: About four months ago.

14 THE COURT: Well, the motions were just -- the motions  
15 were just filed or deemed filed or motions to intervene, when  
16 was this one filed?

17 MR. LADY: July of 2017 was Selectives, Your Honor, and  
18 Conopius was September of 2017.

19 THE COURT: July?

20 MR. LADY: '17, and Hartford's was September of 2017 and  
21 then of course, I think ---

22 THE COURT: Okay. So, I mean, just being filed. So,  
23 it's a pretty timely hearing. And Mr. Dworjany's motion is  
24 dated September 8th.

25 Well, I need to review all of these cases again. Simms

1 and Stoney and the other one, Jennings, *Davis v Jennings*, and  
2 all the Harleyvilles, and Newman, Heritage. Is there anything  
3 else you all want to submit to me for consideration prior to  
4 ruling on it? Obviously I need to rule because we have a  
5 hearing in the weeks ahead. So, on this and the other and we  
6 have one more to hear. Is there a motion in the other one as  
7 well?

8 MR. CALAMARI: Yes, sir.

9 THE COURT: They've all been -- everything is merging  
10 together. So, maybe I need to hear that one as well, which  
11 was set for to come after -- I guess maybe we anticipated 11  
12 o'clock or 11:30 or so.

13 Who is here to argue that? Same folks, okay.

14 MR. LADY: Ms. Blundy is going to have some dazzling new  
15 arguments, Your Honor.

16 THE COURT: Okay. Well, let's hear that one too. Mr.  
17 Wylie, you're not on that; who is the -- who sits in your  
18 chair on that one?

19 MR. WYLIE: Amanda.

20 MS. BLUNDY: Yes, Your Honor.

21 THE COURT: Well, just let's kind of skip to that and  
22 we'll take a few minutes break and then we'll hear that part  
23 of it so we will have all of the interventions on all of the  
24 cases heard that are currently before us today and then we'll  
25 take up the other stuff, whatever that may be. We'll take a

1 few minutes.

2 **(RECESS.)**

3 **\*\*\*\*\*OFF THE RECORD\*\*\*\*\***

4 **(On the Record.)**

5 BY THE COURT:

6 MR. LADY: Your Honor, if I could ---

7 THE COURT: Mr. Lady, yes, sir.

8 MR. LADY: I think all of the intervention motions have  
9 been heard. There was a motion to amend. Did we hear that at  
10 the Status Conference; is that your position, Patrick?  
11 Because I know we debated about bringing in total or whatever,  
12 but I didn't know if you ---

13 MR. MCDONALD: We'll withdrawing that motion.

14 MR. LADY: Okay. So that's out. And then just for the  
15 Court's attention ---

16 THE COURT: As far as the Clerk's office, she has a long  
17 list. She told me there was -- how many did you say, a  
18 hundred and something motions pending and many of them have  
19 been resolved, addressed, things of that nature. So, I think  
20 on all of them that they're withdrawn, resolved, whatever, we  
21 need something submitted to the Clerk. So, I need something  
22 submitted to me to sign.

23 MR. LADY: I'll let Patrick do that.

24 THE COURT: To the extent y'all can -- okay.

25 MR. LADY: There were two motions -- one from Dietrich

1 Building Systems, that's Jim Warner, and I think he had  
2 written the Court and said he was arguing in the supreme court  
3 today and asked that not be heard today and have it postponed.

4 THE COURT: Right.

5 MR. LADY: And then there's sort of a companion motion  
6 for summary judgment by Builder's First Source. It frankly  
7 was not timely filed and it hasn't been 10 days, but they are  
8 sort of companion parties and he asked for that -- for his  
9 motion to be heard at the same time as Jim Warner's.

10 THE COURT: Okay.

11 MR. LADY: And I think -- I think those were the only  
12 other motions other than the one, that motion for summary  
13 judgment. Joe, were you ---

14 MR. CUNNINGHAM: Joe Cunningham for Russ Baltzer. We  
15 filed a motion to relieve to amend our answer to assert cross  
16 claims against certain defendants. We just filed that  
17 yesterday, though. So ---

18 THE COURT: All right. So, that's not pending today  
19 then?

20 MR. LADY: I didn't think so, which leaves, I think the  
21 only motion is the motion for summary judgment between  
22 Richard's Framing and ---

23 MR. MCDONALD: A motion to stay.

24 MR. LADY: --- a motion to stay.

25 THE COURT: All right.

1 MR. LADY: Do you want to hear the motion to stay first  
2 or the motion -- Patrick, they're both your motions, which ---

3 MR. MCDONALD: The motion for summary judgment can go  
4 first.

5 THE COURT: Okay.

6 MOTION FOR SUMMARY JUDGMENT:

7 MR. KENNEDY: Your Honor, again, Bob Kennedy, here on  
8 behalf of Richard H. Construction, d/b/a Richard Framing. I'm  
9 actually hear for my colleague, Kevin O'Brien, today. And, we  
10 are here on the motion for summary judgment against the cross  
11 claims that were filed by the -- I guess we'll call them the  
12 Ocean Keyes Defendants, Keye Construction, and Ocean Keyes.

13 There are four claims, four cross claims, that we are  
14 asking the Court to grant Summary Judgment in favor of Richard  
15 Framing on specifically breach of contract claim, breach of  
16 warranties claim, equitable indemnity claim, and a contractual  
17 indemnity claim. This is not as exciting an issue as the  
18 Court has been dealing with for the last several hours, but  
19 good news, it's probably an easier issue and one I can address  
20 much more briefly, so perhaps we can get some lunch.

21 I want to just briefly talk about the breach of contract  
22 and breach of warranties claims because I think those are the  
23 easiest to resolve. Simply put, they are not viable claims on  
24 their own, separate from the equitable indemnity claim. This  
25 is a case where the Ocean Keyes Defendants are simply trying

1 to shift liability, pass through liability on Richard H.  
2 Construction. The damages sought are wholly derivative,  
3 independent on a finding of liability of the Ocean Keyes  
4 Defendants. They are not seeking damages apart from that.  
5 There are no allegations of that in the complaint and there's  
6 no forecasted evidence of any damages beyond those derivative  
7 claims. And as the Court is well aware, breach of contract,  
8 negligence, breach of warranty claims, in that specific  
9 context are treated as equitable indemnity claims. And for  
10 that reason, we think the only issues really before the Court  
11 today, because we're simply talking about pass through  
12 liability are equitable indemnity and contractual liability  
13 claims.

14 As to the equitable indemnity claims, again there are two  
15 entities. Only one of those entities actually has a  
16 sufficient special relationship in order to assert an  
17 equitable indemnity claim. But regardless, it doesn't matter  
18 who has the right to bring that claim. Neither one can  
19 actually support such a claim because they cannot show that  
20 their hands are clean. They cannot show that they were not at  
21 least partially at fault. And the reason that they cannot  
22 show that they were at least partially at fault, is because  
23 their own expert has offered testimony under oath, that at  
24 least some portion of the damages is attributable to the Ocean  
25 Keyes Defendants. When some portion of the damages is



1 attributable to their own work, they cannot have an equitable  
2 indemnity claim. We think that's pretty simple and  
3 straightforward. We cited the testimony of the -- of their  
4 own expert, because we think it showed that absence any issue  
5 of fact. It was notable in the response that was filed last  
6 evening in opposition to the memorandum of law the argument  
7 against our argument was that, well, it's possible that  
8 there's still gonna be an issue of fact because the jury might  
9 not believe our own expert and the jury may choose to  
10 disregard our expert's testimony that we were at fault. That  
11 was the argument in opposition to our argument, pointing out  
12 that their own expert testified that we have to share some  
13 blame. Now, we could also offer testimony from all the other  
14 experts who have been deposed in this case saying, yes, the  
15 general contractor and developer share some of the fault, but  
16 we thought it was notable that their own expert testified to  
17 that.

18 As to their argument that, well, the jury might not believe  
19 our expert, we think that's a pretty laughable argument but,  
20 fortunately, the South Carolina Supreme Court has spoken on  
21 this issue specifically. A 2010 decision, *Hoard v. Roper*  
22 *Hospital*, the South Carolina Supreme Court said that you  
23 cannot argue that an issue of fact exists because a jury might  
24 not believe a witness. Specifically, the court said the  
25 plaintiff cannot argue that there's genuine issue of material

1 fact on the basis that the jury might not believe their own  
2 witness. So the argument that, well, our expert said that we  
3 were at fault, at least partially at fault but the jury might  
4 not believe it; that doesn't hold water. The fact is that  
5 their expert did testify that the Ocean Keyes Defendants were  
6 at least partially at fault, as did multiple other experts in  
7 this case and there's no forecast of evidence showing that  
8 they are not at fault. And for those reasons, we think that  
9 the issue of equitable indemnity is pretty clear and that  
10 issue should be resolved in our favor.

11 To the extent that the equitable indemnity claim is not  
12 just outright dismissed, we do note and we do argue on our  
13 motion that, at a minimum, it should be severed. As an  
14 equitable claim there is not right to a jury trial. So, to  
15 the extent that this claim remains on the table going forward,  
16 it should not be tried with the factual claims at issue in the  
17 main action. It should be severed and there should be a  
18 separate trial. But hopefully, we don't even reach that  
19 point.

20 The more interesting issue in regard to the cross claims  
21 is the contractual indemnity claim. As an initial matter,  
22 there is no contractual privity between our client, Richard  
23 Framing and Keye Construction. Again, we have two, two cross  
24 claim plaintiffs, Ocean Keyes and Keye Construction. The only  
25 entity with whom Richard Framing has a contract is Ocean

1 Keyes. So, with respect to Keye Construction, there is no  
2 contractual indemnity claim because there's no contract.

3 As to the contract between Ocean Keyes and Richard  
4 Framing, there were a number of them. They're attached to our  
5 motion. It is notable that in that contract, the word  
6 indemnity is not mentioned once. It is a standard AIA, A101  
7 contract, and nowhere in any of those contracts is the word  
8 indemnity mentioned. The question that immediately springs to  
9 mind is, how can you have a contractual indemnity claim based  
10 on a contract that does not mention the word indemnity a  
11 single time. The argument from the Ocean Keyes Defendants is  
12 that within the A101 contract, there is a reference to the  
13 A201 contract, and it says that we adopt the general terms of  
14 the A201 contract. And within the A201 contract, they claim  
15 there is sufficient indemnity language to support a  
16 contractual indemnity claim. The issue is that the A201  
17 contract, upon which they are relying to support their  
18 contractual indemnity claim, is not actually attached to the  
19 contract and there was never any time where they told our  
20 client where he could go get that A201 language. They never  
21 told our client what that A201 indemnity language was. All we  
22 have is a contract that has a number of other terms and  
23 conditions and it simply references the A201 contract. And  
24 the reason this is significant is because the South Carolina  
25 Court of Appeals has addressed this very issue as cited in our

1 motion in *Traynham v. Yeargin*, 403 S.E.2d 329, a 1991 decision  
2 from the court of appeals. The court says when an AIA  
3 contract is not attached, the terms are not described or  
4 instructions on where to locate those terms are not  
5 specifically given -- basically due process, giving the other  
6 side an opportunity to understand what they are actually  
7 agreeing to -- when that opportunity is not so provided, those  
8 terms are not incorporated into the agreement. And here we  
9 have an affidavit from the principal of Richard H Construction  
10 averring that he never saw the A201 contract, it was not  
11 attached to the agreement, it's not attached to any of the  
12 agreements that are part of the record evidence here, and he  
13 was never given the opportunity, never told where he could see  
14 this. He knows nothing about this indemnity language. Per  
15 Traynham v. Yeargin, based on that evidence, A201 language is  
16 not part of this agreement. There is no indemnity provision.

17 Now, Mr. McDonald will, will likely argue that the  
18 reference does suffice, and indeed in his brief in opposition  
19 to our motion submitted last evening, he does reference a  
20 transcript from a separate proceeding, a sister proceeding,  
21 the Beach Villas lawsuit that is just one of multiple lawsuits  
22 regarding, regarding the Ocean Keyes Development. And, there  
23 was another proceeding in which a representative of Ocean  
24 Keyes was deposed and he testified, as quoted in the response  
25 in opposition, that the A201 contract was supposed to be

1 provided to, to all the contracting parties. So, at some  
2 point -- and Richard H Construction is a party to -- in that  
3 sister proceeding. The testimony in that sister proceeding  
4 that is used in this case for the proposition that the -- that  
5 the contract was provided, was that it was supposed to be  
6 provided.

7 Now, there are several layers of problems with this.  
8 First of all, that separate proceeding, the testimony from  
9 that separate proceeding is not properly before the Court  
10 today. It was sworn testimony, and that is correct, but it  
11 was not submitted sufficiently in advance, it wasn't  
12 sufficiently proffered in order for the Court to properly  
13 consider that testimony. Moreover, if you actually look at  
14 the testimony that was provided, the testimony applies to the  
15 contracts that were issued in that separate proceeding, in the  
16 Seashore Villas lawsuit. There is no testimony whatsoever in  
17 the deposition transcript that was provided by the Ocean Keyes  
18 counsel about the contracts in this case.

19 And perhaps, most importantly, in addition to not being  
20 properly proffered, not talking about the contracts that were  
21 issued in this particular case, the testimony doesn't stand  
22 for the proposition that the, the A201 contract was actually  
23 provided to Richard H Construction. What is said is the  
24 contract should have been provided. And if you go further on  
25 in the testimony, it's actually attached to the opposition,

1 the question was asked, Well, do you know if it was actually  
2 provided? And the answer was, I don't know. So, here we have  
3 -- we have testimony on one side from this case saying the  
4 contract was never provided. I don't what that indemnity  
5 language was. And we have testimony that hasn't been properly  
6 proffered to this Court from another case involving different  
7 contracts where the testimony was, it should've been provided  
8 but we don't know if it was provided. That does not create an  
9 issue of fact. The only competent evidence before the Court  
10 today is that the indemnity language that they're relying on  
11 to support their contractual indemnity claim, the only  
12 concrete evidence before the Court is the affidavit from our  
13 client that says, it was not provided to him. And for that  
14 reason, in the absence of any actual contract language,  
15 showing that there was any indemnity language whatsoever,  
16 contractual indemnity language, the contractual indemnity  
17 claim must fail.

18 I think that it is notable that the 201 language, that  
19 Plaintiff's counsel is relying on in support of their  
20 contractual indemnity claim is nowhere in the record. It has  
21 never been proffered in this case properly. It hasn't been  
22 submitted with sworn testimony saying this is the actual 201  
23 language that was attached to all of our contracts. No one  
24 has ever said this is the actual contract language. The first  
25 time that we saw this A201 contract was in the brief in

1 opposition that was emailed to us last evening. That was the  
2 first time that it was proffered at all in any way, shape, or  
3 form. So, we would submit that the A201 language that the  
4 Ocean Keyes Defendants are relying on in support of their  
5 contractual indemnity claim, is not even properly before the  
6 Court, and therefore, should not be considered. Because  
7 there's no indemnity language in any contract properly before  
8 the Court today, summary judgment is certainly appropriate.

9       The last point, Your Honor, is something that was not in  
10 our motion, but something that we came across subsequently and  
11 we have spoken with the counsel for the Ocean Keyes Defendants  
12 in this regard and we did want to bring it to the attention to  
13 the Court. Even if the Court were inclined to consider the  
14 A201 language, it does not provide shelter, it does not  
15 provide them a claim for contractual indemnity. If you look  
16 at the language that's cited in their brief in opposition,  
17 there is a large exception at the end, where it says that the  
18 contractor shall indemnify and hold harmless, blah, blah,  
19 blah, except it says other than the work itself, and that is  
20 the key language in the indemnity provision and the question,  
21 if the Court even considers the language, which we don't think  
22 you should, is what do the words other than the work itself  
23 mean. And if you look at the commentary to the AIA language  
24 as well as the case law that looks at this language, it's very  
25 clear that this indemnity provision is not intended to apply

1 to a claim that a contractor failed to construct a building  
2 according to the contract documents and that's the very claim  
3 that's at issue here.

4 All the AIA language, commentaries made clear that this  
5 does not apply to a construction defect claim like this. And  
6 we do have one case from New York; it's called *Porter Managers*  
7 *v. 125 North*, which I would like to hand up for the Court's  
8 consideration. Again, I don't think you need to consider  
9 this, but it's some of the icing on the cake in terms of the  
10 meaning of this A201 language. This is a New York decision,  
11 which of course is not binding on this Court, but it is  
12 instructive as to what the indemnity language that the Ocean  
13 Keyes Defendants are relying upon means. Again, a simple  
14 construction defect case, but the main holding on page 8,  
15 relevant to our argument today is that this first indemnity  
16 provision, which is referenced here in this agreement clearly  
17 was intended to cover structures where indemnities are sued by  
18 a third party for physical injury and property damage  
19 occurring as a result of a subcontractor's work, but not when  
20 the claim challenges the subcontractor's work itself. The  
21 issue here is the subcontractor's work itself and so even if  
22 you get to the point where you're considering this, this  
23 indemnity provision, which quite frankly, is not properly  
24 before the Court, we do not believe that it extends to cover  
25 this particular claim.



1           So, at the end of the day, the breach of contract, the  
2 breach of warranty claims, they are subsumed by the equitable  
3 indemnity claim. The equitable indemnity claim fails because  
4 as conceded by their own expert, they have -- their hands are  
5 not clean in this. They share some responsibility for the  
6 damages that are alleged, so they cannot move forward with  
7 their equitable indemnity claim. And their contractual  
8 indemnity claim fails because they cannot show any indemnity  
9 language in the contract between Richard H. Construction and  
10 the Ocean Keyes Defendants. In fact, the only evidence that  
11 they've put on is from another case where they say that, that  
12 contract language should have been provided but they don't  
13 even know if it's been provided. Our client has testified  
14 under oath that the contract language was not provided, that's  
15 the only competent evidence before the Court. Because it's  
16 the only evidence, the only possible conclusion, even taking  
17 the forecasted evidence in the light most favorable to the  
18 other side, is that the contract language was not provided.  
19 Because that contract language was not provided, summary  
20 judgment is appropriate in favor of Richard H. Construction.

21           Thank you, Your Honor.

22           THE COURT: Yes, sir.

23           MR. EMGE: Your Honor, may I argue from table? Is that  
24 acceptable?

25           THE COURT: Yes, sir.

1           MR. EMGE: I think I talk loud enough that that shouldn't  
2 be a problem. My name is Chip Emge. I represent Ocean Keyes  
3 Development, the developer. We do not represent Keye  
4 Construction with respect to this motion. What I'd like to do  
5 is take the arguments in the order that they were presented in  
6 the brief, and I have -- I know we filed yesterday -- I have  
7 extra copies of our motion or memorandum and exhibits if you  
8 would like. First, I would like to address the breach of  
9 contract and breach of warranty claims and the Richard  
10 Framings argument, essentially the Stoneledge decision that  
11 they're just merely disguised equitable indemnity claims.  
12           First, this case is distinguishable from Stoneledge,  
13 because the developer itself suffered damages as a result of  
14 Richard Framings' breach of the contract. We are not claiming  
15 just that the defense of this suit is the damage in and of  
16 itself. We're saying that Richard's Framing does, was not up  
17 to par and, as a result of that, we did not get the building  
18 or the type of building that we contracted for. Also, unlike  
19 Stoneledge and I would get to this in a moment, we believe  
20 there is a contractual indemnity provision, and I'll discuss  
21 that in a moment as to why I believe the A201 was incorporated  
22 by reference into the contract with Richards Construction.  
23 The independent damages that were suffered by OKD, there's  
24 testimony that we cite in our brief from Mr. Baltzer on Page  
25 113 of his brief, that there were beams that were originally

1 constructed by Richards Framing that the developer prior to  
2 the bringing of this lawsuit, had to repair at their costs.  
3 That is the part of the damages that we seek and therefore,  
4 that is independent. There is also evidence in the report of  
5 Mr. Donahoe or Donahue, which cites a number of engineering  
6 issues or he, as an engineer, he knows the number of issues  
7 which deal with the Richards Framing's work. Again, our  
8 client had to address those. It was prior to this case being  
9 sought, but the result of that was that those same issues are  
10 being presented again in this case.

11 And, Mr. Hernandez himself, noted that they had to do  
12 the repairs with respect to those beams. I believe we have  
13 cited that's on Page 159 of his testimony. And again, OKD as  
14 the developer, had to compensate Mr. Hernandez, Richard's  
15 Framing, for the remediation work that they did, which is  
16 again an issue in this case.

17 With respect to the equitable indemnity argument and Mr.  
18 Gregory's testimony, I think it's important to put it in  
19 context. Mr. Kennedy argues that Mr. Gregory was talking  
20 about responsibility, but that is not the case. What he was  
21 talking about as we set forth in our brief, is he was doing an  
22 allocation, an allocation of repairs strictly for mediation.  
23 And as part of that, he said, I think it's fair to assume that  
24 there should be some allocation to the GC. He's talking about  
25 an allocation of the costs of the repair. First it's an

1 assumption. Second, it's not a statement as to liability and,  
2 candidly, he said he had not even done that analysis. So I  
3 don't think that you can say as a matter of law, that Mr.  
4 Gregory is saying that Ocean Keyes Development is liable.  
5 Secondly, Mr. Gregory's testimony was general in nature; it  
6 was not specific to any one defendant. So to say that you  
7 can't extrapolate from the allocation to say that as to  
8 Richard's Framing, Ocean Keyes Development was negligent or at  
9 fault in some way.

10 In addition, I think there's some question of fact with  
11 respect to liability because in Mr. Hernandez own testimony,  
12 he, quite clearly, testifies that they never had any -- and  
13 I'll see if I can get the exact quote for you -- this is  
14 counsel asking Mr. Hernandez, did you ever go to anyone  
15 whether it was Russ Baltzer, Mark Hyman, John Maduir (spelled  
16 phonetically), or Brian Deal (spelled phonetically) and notify  
17 them of any problems you thought there were with the project?  
18 No. Did you ever, during the course of your work at the  
19 project, feel that the work was too much for your company with  
20 regard to how many people you needed to perform it? No. Did  
21 you ever feel like the work you were contracted to do is out  
22 the scope -- outside of the scope of what you had to do? No.  
23 And the importance of that testimony is that if there were no  
24 questions on the part of Mr. Hernandez with respect to the  
25 scope of his work and how it was to be done, then it is fair

1 for Ocean Keyes Development to assume that the work was done  
2 properly. That in and of itself creates an issue of fact as  
3 to whether Ocean Keyes Development was negligent for the  
4 purposes of the equitable indemnity argument.

5 With respect to the incorporation of the indemnity  
6 provision, the case -- the court of appeals case cited by the  
7 Plaintiff, the Traynham case, it was critical to their -- the  
8 court of appeals decision, that there was no enumeration or  
9 description of the conditions of the contract under Article  
10 VII as there was in the what I'll call the Timmons ville case,  
11 which is the prior supreme court case. And in Timmons ville,  
12 the court said, we think that in the absence of a showing of  
13 fraud, mistake, unfair dealing, or the like, a party shall  
14 contract, incorporating in arbitration provision, cannot  
15 escape the obligation of such a provision by simply declaring,  
16 but I did not read the whole agreement. As in the  
17 Timmons ville case -- and we've attached these documents to our  
18 brief -- the AIA contract signed by Mr. Hernandez has a very  
19 clear enumeration of the documents. In paragraph -- well, in  
20 Article VIII, the enumeration of contract documents, 8.1.1.  
21 the agreement as is executed, 1997 edition of the standard  
22 form of agreement between owner and contractor AIA 101. - 101-  
23 1997. The general conditions or the 1997 edition of the  
24 general conditions of the contract for construction AIA  
25 document A201, 1997. That is identical to the facts that were

1 presented to the Court in *First Baptist Church of Timmonsville*  
2 *v. Creed & Sons*, and the cite for that is 281 S.E.2d 121. So  
3 first, it does not matter whether Mr. Hernandez physically had  
4 a copy of the A201 attached to the contract or given to him.  
5 It was incorporated by reference in the contract that he  
6 signed. The -- Richard's Framing also makes an argument that  
7 Mr. Hernandez was not given any directions about where to find  
8 the A201. Nowhere in the Timmonsville case do they discuss  
9 directions. I will grant you that in the Traynham case, they  
10 state indicta that no description is given of the general  
11 conditions and no directions are given to the Traynham about  
12 where they might find them. However, in this case, those  
13 documents were specifically enumerated and specially called  
14 out as the AIA contract documents, which like the Timmonsville  
15 case, the reference in the Timmonsville case which the court  
16 held was sufficient was a reference to the construction  
17 industry arbitration rules of the American Arbitration  
18 Association. That was the extent of the directions that the  
19 court upheld in Timmonsville, and we believe that that is  
20 applicable here.

21 As far as the proffer of the testimony of Mr. Baltzer,  
22 the record is replete that these sister cases, they were all  
23 essentially handled the same way. I don't -- I think it was  
24 properly proffered. I think that deposition testimony is,  
25 Your Honor, and those can be used for any purpose whatsoever.

1 It's not an affidavit that requires the 48-hour rule, but that  
2 being said, I think it does create an issue of fact, even if  
3 the Court is not inclined to accept the incorporation by  
4 reference, I think it creates an issue of fact as to whether  
5 or not this was the A201 was at least offered or available to  
6 Mr. Hernandez. Again, we don't think the Court needs to, to  
7 reach that, because we think the Timmonsville case clearly  
8 holds that the A201 was incorporated by reference in this  
9 case. And the importance of that reference is the terms of  
10 the indemnification in the A201, which the contractor shall  
11 indemnify and hold harmless, blah, blah, blah blah, blah from  
12 -- against claims, damages, losses of expenses, including but  
13 not limited to attorney's fees arising out of and resulting of  
14 performance of the work and provided other than the work  
15 itself. I mean, this is essentially a Crossman/Newman type of  
16 argument, but our argument is that we have suffered damages  
17 through the breach of their contract which has, in turn,  
18 affected other elements of the building that have had to be  
19 repaired. So the claim, our claim is not just limited to the  
20 breach of the contract with respect to their work, but also  
21 the effects that that breach had on other elements of the  
22 building.

