THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman
Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

Trial Court Case No. 2015-CP-26-002718
Appellate Case No. 2019-001055

Ex Parte: Hartford Fire Ins. 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, Plaintiffs

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.

FINAL BRIEF OF RESPONDENT CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP

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I. Do the limited holdings of Auto Owners Insurance Company, Inc. v. Newman and Harleysville Group Insurance v. Heritage Communities, Inc. reverse the longstanding and well-settled rule established by Sims v. Nationwide Insurance Company and require insurer intervention in a liability action to preserve the right to an allocated verdict?

II. Does Rule 24 of the South Carolina Rules of Civil Procedure and South Carolina law permit quasi-intervention by insurers into a liability action?

COUNTERSTATEMENT OF THE CASE

This matter arises from a consolidated appeal by several insurance companies of the trial court's order denying their efforts to intervene in a collection of construction defect actions alleging deficiencies in the work performed by the insurance companies' respective named and additional insureds (the "Order"). Appellants, collectively comprised of nine insurance companies, filed motions to intervene in four separate construction defect actions for the limited purposes of introducing special verdict forms or juror interrogatories in order to allocate any potential verdicts against their respective insured(s) between covered and uncovered damages (the "Motions to Intervene"). After hearing the Motions to Intervene in a consolidated motion with an agreed-upon record, the Honorable Clifton Newman denied the Motions to Intervene. This appeal of the Order followed.

A. The Underlying Actions

The actions that comprise this appeal involve four separate construction defect lawsuits pending in Horry County. Respondent Centex Homes, a Nevada general partnership ("Respondent"), the developer and general contractor for these projects, as well as its various subcontractors, have been sued for alleged defects in the development and construction of the Havens, River Crossing, Tanglewood, and Woodlands condominium projects (the "Underlying Actions"). In said Underlying Actions, the respective plaintiffs have alleged that defects occurred

at the respective condominium projects as a result of the work of Respondent and its subcontractors. Respondent subsequently filed cross-claims against the existing subcontractor defendants as well as a third-party complaint against additional subcontractors. Since the filing of the Underlying Actions in 2015, these cases have matriculated through the circuit court for several years and have been the subject of extensive written and deposition discovery, motions practice, and mediations.

B. The Policies and Declaratory Judgment Action

Appellants are insurers that issued commercial general liability ("CGL") policies to several subcontractors named as defendants and third-party defendants in the Underlying Actions. As part of the development and construction of the subject condominium projects, each of the subcontractor defendants entered into subcontracts with Respondent to perform work on the project(s), which subcontracts contained requirements that the respective subcontractor(s) procure insurance coverage specifically naming Respondent as an additional insured.

In 2016, Respondent initiated a Declaratory Judgment Action[1] in the Horry County Court of Common Pleas against Appellants[2] seeking a declaration that Respondent qualified as an additional insured under the CGL policies (the "Policies") to certain subcontractor defendants (the "Subcontractors") and is entitled to a defense and indemnity under such policies with respect to the Underlying Actions. Among other things, Respondent requests in its Amended Complaint in the Declaratory Judgment Action:

[1] Centex Homes, a Nevada Partnership v. The Cypress Bend Condominium Association, et al. Case No. 2016-CP-26-6670 (the "Declaratory Judgment Action").

[2] The subcontractors and plaintiffs in the Underlying Actions are named in the Declaratory Judgment action as interested parties.

h. That the POLICIES were in full force and effect at all times relevant to the claims asserted by CENTEX against Subcontractors;

i. That any and/or all of the damages and/or claims referenced in the Underlying Actions filed by the Associations against CENTEX represent covered losses under the POLICIES;

(R.p.198; WHEREFORE clause, Count I – Declaratory Judgment). In the Declaratory Judgment Action, also currently pending before the Honorable Clifton Newman, Appellants plead various coverage defenses and specifically request allocations of covered versus uncovered damages of any verdicts in the Underlying Actions which may be returned against their insureds, both the named insured Subcontractors and Respondent Centex as an additional insured.

C. Procedural Posture

Despite the pendency of the Declaratory Judgement Action in which the parties are actively litigating the insurance coverage issues raised by the Underlying Actions, including Appellants' duties to defend and indemnify, in 2017, Appellants filed the Motions to Intervene in the Underlying Actions for the limited purpose of seeking an allocated verdict through special interrogatories and/or verdict forms. Judge Clifton Newman heard the various Motions to Intervene in the Underlying Actions in a consolidated hearing and based on a jointly-submitted record. On June 21, 2019, the Court issued the Order denying Appellants' Motions to Intervene. The trial court determined the Supreme Court's decision in Harleysville Grp. Ins. v. Heritage Communities, Inc. did not "mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms." (R.p.6; Order at 6). The trial court further concluded Appellants failed to meet the elements of intervention pursuant to Rule 24, SCRCP. (Id.). Appellants have appealed Order in two parts with Appellants Hartford Fire Insurance

Company and Hartford Casualty Insurance Company ("Appellant Hartford") filing a Brief separate from the collective Brief filed by the remaining Appellant insurers ("Appellants").

STANDARD OF REVIEW

The decision to grant or deny a motion to intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court. *Ex parte* Gov't Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007) citing Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). "This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law." Jeter v. South Carolina Dep't of Transp., 369 S.C. 433, 633 S.E.2d 143, 146 (2006). "An abuse of discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." Richland Cty. v. S.C. Dep't of Revenue, 422 S.C. 292, 307, 811 S.E.2d 758, 766 (2018) (citations omitted). "Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." Jeter, 369 S.C. at 433, 633 S.E.2d at 146.

ARGUMENT

Appellants seek to overturn the trial court's discretionary denial of several Motions to Intervene and alter well-settled South Carolina law requiring insurance coverage issues to be litigated separately from an insured's liability to a plaintiff.

Appellant Hartford's appeal of the denial of its Motion to Intervene seeks clarification of this Court's Opinions in Newman and Harleysville and does not advocate the same pro-intervention positions propounded in Appellants' Brief. As discussed in detail herein, Respondent disagrees with Appellant Hartford's conclusions that Newman and Harleysville have created

"uncertainty in the law." (Hartford Br. p4). However, Respondent joins in Hartford's request that the Court conclude "intervention in an underlying construction defect action is not mandatory, and that a reservation of rights letter issued in accordance with Harleysville is sufficient to preserve the right to allocate between covered and uncovered damages in a separate declaratory judgment action." (Hartford Br. p.13).

In contrast to Appellant Hartford's arguments, Appellants have challenged the Order and defended their collective Motions to Intervene. Despite Appellants' arguments in favor of intervention, their Brief concludes with an invitation to the Court to enter a ruling "modifying" Newman and Harleysville and a request to "return" to the holding in Sims. (App. Br. pp.24-33). Appellants admit their proposed structure of allowing an insurer to intervene in an underlying action – the denial of which they are appealing – is not a workable practice and is contrary to well-settled law requiring a separate action for litigating coverage questions. (App. Br. p.25). Moreover, Appellants acknowledge the inherent conflicts that intervention creates by and between their insureds and defense counsel. (App. Br. p.32). In sum, despite their arguments in favor of intervention, Appellants ultimately join Appellant Hartford and request the Court uphold the long-standing rule that allocation of a verdict should be determined in a separate coverage action. (App.Br.p.33)

As a result, Respondent respectfully submits that there is agreement among the parties that intervention is an unfavorable method to preserve the ability to seek an allocated verdict and that current law precludes insurer intervention in liability actions to raise coverage defenses. In short, reaffirmation of Sims is the only workable method that preserves the integrity of the jury trial of the Underlying Actions, protects judicial resources, and ensures that all parties have a single fair and adequate forum to litigate the issues. However, because Appellants have submitted a detailed

brief in favor of intervention that Respondent believes necessitates a substantive response, including a discussion of Appellants' improper expansion of the Newman and Harleysville decisions, Respondent offers this defense of the Trial Court's denial of the Motions to Intervene and the Order's well-settled conclusion that Appellants are limited to pursuing their coverage defenses as previously plead in the separate pending Declaratory Judgment Action.