23       The -- Richard's Framing raises an argument under the  
24 South Carolina Contribution Among Tortfeasors Act, we believe  
25 that that issue is not ripe yet. One, as far as we know,

1 Richard's Framing has not settled with the Plaintiff. And,  
2 two, we have Ocean Keyes Development has not been found to be  
3 a joint tortfeasor. With respect to severing the equitable  
4 indemnity claim, there is South Carolina case law, *Johnson v.*  
5 *South Carolina National Bank* case, 292 S.C. 51, which clearly  
6 holds that equitable and legal claims can be tried together  
7 with the judge deciding the equitable claims and jury deciding  
8 the factual issues.

9 So, Your Honor, for those reasons, we believe that we  
10 have sufficient grounds to proceed on our breach of contract  
11 and express warranties, our equitable indemnity claim, and our  
12 contractual indemnity claim. We believe there's sufficient  
13 facts and evidence to deny the motion for summary judgment.  
14 I'll be happy to answer any questions you have.

15 THE COURT: The distinction you said between this case  
16 and Stoneledge is?

17 MR. EMGE: Well, the distinction between this case --  
18 there are a couple of distinctions. First, Stoneledge did not  
19 have a specific contractual indemnity provision. Whereas, we  
20 do in this case. Also, we would argue that as the developer,  
21 we have incurred independent damages separate from just the  
22 mere fact that we're here having to defend the Plaintiff's  
23 allegations. In that context, it's the beams, it's other work  
24 that Richard Framing did that,-- that give rise to our  
25 independent claims and therefore, it's not just an equitable



1 indemnity claim in sheep's clothing, if you will.

2 THE COURT: All right. Mr. Kennedy?

3 MR. KENNEDY: Your Honor, I'll be brief here and I'm  
4 somewhat in a unique position; somewhat like you. I'm a  
5 little newer to this case as I'm filling in for a colleague  
6 here, but that's why -- I think his first point is notable.  
7 In considering the arguments of counsel and considering how to  
8 respond, I just know, first, with regard to the discussion,  
9 the existence of independent damages. There's a lot of  
10 general discussion of, yes, we've suffered damages independent  
11 of this indemnification claim but -- and there are general  
12 allegations as noted in the response brief that was submitted  
13 last night on Page 5. There are allegations and cross claims  
14 that as a direct and proximate result of each of the  
15 subcontractor defendant's breach, the work performed caused  
16 resulting property damage to other construction work product  
17 on the project, that the Ocean Keyes Defendants suffered  
18 actual and consequential damages in an amount to be determined  
19 at trial. There are all these allegations and general  
20 statements on these independent damages, but we're beyond that  
21 here. We're at the point where there needs to be some sort of  
22 forecast of evidence, something in the record to actually  
23 establish that they have suffered those damages, and that has  
24 not occurred to what I've heard today. The only evidence in  
25 the record is that the damages that they are seeking is

1 completely derivative of, of the work that was performed by us  
2 and the damages that are being sought by Plaintiff.

3 As to the argument about Mr. Gregory's comments on  
4 allocation, I think it boils down to the fact that Plaintiffs  
5 again are arguing that the jury can simply ignore the plain  
6 meaning of his words that yes, a certain amount needs to be  
7 allocated to the Ocean Keyes Defendants. There is no forecast  
8 of evidence. We put evidence into the record, we could put  
9 additional evidence from multiple other experts saying, yes,  
10 Ocean Keyes Defendants share additional fault, but their own  
11 expert said it, said some of the -- some of the damages have  
12 to be allocated to us. There's no forecast of evidence from  
13 the other side that they actually have unclean hands. I  
14 submit that once we put the evidence before the Court that  
15 their own expert testified that they don't have clean hands,  
16 that burden is on them to actually show differently and they  
17 cannot do that.

18 As to the discussion about the incorporation of the  
19 indemnity provision, this is not a case where we're arguing  
20 that our client did not have or did not read the language,  
21 which I think is what the Timmons ville case talks about. This  
22 is a case where he never had the opportunity to read it  
23 because he's handed a contract that was 10 pages long and  
24 somewhere in there it makes reference to A201, but he was  
25 never shown what that A201 -- 201 language was, it was never

1 discussed with him, he was never told where to get it. In  
2 line with the -- with the case we talked about earlier, we  
3 think that under those circumstances, that provision is not  
4 properly treated as part of this agreement. And I note that  
5 this is not just South Carolina that goes through this process  
6 where as a matter of fundamental fairness, a party to a  
7 contract has to know what's in it, has to be given the  
8 opportunity to learn what's in it. This is something that  
9 court's across the country -- I pulled up Williston on  
10 contracts that makes clear an incorporation by reference is  
11 not effective unless the provisions to which the reference is  
12 made has a reasonably clear and ascertainable meaning. When  
13 you don't even have the opportunity to see the document, when  
14 you're told where it is, it can't have a reasonably clear  
15 meaning, you can't bind something to an indemnity provision  
16 where he or she has never had the opportunity to see it.

17 As to the deposition testimony from the companion case, I  
18 disagree with counsel. I think because it is from the  
19 companion case, although it is sworn testimony, it is  
20 essentially treated as an affidavit. It should've been  
21 submitted 48 hours in advance. And the last -- again, if the  
22 Court is not inclined to grant the motion, at a minimum, we  
23 would request that equitable claims be severed and be tried  
24 separately.

25 THE COURT: All right. Any ---

1 MR. EMGE: Your Honor, just very briefly in response.  
2 First, Richard's Framing had the opportunity to ask any of  
3 these questions with respect to the incorporation of the A201  
4 and its availability to our client, Mr. Baltzer, and they did  
5 not avail themselves of that opportunity.

6 Finally, despite whatever Williston on Contracts may  
7 say, the fact of the matter is that the Timmonsville case  
8 remains the law of this state. And in the Timmonsville case,  
9 the only -- the reference to the incorporated document was  
10 merely the construction industry arbitration rules of the  
11 American Arbitration Association. Identical essentially to  
12 what have here, except in our case, its general conditions are  
13 the A201.

14 That's all I have, Your Honor.

15 THE COURT: All right. Mr. Clark?

16 MR. CLARK: Thank you, Your Honor. Chris Clark for Keye  
17 Construction. I just wanted to put myself on the record and  
18 joining in the arguments of Ocean Keyes Development. Also  
19 point out, as to Keye Construction, Keye Construction is not  
20 the signator on the contract with Richard's Framing. Our  
21 posture is one of equitable indemnity and, of course, we are  
22 in the quintessential position of being a party that's been  
23 named through the alleged misconduct another, Richard's  
24 Framing, in which we had no contribution. We are a sister  
25 company of Ocean Keyes Development, but in these buildings

1 concerning Beach Villas, we didn't actually sign the  
2 construction contracts. That was actually done by Ocean Keyes  
3 Development, our sister company. So we've been named  
4 nonetheless because the alleged misfeasance or malfeasance of  
5 Richard's Framing.

6 THE COURT: I believe there are genuine issues of fact  
7 and parties have made -- both make good arguments, but I do  
8 not believe summary judgment would be appropriate on any of  
9 the grounds argued and I deny the motion.

10 MR. LADY: Thank you, Your Honor.

11 MR. EMGE: Thank you, Your Honor.

12 MR. KENNEDY: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 MOTION TO STAY:

15 MR. MCDONALD: Your Honor, Patrick McDonald on behalf of  
16 Ocean Keyes Development. We had filed a motion to stay. A  
17 little background as far as Ocean Keyes Development. Ocean  
18 Keyes Development developed a community known as Ocean Keyes  
19 Communities there up in North Myrtle Beach. Within Ocean  
20 Keyes Communities, there are three separate projects, Beach  
21 Villas, we're here today on behalf of Beach Villas; Lakeside  
22 Townhomes, which is scheduled to be tried in November,  
23 November 13th, a date certain; and Seashore Villas  
24 Association, which is probably going to be tried in early  
25 2018.

1 Beach Villas first filed its original complaint in 2014  
2 and then their filed -- third amended complaint was filed in  
3 December of 2016 in this case against Ocean Keyes Development,  
4 my client and nine subcontractors, four material suppliers.  
5 It involves nine multi-unit luxury buildings. Lakeside  
6 Townhomes was subsequently filed in July of 2015 and then  
7 Seashore also in 2015, November 18th. They filed a suit on  
8 behalf of 24 luxury villa buildings.

9 During the time periods that the Plaintiffs for all three  
10 projects claimed that property damage occurred, Ocean Keyes  
11 was covered by various commercial general liability policies  
12 issued by three different insurers. State Auto Property &  
13 Casualty Company was one, Star Indemnity was the second one,  
14 and the third one is QBE Insurance Corporation. As you  
15 probably are aware of, in March of this year, Star filed a DJ  
16 action against Ocean Keyes. There is dispute as to Ocean  
17 Keyes representations in the insurance application itself.  
18 They've asked for a rescission and on June 20th, QBE filed a  
19 DJ action against Ocean Keyes and they're also asking for a  
20 rescission.

21 We have spent countless hours in all three suits, devoted  
22 to settling this matter. In -- we had five separate  
23 mediations in all the Ocean Keyes Development cases. We have  
24 not settled any of them and -- despite our best efforts. And  
25 really the elephant in the room has been the elephant in the

1 room all morning; it's the coverage action. Coverage has been  
2 a stumbling block. If the coverage issue gets settled, I  
3 guarantee you, all the rest of it will come into place. When  
4 the coverage dispute has been resolved, all these other  
5 issues, as far as the legal issues, will get resolved.  
6 Anybody associated with any of those settlement discussions,  
7 the mediations, the mediators would say, it was coverage  
8 stances by the various insurance companies. And where I'm  
9 only talking on behalf of the general contractor, as you know,  
10 there are several DJ actions that have been filed by the  
11 subcontractors in Beach Villas, Lakeside, and Seashore.

12 As far as our motion to stay, South Carolina courts have  
13 said -- have stated that whether to stay a case is a decision  
14 made in the exercise of discretion by the court as part of its  
15 inherit power to control its own docket. Court's consider  
16 three factors in weighing a motion to stay. The interest of  
17 judicial economy is the first one; secondly, hardship and  
18 equity to the moving party if the action is not stayed; and  
19 potential prejudice to the non-moving party. All three Ocean  
20 Keyes cases are expected to take, at the very least, two  
21 weeks, and involve several expensive experts, consume valuable  
22 time of 12 jurors, Your Honor, your staff and other Horry  
23 County Courthouse employees. Beach Villas, as you know, is  
24 number two, a date certain trial scheduled to begin October  
25 16th and move and go through October 27th. If this case and

1 the other two Ocean Keyes cases proceed to trial and a  
2 judgment is found in favor of the Plaintiffs, Plaintiffs  
3 unfortunately will only have a paper award due to the other  
4 pending DJ action -- DJ cases in federal court. That's a  
5 month and a half of trials consumed in the Ocean Keyes  
6 Development cases and judicial efficiency, economy of time,  
7 effectiveness of effort for the Court, counsel, litigants, and  
8 every other person involved should be taken into consideration  
9 in this decision.

10       The Plaintiff's due process, it will not compromised  
11 because any judgment funds would effectively be tied up until  
12 the DJ actions have been heard and resolved. And pure and  
13 simple, the need to stay this case outweighs any possible harm  
14 to the Plaintiffs. Allowing this case to proceed forward and  
15 allowing the other two cases to proceed forward is akin to  
16 placing the cart before the horse. When an insured disputes  
17 whether there's a duty to defend the insured, the Harleysville  
18 case found that declaratory action as to the duty to defend is  
19 ripe for adjudication because determining whether an insurer  
20 has a duty to defend the facts as alleged in the underlying  
21 complaint are to be taken as true, compared to the language of  
22 the insurance policy. Harleysville also stated the resolution  
23 of the issue of the insurer's duty to defend the insured in  
24 the pending federal and state actions do not depend on the  
25 determination of any factual issues in this case. They are



1 wholly independent of each other.

2       There are -- the issues in our case versus the issues in  
3 the DJ action do not depend on each other. South Carolina  
4 courts have also held in State Farm Fire & Casualty that  
5 resolving a declaratory judgment action prior to the  
6 underlying action can be both be a valuable and appropriate  
7 means of resolving questions of policy coverage, especially  
8 when the question of policy coverage is independent and  
9 separable from the claims asserted in the pending suit by the  
10 injured third party. In the Rubens Contractor's case that we  
11 cite in our brief that held in favor of the stay because the  
12 issues the insurer's duty to defend and indemnify were ripe  
13 because their resolution would affect the defense in  
14 settlement of the underlying case. That's certainly true in  
15 this matter. The Court in Rubens stated that it seems  
16 inescapable that uncertainty over coverage would skew the  
17 settlement process. That has proven to be true in this case.  
18 In this case the insurer's unwillingness to settle wholly  
19 evidences that settlement cannot be achieved in this action  
20 without first adjudicating the actions for declaratory relief  
21 filed by QBE and Star. Coverage in this case has undeniably  
22 skewed the settlement process. Under the first -- under the  
23 United Capital case, they held that staying a proceeding in  
24 their case, in order to make determination of the coverage  
25 issue before the trial of the declaratory judgment action

1 would be both -- would both serve a useful purpose in  
2 clarifying and settling the legal relations at issue and would  
3 also terminate and affordably from uncertainty, insecurity,  
4 and controversy giving rise to the proceeding.

5 In closing, staying this action until the DJ actions are  
6 decided would minimize duplication and effort in all three of  
7 the Ocean Keyes Development cases. It would minimize  
8 duplication and expenses in all three cases. It would greatly  
9 assist in the settlement of this case and the two other cases.  
10 It would help to crystalize the legal issues in this matter  
11 and the other two matters. In other words, granting this stay  
12 would be the most efficient and expeditious means of resolving  
13 policy coverage disputes and inevitably resolving this suit in  
14 the most reasonable and economical manner. Judicial economy  
15 warrants that this case be stayed until coverage actions have  
16 been decided.

17 THE COURT: All right.

18 Mr. Wylie?

19 MR. WYLIE: Your Honor, we object to staying this case.  
20 He talked about all the settlement negotiations and the  
21 coverage is skewed. He is right; we need to have us a trial.  
22 You've heard for two days everybody talking about all the  
23 insurance issues. This case needs to go forward. It was  
24 filed three years ago, 2014. My client has been spending  
25 hundreds of thousands of dollars keeping these buildings from

1 falling down. We need that trial. We had to spend money we  
2 don't have. There's no reason I can think of in the world to  
3 stay this case. Trying to say that it's gonna help settlement  
4 negotiations, what helps settlement negotiations is having a  
5 trial, that's what gets everybody focused on it. We strongly  
6 object to a motion to stay. It's time to have our trial in  
7 this case.

8 THE COURT: All right. Anyone else with something to say  
9 about it?

10 Well, one of the main things that's typically argued,  
11 judicial economy, I've set aside time to come and try these  
12 cases, so I'm good to, be here to try them. We can see from  
13 other cases, that in many instances, it takes years to unravel  
14 various aspects of the controversies that exist. I don't know  
15 that delaying the case would spur any, any resolution. An  
16 ultimate resolution is not necessarily this Court's  
17 responsibility. My responsibility is to try this case and  
18 these cases and get them off the docket. So, we've gone  
19 through the process of giving everyone an opportunity to get  
20 prepared, to take the depositions, and do the mediations, and  
21 the time of trial is at hand. I deny the motion to stay.

22 MR. LADY: Thank you, Your Honor.

23 THE COURT: All right. Are we done with Beach Villa for  
24 the day?

25 MR. KENNEDY: Your Honor, for that last one, will just a

1 form order be okay?

2 THE COURT: A form order or whatever you all prefer.

3 MR. KENNEDY: We don't need to submit unless the Court  
4 wants it.

5 MR. CALAMARI: A form Order is fine.

6 THE COURT: A form Order is fine. All right, Form IV.  
7 My Clerk is still learning how to do that -- Mr. Lady will  
8 send you one.

9 MR. LADY: Your Honor, just a point of clarification. On  
10 our motion, we did ask that it -- that the equitable claims be  
11 severed; is that being denied as well?

12 THE COURT: Yes, sir, I'm buying the argument that they  
13 both can be done. The Court will deal with equitable and the  
14 jury will deal with legal.

15 MR. LADY: Thank you.

16 THE COURT: All right. We're done with that now.

17 (ADJOURNED.)  
18  
19  
20  
21  
22  
23  
24  
25

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTEENTH JUDICIAL  
 ) CIRCUIT  
 CASE NO.: 2015-CP-26-00279

THE RIVER CROSSING )  
 CONDOMINIUM ASSOCIATION, AND )  
 VINCENT J. TAMBURRO, ON )  
 BEHALF OF HIMSELF AND OTHERS )  
 SIMILARLY SITUATED, )

Plaintiffs, )

vs. )

CENTEX HOMES; CENTEX ) HARTFORD FIRE INSURANCE  
 CONSTRUCTION COMPANY, INC.; ) COMPANY'S AND HARTFORD  
 CENTEX CONSTRUCTION, LLC; ) CASUALTY INSURANCE COMPANY'S  
 CENTEX-ROONEY CONSTRUCTION, ) NOTICE OF MOTION AND MOTION  
 CO., INC.; CENTEX-RODGERS, INC.; ) TO INTERVENE  
 BALFOUR BEATTY )  
 CONSTRUCTION, LLC f/k/a CENTEX )  
 CONSTRUCTION, LLC; RIGHT WAY )  
 CONSTRUCTION, INC.; RIGHT WAY )  
 GROUP, INC.; RWG, INC.,; RWGR, )  
 INC.; STOCK BUILDING SUPPLY, )  
 LLC f/k/a STOCK BUILDING SUPPLY, )  
 INC.; BUILDERS FIRSTSOURCE- )  
 SOUTHEAST GROUP, LLC; MARTIN )  
 MASONRY, INC.; GARY HUNNELL )  
 d/b/a GRAND STRAND ROOFING; )  
 CRAFTMASTER MANUFACTURING, )  
 INC. )  
 d/b/a CMI; ROOF DOCTOR OF THE )  
 CAROLINAS, INC.; STOCK )  
 BUILDING SUPPLY, LLC f/k/a )  
 CAROLINA BUILDERS )  
 CORPORATION; ORFIELD )  
 LABORATORIES, INC.; TREBOR )  
 INDUSTRIES, INC.; STEVEN BOSCH )  
 d/b/a THE ROOFER MAN; )  
 CERTAINTED CORPORATION )  
 SUCCESSOR BY MERGER TO )  
 EXTERIOR SYSTEMS, INC. a/k/a )

NORANDEX, INC.; WEATHER )  
 PROTECTION SYSTEMS, INC.; COX )  
 MILLWORK & SUPPLY, INC.; AM )  
 JACOBS, INC.; GALVIN DEPOMPE; )  
 ROBERTA DEPOMPE; )  
 MORNINGSTAR CONSULTANTS, )  
 INC.; JELD-WIN, INC. AS )  
 SUCCESSOR TO AND/OR MERGER )  
 WITH CRAFTMASTER )  
 MANUFACTURING, INC. d/b/a CMI, )  
 AND SIGN STUDIO & GRAPHICS, )  
 INC., )  
 )  
 )  
 )  
**Defendants.** )

TO: ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively "Hartford") by and through their undersigned attorneys, will move before the Court on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, to intervene in this action for the limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury that addresses factual issues related to indemnity coverage.

Hartford hereby files this Motion to Intervene, pursuant to South Carolina Rule of Civil Procedure 24, and states as follows:

1. Hartford issued general liability insurance policies to third-party defendant Carolina Drywall and Interiors ("Carolina Drywall") for the policy periods in effect November 12, 2003 to March 11, 2005 ("the Hartford Carolina Drywall Policies") pursuant to which Carolina Drywall is seeking coverage for the claims asserted against it

in this action. Hartford is currently participating in the defense of Carolina Drywall in this action under the Hartford Carolina Drywall Policy, subject to a full and complete reservation of its rights.

2. Defendant, Centex Homes ("Centex") claims to be an additional insured under the Hartford Carolina Drywall Policies. Hartford is currently participating in the defense of Centex in this action under the Hartford Carolina Drywall Policies, subject to a full and complete reservation of its rights.

3. Hartford issued general liability policies to defendant Weather Protection Systems, Inc. ("Weather Protection") for the policy periods in effect July 12, 2001 to July 12, 2007 (collectively "the Hartford Weather Protection Policies") pursuant to which Weather Protection is seeking coverage for the claims asserted against it in this action. Hartford is currently participating in the defense of Weather Protection in this action under the Hartford Weather Protection Policies, subject to a full and complete reservation of its rights.

4. Hartford issued primary general liability policies to third-party defendant Michael Dawson Construction ("Dawson") for the policy periods in effect May 29, 2003 to May 29, 2006 (collectively, "the Hartford Dawson Policies") pursuant to which Dawson is seeking coverage for claims asserted against it in this action. Hartford is currently participating in the defense of Dawson in this action under the Hartford Dawson Policies, subject to a full and complete reservation of its rights.

5. Hartford seeks an order permitting it to intervene in this action for the limited purpose of submitting and participating in the preparation of jury instructions,

special interrogatories, and/or a special verdict form for submission to the jury that addresses factual issues related to the indemnity coverage, if any, afforded to Carolina Drywall, Weather Protection, Centex, and Dawson for the claims asserted against each of them in this action.

6. Such special interrogatories and/or special jury verdict forms would include requests that the jury identify: (1) the count(s) for which liability is found as to Carolina Drywall, Weather Protection, Centex and/or Dawson and (2) the breakdown of damages attributable to Carolina Drywall, Weather Protection, Centex and/or Dawson, if any, including allocating between damages for repair costs, damages for property damage, and, to the extent they are awarded, punitive damages.

7. Should the Court permit Hartford to intervene in this action, Hartford requests that its limited participation and the existence of possible insurance coverage for Carolina Drywall, Weather Protection, Centex and/or Dawson not be revealed to the jury, as any reference to insurance coverage would be improper and prejudicial. *See Todd v. Joyner*, 385 S.C. 509, 514, 685 S.E.2d 613, 616 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009).

8. Hartford's limited intervention in this action is proper, and is necessary as Hartford's failure to obtain special interrogatories and/or a special verdict forms could result in a subsequent finding that it is estopped from contending, or has waived its right to contend, that the Hartford Carolina Drywall Policies, the Hartford Weather Protection Policies and the Hartford Dawson Policies (collectively, "the Hartford Policies") do not provide coverage for some or all of a general verdict, if any, rendered against Carolina



Drywall, Weather Protection, Centex and/or Dawson. *See, e.g., Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E. 2d 288 (2017).<sup>1</sup>

9. Hartford's motion for limited intervention is timely, will not cause a delay of the trial, and will not prejudice the rights of any party to this action. Moreover, the special interrogatories and/or special verdict forms contemplated are not beyond the scope of the claims asserted against Carolina Drywall, Weather Protection, Centex and/or Dawson in this action, and will decrease the likelihood of the need for subsequent coverage litigation.

10. Should the Court deny Hartford's request for limited intervention, Hartford respectfully requests that it be allowed to attend all discussions held in chambers between the parties and the trial judge, and have the right to request and submit special

---

<sup>1</sup> Hartford does not in any way not concede that there are issues of fact for the jury in this action or that Hartford cannot adjudicate these issues (including all allocation issues) in a separate declaratory judgment action, filed either before or after a verdict is rendered. Indeed, the duty to indemnify does not even arise until a judgment is rendered against the insured. *Capitol Specialty Ins. Corp. v. Ellis Wise Landscaping, Inc.*, 2015 WL 6408128 (D.S.C. Oct. 20, 2015) (noting there is "no obligation to indemnify until a judgment against the insured is obtained."). Hartford also notes that the burden is on the insured – not Hartford – to establish coverage in the first instance. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523, 525 (1968); *see also Auto-Owners Ins. Co. v. Madison at Park West Prop. Owners Ass'n, Inc.*, 834 F. Supp. 2d 437, 443 (D.S.C. 2011). Thus, it is the insured's burden to establish "covered" damages in order to establish any right to indemnity under the policy. *UFP Eastern Division, Inc. v. Selective Ins. Co.*, 2017 WL 499083, \*5 (D.S.C. Feb. 6, 2017) (holding that at the trial of the separately filed declaratory judgment action the insured "must prove its claim for indemnity falls within the scope of insurance i.e., prove consequential damages resulting from the work performed by [the insured's subcontractor]"). Hartford seeks to intervene to ask the jury special interrogatories based on the uncertainty of South Carolina law in this area, particularly in the face of the South Carolina Supreme Court's opinion in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E. 2d 288 (2017), as discussed in more detail in its Memorandum of Law in Support of Its Motion to Intervene.

interrogatories to the jury in the event that a verdict is rendered against Carolina Drywall, Weather Protection, Centex and/or Dawson.

11. Alternatively, should the Court deny the Motion to Intervene and Hartford's request to submit special interrogatories to the jury, without conceding it would be bound, Hartford respectfully requests that this Court find that Hartford will not be bound by any judgment entered in this action against Carolina Drywall, Weather Protection, Centex and/or Dawson, and that it can litigate all facts relevant to the determination of the coverage afforded, if any, to Carolina Drywall, Weather Protection, Centex and/or Dawson under the Hartford Policies for the claims asserted against them in this action.

12. Intervention as a matter of right is warranted because Hartford has an interest relating to the subject matter of this case and is so situated that the disposition of the action may, as a practical matter, impair or impede Hartford's ability to protect that interest. Moreover, Hartford's interests are not adequately represented by the existing parties, in that defense counsel representing Carolina Drywall, Weather Protection, Centex and/or Dawson may not advocate any coverage position that would be against their client's interests.

13. Alternatively, Hartford is entitled to permissive intervention because Hartford's policy defenses and this action have common questions of fact relating to the damages, if any, that may be awarded to the Plaintiff and/or Third-Party Plaintiff. As noted, the intervention sought will not unduly delay or prejudice the adjudication of the rights of the original parties, as it will be handled solely through the submission of a

special verdict forms or special interrogatories to the jury after the close of evidence in this action.