I. The Trial Court Did Not Err In Denying Appellants' Motions to Intervene.

Insurers, including Appellants, owe their additional insureds and named insureds both the duty to defend and the duty to indemnify. Those duties are distinct: indemnity contemplates merely the payment of money and the agreement to defend contemplates the rendering of services. See Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) (stating the duty to defend is separate and distinct from the obligation to pay a judgment rendered against the insured). A liability insurer must defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy. USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (citations omitted). The duty to defend is established by the allegations in the Complaint and is broader than the duty to indemnify. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). The duty to indemnify arises when a judgment is rendered against an insured, at which time, the insurance policies are subject to the general rules of contract construction. See B.L.G. Enterprises, Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). The insured bears the initial burden of establishing damages are covered under the terms of the policy. Once coverage is established, the burden shifts to the insurer to prove any policy terms or exclusions prohibit coverage.

It is well settled in South Carolina that the determination of an insured's liability to a plaintiff must be litigated separately from any dispute between an insured and insurer as to the duty to indemnify. In other words, South Carolina law maintains a clear separation between litigation on the merits of a plaintiff's claim for damages and the applicability of insurance coverage for those damages. In the landmark case of Sims, the Supreme Court determined a clear conflict of interest exists when an insurer attempts to simultaneously provide a defense under the duty to defend, but also seeks to litigate its coverage position in an effort to alleviate its obligations under the duty to indemnify. Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 85, 145 S.E.2d 523, 524 (1965) (holding "a clear conflict of interests between insurer and insured would have been presented, and the insurer could not in that action have undertaken to assert its defense and at the same time defend the insured against [plaintiff's claims].").

The application of Sims protects an insured from fighting a two-front battle of defending against liability and concurrently being forced to establish that the damages claimed against it are covered by insurance. This arrangement pronounced by Sims, that litigation over the duty to indemnify must be conducted in a separate action from the defense of an underlying action, benefits the insured, and also provides a clear advantage to the insurer. Under Sims, "the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract. . . . to hold otherwise would be to estop the Insurance Company by the by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance." Sims, 247 at 86–87, 145 S.E.2d at 525. To reiterate this point, the Sims Court cited the Restatement of the Law of Judgment, which provides that judgment against an insured does not decide issues

as to the existence of the duty to indemnify, but the insurer may show in a subsequent action that a duty to indemnify does not exist. Id.

The holding of Sims – that it is not feasible for an insurance company to effectively defend the insured, and at the same time seek to protect its own interests – has remained the law of South Carolina for over fifty years. The progeny of Sims is a body of case law in which insurers and insureds, particularly in the construction defect context, litigate coverage disputes in declaratory judgment actions wholly separate from the underlying dispute between a plaintiff and insured. Until recently, the application of Sims and the well-settled arrangement of separate suits for liability and coverage has not been the subject of controversy. However, as outlined in Appellants' Brief, insurers are challenging this principle by seeking to interject the Underlying Action with complex coverage questions that, as in this instance, are already the subject of a separate, pending declaratory judgment action.

Appellants contend the Opinions in Newman and Harleysville reflect a fundamental transformation in the handling of coverage disputes and represent this Court's intentional departure from the Sims arrangement. As a result, Appellants have taken unprecedented efforts to interject their coverage defenses into the Underlying Actions– the very practice Sims declared was inappropriate. Appellants' efforts to intervene in the liability actions is not only counter to the well-settled law set forth by Sims, but is wholly unsupported by case law, the Rules of Civil Procedure, and this Court's Opinions in Newman and Harleysville. For the reasons set forth herein, this Court should affirm the Trial Court's well-reasoned denial of Appellants' Motions to Intervene and to the extent necessary, reaffirm the Sims arrangement of a separate action for coverage disputes.

A. The Newman and Harleysville Opinions do not Require Intervention.

The Trial Court properly concluded that Harleysville "does not mandate that the [Appellants] have a right to intervene." (R.p.6; Order p.6). Despite the same, Appellants purport to rely on Harleysville and this Court's earlier Opinion in Newman for their conclusion that, absent intervention in an underlying liability action to request a special verdict, insurers are barred from obtaining an allocation of covered and non-covered damages. However, Newman and Harleysville do not support this conclusion; rather, the respective holdings in those cases are consistent with Sims.

i. Newman Does Not Necessitate or Require Intervention.

Newman results from the appeal of a declaratory judgment action determining the applicability of insurance coverage of an itemized arbitration award delivered in a previously-arbitrated construction defect dispute. The Court's Opinion effectively determined that exclusions in the policy left portions of the arbitrator's award covering removal and replacement of defective stucco uncovered. However, the Court ultimately concluded the following:

> Nevertheless, 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, 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.[5] *See Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.").

Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). In their conclusion, the Majority elaborated, "there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco." Id. The Court explained in a footnote that while the insurer represented its insured under a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a

separate proceeding, the carrier ultimately did not seek review of or otherwise contest the damages award. Id.

Appellants argue Newman supports their broad proposition that failure to intervene to request an allocated verdict in an underlying action will result in the presumption that all damages, whether covered or uncovered, will be the responsibility of the insurance carrier. This is not the holding of Newman. The Court did not decide Newman in favor of the insured based on the insurer's failure to intervene in the underlying arbitration. Id. Rather, the Court concluded the record before it, inclusive of the Record on Appeal from the arbitration and the evidence presented in the declaratory judgment action, was insufficient to allocate the arbitrator's award and isolate any non-covered damages. Id. Based on the Court's conclusion that the Record before it was devoid of sufficient evidence to parse the uncovered damages from an itemized award, it appears the insurer did not take steps in the declaratory judgment action to request a finding of fact, present expert or other testimony, depose the arbitrator, or any take other action to develop a record sufficient to allocate the award and prove its case in the coverage action. Id. Moreover, the Court alludes to the specific nature of its ruling in footnote 5 by stating the insurer did not seek review of or otherwise contest the arbitrator's damages award. Id. In other words, the insurer did not take action *after* the arbitrator's award to clarify the award. Additionally, it is worth noting that the underlying action in Newman was an arbitration, and the procedural posture and applicable rules render the Newman factually distinguishable from this appeal.

Newman does not alter this Court's holding in Sims nor does it suggest that an insurer waives its right to pursue an allocated verdict in a separate action by failing to intervene in an underlying liability suit. Instead, on the issue of allocation, Newman presents a case-specific holding that the insurer failed to develop or present an adequate record for allocation in that case.

ii. Harleysville Does Not Necessitate or Require Intervention.

Appellants have extrapolated Harleysville to a conclusion absent from the Majority Opinion: intervention in an underlying construction defect action is mandatory to preserve the right to allocate between covered and uncovered damages in a separate declaratory judgment action. Harleysville makes no such pronouncement. Harleysville does not speak to intervention, much less require it. Rather, Harleysville reaffirms a simple principle that, in order for an insurer to challenge a verdict on the basis of covered versus uncovered damages, the insurer must properly reserve its rights through a sufficient reservation of rights letter to its insured.