WHEREFORE, for the reasons set forth above and in the accompanying Memorandum of Law, which is incorporated herein by reference, Hartford respectfully requests that the Court grant this Motion and permit it to intervene in this action for the limited purposes set forth above. Alternatively, Hartford requests that the Court enter an order stating that Hartford will not be bound by any judgment entered against Carolina Drywall, Weather Protection, Centex and/or Dawson in this action, and that Hartford reserves its rights to, and can, re-litigate the facts and issues relevant to the insurance coverage, if any, afforded to Carolina Drywall, Weather Protection, Centex and/or Dawson under the Hartford Policies for the claims asserted against them in this action.

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, Counsel certifies that consultation would serve no useful purpose.

Columbia, South Carolina

December 8, 2017

SWEENEY, WINGATE & BARROW, P.A.

s/Christy E. Mahon

Mark S. Barrow, Esquire, SC Bar No.:7821

Christy E. Mahon, Esquire, SC Bar No.: 15975

1515 Lady Street

Post Office Box 12129

Columbia, South Carolina 29211

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

Plaintiffs,

VS.

Defendants.

MOTION FOR LIMITED  
INTERVENTION OR  
ALTERNATIVELY FOR ORDER OF  
PROTECTION OF RIGHTS  
(SCRPC 24)

YOU WILL PLEASE TAKE NOTICE that Selective Insurance Company of South Carolina, (herein "Selective") on the tenth (10<sup>th</sup>) day following service of this Motion or as soon as possible prior to the start of the jury trial of this matter at the Court's discretion, pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the South Carolina Supreme Court's Opinion in *Harleysville Group Insurance v. Heritage Communities, et. al.*, Opinion 27698, dated July 26, 2017, will move before this Honorable Court for an Order Granting its Motion for Limited Intervention or, in the alternative, for an Order Protecting its rights to raise any and all issues relating to insurance coverage in a subsequent action.

This motion for intervention is based on the following grounds:

1. The verdict, if any, in this action could consist of a mixture of damages covered under certain policies of insurance and damages that are not covered under certain policies of insurance. Allocation of those damages is necessary to assist the determination of which portion of the damage verdict, if any, triggers the duty of indemnity under certain insurance policies.
2. Evidence of damages should be categorized to preserve the findings of the jury that might be important in subsequent related actions.
3. The South Carolina Supreme Court has mandated that only damages meeting the definition of property damage are potentially covered, unless otherwise excluded, by an insurance policy.
4. The expert witnesses in the underlying action have submitted expert reports categorizing the cost of repairing damage into the categories of (1) removing and replacing defective work, and (2) removing and replacing portions of the buildings damaged as a result of the improperly performed work. As such, the

task of the jury to categorize should not complicate the jury's process in reaching the verdict.

5. The insured and the plaintiff carry the burden of proving with specificity the damages that are covered under an insurance policy. Failure to allocate at the time of the underlying verdict results in the inability to allocate the jury's verdict in a subsequent action.
6. The insurance carriers are not permitted to be involved in allocation of the verdict unless the Motion to Intervene is granted.
7. Selective joins in the Motions to Intervene by the other insurance carries and incorporates herein the grounds, arguments and positions taken unless otherwise inconsistent herein.

And we so Move

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/Robert C. Calamari

Robert C. Calamari, Esquire

SC Bar No. 064985

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Post Office Box 3939 (29578-3939)

Myrtle Beach, SC 29577-6412

(843) 448-3500

*Attorneys for Selective Insurance Company of South Carolina*

Myrtle Beach, South Carolina  
December 18, 2017

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF HORRY ) FIFTEENTH JUDICIAL CIRCUIT

The River Crossing Condominium ) Civil Action No. 2015-CP-26-00279  
 Association and Vincent J. Tamburro, )  
 on Behalf of Himself and Others )  
 Similarly Situated, )  
 Plaintiffs, )

vs. )

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

Defendants. )

MOTION FOR LIMITED  
INTERVENTION OR  
ALTERNATIVELY FOR ORDER OF  
PROTECTION OF RIGHTS  
(SCRCP 24)

YOU WILL PLEASE TAKE NOTICE that Harleysville Insurance Company n/k/a Nationwide Insurance Company, (herein "Nationwide") on the tenth (10<sup>th</sup>) day following service of this Motion or as soon as possible prior to the start of the jury trial of this matter at the Court's discretion, pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the South Carolina Supreme Court's Opinion in *Harleysville Group Insurance v. Heritage Communities*, et. al., Opinion 27698, dated July 26, 2017, will move before this Honorable Court for an Order Granting its Motion for Limited Intervention or, in the alternative, for an Order Protecting its rights to raise any and all issues relating to insurance coverage in a subsequent action.

This motion for intervention is based on the following grounds:

1. The verdict, if any, in this action could consist of a mixture of damages covered under certain policies of insurance and damages that are not covered under certain policies of insurance. Allocation of those damages is necessary to assist the determination of which portion of the damage verdict, if any, triggers the duty of indemnity under certain insurance policies.
2. Evidence of damages should be categorized to preserve the findings of the jury that might be important in subsequent related actions.
3. The South Carolina Supreme Court has mandated that only damages meeting the definition of property damage are potentially covered, unless otherwise excluded, by an insurance policy.
4. The expert witnesses in the underlying action have submitted expert reports categorizing the cost of repairing damage into the categories of (1) removing and replacing defective work, and (2) removing and replacing portions of the



buildings damaged as a result of the improperly performed work. As such, the task of the jury to categorize should not complicate the jury's process in reaching the verdict.

5. The insured and the plaintiff carry the burden of proving with specificity the damages that are covered under an insurance policy. Failure to allocate at the time of the underlying verdict results in the inability to allocate the jury's verdict in a subsequent action.
6. The insurance carriers are not permitted to be involved in allocation of the verdict unless the Motion to Intervene is granted.
7. Nationwide joins in the Motions to Intervene by the other insurance carries and incorporates herein the grounds, arguments and positions taken unless otherwise inconsistent herein.

And we so Move

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*Attorneys for Nationwide*

Myrtle Beach, South Carolina  
December 18, 2017

|                                    |   |                                         |
|------------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA            | ) | IN THE COURT OF COMMON PLEAS            |
|                                    | ) | FOR THE FIFTEENTH JUDICIAL CIRCUIT      |
| COUNTY OF HORRY                    | ) |                                         |
|                                    | ) |                                         |
|                                    | ) |                                         |
| The River Crossing Condominium     | ) | Civil Action No.: 2015-CP-26-00279      |
| Association, and Vincent J.        | ) |                                         |
| Tamburro, on behalf of himself and | ) |                                         |
| others similarly situated,         | ) |                                         |
|                                    | ) |                                         |
| Plaintiffs,                        | ) |                                         |
|                                    | ) | <b>NOTICE OF MOTION AND MOTION FOR</b>  |
| v.                                 | ) | <b>LIMITED INTERVENTION OR ORDER OF</b> |
|                                    | ) | <b>PROTECTION OF RIGHTS BY BITCO</b>    |
| Centex Homes, et al.               | ) | <b>GENERAL INSURANCE CORPORATION</b>    |
|                                    | ) | <b>(SCRCP 24)</b>                       |
| Defendants.                        | ) |                                         |
|                                    | ) |                                         |
|                                    | ) |                                         |

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TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that BITCO General Insurance Corporation (hereinafter "BITCO"), by and through their undersigned attorneys, will move before the Court of Common Pleas, County of Horry, South Carolina, on such day and at such time as the Court may appoint, for an Order granting BITCO a limited right to intervene in this matter pursuant to Rule 24 of the South Carolina rules of Civil Procedure, or in the alternative for an order of protection as to its rights so as to raise all matters of insurance coverage in a subsequent action, as follows:

1. BITCO General Insurance Corporation, hereinafter referred to as "BITCO", is a corporation organized and existing under the laws of the state of Illinois and authorized to transact business and write insurance policies in the state of South Carolina. BITCO was formerly known as Bituminous Casualty Corporation, under which name some or all of insurance policies relevant to this matter were issued.

2. Martin Masonry, Inc. (hereafter "Martin Masonry"), is a defendant in the above-captioned matter, and is sued by one or more parties seeking damages arising from allegedly defective construction. BITCO issued one or more policies of general liability insurance to Martin Masonry, and BITCO is participating in the defense of Martin Masonry in this action under those policies subject to a reservation of rights.

3. A.M. Jacobs, Inc. (hereinafter "A.M. Jacobs"), is a defendant in the above-captioned matter, and is sued by one or more parties seeking damages arising from allegedly defective construction. BITCO issued one or more policies of general liability insurance to A.M. Jacobs, and BITCO is participating in the defense of A.M. Jacobs in this action under those policies subject to a reservation of rights.

4. Defendant Centex Homes, Centex Construction Company, Inc., and related Centex entities ("Centex") claim additional insured status under one or more of the policies issued by BITCO to its named insureds, and the issues raised in this motion are applicable to any damages to be assessed against Centex to the extent those damages arise from the work of a BITCO insured.

5. The damages sought against BITCO's insureds are those as set forth in the pleadings currently filed with this Court under the above-captioned civil action number, which are hereby incorporated by reference.

6. The above-referenced policies of insurance issued to BITCO's insureds contain detailed terms, conditions, and exclusions which control whether and to what extent the BITCO insureds are to be indemnified for damages awarded against them in this action. Under South Carolina law these applicable and enforceable conditions and exclusions include, but are not limited to, that the policies provide indemnity only for

“property damage”; that the policies provide indemnity only for damages arising within a policy period; that the policies provide indemnity only for damages arising from an “occurrence”; that the policies provide indemnity only for damages which do not constitute faulty workmanship or economic losses for which there is no coverage; that the damages to be indemnified not arise from exclusion of damages arising from the repair or replacement of the insured’s work such as those designated as (k), (l), (m), and (n) in the policies; and that the damages to be indemnified be covered and not excluded under the other terms and conditions of the policies.

7. Under the law of South Carolina as it currently exists, including the Supreme Court decision in the case of Harleysville Group Insurance v. Heritage Communities, et al., Opinion 27698 dated July 26, 2017, an insurer’s right to apply and enforce the terms and conditions of its policies may be jeopardized unless the insurer seeks to intervene in actions such as this and requests that verdicts and/or orders of judgment are itemized in sufficient detail (to include such items as responsible party, nature/description of damage, date on which the damage arose, and related factors) so as to allow the policy terms and conditions to be applied. The Court emphasized this problem by citing the federal Tenth Circuit case of Mangu Foods, Inc., v. Cont’l Cas. Co. (cite omitted), for the proposition 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.”* This holding in Harleysville comes in light of concerns noted previously in Auto Owners Insurance Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009), where the Supreme Court held that an insurer was responsible to pay non-

covered portions of damages because: “[I]t is not possible from the record before this Court to determine what portion of the arbitrator’s itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits.” 684 S.E.2d at 547.

8. BITCO contends that it is likely that any verdict assessed against its insured in this case will include damages which are not covered losses and/or are excluded by the terms and conditions of the policies. Allocation of these damages is therefore necessary to determine which parts of any verdict in the trial of this case trigger a duty of indemnity.

9. BITCO therefore moves to intervene in this action so as to protect its rights and interests to indemnify its insureds only for those damages which are covered under the policies. This motion is limited in scope so as to pursue the request of such special charges, interrogatories, and/or verdict form as may be necessary to obtain a detailed order which itemizes, apportions, and categorizes the various elements of damages so that it may thereafter be allocated in a separate legal action whether those damages are to be indemnified under the relevant insurance policies.

10. BITCO does not seek to be named as a party in this case, or to participate actively in the trial of this action except as to making such motions at appropriate stages of the trial to submit a special verdict form or special interrogatories to the jury. BITCO does not seek to participate in discovery or to delay the trial of the case. BITCO does

not seek declaratory relief from this Court as to any insurance coverage issue involved in this action. BITCO does not seek that its participation be disclosed to the jury, and in fact BITCO asks that its participation not be mentioned to the jury.

11. BITCO's interests are not adequately protected or represented by other parties to this action because, as discussed above, BITCO's interests in enforcing the terms and conditions of the insurance policies are separate and distinct from those involved in the direct defense of its insureds.

12. BITCO contends that the relief requested in this motion is not unduly burdensome or intrusive into the trial of this matter because the expert testimony contemplated in the trial of this case is inherently based on calculations of the nature of damages which would allow the information sought by BITCO to be allocated by the jury, and because the parties seeking coverage under the policies also are interested in determining the information requested, as they have the burden of proof of establishing coverage under the policies.

13. BITCO's purpose in filing this motion to intervene on a limited basis is supported by the considerations stated in Rule 49, SCRCP, as to special verdicts (Rule 49(a)) and as to a general verdict accompanied by answers to interrogatories (Rule 49(b)). BITCO will plan to request the court after the close of evidence to submit such interrogatories as to the nature and extent of damages as the evidence submitted to the jury may require.

14. The granting of the motion for relief will not prejudice the rights of any party nor delay the trial or other proceedings in this action.

15. In the alternative, to the extent that BITCO's motion for limited intervention

is denied, BITCO moves for an order of this Court protecting BITCO's right to raise any and all issues relating to insurance coverage in a separate action.

16. The matters raised in this motion would appear to be held in common with other insurers who have filed similar motions in this case, and to the extent those motions are consistent herewith BITCO joins in those requests.

WHEREFORE, BITCO prays that this Court permit it to intervene in this action pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, or in the alternative for an order otherwise protecting its interests, and for such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

HUNTER & FOSTER, P.A.

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***Attorney for Defendant BITCO General  
Insurance Corporation***

Dated: 12/20/17  
Greenville, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

IN THE CIRCUIT COURT FOR THE  
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-26-00118

THE HAVEN CONDOMINIUM  
ASSOCIATION,

Plaintiffs,

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  
CENTEX CONSTRUCTION, LLC, RIGHT  
WAY CONSTRUCTION, INC., RIGHT WAY  
GROUP, INC., RWG, INC., RWGR, INC.,  
HARDWORKERS CONSTRUCTION, LLC,  
STOCK BUILDING SUPPLY, LLC, F/K/A  
STOCK BUILDING SUPPLY, INC.,  
BUIDLERS FIRSTSOURCE, SOUTHEAST  
GROUP, LLC, MARTIN MASONRY, INC.,  
MARTIN MASONRY INC. D/B/A RAMON  
MASONRY BRIGGS MASONRY, INC.,  
ARCHER EXTERIORS, INC., GARY  
HUNNELL D/B/A/ GRAND STRAND  
ROFFING, CRAFTMASTER  
MANUFACTURING , INC. D/B/A CMI,  
STOCK BUILDING SUPPLY, LLC,  
F/K/A/CAROLINA BUILDERS  
CORPORATION, HARDWORKERS  
CONSTRUCTION, CO., LLC,  
CERTAINTEED CORPORATION,  
SUCCESSOR BY MERGER TO EXTERIOR  
SYSTEMS, INC., A/K/A/ NORANDEX, INC.  
RAMON BERNARDINO D/B/A RAMON  
MASONRY, MORNINGSTAR  
CONSULTANTS, INC., LPM ENTERPRISES,  
INC., F/K/A/ LOSS PREVENTION  
MANAGEMENT, INC., PROFESSIONAL



SERVICE INDUSTRIES, INC., JELD-WEN,  
INC., AS SUCCESSOR TO AND/OR  
MERGER WITH  
CRAFTMASTERMANUFACTURING, INC.,  
D/B/A CMI, AND ELITE EXTERIORS, LLC,

Defendants.

CENTEX HOMES, A NEVADA GENERAL  
PARTNERSHIP,

Third Party Plaintiff,

vs.

COHEN'S DRYWALL COMPANY, INC.,  
CAROLINA DRYWALL & INTERIORS  
A/K/A CAROLINA DRYWALL  
CONTRACTORS, INC., TRI-CITY  
INSULATION AND BUIDLIGN PRODUCTS  
OF MYRTLE BEACH, INC., RIGHT WAY  
CONSTRUCTION, INC. A/K/A RWG, INC.,  
A/K/A RIGHT WAY GROUP, INC. A/K/A  
RWG, INC., ARCHER FIRE PROTECTION,  
INC., GRAND STRAND ROOFING AND  
SIDING, WEATHER PROTECTION  
SYSTEMS, INC., BOBBY CURRY  
ENGINEERS, INC. A/K/A BOBBY CURRY  
ENGINEERING, INC., GENERAL  
LANDSCAPE MAINTENANCE, LLC,  
TREBOR INDUSTRIES, INC.,  
PROFESSIONAL SERVICE INDUSTRIES,  
INC. A/KA/ PSI, INC., UNIVERSAL FOREST  
PRODUCTS SHOFFNER, LLC, UNIVERSAL  
FOREST PRODUCTS, INC., UNIVERSAL  
FOREST PRODUCTS EASTERN DIVISION,  
INC. N/K/A UFP EASTERN DIVISION,  
ATLANTIC BUIDLING COMPONENTS &  
SERVICES, INC., BRIGGS MASONRY, RJM  
PLUMBING, INC., CAROLINA COOL, INC.  
F/K/A CAROLINA COOLING AND  
PLUMBING, INC., DEAN CUSTOM AIR,  
LLC, ALL HEATING AND COOLING  
SERVICE CORP., JS ELITE FLOORING

COMPANY A/K/A JS ELITE TILE  
COMPANY, LPM ENTERPRISES, INC. F/KA  
LOSS PREVENTION MANAGEMENT, INC.  
A/K/A LOSS PREVENTION  
MANAGEMENT, INC. A/KA/ LOSS  
PREVENTION MANAGEMENT HOME  
INSPECTIONS, INC., MICHAEL DAWSON  
D/B/A MICHAEL DAWSON  
CONSTRUCTION, INC., GEORGETOWN  
CONSTRUCTION SERVICES, AO HARDEE  
& SON, INC., THE MARTIN  
ARCHITECTURAL GROUP, P.C., THE  
HARMAN GROUP, INC., F/K/A CAGLEY  
HARMAN & ASSOCIATION, INC., ROY  
LARRY SCHLEIN & ASSOCAITES, P.A.  
A/K/A ROY LARRY SCHLEIN &  
ASSOCIATES CORPORATION, MILLER  
DESIGN SERVICES, P.A.,

Third Party Defendants.

UNIVERSAL FOREST PRODUCTS  
EASTERN DIVISION, INC. n/k/a UPP  
EASTER DIVISION, INC.,

Fourth Party Plaintiff,

vs.

AC CONSTRUCTION CORPORATIONS,

Fourth Party Defendant.

**CRUM & FORSTER SPECIALTY INSURANCE COMPANY'S AND  
FIRST MERCURY INSURANCE COMPANY'S MOTION TO INTERVENE**

Crum and Forster Specialty Insurance Company ("Crum & Forster") and First Mercury Insurance Company ("First Mercury") will move prior to the start of the trial of this lawsuit for an order permitting Crum & Forster and First Mercury to intervene in this matter for limited

intervention to protect their rights in the outcome of the instant lawsuit. This Motion is made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

### **FACTS**

In this lawsuit, The Havens Condominium Association (“Havens”) makes various construction defect claims against the defendant Archer Exteriors, Inc., (“Archer”) and others. Crum & Forster and First Mercury have interests relating to the property or transaction that is the subject of this litigation because of the assertion that Crum & Forster and First Mercury issued general liability insurance policies that allegedly provide coverage for Archer in the event of a damages award in this matter.<sup>1</sup>

### **DISCUSSION**

Rule 24(a)(2), SCRPC, states that anyone shall be permitted to intervene when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties. Intervention is liberally awarded in cases such as this where there exists the need to declare the rights of the affected parties. Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189 394 S.E.2d 712, 714 (1990).

Crum & Forster’s and First Mercury’s interests in this litigation are clear. The specific interests relate to the assertions that coverage is afforded for any judgment obtained by Plaintiff against Archer. The South Carolina Supreme Court recently issued its opinion in Harleysville

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<sup>1</sup> Such policies are: Policy No. GLO081018 (7/6/05-7/6/06); Policy No. GLO091230 (7/6/06-7/7/07); Policy No. FMMA002350 (8/1/08-8/1/09); Policy No. FMMA002350-2 (8/1/09-8/1/10); Policy No. FMMA003806 (8/1/10-8/1/11); Policy No. FMMA003806-2 (8/1/11-8/1/12); Policy No. MA-CGL-00000015064-01 (8/1/12-8/1/13); and Policy No. MA-CGL-00000015064-02 (8/1/13-8/1/14).

Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017). In that opinion the Court discussed that an insurance carrier should make an effort to have the trial court issue special interrogatories to permit reviewing courts to determine the portion of damage covered by the implicated insurance policies. This Motion is Crum & Forster's and First Mercury's effort to comply with Harleysville. Otherwise, Crum & Forster's and First Mercury's rights and interests in paying for property damage covered by the policy purchased by Archer will be inadequately protected as the named parties will not seek an apportionment on the verdict form and/or special interrogatories of covered and non-covered damages.

SCRCP 24(b)(2) provides permissive intervention where the movant's claim and the primary action have common questions of law or fact. In the instant scenario, the special interrogatories and/or special verdict form will address the factual issues related to indemnity coverage. They would include requests that the jury identify liability as to Archer, damages attributable to Archer, and any repair costs, consequential damages, or punitive damages, if any. Crum & Forster and First Mercury request that they be allowed to participate in the creation of the special interrogatories and/or special verdict form and that their participation not be disclosed to the jury. Any such disclosure or reference to insurance coverage would improperly and prejudicially interject the subject into the minds of the jurors. Any judicial determination disallowing Crum & Forster and First Mercury to participate in the creation of special interrogatories and/or special verdict form potentially prejudices their ability to later contend that coverage does not exist. Conversely, allowing this intervention will likely decrease future litigation related to coverage issues.

This motion is timely and will not cause any prejudice or delay to the trial or prejudice any party to the action. Crum & Forster and First Mercury would request that in the event the

intervention is granted, it be allowed to attend trial, including any discussions in chambers relating to the claims. In the alternative, should the motion be denied, Crum & Forster and First Mercury would request that such a determination not bind Crum & Forster nor First Mercury to any judgment entered against Archer that allegedly triggers coverage under the applicable policies.

### **CONCLUSION**

This Court should grant Crum & Forster's and First Mercury's motion for leave to intervene for the limited purpose of submitting special interrogatories and/or a special verdict form to the jury. Doing so will simplify any future coverage litigation and is appropriate because of the common questions of fact relating to the damages that may be awarded to the Plaintiff stemming from the claims against Archer.

TURNER, PADGET, GRAHAM & LANEY, P.A.

s/John S. Wilkerson

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ATTORNEYS FOR CRUM & FORSTER  
 SPECIALTY INSURANCE COMPANY AND  
 FIRST MERCURY INSURANCE COMPANY

February 27, 2018  
 Charleston, South Carolina

|                                       |   |                                  |
|---------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS     |
|                                       | ) | FIFTEENTH JUDICIAL CIRCUIT       |
| COUNTY OF HORRY                       | ) |                                  |
|                                       | ) | CASE NO.: 2015-CP-26-00279       |
| THE RIVER CROSSING CONDOMINIUM        | ) |                                  |
| ASSOCIATION, AND VINCENT J.           | ) |                                  |
| TAMBURRO, ON BEHALF OF HIMSELF        | ) |                                  |
| AND OTHERS SIMILARLY SITUATED,        | ) |                                  |
|                                       | ) |                                  |
| Plaintiff,                            | ) |                                  |
| v.                                    | ) |                                  |
|                                       | ) |                                  |
| CENTEX HOMES, A NEVADA GENERAL        | ) |                                  |
| PARTNERSHIP, CENTEX CONSTRUCTION      | ) |                                  |
| COMPANY, INC., CENTEX                 | ) |                                  |
| CONSTRUCTION, LLC, CENTEX-ROONEY      | ) | <b>AMERICAN EMPIRE SURPLUS</b>   |
| CONSTRUCTION, CO., INC. CENTEX-       | ) | <b>LINES INSURANCE COMPANY'S</b> |
| RODGERS, INC.; BALFOUR BEATTY         | ) | <b>MOTION TO INTERVENE</b>       |
| CONSTRUCTION, LLC, F/K/A CENTEX       | ) |                                  |
| CONSTRUCTION, LLCC, RIGHT WAY         | ) |                                  |
| CONSTRUCTION, INC., RIGHT WAY         | ) |                                  |
| GROUP, INC., RWG, INC., RWGR, INC.,   | ) |                                  |
| STOCK BUILDING SUPPLY, LLC, F/K/A     | ) |                                  |
| STOCK BUILDING SUPPLY, INC.,          | ) |                                  |
| BUILDERS FIRSTSOURCE – SOUTHEAST      | ) |                                  |
| GROUP, LLC, MARTIN MASONRY, INC.,     | ) |                                  |
| GARY HUNNELL D/B/A GRAND STRAND       | ) |                                  |
| ROOFING, CRAFTMASTER                  | ) |                                  |
| MANUFACTURING, INC. D/B/A CMI, ROOF   | ) |                                  |
| DOCTOR OF THE CAROLINAS, INC.         | ) |                                  |
| STOCK BUILDING SUPPLY, LLC F/K/A      | ) |                                  |
| CAROLINA BUILDERS CORPORATION,        | ) |                                  |
| ORFIELD LABORATORIES, INC., TREBOR    | ) |                                  |
| INDUSTRIES, INC., STEVEN BOSCH, D/B/A | ) |                                  |
| THE ROOFER MAN, CERTAINTEED           | ) |                                  |
| CORPORATION SUCCESSOR BY MERGER       | ) |                                  |
| TO EXTERIOR SYSTEMS, INC. A/K/A       | ) |                                  |
| NORANDEX, INC., WEATHER               | ) |                                  |
| PROTECTION SYSTEMS, INC.,             | ) |                                  |
| CRAWFORD DOOR SYSTEMS, INC., COX      | ) |                                  |
| MILLWORK & SUPPLY, INC., AM JACOBS,   | ) |                                  |
| INC., GALVIN DEPOMPE, ROBERTA         | ) |                                  |
| DEPOMPE, MORNINGSTAR                  | ) |                                  |
| CONSULTANTS, INC., JELD-WEN, INC. AS  | ) |                                  |
| SUCCESSOR TO AND/OR MERGER WITH       | ) |                                  |
| CRAFTMASTER MANUFACTURING, INC.,      | ) |                                  |
| D/B/A CMI, AND SIGN STUDIO &          | ) |                                  |
| GRAPHICS, INC.                        | ) |                                  |

Defendants.