Harleysville deals with cross-appeals from a declaratory judgment action to determine coverage under several Commercial General Liability insurance policies issued by Harleysville Group Insurance ("Harleysville Group"). Harleysville, 420 S.C. 321, 328, 803 S.E.2d, 288, 292. Harleysville Group provided a defense to its named insured ("Heritage") in two underlying construction defect actions. Id. at 330, 803 S.E.2d at 293. General and punitive damage verdicts were rendered against Heritage and, as contemplated in Sims, subsequent declaratory judgment actions were instituted to parse the coverage issues. Id. at 331-32, 803 S.E.2d at 293-94. The Special Referee in the declaratory judgment action found that coverage was triggered under the juries' general verdicts, but also noted that certain uncovered damages were encapsulated therein. Id. at 332, 803 S.E.2d at 294. However, the Special Referee abstained from allocating the verdict because Harleysville Group failed to reserve its right to contest coverage. Id. Accordingly, the Special Referee ordered Harleysville Group to indemnify Heritage the full actual damages award, less an allocation under a time-on-risk analysis. Id.

On appeal, this Court was presented with the question of whether a reservation of rights letter that merely provides the insured with a copy of the policy, coupled with a general statement

that the insurer reserves all of its rights, is sufficient to reserve its rights to contest coverage in a subsequent declaratory judgment action. Id. at 336, 803 S.E.2d at 296. The Court concluded it is not. Id. The Harleysville Opinion provides a primer on an insurer's obligations "to give fair notice to the insured that the insurer intends to assert defenses to coverage or to pursue a declaratory relief action at a later date." Id. at 321, 803 S.E.2d at 297 (quoting United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp., 948 F.Supp. 263, 268 (S.D.N.Y. 1996)).

In support of its holding the Majority Opinion noted that:

> Significantly, none of the reservation letters advised Heritage of the need for allocation of damages between covered and non-covered losses or referenced a possible conflict of interest or Harleysville's intent to pursue a declaratory judgment action following any adverse jury verdicts in the underlying lawsuits. "The right to control the litigation carries with it certain duties," including "the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages." Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491, 1498 (10th Cir. 1994) (citations omitted) (explaining "[i]f the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories" (citing Duke v. Hoch, 468 F.2d 973, 979 (5th Cir. 1972))). Therefore, by "virtue of its duty to defend, an insurer gains the advantage of exclusive control over the litigation," and "it would be unreasonable to permit the insurer to not disclose potential bases for denying coverage." Id. (internal citations and quotation marks omitted).

Id. at 341, 803 S.E.2d at 299.

Appellants contend this passage embodies this Court's broad pronouncement that "[i]f the record does not contain an allocation of the verdict between covered and non-covered damages, then courts must presume that all of the damages are for covered risks notwithstanding the insured's burden of proving that coverage exists[]" and that an insurer "must take additional action to preserve evidence about the verdict for a court in a subsequent coverage action to allocate a general verdict between covered and non-covered damages." (App. Br. p.13). However, these broad conclusions suggested by Appellants are not reached by Court. The Court never spoke to or

considered the need for an insurer to intervene in a liability action to request an allocated verdict, but simply ruled, due to the inadequate reservation of rights letters, "Harleysville failed to reserve the right to contest coverage of actual damages." Harleysville, 420 S.C. at 358, 803 S.E.2d at 309.

Respondents respectfully submit that if this Court intended to upend over fifty years of law and the well-settled arrangement of separate liability and coverage actions established by Sims it would have done so more directly. Appellants' suggestion that this Court's affirmation of the Harleysville Special Referee's order endorses the intervention model is inconsistent with the Court's Opinion. While the Harleysville Opinion affirms the Special Referee's decision to not allocate the verdict between covered and uncovered damages as requested by the carrier, it does so on the clearly stated basis of the insurer's inadequate reservation of rights letter. The Harleysville Opinion and affirmance of the Special Referee's decision is not a tacit approval of the entire order making it the law of the state. The Supreme Court's decision – not the Special Referee's order – is the controlling precedent at issue, and Appellants' intervention model is not discussed and certainly not prescribed as the law in South Carolina.