CENTEX HOMES, A NEVADA GENERAL  
PARTNERSHIP,

Third-Party Plaintiff,

v.

CAROLINA DRYWALL AND INTERIORS  
A/K/A CAROLINA DRYWALL  
CONTRACTORS, INC., VANCE JOHNSON  
PLUMBING CO., INC. BOGLE ELECTRIC,  
INC., PELEN, INC., JAYCO, INC. SUNLAND  
FIRE PROTECTION, INC., DUNN  
PLUMBING COMPANY, INC., ESSENTIALS  
PROTECTIVE COATINGS, INC., RJM  
PLUMBING, INC., MYRTLE BEACH  
LIGHTING, INC. A/K/A R&L LIGHTING,  
INC., TRI-CITY INSULATION AND  
BUILDING PRODUCTS OF MYRTLE  
BEACH, INC., BOND GROUP, INC.,  
INTRACOASTAL SERVICE COMPANY,  
INC., SANDPIPER HEATING & AIR  
CONDITIONING, LLC, AMERICAN  
RESIDENTIAL SERVICES, LLC D/B/A  
AMERICAN RESIDENTIAL SERVICES OF  
SOUTH CAROLINA, INC., A.O. HARDEE &  
SON, INC., VAREEN CONCRETE CO., INC.  
MICHAEL DAWSON D/B/A MICHAEL  
DAWSON CONSTRUCTION, INC. FLOORS,  
INC. SUCCESSOR BY MERGER TO RICE  
PLANTER CARPETS, INC. I.T.P., INC.,  
CARPETS BY KENDALL, INC., RICE  
PLANTER CARPETS, INC. N/K/A  
CREATIVE TOUCH INTERIORS, INC.  
CEMS ENGINEERING, INC., CHRIS R.  
CLARK, AIA, CRESCENT ARCHITECTS,  
LLC, BOBBY L. CURRY, BOBBY CURRY  
ENGINEERS, INC., AND RIGHT WAY  
CONSTRUCTION, INC. A/K/A RWG, INC.  
A/K/A RIGHT WAY GROUP, INC. A/K/A  
RWGR, INC.

Third-Party Defendants.

|                               |   |
|-------------------------------|---|
| _____                         | ) |
| COX MILLWORK & SUPPLY, INC.,  | ) |
|                               | ) |
| Fourth-Party Plaintiff,       | ) |
|                               | ) |
| v.                            | ) |
|                               | ) |
| CITATION MANUFACTURING, INC., | ) |
|                               | ) |
| Fourth-Party Defendant.       | ) |
| _____                         | ) |

**TO: ALL COUNSEL OF RECORD:**

PLEASE take notice that pursuant to Rules 24(a) and (b), SCRCP, American Empire Surplus Lines Insurance Company (“American Empire”), by and through its undersigned counsel, moves the Court for an Order permitting American Empire to intervene in this case for the limited purpose of participating in any necessary proceedings (to include without limitation the right to participate in and conduct discovery, participate and present evidence at trial, and request special jury interrogatories and a special jury verdict form at trial pursuant to Rule 49, SCRCP) and for the limited purposes of identifying and allocating covered and non-covered claims and damages arising under certain CGL insurance policies issued by American Empire to Defendant RWG, Inc.<sup>1</sup> in line with the South Carolina Supreme Court’s holding in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011). American Empire does not seek to be a named party in the above captioned matter. Rather, it seeks only limited intervention as set forth more fully herein.

This Motion to Intervene is further based on the South Carolina Supreme Court’s recent opinion in *Harleysville Group Insurance v. Heritage Communities, Inc. et al.*, 420 S.C. 321 (2017). In short, *Crossman* provides the conceptual framework for distinguishing covered from uncovered

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<sup>1</sup> American Empire issued CGL policies to RWG, Inc. only. American Empire denies that RWG, Inc. is the successor in interest, the successor by merger, amalgamated, or affiliated in any way whatsoever with the following entities: Right Way Construction, Inc., Right Way Group, Inc., and RWGR, Inc.



damages under a standard CGL policy in progressive damage construction defect cases, and *Heritage Communities* instructs insurance companies on the way to accomplish this delineation.

Specifically, in *Heritage Communities* the Supreme Court suggested that the insurer who is in control of the litigation was in the best position to seek an allocation of a jury verdict during the underlying liability case. Indeed, the South Carolina Supreme Court held that the right to control the litigation carried certain duties, including the insurer's "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." *Heritage Communities*, supra, (citing *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)). Essentially, the South Carolina Supreme Court signaled that for an insurer to preserve its coverage defenses and not be liable for a general verdict that includes both covered and non-covered damages, the insurer must advise its insured that certain damage elements may not be covered and seek a special jury verdict form or jury interrogatories at trial. That is precisely what American Empire seek to do here through the filing of the instant Motion to Intervene.

#### **MCCULLOUGH KHAN, LLC**

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ATTORNEY FOR AMERICAN EMPIRE  
 SURPLUS LINES INSURANCE COMPANY

May 3, 2018  
 Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

RIVER CROSSING CONDOMINIUM  
ASSOCIATION and Vincent Tamburro, on  
behalf of himself and others similarly situated

Plaintiff,

v.

CENTEX HOMES, A NEVADA GENERAL  
PARTNERSHIP, *et al.*

Defendants.

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-26-0279

**MOTION TO INTERVENE**

**TO: ALL COUNSEL OF RECORD:**

PLEASE take notice that pursuant to Rules 24(a) and (b), SCRCF, Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company (hereinafter "Clarendon"), by and through its undersigned counsel, move the Court for an Order permitting limited intervention in this case to request special jury interrogatories and a special jury verdict form at trial pursuant to Rule 49, SCRCF and for the purposes of identifying and allocating covered and non-covered claims and damages arising under the CGL insurance policy issued by the Clarendon to Defendant RWG, Inc.<sup>1</sup> in line with the South Carolina Supreme Court's holding in *Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011).

This Motion to Intervene is further based on the South Carolina Supreme Court's recent opinion in *Harleysville Group Insurance v. Heritage Communities, Inc. et al.*, S.C.Sup.Ct. (filed

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<sup>1</sup> Clarendon issued a CGL policy to RWG, Inc. only. Clarendon denies that RWG, Inc. is the successor in interest, the successor by merger, amalgamated, or affiliated in any way whatsoever to create coverage for Right Way Construction, Inc., Right Way Group, Inc., and RWGR, Inc.

Jan. 11, 2017) (Davis Adv.Sh. No. 2 at 21). In short, *Crossman* provides the conceptual framework for distinguishing covered from uncovered damages under a standard CGL policy in progressive damage construction defect cases, and *Heritage Communities* instructs insurance companies on the way to accomplish this delineation.

Specifically, in *Heritage Communities* the Supreme Court suggested that the insurer who is in control of the litigation was in the best position to seek an allocation of a jury verdict during the underlying liability case. Indeed, the South Carolina Supreme Court held that the right to control the litigation carried certain duties, including the insurer's "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." *Heritage Communities*, supra, (citing *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)). Essentially, the South Carolina Supreme Court signaled that for an insurer to preserve its coverage defenses and not be liable for a general verdict that includes both covered and non-covered damages, the insurer must advise its insured that certain damage elements may not be covered and seek a special jury verdict form or jury interrogatories at trial. That is precisely what Clarendon seeks to do here through the filing of the instant Motion to Intervene.

The matters raised in this motion would appear to be held in common with other insurers who have filed similar motions in this case, and to the extent those motions are consistent herewith, Clarendon joins in those requests.

WHEREFORE, Clarendon prays that this Court permit it to intervene in this action pursuant to Rules 24(a) and (b), SCRCF, or in the alternative for an order otherwise protecting its interests, and for such other and further relief as the Court may deem just and proper.

**WALL TEMPLETON & HALDRUP, PA**

s/Neil S. Haldrup

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Attorneys for Clarendon National Insurance  
Company, Successor By Merger to Clarendon  
America Insurance Company

May 8, 2018

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTEENTH JUDICIAL  
) CIRCUIT  
CASE NO.: 2015-CP-26-00279

THE RIVER CROSSING  
CONDOMINIUM ASSOCIATION, AND  
VINCENT J. TAMBURRO, ON  
BEHALF OF HIMSELF AND OTHERS  
SIMILARLY SITUATED,

Plaintiffs,

vs.

CENTEX HOMES; CENTEX  
CONSTRUCTION COMPANY, INC.;  
CENTEX CONSTRUCTION, LLC;  
CENTEX-ROONEY CONSTRUCTION,  
CO., INC.; CENTEX-RODGERS, INC.;  
BALFOUR BEATTY  
CONSTRUCTION, LLC f/k/a CENTEX  
CONSTRUCTION, LLC; RIGHT WAY  
CONSTRUCTION, INC.; RIGHT WAY  
GROUP, INC.; RWG, INC.,; RWGR,  
INC.; STOCK BUILDING SUPPLY,  
LLC f/k/a STOCK BUILDING SUPPLY,  
INC.; BUILDERS-FIRSTSOURCE-  
SOUTHEAST GROUP, LLC; MARTIN  
MASONRY, INC.; GARY HUNNELL  
d/b/a GRAND STRAND ROOFING;  
CRAFTMASTER MANUFACTURING,  
INC.  
d/b/a CMI; ROOF DOCTOR OF THE  
CAROLINAS, INC.; STOCK  
BUILDING SUPPLY, LLC f/k/a  
CAROLINA BUILDERS  
CORPORATION; ORFIELD  
LABORATORIES, INC.; TREBOR  
INDUSTRIES, INC.; STEVEN BOSCH  
d/b/a THE ROOFER MAN;  
CERTAINTED CORPORATION  
SUCCESSOR BY MERGER TO  
EXTERIOR SYSTEMS, INC. a/k/a

) HARTFORD FIRE INSURANCE  
) COMPANY'S AND HARTFORD  
) CASUALTY INSURANCE COMPANY'S  
) MEMORANDUM OF LAW IN SUPPORT  
) OF THEIR MOTION TO INTERVENE

NORANDEX, INC.; WEATHER )  
 PROTECTION SYSTEMS, INC.; COX )  
 MILLWORK & SUPPLY, INC.; AM )  
 JACOBS, INC.; GALVIN DEPOMPE; )  
 ROBERTA DEPOMPE; )  
 MORNINGSTAR CONSULTANTS, )  
 INC.; JELD-WIN, INC. AS )  
 SUCCESSOR TO AND/OR MERGER )  
 WITH )  
 CRAFTMASTERMANUFACTURING, )  
 INC. d/b/a CMI, AND SIGN STUDIO & )  
 GRAPHICS, INC., )  
 )  
 )  
 )  
**Defendants.** )

Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively "Hartford") hereby files this Memorandum of Law in Support of their Motion to Intervene.

Hartford moves to intervene out of an abundance of caution, due to uncertainty whether it has an obligation to seek intervention under *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E. 2d 288 (2017). It could be argued that *Harleysville* can be interpreted as requiring insurers to intervene in underlying proceedings to request allocated verdicts. It appears that there is also an argument that *Harleysville* repealed the general rule that such matters were normally left to separate declaratory judgment action.<sup>1</sup>

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<sup>1</sup> See, e.g., Defendant Ocean Keyes Development, LLC's Memorandum in Opposition to Plaintiff's Motion to Lift Stay, Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, Civil Action No. 2014-CP-26-6573 (Nov. 8, 2017) ("The Harleysville opinion radically changed the landscape of South Carolina law by holding that an insurer has not only a right, but a duty to intervene in the underlying proceedings.").

Hartford, which would prefer to leave all coverage questions for a subsequent declaratory action, does not believe that the Supreme Court meant to impose such an obligation. In fact, Hartford believes that any reference to insurance coverage would be improper and prejudicial before the jury. *See Todd v. Joyner*, 385 S.C. 509, 514, 685 S.E.2d 613, 616 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009). Uncertainty regarding *Harleysville's* meaning, however, compels Hartford to seek intervention.<sup>2</sup>

### **Background**

In the present action ("the Lawsuit"), the River Crossing Condominium Association and Vincent J. Tamburro, on behalf of himself and others similarly situated, ("Plaintiffs") seek damages for alleged various construction defects and alleged related consequential damage arising out of the construction of condominium units located in Horry County, South Carolina ("the Project").

The Plaintiffs allege that as a result of alleged defects and deficiencies at the Project, they will be required to expend large sums of money to repair, correct and replace various parts and components of the condominiums and buildings.

Plaintiffs filed this action against Centex Homes ("Centex") and various related entities, which they allege developed and constructed the Project, and against several

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<sup>2</sup> Hartford's motions to intervene have been denied in other lawsuits; to obtain clarity, it has appealed and is seeking prompt certification to the Supreme Court. *See Motion to Certify to the South Carolina Supreme Court Under Rule 204, SCACR, In Re Motions to Intervene in The Harbour Cove Condominium Association v. Centex Homes et al.*, Appellate Case No. 2017-02146 (Nov. 8, 2017) (Attached as Exhibit A).

Project subcontractors, including Weather Protection. Centex filed third-party claims against various Project subcontractors, including Carolina Drywall and Dawson.

Plaintiffs contend that Centex was engaged in the development, construction and repair of the Project. Plaintiffs contend that Weather Protection was engaged in the supervision, building and construction of the Project, and specifically installed and/or supervised the installation of the windows and related flashings and sealants at the Project. Centex contends that Carolina performed framing, to include but not limited to installation of the water management system and installation of doors and windows together with all associated flashings and waterproofing; installation of windows, doors and window/door flashing and sealants; drywall and fireproofing installation, together with all associated and related waterproofing and flashings; deck waterproofing, together with the membrane system and related components; and independent third party inspections of the Project during construction. Centex contends that Dawson performed work relating to foundation, slab, and flatwork at the Project.

Plaintiffs aver three counts as to Centex and Weather Protection, including for negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness; breach of warranty of habitability, breach of warranty against latent defects, breach of warranty of workmanlike services, breach of warranty for fitness for a particular purpose, breach of warranty of merchantability and serviceability, breach of express warranty; and unfair trade practices. Plaintiffs also aver two counts as to Centex alone, including breach of fiduciary duty, and reformation.



Centex as the third-party plaintiff avers four counts as to the third-party subcontractor defendants, including Carolina Drywall and Dawson. These counts are for indemnity, negligence, breach of warranty, and breach of contract.

Hartford issued primary general liability insurance policies to Carolina Drywall for the policy period in effect November 12, 2003 to March 11, 2005 ("the Hartford Carolina Drywall Policies"). The Hartford Carolina Drywall Policies insure Carolina Drywall for certain risks under the insuring agreement and exclude certain risks through policy exclusions.

Hartford issued primary general liability policies to Weather Protection for the policy periods in effect July 12, 2001 to July 12, 2002 (collectively, "the Hartford Weather Protection Policies"). The Hartford Weather Protection Policies insure Weather Protection for certain risks under the insuring agreement and exclude certain risks through policy exclusions.

Hartford issued primary general liability policies to Dawson for the policy periods in effect May 29, 2003 to May 29, 2006 (collectively, "the Hartford Dawson Policies"). The Hartford Dawson Policies insure Dawson for certain risks under the insuring agreement and exclude certain risks through policy exclusions. The Hartford Carolina Drywall Policies, the Hartford Weather Protection Policies and the Hartford Dawson Policies are referred to collectively herein as "the Hartford Policies."

Carolina Drywall, Weather Protection, and Dawson each tendered the claims asserted against them in the Lawsuit to Hartford. Additionally, Centex tendered the Lawsuit to Hartford, asserting its entitlement to coverage as an additional insured under

the Hartford Policies. Hartford agreed to participate in the defense of Carolina Drywall under the Hartford Carolina Drywall Policies, Weather Protection under the Hartford Weather Protection Policies, and Dawson under the Hartford Dawson Policies in the Lawsuit subject to a full and complete reservation of its rights. Hartford also agreed to participate in the defense of Centex (as an additional insured) under the Hartford Carolina Drywall Policies in the Lawsuit subject to a full and complete reservation of rights. Hartford specifically reserved its right to disclaim indemnity coverage for damages awarded against Carolina Drywall, Weather Protection, Dawson, or Centex if those damages are not covered by the terms and conditions of the Hartford Policies.

Hartford's reservation of rights letters to Carolina Drywall, Weather Protection, Dawson, and Centex set forth in detail the various grounds upon which Hartford may deny indemnity coverage to Carolina Drywall, Weather Protection, Dawson, and Centex, including, but not limited to, the damage to property, damage to your work, damage to impaired property or property not physically injured, mold, EIFS and wrap exclusions contained in the Hartford Policies and the letters inform Carolina Drywall, Weather Protection, Dawson, and Centex that there also may be no coverage for damages awarded for the cost of repairing and replacing Carolina Drywall's, Weather Protection's, Dawson's, and Centex's own alleged defective work. Hartford is also advising Carolina Drywall, Weather Protection, Dawson, and Centex in writing that because of the potential for a general verdict, Carolina Drywall, Weather Protection, Dawson, and Centex should each submit a special verdict form or special interrogatories seeking an allocation of damages between covered and uncovered damages. *See Harleysville Group Insurance v.*

*Heritage Communities, Inc.*, 420 S.C. at 341, 803 S.E. 2d at 299 ("Significantly, none of the reservation letters advised Heritage of the need for allocation of damages between covered and non-covered losses....").

Notwithstanding that Hartford is specifically advising Carolina Drywall, Weather Protection, Dawson, and Centex concerning the coverage issues and the potential that some or all damages awarded against either party may not be covered, in light of the South Carolina Supreme Court's recent decision in *Harleysville Group Insurance v. Heritage Communities, Inc.*, *supra*, Hartford is concerned that it could be prohibited from enforcing the terms of the Hartford Policies if a jury awards damages in a general, unallocated verdict.<sup>3</sup>

Accordingly, Hartford seeks leave pursuant to South Carolina Rule of Civil Procedure 24 to intervene in the Lawsuit for the limited purpose of requesting special interrogatories in the event a general verdict is entered against Carolina Drywall, Weather Protection, Dawson, or Centex.<sup>4</sup>

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<sup>3</sup> The opinion in *Harleysville* has created uncertainty surrounding this issue, even though case law indicates that the burden is on the insured—not Hartford—to establish coverage in the first instance. *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E. 2d 523, 525 (1968); *see also Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass'n Inc.*, 834 F. Supp. 2d 437, 443 (D.S.C. 2011). Hartford maintains that it is the insured's burden to establish "covered" damages in order to establish any right to indemnity under the policies. *UFP Eastern Division, Inc. v. Selective Ins. Co.*, 2017 WL 499083, \*5 (D.S.C. Feb. 6, 2017) (holding that at the trial of the separately filed declaratory judgment action the insured "must prove its claim for indemnity falls within the scope of insurance – i.e., prove consequential damages resulting from work performed by [the insured's subcontract].").

<sup>4</sup> Hartford does not concede that it has the duty, under the Hartford Policies or at law, to request special interrogatories or a special verdict to clarify coverage. Hartford also does not concede that it in any way waives the right to contest coverage issues in a declaratory judgment action, whether filed before or after a verdict is rendered.

### Argument

Rule 24(a) of the South Carolina Rules of Civil Procedure provides that an applicant can intervene as a matter of right if "the applicant claims an interest related to the property or transaction which is the subject of the action and [it] is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 24(a)(2), SCRPC. Rule 24 also provides for permissive intervention which provides that an applicant can intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24(b)(2), SCRPC.

Moreover, the Supreme Court of South Carolina has stated that "[w]e interpret the rules to permit liberal intervention particularly where, as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected." *Berkeley Elec. Coop. Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990).

Hartford, as an insurer for Carolina Drywall, Weather Protection and Dawson, has an interest in the subject matter of this litigation. Hartford issued the Hartford Policies to provide coverage for certain damages and to exclude coverage for those damages not within a risk underwritten by the policies. Hartford charged a premium, which Carolina Drywall, Weather Protection and Dawson agreed to pay, commensurate with the scope of coverage it agreed to provide. Hartford has an interest because its indemnity coverage may be implicated if a jury enters a general verdict against Carolina Drywall, Weather Protection, Dawson, or Centex.

Hartford's interest in its indemnity exposure, however, is not adequately represented by existing parties, who are incentivized to maximize coverage and not necessarily allocate damages among different categories of loss or damage. Counsel for Carolina Drywall, Weather Protection, and Dawson, even though retained by Hartford, must act in the interests of Carolina Drywall, Weather Protection, and Dawson, and follow its instructions, not Hartford's, with respect to the proffer of a verdict form or special interrogatories. The same is true with respect to Centex, whose counsel Hartford did not retain, but to whose defense Hartford is contributing. As a result, Hartford's interests are not fully protected in the litigation.

In light of *Harleysville* and other recent case law, in the event both covered and non-covered elements of damages are submitted to the jury and if the jury returns a general verdict, it could be argued under *Harleysville* that Hartford could be compelled to indemnify Carolina Drywall, Weather Protection, Dawson, and/or Centex for what would be, in whole or in part, a non-covered loss, unless Hartford takes action, as it is attempting to do by moving to intervene, to make certain that the jury's verdict, if any, is allocated between covered and non-covered claims or elements of damages.

In *Harleysville*, the Court stated "[t]he right to control the litigation carries with it certain duties, including the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages." *Harleysville*, 420 S.C. at 341, 803 S.E. 2d at 299 (internal quotations and citations omitted). The Court additionally explained that when a general verdict is awarded, "the

Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict." *Harleysville*, 420 S.C. at 343 n.11, 803 S.E. 2d at 300 n.11

In *Harleysville*, the Court determined Harleysville's reservation of rights letters failed to give its insured an express reservation or other indication that Harleysville disputed coverage for any specific portion or type of damages, and similarly failed to advise its insured "that a conflict of interest may have existed or that [the insured] should protect [its] interests by requesting an appropriate verdict." *Harleysville*, 420 S.C. at 343, 803 S.E. 2d at 300. The Court quoted with approval the opinion of the Special Referee that it could not "engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making." *Harleysville*, 420 S.C. at 343 n.11, 803 S.E. 2d at 300 n.11. The Court affirmed the Special Referee's holding that Harleysville had a duty to indemnify the full amount of the general verdict, even though it included elements of damages that were not covered under the policies. *Harleysville*, 420 S.C. at 358, 803 S.E. at 309.

Similarly, in *Auto Owners Insurance Co. v. Newman*, 385 S.C. 187, 198, 684 S.E. 2d 541, 547 (2009) the Court acknowledged an arbitrator's award included both covered and non-covered damages but held that the insurer had a duty to indemnify the entire award because the Court could not determine from the record which costs were solely attributable to the non-covered faulty workmanship. The court specifically remarked that "Auto-Owners did not seek review of or otherwise contest the damages award." *Auto Owners Insurance Co. v. Newman*, 385 S.C. at 198 n.5, 684 S.E. 2d at 547 n.5. The Court stated that Auto-Owners "had an opportunity to raise this matter when the issue of

damages was litigated before the arbitrator...." *Auto Owners Insurance Company v. Newman*, 385 S.C. at 198, 684 S.E. at 547.

As suggested in both *Harleysville* and *Newman*, if Hartford fails to act, disposition of the action by general verdict may hamper Hartford's ability to protect its interest in covering only those damages for which Hartford has underwritten its policies and for which Carolina Drywall, Weather Protection and Dawson paid a premium. Hartford therefore seeks to avoid this result and avoid creating the same "dilemma" the insurers faced by being proactive and moving to intervene before a general verdict is rendered, if any, against Carolina Drywall, Weather Protection, Dawson, and/or Centex.

Hartford seeks to intervene for a limited purpose – it seeks only the ability to request that the trial court submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury's verdict against Carolina Drywall, Weather Protection, Dawson, and/or Centex, if a verdict is returned in favor of Plaintiffs or Third-Party Plaintiff against any or all of them. Hartford does not seek to actively participate in the trial of this action outside of this limited exception, does not seek to participate in discovery, does not seek to delay the trial of this action, and does not seek from this Court any declaratory relief or rulings concerning coverage issues. There is thus no prejudice to any party by this proposed intervention.

Moreover, if Hartford's motion for intervention is denied, Hartford will be prejudiced. Hartford's interests will be impaired because it may ultimately be compelled to pay an entire judgment against Carolina Drywall, Weather Protection, Dawson, and/or

Centex (if one is entered), despite the fact that a portion of such a judgment may not be a covered risk for which a premium was paid. *See Newman, supra*.

Hartford also moves under Rule 24(b) SCRCPP, for permissive intervention. There are questions of law and fact which are common to this litigation and the related coverage dispute. This litigation concerns alleged property damage as a result of alleged construction defects. If these issues go to the jury and the jury finds that Carolina Drywall, Weather Protection, Dawson, and/or Centex is liable for damages in connection with any or all of these claims, it is possible, and likely, that such liability would extend to both covered and non-covered claims. If this occurs, it may be necessary to apportion damages among covered and non-covered claims in order to determine the extent of Carolina Drywall's, Weather Protection's, Dawson's, and/or Centex's rights, if any, to coverage in connection with damages awarded against it. Therefore, Hartford should be allowed to submit and participate in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury that addresses factual issues related to the indemnity coverage.

Finally, granting Hartford's motion to intervene will promote judicial economy. If a general verdict is rendered against Carolina Drywall, Weather Protection, Dawson, and/or Centex, Hartford would likely bring a declaratory judgment action to determine covered versus non-covered damages. If so, these same parties would have to engage in discovery (including fact and expert witness depositions), brief and argue dispositive motions, and, if the case does not resolve on motions, go to trial to ask the jury the same questions Hartford intends to ask the jury in this case. This would not promote judicial economy, and would be



an unnecessary expenditure of the resources of the judicial system and these litigants.

Should the Court permit Hartford to intervene in this action, Hartford requests that its limited participation and the existence of possible insurance coverage for Carolina Drywall, Weather Protection, Dawson, and Centex not be revealed to the jury, as any reference to insurance coverage would be improper and prejudicial. *See Todd v. Joyner, supra.*

As Hartford has timely filed this Motion, has an interest in the subject matter of the action which interest may be impaired by the disposition of the action, and its interests are not adequately represented by existing parties, Hartford respectfully requests that this Court grant its motion and permit it to intervene for the limited purposes set for the herein. Alternatively, Hartford requests that the Court enter an order stating that Hartford will not be bound by any judgment entered against Carolina Drywall, Weather Protection, Dawson, and/or Centex in this action, and that Hartford reserves its right to, and can, re-litigate in a separate action the facts and issues relevant to the insurance coverage, if any, afforded to Carolina Drywall, Weather Protection, Dawson, and/or

Centex under the Hartford Policies for the claims asserted against it in this action.

December 8, 2017

SWEENEY, WINGATE & BARROW, P.A.

s/Christy E. Mahon

Mark S. Barrow, Esquire, SC Bar No.:7821

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and Hartford Casualty Insurance Company*

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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

Plaintiffs,

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

Defendants.

Centex Homes, a Nevada General Partnership,

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL DISTRICT

Case No.: 2015-CP-26-00279

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 SCOTTSDALE INSURANCE COMPANY'S MOTION TO INTERVENE

Third-Party Plaintiff,

vs.

Carolina Drywall and Interiors a/k/a  
Carolina Drywall Contractors, Inc., Vance  
Johnson Plumbing Co., Inc., Bogle  
Electric, Inc., Pelen, Inc., Jayco, Inc.,  
Sunland Fire Protection, Inc., Dunn  
Plumbing Company, Inc., Essentials  
Protective Coatings, Inc., RJM Plumbing,  
Inc., Myrtle Beach Lighting, Inc. a/k/a R&L  
Lighting, Inc., Tri-City Insulation and  
Building Products of Myrtle Beach, Inc.,  
Bond Group, Inc., Intracoastal Service  
Company, Inc., Sandpiper Heating & Air  
Conditioning, LLC, American Residential  
Services, LLC d/b/a American Residential  
Services of South Carolina, Inc., A.O.  
Hardee & Son, Inc., Vereen Concrete Co.,  
Inc., Michael Dawson d/b/a Michael  
Dawson Construction, Inc., Floors, Inc.  
successor by merger to Rice Planter  
Carpets, Inc., I.T.P., Inc., Carpets By  
Kendall, Inc., Rice Planter Carpets, Inc.  
n/k/a Creative Touch Interiors, Inc., CEMS  
Engineering, Inc., Chris R. Clark, AIA,  
Crescent Architects, LLC, Bobby L. Curry,  
Bobby Curry Engineers, Inc., and Right  
Way Construction, Inc. a/k/a RWG, Inc.  
a/k/a Right Way Group, Inc. a/k/a RWGR,  
Inc.,

Third-Party Defendants.

Cox Millwork & Supply, Inc.,

Fourth-Party Plaintiff,

vs.

Citation Manufacturing, Inc.,

Fourth-Party Defendant.

Defendants Centex Homes, a Nevada General Partnership (“Centex Homes”), 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 Scottsdale Insurance Company (“Scottsdale”) in the above-captioned matter.

### **EXECUTIVE SUMMARY**

Scottsdale 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 motion to intervene filed by the carriers in another lawsuit involving a multi-family project in the same neighborhood. Moreover, intervention sought by Scottsdale 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 Scottsdale 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 twelve (12) building condominium project called River Crossing 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, including, but not limited to, Steven Bosch DBA

The Rooferman ("Rooferman"), 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, Scottsdale'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, Scottsdale with respect to, among other things, the claims asserted by Plaintiffs in the above-captioned construction defect action against Centex (the "Declaratory Judgment Action").

Scottsdale issued certain applicable insurance policies to Rooferman, its named insured, and is currently participating in the defense of Rooferman in this action. In addition, Scottsdale is currently participating in the defense of Centex Homes as an additional insured in this action under the insurance policies issued to Rooferman, Scottsdale's named insured.

This matter was unsuccessfully mediated on January 30-31, 2018. Scottsdale filed its Motion on March 28, 2019. By filing its motion to intervene in this matter, Scottsdale has moved to submit a "special verdict form" or "special interrogatories", or some other form of special jury instructions, to the jury to determine the basis of the jury's verdict. The Court has not yet scheduled a date certain trial in this matter.

## ARGUMENTS

### I. **SCOTTSDALE LACKS STANDING TO INTERVENE AND DOES NOT MEET THE REQUIREMENTS FOR INTERVENTION.**

Scottsdale 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, Scottsdale does not have an interest in the property that is the subject of this action, the Project. Nor does Scottsdale 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 Scottsdale's named insured 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, Scottsdale'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, Scottsdale's interest is not appropriate to be litigated or interjected into this construction defect suit.

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

**II. CONTRARY TO SCOTTSDALE'S ASSERTIONS, SOUTH CAROLINA CASE LAW DOES NOT PROVIDE SCOTTSDALE THE RIGHT TO INTERVENE.**

Scottsdale'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 Scottsdale's assertion, the decision in Harleysville does not stand for the proposition that Scottsdale 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 \*5-6. 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. at 298-99.

To the extent that Scottsdale 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.<sup>1</sup>

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<sup>1</sup> 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

Importantly, the Court recently has already denied a motion to intervene similar to Scottsdale's motion in the lawsuit captioned *The Harbour Cove Condominium Association v. Centex Homes, et al.*, Case No.: 2014-CP-26-7634<sup>2</sup>, that involves a condominium project called Harbour Cove which, similar to River Crossing 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. Scottsdale has offered no legal or factual basis why the Court should depart from its ruling in Harbour Cove.

For these additional reasons, Scottsdale's Motions should be denied.

### **III. INTERVENTION BY SCOTTSDALE 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. 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).

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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.

<sup>2</sup> 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).

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. This is especially true where, as here, Scottsdale's insureds include not only Rooferman, but also Centex. For this additional reason and in order to avoid impermissible conflict of interest, Scottsdale's Motions should be denied.

**IV. SCOTTSDALE'S MOTION SHOULD BE DENIED BECAUSE INTERVENTION BY SCOTTSDALE 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 Scottsdale'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 Plaintiffs' allegations of construction defects and prove its breach of contract, breach of warranty, indemnity and negligence claims against its subcontractors is unfairly prejudicial. Effectively, Scottsdale's request 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 Scottsdale 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, Scottsdale does not even present with any specificity what special verdict form or special interrogatories they would suggest be presented to the jury. Such a request by Scottsdale puts Centex at a significant disadvantage in preparing its claims and defenses for trial.

Not only would Scottsdale'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 12 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 Scottsdale's Motion is granted, it stands to reason that the jury would be confused by injecting complicated coverage issues, new parties, and multiple policies for each trade potentially covering policy periods from 2001 to 2018 into an already complex construction case.

If that were not confusing enough, Scottsdale's request, in addition to the special interrogatories and/or special verdict form, is that the jury not be told the basis for the special interrogatories and/or special verdict form. Specifically, Scottsdale requests, among other things, that their participation and/or the existence of possible insurance

coverage not be mentioned to the jury, thereby precluding any explanation or clarification that could help alleviate the jury's confusion. 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 Scottsdale's Motion is granted.

**B. Intervention would create inconsistent results.**

Intervention, and ultimately the presentation of a special verdict form and/or special interrogatories or jury instructions, will result in significant inconsistencies should it be allowed. Scottsdale'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 Scottsdale 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, Scottsdale'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. It is clear that Scottsdale may attempt to use this as another bite at the apple. 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 Scottsdale in this action would necessarily give Scottsdale certain rights and standing. Presumably, Scottsdale 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, Scottsdale’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 Scottsdale could frustrate and/or deter settlement and could create a conflict of interest because, upon information and belief, Scottsdale has supplied counsel to its respective named insured in this action. Further, Scottsdale owes a duty to defend Centex as an additional insured. As settlement negotiations are ongoing, permitting Scottsdale 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. There has been no judicial

determination in this action of what is or is not covered by the applicable insurance policies, the damages in this trial have not been evaluated, proven or argued along the lines of coverage, but instead only in accordance with the facts, evidence and expert opinions relating to liability for construction defects and the substantive law governing the claims and defenses between the parties. Further, there has been no analysis with respect to the policies which impacts the payment of any awarded damages. 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 Scottsdale's Motion are likely to gum up the Court's docket and further delay the disposition of this case that has been pending before the Court since 2015.

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

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

If the Court denies Scottsdale's Motion, which Centex argues the law, facts and the interests of justice support, Scottsdale 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 Scottsdale (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.

Because Scottsdale 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 Carriers' Motions 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, Scottsdale’s Motion should be denied.

### **CONCLUSION**

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

1. That, should Scottsdale be permitted to intervene, it be named as 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 Scottsdale wants answered and that it be permitted to explain to the jury the basis for the requested information (e.g., that Scottsdale needs it for a coverage determination) and the reasons why the jury should find one way or the other.

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Balfour Beatty Construction, LLC f/k/a Centex  
Construction, LLC

April 18, 2019

# Exhibit A



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

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

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

The Insurers each seek to intervene for the "limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

- (1) definition of progressive damages;
- (2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;



(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

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

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

#### **DISCUSSION OF THE LAW**

“The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion.” Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (citing South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. Ex parte Government Employee’s Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court’s denial of an insurer’s motion to intervene). “However, a party must have standing to intervene in an action pursuant to Rule 24, SCRPC.” Id. A party has standing if the party has a personal stake in the



subject matter of a lawsuit and is a “real party in interest.” *Id.* “A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.” *Id.*

### **BACKGROUND**

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure (“SCRCP”). As our Supreme Court has held, “intervention is only appropriate where the party seeking intervention has ‘a real proprietary interest in the subject matter of the proceedings;’ an interest which is merely ‘peripheral and not the real interest at stake’ will not warrant intervention.” *Ex parte Gov’t Employee’s Ins. Co. (GEICO) v. Goethe*, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (quoting *Bailey v. Bailey*, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in *GEICO*, the court affirmed the family court’s denial of insurer’s motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the Harbour Cove Condominium project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Harbour Cove Condominium project. Each of the Insurers’ interest arises solely out of its contract of insurance with its insured and those interests are not



appropriate to be litigated or interjected into this construction defect action. Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

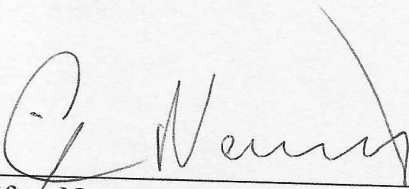
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

Based on the foregoing the Motions to Intervene is Denied.

**AND IT IS SO ORDERED.**

October 12 2017

  
\_\_\_\_\_  
Clifton Newman  
Presiding Judge

ELECTRONICALLY FILED - 2017 Oct 13 4:28 PM - HORRY - COMMON PLEAS - CASE#2014CP2607634  
ELECTRONICALLY FILED - 2019 Apr 18 3:28 PM - HORRY - COMMON PLEAS - CASE#2015CP2600279



STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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

Plaintiffs,

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

Defendants.

Centex Homes, a Nevada General Partnership,

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL DISTRICT

Case No.: 2015-CP-26-00279

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 SEVERAL INSURANCE CARRIERS' MOTIONS TO INTERVENE

Third-Party Plaintiff,  
vs.

Carolina Drywall and Interiors a/k/a  
Carolina Drywall Contractors, Inc., Vance  
Johnson Plumbing Co., Inc., Bogle  
Electric, Inc., Pelen, Inc., Jayco, Inc.,  
Sunland Fire Protection, Inc., Dunn  
Plumbing Company, Inc., Essentials  
Protective Coatings, Inc., RJM Plumbing,  
Inc., Myrtle Beach Lighting, Inc. a/k/a R&L  
Lighting, Inc., Tri-City Insulation and  
Building Products of Myrtle Beach, Inc.,  
Bond Group, Inc., Intracoastal Service  
Company, Inc., Sandpiper Heating & Air  
Conditioning, LLC, American Residential  
Services, LLC d/b/a American Residential  
Services of South Carolina, Inc., A.O.  
Hardee & Son, Inc., Vereen Concrete Co.,  
Inc., Michael Dawson d/b/a Michael  
Dawson Construction, Inc., Floors, Inc.  
successor by merger to Rice Planter  
Carpets, Inc., I.T.P., Inc., Carpets By  
Kendall, Inc., Rice Planter Carpets, Inc.  
n/k/a Creative Touch Interiors, Inc., CEMS  
Engineering, Inc., Chris R. Clark, AIA,  
Crescent Architects, LLC, Bobby L. Curry,  
Bobby Curry Engineers, Inc., and Right  
Way Construction, Inc. a/k/a RWG, Inc.  
a/k/a Right Way Group, Inc. a/k/a RWGR,  
Inc.,

Third-Party Defendants.

Cox Millwork & Supply, Inc.,

Fourth-Party Plaintiff,

vs.

Citation Manufacturing, Inc.,

Fourth-Party Defendant.

Defendants Centex Homes, a Nevada General Partnership ("Centex Homes"), 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 Motions to Intervene ("Motions") filed by BITCO General Insurance Corporation f/k/a Bituminous Casualty Corporation ("BITCO"), Selective Insurance Company of South Carolina ("Selective"), Harleysville Insurance Company n/k/a Nationwide Insurance Company ("Harleysville"), American Empire Surplus Lines Insurance Company ("American Empire"), and Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company ("Clarendon") (with BITCO, Selective, Harleysville, American Empire, and Clarendon hereinafter collectively referred to as the "Carriers") in the above-captioned matter.

### **EXECUTIVE SUMMARY**

The Carriers lack standing to intervene because they do not have an interest in the property that is the subject of this action nor do they 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 motion to intervene filed by the Carriers in another lawsuit involving a multi-family project in the same neighborhood. Moreover, intervention sought by the Carriers 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 the Carriers 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 twelve (12) building condominium project called River Crossing 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, including, but not limited to, Martin Masonry, Inc. ("Martin Masonry"), A.M. Jacobs, Inc. ("A.M. Jacobs"), Trebor Industries, Inc. ("Trebor"), and Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc. (collectively "RWG"), 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, the Carriers' obligations and liabilities to Centex Homes and the rights of Centex Homes as an additional insured under the insurance policies issued by, among others, the Carriers with respect to, among other things, the claims asserted by Plaintiffs in the above-captioned construction defect action against Centex (the "Declaratory Judgment Action").

BITCO issued certain applicable insurance policies to Martin Masonry and A.M. Jacobs, its named insureds, and is currently participating in the defense of Martin Masonry and A.M. Jacobs in this action. In addition, BITCO is currently participating in the defense of Centex Homes as an additional insured in this action under the



insurance policies issued to Martin Masonry and A.M. Jacobs, BITCO's named insureds. Selective issued certain applicable insurance policies to, among others, Martin Masonry and Trebor, its named insureds. Harleysville issued certain applicable insurance policies to Martin Masonry, its named insured. American Empire and Clarendon issued certain applicable insurance policies to RWG, their named insured, and both are, upon information and belief, currently defending RWG in this matter.

This matter was unsuccessfully mediated on January 30-31, 2018. Selective and Harleysville filed their Motions on December 18, 2017. BITCO filed its Motion on December 21, 2017. American Empire filed its Motion on May 3, 2018. Clarendon filed its Motion on May 8, 2018. By filing their respective motions to intervene (the "Carriers' Motions") in this matter, the Carriers have moved to submit a "special verdict" or "special interrogatories", or some other form of special jury instructions, to the jury to determine the basis of the jury's verdict. The Court has not yet scheduled a date certain trial in this matter.

### **ARGUMENTS**

#### **I. THE CARRIERS LACK STANDING TO INTERVENE AND DO NOT MEET THE REQUIREMENTS FOR INTERVENTION.**

The Carriers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP").

As our Supreme Court has held, "intervention is only appropriate where the party seeking intervention has 'a real proprietary interest in the subject matter of the proceedings;' an interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." Ex parte Gov't Employee's Ins. Co. (GEICO) v. Goethe,

373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (quoting Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994)). In GEICO, the 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), SCRPC, 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, the Carriers do not have an interest in the property that is the subject of this action, the Project. Nor do the Carriers 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 the Carriers' 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, each of the Carriers' 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, the Carriers' interests are not appropriate to be litigated or interjected into this construction defect suit.

In light of the Carriers' lack of standing to intervene, the Carriers' Motions should be denied.

**II. CONTRARY TO THE CARRIERS' ASSERTIONS, SOUTH CAROLINA CASE LAW DOES NOT PROVIDE THE CARRIERS THE RIGHT TO INTERVENE.**

The Carriers' reliance on Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) in support of their proposition that they should be allowed to intervene is misguided. Contrary to the Carriers' assertion, the decision in Harleysville does not stand for the proposition that the Carriers have 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 \*5-6. 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. at 298-99.

To the extent that the Carriers also rely 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.<sup>1</sup>

Importantly, the Court recently has already denied the Carriers' 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<sup>2</sup>, that

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<sup>1</sup> 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.

<sup>2</sup> The Court's denial has been appealed by the insurers and the appellants are seeking certification to the South Carolina Supreme Court under Rule 204, SCACR, in *In Re Motions to*

involves a condominium project called Harbour Cove which, similar to River Crossing 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, the Carriers' Motions should be denied.

**III. INTERVENTION BY THE CARRIERS 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. 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, the Carriers' Motions should be denied.

**IV. THE CARRIERS' MOTIONS SHOULD BE DENIED BECAUSE INTERVENTION BY THE CARRIERS WOULD BE UNFAIRLY PREJUDICIAL TO CENTEX.**

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*Intervene in The Harbour Cove Condominium Association v. Centex Homes et al.*, Appellate Case No. 2017-02146 (Nov. 8, 2017).

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

In the Carriers' Motions, they request 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, the Carriers request that this case be transformed from an already complex construction case into a complex construction and coverage case. 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, the Carriers do not even present with any specificity what special verdict or special interrogatories they would suggest be presented to the jury. Such a request by the Carriers puts Centex at a significant disadvantage in preparing its claims and defenses for trial.

Not only would the Carriers' 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 12 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 the Carriers’ Motion is granted, it stands to reason that the jury would be confused by injecting complicated coverage issues, new parties, and multiple policies for each trade potentially covering policy periods from 2001 to 2018 into an already complex construction case.

If that were not confusing enough, the Carriers request, in addition to the special interrogatories and/or special instructions, that the jury not be told the basis for the special interrogatories and/or special instructions. Specifically, BITCO requests, among other things, that their participation and/or the existence of possible insurance coverage not be mentioned to the jury, thereby precluding any explanation or clarification that could help alleviate the jury’s confusion. 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 the Carriers’ Motions are 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. The Carriers’ Motions seek 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 the Carriers 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, the Carriers' 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. It is clear that the Carriers may attempt to use this as another bite at the apple. 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 the Carriers in this action would necessarily give the Carriers certain rights and standing. Presumably, the Carriers 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, the Carriers' Motions should be denied.



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

In addition to being unfairly prejudicial to Centex, intervention by the Carriers could frustrate and/or deter settlement and could create a conflict of interest because, upon information and belief, at least some of the Carriers have supplied counsel to their respective named insureds in this action. Further, the Carriers owe a duty to defend Centex as an additional insured. As settlement negotiations are ongoing, permitting the Carriers 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. There has been no judicial determination in this action of what is or is not covered by the applicable insurance policies, the damages in this trial have not been evaluated, proven or argued along the lines of coverage, but instead only in accordance with the facts, evidence and expert opinions relating to liability for construction defects and the substantive law governing the claims and defenses between the parties. Further, there has been no analysis with respect to the policies which impacts the payment of any awarded damages. 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 the Carriers' Motions are likely to gum up the Court's docket and further delay the disposition of this case that has been pending before the Court since 2015.

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

**D. The Carriers already have a vehicle to address their concerns in the pending Declaratory Judgment Action.**

If the Court denies the Carriers Motions, which Centex argues the law, facts and the interests of justice support, the Carriers are 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 the Carriers (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.

Because the Carriers 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 Carriers' Motions 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, the Carriers’ Motions should be denied.

### **CONCLUSION**

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

1. That the Court not have the jury answer the special verdict form until after the normal verdict has been returned.
2. That the Court allow Centex's counsel to introduce evidence and argument after the normal verdict related to the issues that the Carriers want answered and that it be permitted to explain to the jury the basis for the requested information (e.g., that the Carriers need it for a coverage determination) and the reasons why the jury should find one way or the other.

PARKER POE ADAMS & BERNSTEIN  
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Charleston, SC 29401

By: s/ Thomas C. Hildebrand, Jr.

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May 18, 2018



# Exhibit A

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

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

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

The Insurers each seek to intervene for the "limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

- (1) definition of progressive damages;
- (2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;



(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

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

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

### DISCUSSION OF THE LAW

“The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion.” Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (citing South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. Ex parte Government Employee’s Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court’s denial of an insurer’s motion to intervene). “However, a party must have standing to intervene in an action pursuant to Rule 24, SCRPC.” Id. A party has standing if the party has a personal stake in the



subject matter of a lawsuit and is a “real party in interest.” *Id.* “A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.” *Id.*

### **BACKGROUND**

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure (“SCRCP”). As our Supreme Court has held, “intervention is only appropriate where the party seeking intervention has ‘a real proprietary interest in the subject matter of the proceedings;’ an interest which is merely ‘peripheral and not the real interest at stake’ will not warrant intervention.” *Ex parte Gov’t Employee’s Ins. Co. (GEICO) v. Goethe*, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (quoting *Bailey v. Bailey*, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in *GEICO*, the court affirmed the family court’s denial of insurer’s motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the Harbour Cove Condominium project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Harbour Cove Condominium project. Each of the Insurers’ interest arises solely out of its contract of insurance with its insured and those interests are not



appropriate to be litigated or interjected into this construction defect action. Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

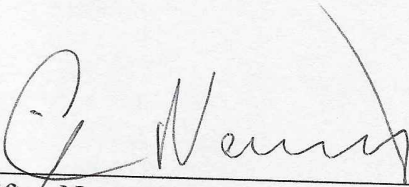
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

Based on the foregoing the Motions to Intervene is Denied.

**AND IT IS SO ORDERED.**

October 12 2017

  
\_\_\_\_\_  
Clifton Newman  
Presiding Judge

EEHEDRONICALLY FILED - 2017 May 18 11:28 PM - HODGINS - COMMON PLEAS - CASE# 20140172800279



STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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

Plaintiffs,

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

Defendants.

Centex Homes, a Nevada General Partnership,

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL DISTRICT

Case No.: 2015-CP-26-00279

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 HARTFORD'S MOTION TO INTERVENE

Third-Party Plaintiff,

vs.

Carolina Drywall and Interiors a/k/a  
Carolina Drywall Contractors, Inc., Vance  
Johnson Plumbing Co., Inc., Bogle  
Electric, Inc., Pelen, Inc., Jayco, Inc.,  
Sunland Fire Protection, Inc., Dunn  
Plumbing Company, Inc., Essentials  
Protective Coatings, Inc., RJM Plumbing,  
Inc., Myrtle Beach Lighting, Inc. a/k/a R&L  
Lighting, Inc., Tri-City Insulation and  
Building Products of Myrtle Beach, Inc.,  
Bond Group, Inc., Intracoastal Service  
Company, Inc., Sandpiper Heating & Air  
Conditioning, LLC, American Residential  
Services, LLC d/b/a American Residential  
Services of South Carolina, Inc., A.O.  
Hardee & Son, Inc., Vereen Concrete Co.,  
Inc., Michael Dawson d/b/a Michael  
Dawson Construction, Inc., Floors, Inc.  
successor by merger to Rice Planter  
Carpets, Inc., I.T.P., Inc., Carpets By  
Kendall, Inc., Rice Planter Carpets, Inc.  
n/k/a Creative Touch Interiors, Inc., CEMS  
Engineering, Inc., Chris R. Clark, AIA,  
Crescent Architects, LLC, Bobby L. Curry,  
Bobby Curry Engineers, Inc., and Right  
Way Construction, Inc. a/k/a RWG, Inc.  
a/k/a Right Way Group, Inc. a/k/a RWGR,  
Inc.,

Third-Party Defendants.

Cox Millwork & Supply, Inc.,

Fourth-Party Plaintiff,

vs.

Citation Manufacturing, Inc.,

Fourth-Party Defendant.



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 Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively, "Hartford") in the above-captioned matter.

### **EXECUTIVE SUMMARY**

Hartford 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 Hartford, in another lawsuit involving a multi-family project in the same neighborhood. Moreover, intervention sought by Hartford 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 Hartford 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 twelve (12) building condominium project called River Crossing 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, including Carolina Drywall and Interiors a/k/a

Carolina Drywall Contractors, Inc. ("Carolina Drywall"), Weather Protection Systems, Inc. ("WPS"), and Michael Dawson d/b/a Michael Dawson Construction, Inc. ("Dawson"), 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, Hartford'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, Hartford with respect to, among other things, the claims asserted by Plaintiffs in the above-captioned construction defect action against Centex (the "Declaratory Judgment Action").

Hartford issued certain applicable insurance policies to Carolina Drywall, WPS, and Dawson, its named insureds, and is currently participating in their defense in this action. In addition, Hartford is currently participating in the defense of Centex Homes as an additional insured in this action under the insurance policies issued to Carolina Drywall, Hartford's named insured.