Moreover, not only does Harleysville not contain the holding Appellants advocate, the Harleysville decision is in direct contrast to the result Appellants submit. Specifically, the Harleysville trial court rejected the premise asserted by the plaintiff in the underlying defect action that because the jury rendered "general verdicts," Harleysville Group would be on the hook for the entire award. Instead, this Court affirmed the special referee's *allocation of the general verdict* (with some modifications). Contrary to Appellants' arguments, Harleysville demonstrates that a general verdict can be allocated in a subsequent declaratory judgment action. Here, just as in Harleysville, the court presiding over a subsequent declaratory judgment action can hear evidence, including expert testimony, on issues relating to coverage and allocate a jury's general verdict.

Newman and Harleysville do not represent a break from established law, nor do they require insurer intervention to request an allocation to avoid waiving coverage defenses. Rather, these Opinions are simply cautionary tales of specific insurers that respectively failed to present a proper record to the Court and failed to adequately reserve its rights. Moreover, Harleysville expressly provides an example of an insurer successfully obtaining an allocation of a general verdict through the presentation of evidence to the trial judge or special referee in a subsequent declaratory judgment action – no intervention required. Harleysville, 420 S.C. at 350-351, 803 S.E.2d at 304-305. Accordingly, the holdings of Newman and Harleysville do not obviate the longstanding rule of Sims or require insurer intervention in a liability action to preserve the right to an allocated verdict. To the contrary, Appellants need to look no further than these cases to identify the proper means to litigate any available and applicable coverage defenses to a verdict in the Underlying Actions, is in the pending Declaratory Judgment Action.

II. The Trial Court Properly Applied the Law of Intervention in the Denial of Appellants' Motions.

In its well-reasoned denial of Appellants' Motions to Intervene, the Trial Court properly considered the true holdings of Harleysville and Sims –which is more than a sufficient basis under an abuse of discretion standard to affirm the Order. However, the Trial Court went further in its analysis and provided detailed legal reasoning why intervention under Rule 24 of the South Carolina Rules of Civil Procedure was improper. This Court should affirm the Trial Court's Order under those grounds.

Under Rule 24, SCRCP, the Trial Court determined Appellants lacked "an interest in the property that is the subject of each of the actions, the Condominium project at issue in each case." (R.p.5; Order p.5). The Trial Court concluded Appellants' interest arise solely out of its contract of insurance and those interests are not proper for interjection into a liability action. (R.pp.5-7;

Order pp.5-7). The Trial Court relied on Sims and cited to the impermissible conflict in determining coverage issues in a liability action and maintained the well-settled law that coverage disputes belong in a separate declaratory judgment action. (R.pp.6-7; Order pp.6-7). The Trial Court did not abuse its discretion in the denial of these motions.

Rule 24, SCRCP, prescribes under what conditions intervention in a pending action is appropriate. Under the Rule, intervention may be permitted as of right or permissively. Subsection (a) of the Rule governs intervention of right under these grounds:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he 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.

Permissive intervention, under subsection (b) sets forth in relevant part the following parameters for intervening in an action:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24, SCRCP.

A. The Trial Court Properly Concluded that Appellants Lack Standing to Intervene.

Appellants contend that the Trial Court's ruling is in error due to the Court's failure to employ a liberal and expansive view of intervention. Specifically, Appellants contend that their interest in determining whether any portion of a potential judgment against one of their insureds is covered or non-covered equates to a "real, actual, material, or substantial interest" in the Underlying Actions. (App. Br. p.17).

While the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties, a non-party insurer has standing to intervene under Rule 24, SCRCP only if it has a personal stake in the subject matter of a lawsuit and is a "real party in interest." GEICO, 373 S.C. at, 138, 644 S.E.2d at 702 (citing Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 190, 394 S.E.2d 712, 714 (1990)); Bailey v. Bailey, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994). "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. (citations omitted). This Court has held, "intervention is only appropriate where the party seeking intervention has 'a real proprietary interest in the subject matter of the proceedings,' and interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." GEICO, 373 S.C. at 139, 644 S.E.2d at 703 (quoting Bailey, 441 S.E.2d at 325).

The liberal view of intervention called for by Appellants does not negate the requirement that a non-party's interest must be determined in relation to the overall subject matter of the action and not in relation to the particular issues before the court. Berkeley Elec., 394 S.E.2d at 714. Even under a liberal application of Rule 24, SCRCP, the overall subject matter of the Underlying Actions is not insurance coverage – as correctly noted by the Trial Court, it is the purported construction defects in the condominium projects and whether Appellant's insureds were negligent and/or breached warranties in performing construction work at the condominium projects.

The Trial Court's finding that "[i]ntervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case" is consistent with prior rulings of this Court. (R.p.6; Order p.6). In GEICO, this Court affirmed the family court's denial of insurer's motion to intervene and held that an insurer, which denied its insured's claim to stack coverage on

the grounds 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 he could stack coverage as a Class I insured. Id. In denying the insurer's motion to intervene, this Court held 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," and a monetary interest was "insufficient to warrant GEICO's intervention. Id. at 138-39; 644 S.E.2d at 702.

As was the case in GEICO and as the Trial Court here rightly noted, Appellants do not have an interest in the property that is the subject of this action: the condominium buildings at issue. Nor do Appellants have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the condominium buildings. Instead, Appellants' interest arises solely out of its contract of insurance, and is, therefore, merely peripheral and not part of the real interest at stake. Because the Appellants' interest in the Underlying Actions is a peripheral, monetary interest alone, the trial Court properly concluded that Appellants lack standing to intervene under Rule 24, SCRCP.

i. Neither Rule 24 Nor Any Other Rule of South Carolina Civil Procedure Expressly Permits the "Limited Intervention" Requested by Appellants.

Liberal interpretation of the intervention requirements also does not allow a non-party to intervene as a quasi-party. Specifically, Appellants are seeking to intervene for the "limited purpose" of submitting special interrogatories and/or special verdict forms to the jury. (App. Br. p.14). Appellants are admittedly not requesting status as actual parties to the Underlying Actions and have expressly requested that their involvement be concealed from the jury. While they seek to intervene in the Underlying Actions to submit coverage issues for determination by the jury, Appellants wish to do so in some unnamed, discovery-exempt capacity.

Notably, Appellants have not submitted any case law or rule that would allow this method of quasi-intervention. That is likely because the law provides that intervention "is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a *party* to the action. In re Horry Cty. State Bank, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) (citing See Black's Law Dictionary 826 (7th ed.1999) (emphasis added)). Appellants are not seeking to be parties to the action, in which they would answer or prosecute claims, but, rather, wish to assume the role of an incognito quasi-party to submit coverage questions to juries in construction defect matters without the burdens of litigation including discovery. Such an arrangement is not contemplated by Rule 24, SCRCP.

Appellant's request for so-called "limited intervention" highlights that Appellants' interest is not in the subject matter of the Underlying Actions as required by Rule 24, SCRCP. Rather, Appellants' concern with the Underlying Actions derives solely from their contracts of insurance and their coverage defenses, which are already preserved in and the subject of the pending Declaratory Judgment Action. In sum, Appellants are not seeking intervention into these actions as a party or to protect an interest permitted by Rule 24, SCRCP, and, therefore, the Trial Court properly determined that "Appellants lack the necessary standing to intervene" and the manner of intervention sought by Appellants is not permitted under "Rule 24 of the South Carolina Rules of Civil Procedure." (R.p.5; Order p.5).

B. The Trial Court Correctly Denied the Motions to Intervene Because Appellants Will Not Be Impaired or Impeded From Protecting Their Interests.

As stated above, the Trial Court properly determined that the Appellants' interests in the Underlying Action are insufficient to support intervention under Rule 24, SCRCP. Moreover, the Trial Court correctly denied the Motions to Intervene because it determined that Appellants "can

satisfactorily protect any purported interests they may have in a separate declaratory judgment action," including the pending Declaratory Judgment Action.