This matter is scheduled for mediation on January 30-31, 2018. Hartford filed its Motion on December 8, 2017. By filing its motion to intervene in this matter, Hartford has moved to submit a "special verdict" or "special interrogatories", or some other form of special jury instructions, to the jury to determine the basis of the jury's verdict. The Court has not yet scheduled a date certain trial in this matter.

## ARGUMENTS

### **I. HARTFORD LACKS STANDING TO INTERVENE AND DOES NOT MEET THE REQUIREMENTS FOR INTERVENTION.**

Hartford 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, Hartford does not have an interest in the property that is the subject of this action, the Project. Nor does Hartford 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 Hartford'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, Hartford'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, Hartford's interest is not appropriate to be litigated or interjected into this construction defect suit.

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

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

Hartford'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 Hartford's assertion, the decision in Harleysville does not stand for the proposition that Hartford 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 \*5-6. 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.<sup>1</sup> 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. at 298-99.

To the extent that Hartford 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

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<sup>1</sup> Hartford represents in its Motion that it has already complied with the court's directive in Harleysville and informed its respective insureds of the possible bases for denying coverage and of the need for the insureds to submit a special verdict form or special interrogatories allocating between covered and uncovered damages.

manifest differences between an arbitration and a matter in litigation counsel against applying Newman to this case.<sup>2</sup>

Importantly, the Court recently has already denied Hartford'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<sup>3</sup>, that involves a condominium project called Harbour Cove which, similar to the River Crossing 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, Hartford's Motion should be denied.

### **III. INTERVENTION BY HARTFORD 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. Ins. Co., 247 S.C. 82, 145 S.E2d 523 (1965). As was the case in Sims, "[t]he type of

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<sup>2</sup> 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.

<sup>3</sup> Hartford and other insurers have appealed the Court's denial and are seeking certification to the South Carolina Supreme Court under Rule 204, SCACR, 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).

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, Hartford’s Motion should be denied.

**IV. HARTFORD’S MOTION SHOULD BE DENIED BECAUSE INTERVENTION BY HARTFORD 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 Hartford’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 Plaintiffs’ allegations of construction defects and prove its breach of contract, breach of warranty, indemnity and negligence claims against its subcontractors is unfairly prejudicial. Effectively, Hartford requests that this case be transformed from an already complex construction case into a complex

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

Not only would Hartford'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 Hartford's Motion is granted, it stands to reason that the jury would be confused by injecting complicated coverage issues, at least two new parties, and multiple policies for each trade potentially covering policies periods from 2001 to 2018 into an already complex construction case.

If that were not confusing enough, Hartford requests, in addition to the special interrogatories and/or special instructions, that the jury not be told the basis for the special interrogatories and/or special instructions. Specifically, Hartford requests, among other things, that its participation and/or the existence of possible insurance



coverage not be mentioned to the jury, thereby precluding any explanation or clarification that could help alleviate the jury's confusion. 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 Hartford'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. Hartford'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 Hartford 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, Hartford'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, Hartford in its Motion specifically purports to reserve its rights to contest coverage issues in the Declaratory Judgment Action. It is clear that Hartford may attempt to use this as another bite at the apple, as Hartford 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 Hartford in this action would necessarily give Hartford certain rights and standing. Presumably, Hartford 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, Hartford’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 Hartford could frustrate and/or deter settlement and could create a conflict of interest because, upon information and belief, Hartford has supplied counsel to at least some, if not all, of its named insureds in this action. Further, Hartford owes a duty to defend Centex as an additional insured. As settlement negotiations are ongoing, permitting Hartford 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. There has been no judicial determination in this action of what is or is not covered by the applicable insurance policies, the damages in this trial have not been evaluated, proven or argued along the lines of coverage, but instead only in accordance with the facts, evidence and expert opinions relating to liability for construction defects and the substantive law governing the claims and defenses between the parties. Further, there has been no analysis with respect to the policies which impacts the payment of any awarded damages. 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 Hartford's Motion are likely to gum up the Court's docket and further delay the disposition of this case that has been pending before the Court since 2015.

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

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

If the Court denies Hartford's Motion, which Centex argues the law, facts and the interests of justice support, Hartford 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 Hartford (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, Hartford is already, at a minimum, contemplating presenting these issues in the Declaratory Judgment Action as well.

Because Hartford 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 Hartford'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, Hartford's Motion should be denied.

### **CONCLUSION**

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

1. That the Court not have the jury answer the special verdict form until after the normal verdict has been returned.
2. That the Court allow Centex's counsel to introduce evidence and argument after the normal verdict related to the issues that Hartford wants answered and that it be permitted to explain to the jury the basis for the requested information (e.g., that Hartford needs it for a coverage determination) and the reasons why the jury should find one way or the other.

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Construction Company, Inc.; Centex  
Construction, LLC; Centex-Rooney  
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Balfour Beatty Construction, LLC f/k/a Centex  
Construction, LLC

December 15, 2017

# Exhibit A

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

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

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

The Insurers each seek to intervene for the "limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

- (1) definition of progressive damages;
- (2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

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

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

#### **DISCUSSION OF THE LAW**

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (citing South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. Ex parte Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRPC." Id. A party has standing if the party has a personal stake in the

subject matter of a lawsuit and is a “real party in interest.” *Id.* “A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.” *Id.*

### **BACKGROUND**

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure (“SCRCP”). As our Supreme Court has held, “intervention is only appropriate where the party seeking intervention has ‘a real proprietary interest in the subject matter of the proceedings;’ an interest which is merely ‘peripheral and not the real interest at stake’ will not warrant intervention.” *Ex parte Gov’t Employee’s Ins. Co. (GEICO) v. Goethe*, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (quoting *Bailey v. Bailey*, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in *GEICO*, the court affirmed the family court’s denial of insurer’s motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the Harbour Cove Condominium project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Harbour Cove Condominium project. Each of the Insurers’ interest arises solely out of its contract of insurance with its insured and those interests are not

appropriate to be litigated or interjected into this construction defect action. Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

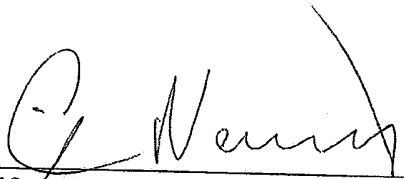
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

Based on the foregoing the Motions to Intervene is Denied.

**AND IT IS SO ORDERED.**

October 12 2017

  
\_\_\_\_\_  
Clifton Newman  
Presiding Judge

ELECTRONICALLY FILED - 2017 Dec 15 12:36 PM - Horry - COMMON PLEAS - CASE#2015CP2600279  
ELECTRONICALLY FILED - 2017 Oct 13 4:28 PM - Horry - COMMON PLEAS - CASE#2014CP2607634



STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL DISTRICT  
CASE NO: 2015-CP-26-00279

THE RIVER CROSSING )  
CONDOMINIUM ASSOCIATION and )  
VINCENT J. TAMBURRO, on behalf of )  
himself and others similarly situated, )

Plaintiffs, )

v. )

CENTEX HOMES, a Nevada General )  
Partnership; CENTEX CONSTRUCTION )  
COMPANY, INC.; CENTEX )  
CONSTRUCTION, LLC; CENTEX- )  
ROONEY CONSTRUCTION, CO., INC.; )  
CENTEX-RODGERS, INC.; BALFOUR )  
BEATTY CONSTRUCTION, LLC. f/k/a )  
CENTEX CONSTRUCTION, LLC; )  
RIGHT WAY CONSTRUCTION, INC.; )  
RIGHT WAY GROUP, INC.; RWG, )  
INC.; RWGR, INC.; STOCK BUILDING )  
SUPPLY, LLC f/k/a STOCK BUILDING )  
SUPPLY, INC.; CENTEX HOMES, A )  
NEVADA GENERAL PARTNERSHIP; )  
MARTIN MASONRY, INC.; GARY )  
HUNNELL d/b/a GRAND STRAND )  
ROOFING; CRAFTMASTER )  
MANUFACTURING, INC. d/b/a CMI; )  
and ROOF DOCTOR OF THE )  
CAROLINAS, INC.; STOCK BUILDING )  
SUPPLY, LLC f/k/a CAROLINA )  
BUILDERS CORPORATION; ORFIELD )  
LABORATORIES, INC.; TREBOR )  
INDUSTRIES, INC.; STEVEN BOSCH )  
d/b/a THE ROOFERMAN; )  
CERTAINTEED CORPORATION )  
successor by merger to EXTERIOR )  
SYSTEMS, INC. a/k/a NORANDEX, )  
INC.; WEATHER PROTECTION )  
SYSTEMS, INC.; CRAWFORD DOOR )  
SYSTEMS, INC.; COX MILLWORK & )  
SUPPLY, INC.; A.M. JACOBS, INC.; )  
GALVIN DePOMPE; ROBERTA )

**PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO MOTIONS TO  
INTERVENE**

DePOMPE; MORNINGSTAR )  
CONSULTANTS, INC.; JELD-WEN, )  
INC. as successor to and/or merger with )  
CRAFTMASTER MANUFACTURING, )  
INC. d/b/a CMI; and SIGN STUDIO & )  
GRAPHICS, INC., )  
) )  
Defendants. )  
) )  
CENTEX HOMES, a Nevada General )  
Partnership, )  
) )  
Third-Party Plaintiff, )  
) )  
v. )  
) )  
CAROLINA DRYWALL AND )  
INTERIORS a/k/a CAROLINA )  
DRYWALL CONTRACTORS, INC.; )  
ORFIELD LABORATORIES, INC.; )  
TREBOR INDUSTRIES, INC.; STEVEN )  
BOSCH d/b/a THE ROOFER MAN; )  
VANCE JOHNSON PLUMBING CO., )  
INC.; A.M. JACOBS, INC.; WEATHER )  
PROTECTION SYSTEMS, INC.; )  
CRAWFORD DOOR SYSTEMS, INC.; )  
CERTAINTEED CORPORATION, )  
successor by merger to EXTERIOR )  
SYSTEM, INC. a/k/a NORANDEX, INC.; )  
COX MILLWORK & SUPPLY, INC.; )  
GALVIN DePOMPE; ROBERTA )  
DePOMPE; SIGN STUDIO & )  
GRAPHICS, INC.; BOGLE ELECTRIC, )  
INC.; PELEN, INC.; JAYCO, INC.; )  
SUNLAND FIRE PROTECTION, INC.; )  
DUNN PLUMBING COMPANY, INC.; )  
ESSENTIALS PROTECTIVE )  
COATINGS, INC.; RJM PLUMBING, )  
INC.; MYRTLE BEACH LIGHTING, )  
INC. a/k/a R&L LIGHTING, INC.; TRI- )  
CITY INSULATION AND BUILDING )  
PRODUCTS OF MYRTLE BEACH, )  
INC.; BOND GROUP, INC.; )  
MORNINGSTAR CONSULTANTS, )  
INC.; INTRACOASTAL SERVICE )  
COMPANY, INC.; SANDPIPER )

HEATING & AIR CONDITIONING, )  
 LLC; AMERICAN RESIDENTIAL )  
 SERVICES, LLC d/b/a AMERICAN )  
 RESIDENTIAL SERVICES OF SOUTH )  
 CAROLINA, INC.; A.O. HARDEE & )  
 SON, INC.; VEREEN CONCRETE CO., )  
 INC.; MICHAEL DAWSON d/b/a )  
 MICHAEL DAWSON )  
 CONSTRUCTION, INC.; I.T.P., INC.; )  
 CARPETS BY KENDALL, INC.; and )  
 RICE PLANTERS CARPETS, INC. n/k/a )  
 CREATIVE TOUCH INTERIORS, INC.; )  
 CEMS ENGINEERING, INC.; CHRIS R. )  
 CLARK, AIA; CRESCENT )  
 ARCHITECTS, LLC; BOBBY L. )  
 CURRY; BOBBY CURRY ENGINEERS, )  
 INC., )  
 )  
 Third-Party Defendants. )  
 )  
 )  
 )  
 COX MILLWORK & SUPPLY, INC., )  
 )  
 Fourth-Party Plaintiff, )  
 )  
 v. )  
 )  
 )  
 CITATION MANUFACTURING, INC., )  
 )  
 Fourth-Party Defendant. )  
 )

Plaintiffs River Crossing Condominium Association and Vincent J. Tamburro, on behalf of himself and others similarly situated, (hereinafter collectively “Plaintiffs”), by and through their undersigned counsel, submit this Memorandum in Opposition to the Motions to Intervene filed by several insurance carriers in this action (hereinafter collectively “Carriers”).

### **FACTS**

River Crossing is a condominium community in North Myrtle Beach, South Carolina, that consists primarily of twelve (12) condominium buildings. 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 (hereinafter collectively referred to as “Centex”) developed and constructed River Crossing. River Crossing is one of several multi-family residential communities that Centex developed and constructed within a larger development known as Barefoot Landing.

Plaintiffs filed this construction-defect action against Centex and its subcontractors as a result of an engineer’s investigation of the River Crossing community, which revealed significant construction defects throughout the community. Various attorneys have served as defense counsel for the subcontractor defendants in this matter since its inception.

### **ARGUMENTS**

#### **I. SOUTH CAROLINA LAW DOES NOT PERMIT A LIABILITY INSURER TO INTERVENE IN A TORT ACTION TO PROTECT ITS RIGHTS TO CONTEST COVERAGE.**

This Court should deny the Carriers’ requests for intervention in this construction defect matter as intervention would be inappropriate and in violation of South Carolina law for several reasons. First, the *Harleysville* case does not support insurer intervention in this context, and consequently, the Carriers have no other standing to intervene. Further, state law requires the insurers in this case to litigate their coverage defenses in a separate action to avoid an impermissible conflict of interest. Finally, intervention and the imposition of insurance questions on an already complex construction defect jury trial would confuse the jury and violate Plaintiffs’ Due Process rights.

##### **A. South Carolina jurisprudence does not mandate intervention by insurers in construction defect actions.**

As this Court is aware, in recent years, South Carolina law has sought to clarify an insurer’s responsibilities for damages caused by its insured in construction defect actions. In

2009, the South Carolina Supreme Court in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) 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 the Supreme Court affirmed the trial court'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, the *Newman* 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. *Newman* effectively put liability insurers on alert that they had the ability to contest coverage of at least part of an award in a construction defect action, which is the foundation of the instant appeal.

**B. *Harleysville Group Ins. v. Heritage Cmtys, Inc.* does not give authority for intervention.**

The recent case of *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), is touted by the Carriers in this matter as the primary authority for their intervention in this construction defect action, but it does not actually support intervention.

*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. *Harleysville* 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 the Carriers and insurers across the state read *Harleysville* as carte blanche authority for intervention in a tort action to protect their interests, with respect to contesting coverage, the *Harleysville* opinion focused solely on whether the insurer's reservations of rights were sufficient for the insurers to even have the ability to contest coverage. The Supreme 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. *Harleysville* at 338, 803 S.E.2d at 297. Essentially, the Court clearly delineated that an insurer's reservation of rights must be sufficiently specific as to put the insured on notice that 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, the Supreme 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 the idea that an award cannot be allocated without sufficient evidence to support that allocation. *Harleysville* at 343, 803 S.E.2d 300 n. 11. The Carriers and, presumably, countless insurers in the state use this footnote to further bolster their position that the *Harleysville* opinion requires their intervention because an allocated verdict (and the presentation of evidence to support it) is the only way to determine whether a jury award falls within coverage limits. This conclusion is clearly misplaced as nowhere in footnote 11 does the Supreme Court indicate that allocating a verdict is the only way for an insurer to contest coverage, and other South Carolina law discussed below provides that evidence as to potential coverage may be presented in a subsequent action.

In the context of reservations of the right to contest coverage, the *Harleysville* opinion stands for the premise that a generic reservation of rights by an insurer is insufficient to actually reserve any rights. The reservation must be specific enough to put an insured on notice of the specific policy provisions under which its insurer may contest coverage; it must specifically lay out the coverage defenses the insurer may present in a subsequent action; and must advise the insured of a potential conflict of interest. Without a sufficient reservation of rights, the insurer

cannot contest coverage. Nowhere does the *Harleysville* opinion support the presumption that an insurer must intervene in a tort action to protect its rights. In fact, the word “intervene” is never used by the majority opinion and appears only once when the dissent mentions *Harleysville* could not possibly have intervened without an impermissible conflict of interest. *Harleysville* at 363, 903 S.E.2d at 311 (Pleicones, J., dissenting). Contrary to the Carriers’ positions, one may reasonably conclude that *Harleysville* provides that if an insurer has properly reserved its rights, there is no need for intervention because the insured may then litigate coverage in a separate declaratory action. Regardless, no reading of *Harleysville* supports the position that an insurer can or must intervene in a tort trial to contest coverage. Plaintiffs seek a ruling that *Harleysville* neither requires nor gives authority for intervention, or in the alternative, a finding that the Carriers have made no showing of sufficient reservations of rights to contest coverage so the question of intervention is moot.

**C. The Carriers lack standing to intervene under *Ex Parte GEICO* and South Carolina Rule of Civil Procedure 24.**

Regardless of *Harleysville*, binding law demonstrates that the Carriers 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) discuss intervention of right and permissive intervention, respectively. Rule 24, SCRCF. Rule 24(a) provides that “anyone shall be permitted to intervene” when he has an interest in the property or transaction at issue in the lawsuit, those interests may be impeded by the disposition of the action, and his 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*”), the Carriers meet the requirements for neither type of intervention.

**1. The Carriers must have standing to intervene.**

The Carriers seek a reading of the Rules and case law that suggests they are not required to have standing to intervene, as they seek to intervene in a limited capacity rather than as parties to the instant litigation. Neither the courts in this state nor the rules of procedure make any distinction between standing to intervene as a party versus standing to intervene for limited purposes, and the Supreme Court has routinely held a party seeking to intervene must have standing. *GEICO* at 138, 644 S.E.2d at 702 (citing *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). Additionally, *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991), the only binding case to which some insurers cite in support of their proposition that South Carolina courts have previously held no standing is required for limited intervention, is significantly distinguishable from the current posture of this action.

*Davis* involved a property action that was settled and dismissed, and a newspaper’s attempt to intervene to object to the sealing of the record after the action was completed. The Court held that because the newspaper sought to intervene for the limited purpose of challenging the seal of the record, no showing of standing was required. *Davis* at 504, 405 S.E.2d at 603. *Davis* is significantly distinguishable from the instant action on several grounds, namely that the holding was specifically limited to Rule 24’s applicability to third-party challenge of protective orders and did not declare that all limited interventions were absolved of a standing requirement. *Id.* Further, the newspaper company moved to intervene *after* the action had been settled and dismissed with prejudice, which is contrary to the procedural posture of this ongoing construction defect action. *Id.* at 503, 405 S.E.2d at 602. Had the newspaper company in *Davis*

sought to intervene for some limited purpose in the early stages of the litigation, the Supreme Court would have been evaluating significantly different facts and would likely have reached another conclusion. The Court, when evaluating the timeliness of the newspaper's intervention, cited to a First Circuit Court of Appeals decision providing that if "desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the parties." *Id.* at 505, 405 S.E.2d at 603 (citing *Public Citizen*, 858 F.2d at 786). The citation to and discussion of this language from the *Public Citizen* case indicates that the fact that the action had concluded was central to the Court's reasoning as to why intervention in that limited capacity should be permitted and why the newspaper's motion was not untimely. South Carolina courts have made it clear they do not rule by implication, and the holding that an intervenor must not show standing when it seeks to challenge a protective order in the context of a case that had already been dismissed from the court system cannot be extrapolated to provide that no hopeful intervenor must have standing when it seeks to intervene in a limited capacity. Despite any reliance on *Davis*, the Carriers in this matter must have standing to intervene.

**2. The Carriers do not have standing to intervene as of right.**

The Carriers in this action 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 this construction defect litigation. *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. The Supreme Court in *GEICO* affirmed the lower court's refusal to permit the insurer's intervention by concluding that 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,

the 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, the Supreme 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 case in that the Carriers do not have standing to intervene under Rule 24(a) because they are not real parties in interest. Though the Carriers may argue that *GEICO* does not preclude the possibility that the court intended to require intervention, the fact that the *GEICO* opinion completely fails to even utter the word is clear evidence the Supreme Court did not intend its ruling to be taken as license to grant insurer intervention in a tort action. *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.”).

The only interest the Carriers have in the subject matter of the litigation is whether or not any award entered against their insureds is covered under their insurance policies, which is purely financial. Though certain Carriers may claim they have an interest in essentially protecting the record of the trial of the tort action to preserve information that may be used in a subsequent action, the *Sims* case provides that insurers may present additional evidence in a separate coverage action and need not protect the trial record. *See infra* Section D. The Carriers 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 Plaintiffs’ construction defect claims, which does not involve a determination of insurance benefits. Accordingly, the Carriers do not have standing to intervene as of right under Rule 24(a).

**3. The Carriers 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 (5<sup>th</sup> 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.* 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 Carriers in this case. Permitting the Carriers to use the permissive intervention rules has no bearing on judicial economy here because there is already a separate coverage action pending,<sup>1</sup> and because the allocated verdict the Carriers seek merely establishes the basis for their defenses to coverage that must be litigated in a subsequent coverage action. Even if this Court determined judicial economy was served by permitting intervention, the Carriers have no questions of law or fact in common with the parties in this tort action, and any subsequent declaratory action would not “substantially duplicate” this construction defect lawsuit. The questions of law and fact at issue in the construction defect

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

action involve whether certain contractors and subcontractors violated building codes, industry standards, and manufacturers' instructions in the construction of the River Crossing condominium 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 masonry is not substantially duplicated in an action surrounding an insurance policy's definition of "occurrence." There is no commonality among the claims of the Carriers and the tort issues in this construction defect action 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 this matter since its inception in 2015 and moved to intervene nearly four (4) years later, so 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 Plaintiffs' Due Process rights. *See infra* Section E.

**4. 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 that they returned a verdict for Plaintiffs. *Restor-A-Dent* 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 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. *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. Accordingly, [the insurer] does not have an interest in the subject matter of the action between [Plaintiff] and [Defendant]." *Id.* The Court further reasoned that any potential interest asserted by the insurer depended upon two contingencies: a jury verdict for plaintiff and 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* 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 of 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. The district judge denied the motion, observing that the motion was filed only two months before the commencement of trial. "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* 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.*

**D. State law requires a separate action to avoid an impermissible conflict of interest.**

South Carolina case law is clear that when an insurer undertakes the indemnity and defense of its insured in a liability action, it cannot raise its own defenses to coverage in the same action without creating a catastrophic conflict of interest. Insurers can and must raise their own defenses and litigate coverage in separate actions.

**1. An insurer cannot defend its insured and its own interests in same action.**

South Carolina law is clear that an insurer cannot defend its insured and assert its own defenses to coverage in the same action. *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 85, 145 S.E.2d 523, 524 (1965). *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. *Id.* at 84, 145 S.E.2d at 523. 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, this Court in *Sims* quoted *Farm Bureau Mutual Ins. Co. v. Hammer et al.*, 4<sup>th</sup> C.C.A. 177 F. (2d) 793 (4<sup>th</sup> Cir. 1949) and its 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 Carriers 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 if the Carriers are permitted to intervene must transition 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.

**2. A separate declaratory judgment action is sufficient to protect an insurer's interests even without an allocated verdict.**

Contrary to the Carriers' positions that they cannot contest coverage without an allocated verdict, *Sims* and the Restatement (2d) of Judgments also provide that a subsequent declaratory action is sufficient to protect an insurer's interest without an allocation. The Carriers lean on the presumption that if they are to contest coverage in a separate declaratory action, a verdict allocating any award between costs to remove faulty work and costs to repair the consequential damages of faulty work is absolutely necessary for a coverage determination. This is not the case.

When analyzing the *Farm Bureau* case, this Court in *Sims* quoted that court's "unassailable logic" that the notion that 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* at 86-7, 145 S.E.2d at 525. The *Farm Bureau* court further supported that position by its reference to Section 107 of the Restatement of the Law of Judgments, which provided that 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." *Sims* 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 Section cited by the *Farm Bureau* court, Restatement of Judgments (2d) Section 58, 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). Put more simply, an indemnitor with interests adverse to those of its indemnitee is not bound by the material facts established against the indemnitee when contesting coverage in a subsequent action. Essentially, when an insurer has a conflict of interest with its insured such that it cannot protect its own interests while indemnifying its insured, South Carolina law permits the insurer to introduce additional facts in a declaratory action to defend its coverage positions. Simply put, the insurers here can contest coverage in a declaratory action without an allocated verdict and thus, without intervention.

**E. The injection of insurance issues in a construction defect trial would confuse the jury and add to Plaintiffs’ burden of proof.**

If the Carriers 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. The Carriers 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 their 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 potentially would

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, quite often with different insurance carriers from 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 which 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 several 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 Plaintiffs' burden of proof. Now, not only must Plaintiffs show that the defendants breached the standard of care and proximately caused damage to the buildings at issue, the injection of insurance coverage issues requires Plaintiffs to make potentially a number of other showings with regard to the damages claimed. Further, the Carriers 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 Carriers want certain questions answered, but apparently seek to have counsel for Plaintiffs and Defendants figure out 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 shortly before trial introduces sudden insurance questions which inherently complicate the presentation of the case by all parties and as such are prejudicial to the Plaintiffs and insureds. This complication changes the presentation of evidence and conduct of the entire trial of this action, and has the potential to confuse the jury to such extent that they cannot render a competent verdict.

As stated by this Court in its Order denying the insurers' Motions to Intervene in the Harbour Cove matter (2014-CP-26-7634), 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". The Carriers' intervention would place an undue burden on parties to an already complicated construction defect action.

Notably, in other past the Carriers have relied on the Fifth Circuit Court of Appeals case *Duke v. Hoch*, 468 F.2d 973, 1972 U.S. App. LEXIS 7288 (5th Cir. 1972) and its discussion of allocated verdicts to support their apparent position that the interrogatories and verdict form they would have imposed upon the jury are relatively routine and "workable." Though referenced and discussed in *Harleysville*, *Duke* is a federal case from the Fifth Circuit and is neither binding on this Court nor relevant to the instant analysis. Nonetheless, the underlying issues are readily distinguishable. The matters addressed in *Duke* appear to be much less complicated and more easily determined than those in a typical multifamily construction defect case. The additional burdens on the parties in the cited matter would seem slight. Here, very complicated coverage

determinations of very complicated liability determinations in a multi-party matter are horses of a different color entirely.

**F. Intervention would infringe upon Plaintiffs' Due Process Rights.**

The Carriers' intervention for the limited purpose of submitting a special verdict form and interrogatories to the jurors would infringe upon Plaintiffs' 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). The South Carolina Supreme 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).

Plaintiffs' 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, Plaintiffs should be entitled to conduct some discovery on all potential insurance coverage positions raised by the Carriers under South Carolina Rule of Civil Procedure 26(b)(1), as those issues have now become relevant in this tort action. Rule 26(b)(1), SCRCF. As Due Process is flexible and may be tailored to specific situations, Plaintiffs' presentation of evidence



may even potentially necessitate 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, Plaintiffs' Due Process rights would require the Carriers' full intervention as parties to the construction defect action rather than limited intervention so Plaintiffs may conduct traditional pre-trial discovery to prepare their case for trial. Permitting the insurers to intervene and proceed immediately to trial prohibits Plaintiffs from conducting discovery that has only now become relevant and as such deprives Plaintiffs of their Due Process rights. Alternatively, insurer intervention even with a prescribed discovery period unfairly prejudices Plaintiffs in this action, as it would extend the length of this action that has been pending since 2015.

### **CONCLUSION**

Plaintiffs respectfully request that this Court deny the Carriers' Motions to Intervene in this matter.

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Attorneys for Plaintiffs

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|-----------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA           | ) | IN THE COURT OF COMMON PLEAS |
|                                   | ) |                              |
| COUNTY OF HORRY                   | ) | FOR THE FIFTEENTH JUDICIAL   |
|                                   | ) | CIRCUIT                      |
| THE RIVER CROSSING CONDOMINIUM    | ) | CASE NO.: 2015-CP-26-00279   |
| ASSOCIATION, AND VINCENT J.       | ) |                              |
| TAMBURRO, ON BEHALF OF HIMSELF    | ) |                              |
| AND OTHERS SIMILARLY SITUATED,    | ) |                              |
|                                   | ) |                              |
|                                   | ) |                              |
| Plaintiffs,                       | ) |                              |
|                                   | ) |                              |
| vs.                               | ) |                              |
|                                   | ) |                              |
| CENTEX HOMES; CENTEX              | ) | HARTFORD FIRE INSURANCE      |
| CONSRUCTION COMPANY, INC.;        | ) | COMPANY'S AND HARTFORD       |
| CENTEX CONSTRUCTION, LLC;         | ) | CASUALTY INSURANCE COMPANY'S |
| CENTEX-ROONEY CONSTRUCTION,       | ) | SUPPLEMENTAL MEMORANDUM OF   |
| CO., INC.; CENTEX-RODGERS, INC.;  | ) | LAW IN SUPPORT OF MOTION TO  |
| BALFOUR BEATTY CONSTRUCTION,      | ) | INTERVENE                    |
| LLC f/k/a CENTEX CONSTRUCTION,    | ) |                              |
| LLC; RIGHT WAY CONSTRUCTION,      | ) |                              |
| INC.; RIGHT WAY GROUP, INC.; RWG, | ) |                              |
| INC.;; RWGR, INC.; STOCK BUILDING | ) |                              |
| SUPPLY, LLC f/k/a STOCK BUILDING  | ) |                              |
| SUPPLY, INC.; BUILDERS-           | ) |                              |
| FIRSTSOURCE-SOUTHEAST GROUP,      | ) |                              |
| LLC; MARTIN MASONRY, INC.; GARY   | ) |                              |
| HUNNELL d/b/a GRAND STRAND        | ) |                              |
| ROOFING; CRAFTMASTER              | ) |                              |
| MANUFACTURING, INC. d/b/a CMI;    | ) |                              |
| ROOF DOCTOR OF THE CAROLINAS,     | ) |                              |
| INC.; STOCK BUILDING SUPPLY, LLC  | ) |                              |
| f/k/a CAROLINA BUILDERS           | ) |                              |
| CORPORATION; ORFIELD              | ) |                              |
| LABORATORIES, INC.; TREBOR        | ) |                              |
| INDUSTRIES, INC.; STEVEN BOSCH    | ) |                              |
| d/b/a THE ROOFER MAN;             | ) |                              |
| CERTAINTED CORPORATION            | ) |                              |
| SUCCESSOR BY MERGER TO            | ) |                              |
| EXTERIOR SYSTEMS, INC. a/k/a      | ) |                              |
| NORANDEX, INC.; WEATHER           | ) |                              |
| PROTECTION SYSTEMS, INC.; COX     | ) |                              |
| MILLWORK & SUPPLY, INC.; AM       | ) |                              |
| JACOBS, INC.; GALVIN DEPOMPE;     | ) |                              |

ROBERTA DEPOMPE; MORNINGSTAR )  
CONSULTANTS, INC.; JELD-WIN, INC. )  
AS SUCCESSOR TO AND/OR MERGER )  
WITH CRAFTMASTER )  
MANUFACTURING, INC. d/b/a CMI, AND )  
SIGN STUDIO & GRAPHICS, INC.. )

**Defendants.** )

THE TANGLEWOOD CONDOMINIUM )  
ASSOCIATION, )

**Plaintiff,** )

vs. )

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-RODGERS, INC.; )  
BALFOUR BEATTY )  
CONSTRUCTION, LLC, F/K/A )  
CENTEX CONSTRUCTION, LLC, )

**Defendants.** )

Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively "Hartford") hereby file this Supplemental Memorandum of Law in Support of their Motions to Intervene.

In addition to their arguments made in their prior Memoranda of Law in Support of their Motions to Intervene, Hartford hereby incorporates all the arguments in the below and incorporates them herein by reference to the extent not inconsistent with Hartford's position in these matters.

Hartford hereby makes the below part of the record in order to preserve all of the arguments made in all of the exhibits below which are attached hereto that are not inconsistent with their position in these matters.

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

- 1) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Motion to Intervene 12/08/17
- 2) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene 12/08/17

- 3) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene Exhibit A 12/08/17
- 4) Selective Insurance Company's Motion to Intervene 12/08/17
- 5) Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion to Intervene 12/18/17
- 6) BITCO General Insurance Corporation's Motion to Intervene 12/21/17
- 7) American Empire Surplus' Motion to Intervene 05/03/18
- 8) Clarendon National's Motion to Intervene 05/08/18
- 9) Scottsdale Insurance Company's Motion to Intervene 03/28/19

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

- 10) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Motion to Intervene 12/08/17
- 11) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene 12/08/17
- 12) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene Exhibit A 12/08/17
- 13) Selective Insurance Company's Motion to Intervene 12/18/17
- 14) Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion to Intervene 12/18/17

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

- 15) Selective Insurance's Motion for Limited Intervention 02/02/18
- 16) Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion for Limited Intervention 02/02/18
- 17) BITCO's Motion for Limited Intervention or Order of Protection of Rights 03/26/18

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

- 18) Selective Insurance Company's Motion to Intervene 02/02/18
- 19) Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion to Intervene 02/02/18
- 20) Crum & Forster Ins Co. and First Mercury Insurance Company's Motion to Intervene 02/27/18
- 21)

**Harbour Cove Condominium Association, et al. v. Centex Homes, et al., Civil Action No.: 2014-CP-26-7634; Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al., Civil Action No.: 2014-CP-26-06573; The Cypress Bend Condominium Association and The Cypress Bend Horizontal Property**

**Regime v. Centex Homes, et al., Civil Action No.: 2014-CP-26-01226**

- 22) Record On Appeal Volume 1 and 22) Record On Appeal Volume 2 – which includes but is not limited to:
  - Harbour Cove Order Denying Motion of Insurers for Limited Intervention dated October 12, 2017
  - Harbour Cove Transcript of Record (Motion Hearing) on September 28, 2017
  - Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Motion to Intervene

- Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene and Exhibit
- BITCO General Insurance Corporation's Motion to Intervene
- BITCO General Insurance Corporation's Memorandum in Support of Motion to Intervene
- Selective Insurance Company of South Carolina's Motion for Limited Intervention or Alternatively for Order of Protection of Rights
- Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion for Limited Intervention or Alternatively for Order of Protection of Rights (SCRCP 24)
- Beach Villas Transcript of Record (Motion Hearing) on September 28, 2017
- Beach Villas* Amended Order Denying Motion of Insurers for Limited Intervention dated October 12, 2017
- Cypress Bend Transcript of Record (Motion Hearing) on September 27, 2017

**Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al., Civil Action No.: 2014-CP-26-06573**

- 23) Selective Insurance Company of South Carolina's Motion for Limited Intervention or Alternatively for Order of Protection of Rights 9/8/17
- 24) Hartford Fire Insurance's Motion to Intervene 9/18/17
- 25) Hartford Fire Insurance's Memorandum of Law in Support of Motion to Intervene 9/18/17
- 26) Hartford Fire Insurance's Memorandum of Law in Support of Motion to Intervene Exhibit A 9/18/17

**The Cypress Bend Condominium Association and The Cypress Bend Horizontal Property Regime v. Centex Homes, et al., Civil Action No.: 2014-CP-26-01226**

- 27) Hartford Fire Insurance's Motion to Intervene 4/21/17
- 28) Hartford Fire Insurance's Memorandum of Law in Support of Motion to Intervene 4/21/17
- 29) Hartford Fire Insurance's Memorandum of Law in Support of Motion to Intervene Exhibit A 4/21/17
- 30) BITCO General Insurance Corporation's Motion to Intervene 4/21/17
- 31) BITCO General Insurance Corporation's Memorandum in Support of Motion to Intervene 4/21/17
- 32) Selective Insurance Company of South Carolina's Motion for Limited Intervention or Alternatively for Order of Protection of Rights 4/25/17
- 33) American Empire Surplus Lines Insurance Company ("American Empire") and Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company's Joint Motion to Intervene 5/22/17
- 34) Catalina London, Ltd.'s Motion for Limited Intervention 5/22/17
- 35) Non-Party Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company's Motion For Limited Intervention or Alternatively for Order of Protection of Rights 9/18/17

**Harbour Cove/Beach Villas Appellate Case No. 2017-002146**

- 36) Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company's Motion to Certify to the South Carolina Supreme Court Under Rule 204, SCACR 11/8/17
- 37) National Fire & Marine Insurance Company's Motion to Transfer Case to the Supreme Court 11/13/17
- 38) BITCO General Insurance Company's Motion to Transfer Case to the Supreme Court 11/20/17
- 39) South Carolina Court of Appeals' Order denying Motion to Dismiss Appeal 1/24/18
- 40) Supreme Court of South Carolina Order Granting Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, National Fire & Marine Insurance Company's and BITCO General Insurance Company's Motion to Certify the Appeals Pursuant to Rule 204(b), SCACR
- 41) Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance's Final Brief
- 42) Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance's Final Reply Brief
- 43) BITCO General Insurance Company's Final Brief
- 44) BITCO General Insurance Company's Final Reply Brief
- 45) Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company's Final Brief
- 46) Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company's Final Reply Brief
- 47) Selective Insurance Company of South Carolina's Final Brief
- 48) Selective Insurance Company of South Carolina's Final Reply Brief
- 49) National Fire & Marine Insurance Company's Final Brief
- 50) National Fire & Marine Insurance Company's Final Reply Brief

Respectfully submitted,

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April 24, 2019

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM Horry COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2015-CP-26-00279

RECEIVED

JUN 27 2019

SC Court of Appeals

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

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

v.

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

Centex Homes, a Nevada General Partnership, Third-Party Plaintiff,

v.

Carolina Drywall and Interiors a/k/a Carolina Drywall Contractors, Inc., Vance Johnson Plumbing Co., Inc., Bogle Electric, Inc., Pelen, Inc., Jayco, Inc., Sunland Fire Protection, Inc., Dunn Plumbing Company, Inc., Essentials Protective Coatings, Inc., RJM Plumbing, Inc., Myrtle Beach Lighting, Inc. a/k/a R&L Lighting, Inc., Tri-City Insulation and Building Products of Myrtle Beach, Inc., Bond Group, Inc., Intracoastal Service Company, Inc., Sandpiper Heating & Air Conditioning, LLC, American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc., A.O. Hardee & Son, Inc., Vereen Concrete Co., Inc., Michael Dawson d/b/a Michael Dawson Construction, Inc., Floors, Inc. successor by merger to Rice Planter Carpets, Inc., I.T.P., Inc., Carpets By Kendall, Inc., Rice Planter Carpets, Inc. n/k/a



Creative Touch Interiors, Inc., CEMS Engineering, Inc., Chris R. Clark, AIA, Crescent Architects, LLC, Bobby L. Curry, Bobby Curry Engineers, Inc., and Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc., Third-Party Defendants,

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

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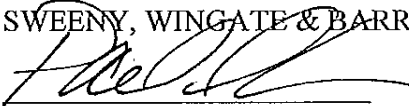
NOTICE OF APPEAL

---

Hartford Casualty Insurance Company and Hartford Fire Insurance Company appeal the Honorable Clifton Newman's Order Denying Motions to Intervene, dated June 21, 2019. Appellants received written notice of entry of the order on June 21, 2019.

June 27, 2019

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90314

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2015-CP-26-00279

RECEIVED  
JUL 18 2019  
SC Court of Appeals

Ex Parte: Bitco General Insurance Corporation, ..... Appellant,

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

v.

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

Centex Homes, a Nevada General Partnership, Third-Party Plaintiff,

v.

Carolina Drywall and Interiors a/k/a Carolina Drywall Contractors, Inc., Vance Johnson Plumbing Co., Inc., Bogle Electric, Inc., Pelen, Inc., Jayco, Inc., Sunland Fire Protection, Inc., Dunn Plumbing Company, Inc., Essentials Protective Coatings, Inc., RJM Plumbing, Inc., Myrtle Beach Lighting, Inc., a/k/a R&L Lighting, Inc., Tri-City Insulation and Building Products of Myrtle Beach, Inc., Bond Group, Inc., Intracoastal Service Company, Inc., Sandpiper Heating & Air Conditioning, LLC, American Residential Services, LLC, d/b/a American Residential Services of South Carolina, Inc., A.O. Hardee & Son, Inc., Vereen Concrete Co., Inc., Michael Dawson d/b/a Michael Dawson Construction, Inc., Floors, Inc., successor by merger to Rice Planter Carpets, Inc., I.T.P., Inc., Carpetes By Kendall, Inc., Rice Planter Carpets, Inc., n/k/a Creative Touch Interiors, Inc., CEMS Engineering, Inc., Chris R. Clark, AIA, Crescent Architects, LLC, Bobby L. Curry, Bobby Curry Engineers, Inc., and Right Way Construction, Inc., a/k/a RWG, Inc., a/k/a Right Way Group, Inc., a/k/a RWGR, Inc., Third-Party Defendants,

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

---

NOTICE OF APPEAL

---

Bitco General Insurance Corporation hereby appeals the Honorable Clifton Newman's Order Denying Motions to Intervene, dated June 21, 2019. Appellants received written notice of entry of the order on June 21, 2019.

July 18, 2019

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90336

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2015-CP-26-00279  
Appellate Case No. 2019-001053

**RECEIVED**  
JUL 19 2019  
SC Court of Appeals

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

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

v.

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

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

Centex Homes, a Nevada General Partnership, ..... Third-Party Plaintiff,

v.

Carolina Drywall and Interiors a/k/a Carolina Drywall Contractors, Inc., Vance Johnson Plumbing Co., Inc., Bogle Electric, Inc., Pelen, Inc., Jayco, Inc., Sunland Fire Protection, Inc., Dunn Plumbing Company, Inc., Essentials Protective Coatings, Inc., RJM Plumbing, Inc., Myrtle Beach Lighting, Inc. a/k/a R&L Lighting, Inc., Tri-City Insulation and Building Products of Myrtle Beach, Inc., Bond Group, Inc., Intracoastal Service Company, Inc., Sandpiper Heating & Air Conditioning, LLC, American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc., A.O. Hardee & Son, Inc., Vereen

Concrete Co., Inc., Michael Dawson d/b/a Michael Dawson Construction, Inc.,  
Floors, Inc. successor by merger to Rice Planter Carpets, Inc., I.T.P., Inc., Carpets  
By Kendall, Inc., Rice Planter Carpets, Inc. n/k/a Creative Touch Interiors, Inc.,  
CEMS Engineering, Inc., Chris R. Clark, AIA, Crescent Architects, LLC, Bobby  
L. Curry, Bobby Curry Engineers, Inc., and Right Way Construction, Inc. a/k/a  
RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc..... Third-Party Defendants,

Cox Millwork & Supply, Inc, ..... Fourth Party Plaintiff,

v.

Citation Manufacturing, Inc.,..... Fourth Party Defendant.

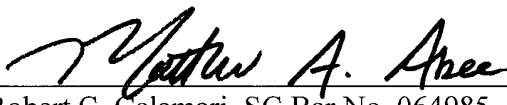
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**Joint Notice of Cross-Appeal**

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Harleysville Insurance Company n/k/a Nationwide Insurance Company and Selective  
Insurance Company (“Cross-Appellants”) notice their cross-appeal from the June 21, 2019 Orders  
Denying Motions to Intervene by the Honorable Clifton Newman. Cross-Appellants received  
notice of the entry of the order from which they cross-appeal on June 21, 2019.

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Columbia, South Carolina  
July 19, 2019

90362

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No.: 2015-CP-26-00118

**RECEIVED**

JUL 22 2019

SC Court of Appeals

Ex Parte: Crum & Forster Specialty Insurance Company  
and First Mercury Insurance Company,.....Appellants,

In Re: The Haven Condominium Association,..... Plaintiffs,

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, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., Hardworkers Construction, LLC, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., Builders FirstSource, Southeast Group, LLC, Martin Masonry, Inc., Martin Masonry Inc. d/b/a Ramon Masonry Briggs Masonry, Inc., Archer Exteriors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, CraftMaster Manufacturing, Inc. d/b/a CMI, Stock Building Supply, LLC, f/k/a Carolina Builders Corporation, Hardworkers Construction, Co., LLC, CertainTeed Corporation, Successor By Merger To Exterior Systems, Inc., a/k/a Norandex, Inc., Ramon Bernardino d/b/a Ramon Masonry, Morningstar Consultants, Inc., LPM Enterprises, Inc., f/k/a Loss Prevention Management, Inc., Professional Service Industries, Inc., Jeld-Wen, Inc., as Successor To and/or Merger With CraftMaster Manufacturing, Inc., d/b/a CMI, and Elite Exteriors, LLC,.....Defendants

Centex Homes, a Nevada General Partnership,.....Third Party Plaintiff,

vs.

Cohen's Drywall Company, Inc., Carolina Drywall & Interiors a/k/a Carolina Drywall Contractors, Inc., Tri-City Insulation and Building Products of Myrtle Beach, Inc., Right Way Construction, Inc. a/k/a RWG, Inc., a/k/a Right Way Group, Inc. a/k/a RWG, Inc., Archer Fire Protection, Inc., Grand Strand Roofing and Siding, Weather Protection Systems, Inc., Bobby Curry Engineers, Inc. a/k/a Bobby Curry Engineering, Inc., General Landscape Maintenance, LLC, Trebor Industries, Inc., Professional Service Industries, Inc. a/k/a PSI, Inc., Universal Forest Products Shoffner, LLC, Universal Forest Products, Inc., Universal Forest Products

TPGL 9630569v1

Eastern Division, Inc. n/k/a UFP Eastern Division, Atlantic Building Components & Services, Inc., Briggs Masonry, RJM Plumbing, Inc., Carolina Cool, Inc. f/k/a Carolina Cooling and Plumbing, Inc., Dean Custom Air, LLC, All Heating and Cooling Service Corp., JS Elite Flooring Company a/k/a JS Elite Tile Company, LPM Enterprises, Inc. f/k/a Loss Prevention Management, Inc. a/k/a Loss Prevention Management, Inc. a/k/a Loss Prevention Management Home Inspections, Inc., Michael Dawson d/b/a Michael Dawson Construction, Inc., Georgetown Construction Services, AO Hardee & Son, Inc., The Martin Architectural Group, P.C., The Harman Group, Inc., f/k/a Cagley Harman & Association, Inc., Roy Larry Schlein & Associates, P.A. a/k/a Roy Larry Schlein & Associates Corporation, Miller Design Services, P.A., ..... Third Party Defendants,

Universal Forest Products Eastern Division, Inc.  
n/k/a UFP Eastern Division, Inc., ..... Fourth Party Plaintiff,

vs.

AC Construction Corporations, ..... Fourth Party Defendant

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

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NOTICE OF APPEAL

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Crum & Forster Specialty Insurance Company and First Mercury Insurance Company appeal the Honorable Clifton Newman's Order Denying Motions to Intervene, dated June 21, 2019. Appellants received written notice of entry of the order on June 21, 2019. A copy of the Order is attached herein.

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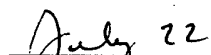
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, 2019  
Charleston, South Carolina

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FIRST MERCURY INSURANCE COMPANY

TPGL 9630569v1



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90351

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2015-CP-26-4514

**RECEIVED**  
JUL 22 2019  
SC Court of Appeals

Ex Parte: American Empire Surplus Lines Insurance Company, Appellant,

In Re: The Woodlands Condominium Association, Plaintiff,

v.

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

Centex Homes, a Nevada General Partnership, Third-Party Plaintiff,

v.

Right Way Construction, Inc., a/k/a RWG, Inc., a/k/a Right Way Group, Inc. a/k/a RWGR, Inc., Stock Building Supply, LLC f/k/a Carolina Builders Corporation, Stock Building Supply, LLC f/k/a Stock Building Supply, Inc., AK Framing, Grand Strand Roofing & Siding, Builders FirstSource-Southeast Group, LLC, John Doe, Elite Exteriors, LLC, Cohen's Drywall Company, Inc., Vance Johnson Plumbing Co., Inc., RJM Plumbing, Inc., Tri-City Insulation and Building Products of Myrtle Beach, Inc., Carolina Drywall & Interior, Inc., a/k/a Carolina Drywall & Interiors, Inc.; Carolina Drywall Contractors, Inc.; Morningstar Consultants, Inc., LPM Enterprises, Inc. f/k/a Loss Prevention Management, Inc., a/k/a LPM Home Inspections, Inc., Weather Protection Systems, Inc., Crawford Door Systems, Inc., Thomas, Inc., d/b/a Thomas Heating and Cooling, All Heating and Cooling Service Corp., American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc., Martin Masonry, Inc., Michael Dawson d/b/a Michael Dawson Construction, Inc., Michael Dawson Construction, Inc., AO Hardee & Son, Inc., Jayco, Inc., AM Jacobs, Inc., Trebor Industries, Inc., Taylor Made Builders, Inc., Essential Protective Coatings, LLC, Creative Touch Interiors, Inc. f/k/a Floors, Inc. f/k/a Rice Planter Carpets, Inc., Craftmaster Manufacturing, Inc. d/b/a CMI and/or Jeld-Wen, Inc., as successor to and/or merger with Craftmaster Manufacturing, Inc. d/b/a CMI Crescent Architects, LLC, CEMS Engineering, Inc., Georgetown Construction Services, Inc., Pike, McFarland, Hall Associates, Inc. and Rast Associates, Inc., Third-Party Defendants,

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

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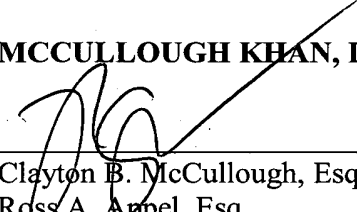
NOTICE OF APPEAL

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American Empire Surplus Lines Insurance Company appeals the Honorable Clifton Newman's Order Denying Motions to Intervene, dated June 21, 2019. Appellant received written notice of entry of the order on June 21, 2019.

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BY:



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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**  
JUL 22 2019  
SC Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Case No. 2015-CP-26-00279

Ex Parte: Clarendon National Insurance Company Successor in interest by merger to Clarendon America.....Appellants,

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

v.

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

Centex Homes, a Nevada General Partnership,.....Third-Party Plaintiff,

v.

Carolina Drywall and Interiors a/k/a Carolina Drywall Contractors, Inc., Vance Johnson Plumbing Co., Inc., Bogle Electric, Inc., Pelen, Inc., Jayco, Inc., Sunland Fire Protection, Inc., Dunn Plumbing Company, Inc., Essentials Protective Coatings, Inc., RJM Plumbing, Inc., Myrtle Beach Lighting, Inc. a/k/a R&L Lighting, Inc., Tri-City Insulation and Building Products of Myrtle Beach, Inc., Bond Group, Inc., Intracoastal Service Company, Inc., Sandpiper Heating & Air Conditioning,

LLC, American Residential Services, LLC d/b/a American Residential Services of South Carolina, Inc., A.O. Hardee & Son, Inc., Vereen Concrete Co., Inc., Michael Dawson d/b/a Michael Dawson Construction, Inc., Floors, Inc. successor by merger to Rice Planter Carpets, Inc., I.T.P., Inc., Carpets By Kendall, Inc., Rice Planter Carpets, Inc. n/k/a Creative Touch Interiors, Inc., CEMS Engineering, Inc., Chris R. Clark, AIA, Crescent Architects, LLC, Bobby L. Curry, Bobby Curry Engineers, Inc., and Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.,.....Third-Party Defendants,

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

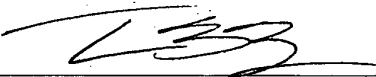
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**NOTICE OF APPEAL**

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Clarendon National Insurance Company, successor in interest by merger to Clarendon America, appeals the order of The Honorable Clifton B. Newman denying Appellant's Motion of Insurers for Limited Intervention. The Court issued the Order on June 21, 2019 and it is attached as Exhibit A.

July 19, 2019

  
\_\_\_\_\_  
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|                                |   |                               |
|--------------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA        | ) | IN THE COURT OF COMMON PLEAS  |
|                                | ) |                               |
| COUNTY OF HORRY                | ) | FOR THE FIFTEENTH JUDICIAL    |
|                                | ) | CIRCUIT                       |
| THE HAVENS CONDOMINIUM         | ) | CASE NO.: 2015-CP-26-0118     |
| ASSOCIATION,                   | ) |                               |
|                                | ) |                               |
| Plaintiffs,                    | ) | STIPULATION AND AGREEMENT OF  |
|                                | ) | RECORD FOR HEARING ON MOTIONS |
| v.                             | ) | TO INTERVENE                  |
|                                | ) |                               |
| CENTEX HOMES, et al.           | ) |                               |
|                                | ) |                               |
| Defendants.                    | ) |                               |
|                                | ) |                               |
| THE RIVER CROSSING CONDOMINIUM | ) | CASE NO.: 2015-CP-26-00279    |
| ASSOCIATION, AND VINCENT J.    | ) |                               |
| TAMBURRO, ON BEHALF OF HIMSELF | ) |                               |
| AND OTHERS SIMILARLY SITUATED, | ) |                               |
|                                | ) |                               |
| Plaintiff,                     | ) |                               |
|                                | ) |                               |
| v.                             | ) |                               |
|                                | ) |                               |
| CENTEX HOMES, ET AL.,          | ) |                               |
|                                | ) |                               |
| Defendants.                    | ) |                               |
|                                | ) |                               |
| THE TANGLEWOOD CONDOMINIUM     | ) | CASE NO.: 2015-CP-26-2718     |
| ASSOCIATION,                   | ) |                               |
|                                | ) |                               |
| Plaintiff,                     | ) |                               |
|                                | ) |                               |
| v.                             | ) |                               |
|                                | ) |                               |
| CENTEX HOMES, A NEVADA GENERAL | ) |                               |
| PARTNERSHIP, ET AL.,           | ) |                               |
|                                | ) |                               |
| Defendants.                    | ) |                               |
|                                | ) |                               |
| THE WOODLANDS CONDOMINIUM      | ) | CASE NO.: 2015-CP-26-04514    |
| ASSOCIATION,                   | ) |                               |
|                                | ) |                               |



|                                |             |   |
|--------------------------------|-------------|---|
|                                | Plaintiff,  | ) |
|                                |             | ) |
| v.                             |             | ) |
|                                |             | ) |
| CENTEX HOMES, A NEVADA GENERAL |             | ) |
| PARTNERSHIP, ET AL.,           |             | ) |
|                                |             | ) |
|                                | Defendants. | ) |

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The Court held a hearing on pending Motions to Intervene which was held in Horry County, South Carolina on April 25, 2019. The below parties stipulate and agree that the following were presented to the Court and that the arguments in the below were incorporated by reference to the extent not inconsistent with the parties' positions in the present cases. The undersigned agreed that the below are part of the record and the arguments made therein are preserved for appellate review to the extent not inconsistent with their positions:

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

- 1) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Motion to Intervene 12/08/17
- 2) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene 12/08/17
- 3) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene Exhibit A 12/08/17
- 4) Selective Insurance Company's Motion to Intervene 12/08/17
- 5) Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion to Intervene 12/18/17
- 6) BITCO General Insurance Corporation's Motion to Intervene 12/21/17
- 7) American Empire Surplus' Motion to Intervene 05/03/18
- 8) Clarendon National's Motion to Intervene 05/08/18
- 9) Scottsdale Insurance Company's Motion to Intervene 03/28/19

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

- 10) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Motion to Intervene 12/08/17
- 11) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene 12/08/17
- 12) Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene Exhibit A 12/08/17
- 13) Selective Insurance Company's Motion to Intervene 12/18/17
- 14) Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion to Intervene 12/18/17

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

- 15) Selective Insurance's Motion for Limited Intervention 02/02/18
- 16) Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion for Limited Intervention 02/02/18
- 17) BITCO's Motion for Limited Intervention or Order of Protection of Rights 03/26/18

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

- 18) Selective Insurance Company's Motion to Intervene 02/02/18
- 19) Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion to Intervene 02/02/18
- 20) Crum & Forster Ins Co. and First Mercury Insurance Company's Motion to Intervene 02/27/18

**Harbour Cove Condominium Association, et al. v. Centex Homes, et al., Civil Action No.: 2014-CP-26-7634; Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al., Civil Action No.: 2014-CP-26-06573; The Cypress Bend Condominium Association and The Cypress Bend Horizontal Property Regime v. Centex Homes, et al., Civil Action No.: 2014-CP-26-01226**

- 21) Record On Appeal Volume 1 and 22) Record On Appeal Volume 2 – which includes but is not limited to:
  - Harbour Cove Order Denying Motion of Insurers for Limited Intervention dated October 12, 2017
  - Harbour Cove Transcript of Record (Motion Hearing) on September 28, 2017
  - Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Motion to Intervene
  - Hartford Fire Insurance Company's and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene and Exhibit
  - BITCO General Insurance Corporation's Motion to Intervene
  - BITCO General Insurance Corporation's Memorandum in Support of Motion to Intervene
  - Selective Insurance Company of South Carolina's Motion for Limited Intervention or Alternatively for Order of Protection of Rights
  - Harleysville Insurance Company n/k/a Nationwide Insurance Company's Motion for Limited Intervention or Alternatively for Order of Protection of Rights (SCRCP 24)
  - Beach Villas Transcript of Record (Motion Hearing) on September 28, 2017
  - Beach Villas Amended Order Denying Motion of Insurers for Limited Intervention dated October 12, 2017
  - Cypress Bend Transcript of Record (Motion Hearing) on September 27, 2017

**Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al., Civil Action No.: 2014-CP-26-06573**

- 23) Selective Insurance Company of South Carolina's Motion for Limited Intervention or Alternatively for Order of Protection of Rights 9/8/17
- 24) Hartford Fire Insurance's Motion to Intervene 9/18/17
- 25) Hartford Fire Insurance's Memorandum of Law in Support of Motion to Intervene 9/18/17
- 26) Hartford Fire Insurance's Memorandum of Law in Support of Motion to Intervene Exhibit A 9/18/17

**The Cypress Bend Condominium Association and The Cypress Bend Horizontal Property Regime v. Centex Homes, et al., Civil Action No.: 2014-CP-26-01226**

- 27) Hartford Fire Insurance's Motion to Intervene 4/21/17
- 28) Hartford Fire Insurance's Memorandum of Law in Support of Motion to Intervene 4/21/17
- 29) Hartford Fire Insurance's Memorandum of Law in Support of Motion to Intervene Exhibit A 4/21/17
- 30) BITCO General Insurance Corporation's Motion to Intervene 4/21/17
- 31) BITCO General Insurance Corporation's Memorandum in Support of Motion to Intervene 4/21/17
- 32) Selective Insurance Company of South Carolina's Motion for Limited Intervention or Alternatively for Order of Protection of Rights 4/25/17
- 33) American Empire Surplus Lines Insurance Company ("American Empire") and Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company's Joint Motion to Intervene 5/22/17
- 34) Catalina London, Ltd.'s Motion for Limited Intervention 5/22/17
- 35) Non-Party Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company's Motion For Limited Intervention or Alternatively for Order of Protection of Rights 9/18/17

**Harbour Cove/Beach Villas Appellate Case No. 2017-002146**

- 36) Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company's Motion to Certify to the South Carolina Supreme Court Under Rule 204, SCACR 11/8/17
- 37) National Fire & Marine Insurance Company's Motion to Transfer Case to the Supreme Court 11/13/17
- 38) BITCO General Insurance Company's Motion to Transfer Case to the Supreme Court 11/20/17
- 39) South Carolina Court of Appeals' Order denying Motion to Dismiss Appeal 1/24/18
- 40) Supreme Court of South Carolina Order Granting Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, National Fire & Marine Insurance Company's and BITCO General Insurance Company's Motion to Certify the Appeals Pursuant to Rule 204(b), SCACR
- 41) Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance's Final Brief
- 42) Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance's Final Reply Brief
- 43) BITCO General Insurance Company's Final Brief
- 44) BITCO General Insurance Company's Final Reply Brief
- 45) Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company's Final Brief
- 46) Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company's Final Reply Brief
- 47) Selective Insurance Company of South Carolina's Final Brief
- 48) Selective Insurance Company of South Carolina's Final Reply Brief
- 49) National Fire & Marine Insurance Company's Final Brief
- 50) National Fire & Marine Insurance Company's Final Reply Brief

Exhibits 1-50 have been previously filed with Hartford Fire Insurance Company and Hartford Casualty Insurance Company's Supplemental Memorandum of Law in Support of their Motions to Intervene. As they have been previously filed, they are not included as exhibits on E-File in River Crossing and Tanglewood but are included in the Stipulation as if attached hereto.

### **Other Filings**

- 51) Transcript of hearing on April 25, 2019
- 52) Amended Summons and Complaint in Centex Homes v. Cypress Bend Condominium Association, et al., Case No. 2016-CP-26-6670, dated October 25, 2016

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

- 53) Plaintiff's Memorandum of Law in Opposition to Motions to Intervene filed April 24, 2019
- 54) 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 Scottsdale Insurance Company's Motion to Intervene filed April 18, 2019
- 55) 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 Exhibit 1 to Memorandum of Law in Opposition to Scottsdale Insurance Company's Motion to Intervene filed April 18, 2019
- 56) 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 Several Insurance Carrier's Motion to Intervene filed May 18, 2018
- 57) 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 Exhibit 1 to Memorandum of Law in Opposition to Several Insurance Carrier's Motion to Intervene filed May 18, 2018
- 58) 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 Hartford's Motion to Intervene filed December 15, 2017
- 59) 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 Exhibit 1 to Memorandum of Law in Opposition to Hartford's Motion to Intervene filed December 15, 2017

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

- 60) 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 filed April 24, 2019
- 61) 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 Exhibit 1 to Memorandum of Law in Opposition to Clarendon's Motion to Intervene filed April 24, 2019

- 62) Plaintiff's Memorandum of Law in Opposition to Motions to Intervene filed April 24, 2019
- 63) 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 Nationwide's Motion to Intervene filed January 22, 2018
- 64) 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 Exhibit 1 to Memorandum of Law in Opposition to Nationwide's Motion to Intervene filed January 22, 2018
- 65) 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 Selective's Motion to Intervene filed January 22, 2018
- 66) 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 Exhibit 1 to Memorandum of Law in Opposition to Selective's Motion to Intervene filed January 22, 2018
- 67) 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 Hartford's Motion to Intervene filed December 15, 2017
- 68) 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 Exhibit 1 to Memorandum of Law in Opposition to Hartford's Motion to Intervene filed December 15, 2017

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

- 69) 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 Several Insurance Carrier's Motion to Intervene filed May 18, 2018
- 70) 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 Exhibit 1 to Memorandum of Law in Opposition to Several Insurance Carrier's Motion to Intervene filed May 18, 2018

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

- 71) Plaintiff's Memorandum of Law in Opposition to Motions to Intervene filed April 24, 2019
- 72) 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 Several Insurance Carrier's Motion to Intervene filed March 1, 2018
- 73) 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 Exhibit 1 to Memorandum of Law in Opposition to Several Insurance Carrier's Motion to Intervene filed March 1, 2018

**Harbour Cove Condominium Association, et al. v. Centex Homes, et al., Civil Action No.: 2014-CP-26-7634; Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al., Civil Action No.: 2014-CP-26-06573; The Cypress Bend Condominium Association and The Cypress Bend Horizontal Property Regime v. Centex Homes, et al., Civil Action No.: 2014-CP-26-01226**

- 74) Plaintiff's Memorandum in Opposition to American Empire Surplus Lines Insurance Company and Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company's Joint Motion to Intervene filed September 28, 2017
- 75) Plaintiff's Memorandum in Opposition to Selective Insurance Company of South Carolina's Motion for Limited Intervention or Alternatively for Order of Protection of Rights (SCRCP 24) filed September 28, 2017
- 76) Plaintiff's Memorandum in Opposition to National Fire and Marine Insurance Company Motion for Limited Intervention Pursuant to Rule 24, SCRCP to Have Court Submit a Special Verdict Form and/or General Verdict Form Accompanied by Answer to Interrogatories Pursuant To Rule 49, SCRCP filed September 28, 2017
- 77) Plaintiff's Memorandum in Opposition to Harleysville Insurance Company N/K/A Nationwide Insurance Company's Motion for Limited Intervention or Alternatively for Order of Protection of Rights (SCRCP 24) filed September 28, 2017
- 78) Plaintiff's Memorandum in Opposition to BITCO General Insurance Corporation's Notice of 23) Motion and Motion to Intervene filed September 28, 2017
- 79) Plaintiff's Memorandum in Opposition to Hartford Fire Insurance Company and Hartford Casualty Insurance Company's Notice of Motion and Motion to Intervene filed September 28, 2017
- 80) Plaintiff's Memorandum in Opposition to Catalina London, Ltd.'s Motion For Limited Intervention filed September 28, 2017

**Harbour Cove/Beach Villas Appellate Case No. 2017-002146**

- 81) Final Brief of Respondent Harbour Cove Condominium Association

**Woodlands v. Centex; Case No. 2015-CP-26-04514 filed in 2015-CP-26-04513**

- 82) Plaintiffs' Memorandum in Opposition to Motions to Intervene

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

- 83) Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company's Motion to Intervene 4/24/19

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

- 84) Clarendon National Insurance Company as Successor by Merger to Clarendon America Insurance Company's Motion to Intervene 4/24/19

**Other Filings - Centex Homes v. The Cypress Bend Condominium Association, et al., Case No.: 2016-CP-26-6670**

- 85) Answer and Affirmative Defenses of Defendant American Empire Surplus Lines Insurance Company filed 11/28/16
- 86) Answer of Defendant Nationwide Mutual Fire Insurance Company to Plaintiff's Amended Complaint dated 1/6/17



- 87) Answer of The Harleysville Insurance Company to Plaintiff's Amended Complaint dated 1/6/17
- 88) Answer of Defendants BITCO General Insurance Corporation f/k/a Bituminous Casualty Corporation, BITCO National Insurance Company f/k/a Bituminous Casualty Corporation, BITCO General Insurance Corporation f/k/a Bituminous Ins. Co., BITCO National Insurance Company f/k/a Bituminous Ins. Co. to Plaintiff's Amended Complaint dated 1/4/17
- 89) Selective's Answer to Amended Complaint dated 1/6/17
- 90) Defendants Scottsdale Insurance Company and National Casualty Company's Answer to Plaintiff's Amended Complaint dated 1/11/17
- 91) Defendant's Hartford Casualty Insurance Company, Hartford Fire Insurance Company, Hartford Underwriters Insurance Company, and Property and Casualty Insurance Company of Hartford's Answer to Plaintiff's Amended Complaint dated 1/23/17
- 92) Clarendon National Insurance Company as successor in interest by merger to Clarendon American Insurance Company's Answer to Plaintiff's Amended Complaint dated April 12, 2017

**Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al., Civil Action No.: 2014-CP-26-06573**

- 93) Beach Villas at Ocean Keyes Property Owners Association, Inc.'s Memorandum in Opposition to Motion to Intervene filed September 27, 2017

The parties so agree and stipulate.

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2019-001053

RECEIVED

APR 06 2020

S.C. SUPREME COURT

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.

Agreement and Stipulation Regarding the Record on Appeal

Pursuant to Rule 261, SCACR, Appellants-Intervenors' 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, and First Mercury Insurance Company (the "Insurers"); Hartford Fire Insurance Company and Hartford Casualty Insurance Company ("Hartford"); Plaintiffs-Respondents The Havens Condominium Association, The River Crossing Condominium Association, The Tanglewood Condominium Association, The Woodlands Condominium Association, and Vincent J. Tamburro (collectively, "Plaintiffs"); and 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 ("Centex") submit the following agreement and stipulation for the Court's consideration regarding the record on appeal.

The purpose of this agreement is to limit the volume of materials included in the record on appeal so that the parties need not submit duplicative materials from the four underlying actions. Doing so will aid the Court and the parties in managing the appeal.

In furtherance of this goal, the parties agree:

1. This appeal arises from four separate construction defect actions against Centex and others filed in 2015: (1) *The Havens Condominium Association v. Centex Homes, et al.*, Case No. 2015-CP-26-00118 (the "Havens Lawsuit");<sup>1</sup> (2) *The River Crossing Condominium*

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<sup>1</sup> In February 2020, the parties to this construction defect Havens Lawsuit settled all claims. The parties on appeal intend to proceed with the appeal regarding the River Crossing Lawsuit, the Tanglewood Lawsuit and the Woodlands Lawsuit, which remain pending in the Horry County Court of Common Pleas.

*Association, et al. v. Centex Homes, et al.*, Case No. 2015-CP-26-00279 (the “River Crossing Lawsuit”); (3) *The Tanglewood Condominium Association v. Centex Homes, et al.*, Case No. 2015-CP-26-02718 (the “Tanglewood Lawsuit”); and (4) *The Woodlands Condominium Association v. Centex Homes, et al.*, Case No. 2015-CP-26-04514 (the “Woodlands Lawsuit”). The Insurers timely appealed to the Court of Appeals, which consolidated the four cases on appeal before the Court certified the case under Rule 204(b), SCACR.

2. The four actions were not consolidated before the trial court; however, the trial court did entertain motions to intervene filed by the Insurers at the same time and based on the same arguments made across the four matters. In those matters, the Insurers filed substantially the same motions to intervene, which were filed in duplicate in the four actions below. In addition, the Insurers joined in the arguments made by Hartford in its memorandum in support filed on December 8, 2017, and its supplemental memorandum in support filed on April 24, 2019. The two memoranda were filed in duplicate in each of the four matters.

3. In response, Centex filed a memorandum in opposition on April 18, 2019, which it duplicated across the four matters. Likewise, Plaintiffs filed a memorandum in opposition on April 24, 2019, which they duplicated across the four matters.

4. Before the trial court, the parties stipulated to the agreed record before the trial court, which incorporated certain filings and arguments made in similar actions. (*See Stipulation and Agreement of Record for Hearing on Motions to Intervene*, June 5, 2019.) This stipulation was filed in all four matters below. The materials set forth in the stipulated record would total roughly 700 pages.

5. To avoid duplication of materials on the record on appeal, the parties agree and stipulate that the record should consist of the following documents—all of which were filed in *The*

*River Crossing Condominium Association, et al. v. Centex Homes, et al.*, Case No. 2015-CP-26-00279, unless otherwise noted—that were filed in substantially similar fashion across the four matters below:

**ORDERS**

- Judge Newman’s Order denying Motions to Intervene, June 21, 2019

**PLEADINGS**

*River Crossing Lawsuit (Representative of Four Consolidated Cases, Horry County, SC)*

- Summons and Complaint, January 13, 2015
- Amended Summons and Complaint, February 13, 2015
- Answer to the Amended Complaint by Centex, February 27, 2015

*Coverage Declaratory Judgment Action (Centex v. Cypress Bend, No. 2016-CP-26-06670)*

- Summons and Complaint (without exhibits), October 19, 2016
- Amended Summons and Complaint (with Exhibits A, K and L), October 25, 2016
- Answer (without exhibits) by American Empire Surplus Lines Insurance Company, December 13, 2016
- Answer (without exhibits) by BITCO General Insurance Corporation, January 4, 2017
- Answer (without exhibits) by Clarendon National Insurance Company, Successor by Merger to Clarendon America Insurance Company, April 12, 2017
- Answer (without exhibits) by Harleysville Insurance Company n/k/a Nationwide Insurance Company, January 6, 2017
- Answer (without exhibits) by Selective Insurance Company, January 6, 2017
- Answer (without exhibits) by Hartford, January 23, 2017
- Answer (without exhibits) by First Mercury and Crum & Forester, February 3, 2017

**TRANSCRIPTS**

- Transcript of Motion to Intervene Hearing dated April 25, 2019.

- Transcript of Motion to Intervene Hearing dated September 27–28, 2017.<sup>2</sup>

### **MOTIONS**

- Hartford Fire Insurance Company and Hartford Casualty Insurance Company Motion to Intervene, filed December 8, 2017.
- Selective Insurance Company of South Carolina's Motion for Limited Intervention or Alternatively For Order of Protection of Rights, filed December 18, 2017.
- Harleysville Insurance/Nationwide Motion for Limited Intervention or Alternatively For Order of Protection of Rights, filed December 18, 2017.
- BITCO General Insurance Corporation's Motion for Limited Intervention or Order for Protection of Rights, filed December 21, 2017.
- Crum & Forester Specialty Insurance Company's and First Mercury Insurance Company's Motion to Intervene, filed February 27, 2018.<sup>3</sup>
- American Empire Surplus Lines Insurance Company Motion to Intervene, filed May 3, 2018.
- Clarendon National Insurance Company, Successor by Merger to Clarendon America Insurance Company's Motion to Intervene, filed May 8, 2018.

### **MEMORANDA OF LAW**

- Hartford Fire Insurance Company and Hartford Casualty Insurance Company's Memorandum of Law in Support of Motion to Intervene, filed December 8, 2017.<sup>4</sup>
- Centex's Memo in Opposition to Insurance Carriers Motions to Intervene (with Exhibit A), filed April 18, 2019.
- Centex's Memo in Opposition to Several Insurance Carriers' Motions to Intervene (with Exhibit A), filed May 18, 2018;

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<sup>2</sup> This transcript is from *Cypress Bend Condominium Assoc. v. Centex Homes*, Civil Action No. 2014-CP-26-01226, *Harbour Cove Condominium Association, et al. v. Centex Homes, et al.*, Civil Action No. 2014-CP-26-7634, and *Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al.*, Civil Action No. 2014-CP-26-06573, and was incorporated into the record below by stipulation of the parties.

<sup>3</sup> This document was filed in the Havens Lawsuit only. The Havens Lawsuit is the only case of the four underlying cases involving Appellants Crum & Forester Specialty Insurance Company and First Mercury Insurance Company.

<sup>4</sup> The parties agree to omit Exhibit A from the memorandum.

- Centex's Memo in Opposition to Hartford's Motion to Intervene (with Exhibit A), filed December 15, 2017;
- River Crossings's Memo in Opposition to Insurance Carriers Motions to Intervene, filed April 24, 2019.
- Hartford Fire Insurance Company and Hartford Casualty Insurance Company's Supplemental Memorandum of Law in Support of Motion to Intervene, filed April 24, 2019.<sup>5</sup>

#### **NOTICES OF APPEAL<sup>6</sup>**

- Hartford Casualty Insurance Company and Hartford Fire Insurance Company Notice of Appeal, filed June 27, 2019.
- BITCO General Insurance Corporation's Notice of Appeal, filed July 18, 2019.
- Harleysville Insurance and Nationwide's Notice of Appeal, filed July 19, 2019.
- Selective Insurance Company of South Carolina's Notice of Appeal, filed July 19, 2019.
- Crum & Forester Specialty Insurance Company and First Mercury Insurance Company's Notice of Appeal, filed July 22, 2019.
- American Empire Surplus Lines Insurance Company Notice of Appeal, filed July 22, 2019.
- Clarendon National Insurance Company Notice of Appeal, filed July 22, 2019.

#### **MISCELLANEOUS**

- Stipulation and Agreement of Record for Hearing on Motion to Intervene, June 6, 2019.<sup>7</sup>
- This Agreement and Stipulation Regarding the Record on Appeal.

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<sup>5</sup> The parties agree to omit the exhibits from this supplemental memorandum.

<sup>6</sup> The parties agree to omit the notices of appeal filed in the other cases because those notices of appeal were substantially the same and were all filed on the same day.

<sup>7</sup> The parties agree to omit exhibits to the stipulation.

6. The parties agree that it would be unnecessary to include copies of each filing from each of the four cases below. The parties further agree that the arguments set forth in their motions and memoranda were made in each of the four cases below.

7. The parties' counsel certify, pursuant to Rule 209(c), SCACR, that this agreement should control in lieu of any designations of matter filed by the parties, and that the documents set forth in paragraph 5 contain no matter which is irrelevant to the appeal.

8. The parties stipulate that limiting the number of documents included in the record on appeal as set forth in paragraph 5 would promote the orderly administration of justice and would focus the record to those issues on appeal.

#### **Conclusion**

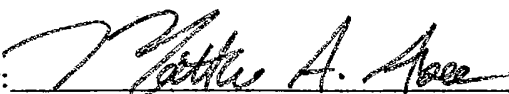
Therefore, the Insurers, Plaintiffs, and Centex agree that, to reduce the size of the Record on Appeal, the parties shall limit the record to those documents set forth in paragraph 5, above. The parties respectfully request that the Court accept the parties' agreement and stipulation, and that the Insurers' be ordered to file the Record on Appeal containing only the matters set forth in paragraph 5 according to the timeframes established under Rule 210, SCACR.

**[Signatures on following page.]**



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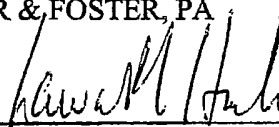
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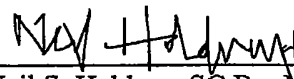
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April 1, 2020

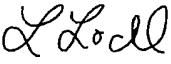
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THE STATE OF SOUTH CAROLINA  
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APPEAL FROM HORRY COUNTY  
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Ex. Parte: Hartford Fire Insurance Company, Hartford Casualty Insurance Company, American 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:

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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,

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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.

---

**Certificate of Counsel**

---

Counsel listed below certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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THE STATE OF SOUTH CAROLINA  
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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**

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I, the undersigned associate of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Harleysville Insurance Company n/k/a Nationwide Insurance Company and Selective Insurance Company, certify that I have served all counsel in this action with a copy of the document set forth below by emailing a copy to all counsel of record using the attorneys' AIS email addresses set forth below:

Pleadings:     **Consolidated Record on Appeal (Volumes I and II)**

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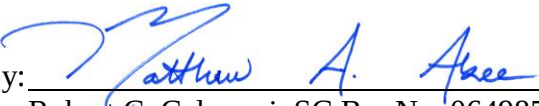
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