Appellants contend that their ability to defend against indemnifying their insureds for purported non-covered damages will be "lost altogether" if intervention is denied. (App. Br. p.18). Appellants' argument on this point hinges on their misguided view that absent intervention, an insurer's ability to allocate whether damages rendered by a jury are covered or un-covered is waived. Such a conclusion is not supported by South Carolina case law. Rather, as noted supra, Sims, Newman and Harleysville teach that allocation of verdict, even one general in nature, is possible so long as, potentially among other things, an insurer sufficiently reserves its rights and establishes a satisfactory record in the declaratory judgment action.

Where, as here, the issues of whether covered versus uncovered damages are already pending before the trial court in the Declaratory Judgment Action, there is no risk of waiver by Appellants. In fact, Respondent has sought declarations seeking a judicial determination of the amount of damages covered under the Policies for which Insurers seek to intervene in the Underlying Actions. Likewise, Appellants have already pled demands for damage allocations the Declaratory Judgment Action. Because Appellants were and remain unable to demonstrate that denial of the Motions to Intervene will result in a waiver of its coverage defenses in the Declaratory Judgment Action, the Trial Court correctly determined that Appellants "can satisfactorily protect any purported interests they may have" in the Declaratory Judgment Action such that intervention in the Underlying Actions is inappropriate.

C. The Trial Court Properly Considered the Practical Implications of its Decision Denying Intervention as Required by Rule 24, SCRCP.

A trial court "should consider the practical implications of a decision denying or allowing intervention." GEICO, 373 S.C. at 138, 644 S.E.2d at 702. Here, the Order sets forth a litany of

reason why, practically speaking, the Trial Court determined that intervention was improper and inappropriate in this instance. Appellants have demonstrated no abuse of discretion sufficient to overturn the Trial Court's well-reasoned conclusions.

i. The Trial Court Correctly Determined that Intervention Would Create an Impermissible Conflict of Interest.

In addition to correctly determining that Appellants lack the requisite standing to intervene and can satisfactorily protect any purported interest in a Declaratory Judgment Action, the Trial Court also concluded that intervention would lead to an "irreconcilable conflict created by the diametrically opposed goals" between the insurer, insureds, and defense counsel. (R.p.6; Order p.6). The Trial Court's recognition the fact that counsel for Respondent and the Subcontractors, both of which are the acknowledged insureds of Appellants, would be in an the position of "an irreconcilable conflict…[of trying] to minimize [their client's] liability by showing a lack of consequential damages and, on the other hand…be faced with the necessity of proving consequential damages in order to trigger and maximize coverage" has been previously acknowledged by this Court and serves as the basis for the rule precluding insurer intervention in favor of a subsequent declaratory judgment action. See Sims, 247 S.C. 88, 145 S.E.2d 526 (stating "[the insurer] cannot possibly defend the state court action and protect both its own interests and the interests of its insureds.").

Well-established law in this State from this Court precludes Appellants from intervention in this situation due to the inherent conflict of interest that arises when an insurer seeks to further its own interest while defending its insured. Id. Appellants are correct that Respondent, as an additional insured, maintains the goal of maximizing coverage for any verdict that may be rendered. However, Appellants' arguments on this point miss a key point: the goals of Appellants and Respondents in the Underlying Action to contest liability for the alleged defects and show a

lack of consequential damages are aligned. Moreover, the positions of Respondent, Appellants and the Subcontractors with respect to the duty, if any, of Appellants to indemnify its insureds for the damages proved in the Underlying Actions are already preserved in the pending Declaratory Judgment Action. Accordingly, as Appellants' ability to seek an allocation of a general verdict handed down in the Underlying Actions is not waived, intervention is antithetical to and violates Appellants' duty to defend.

ii. The Trial Court Did Not Abuse Its Discretion in Determining that Intervention Should Be Precluded Because It Would Be Confusing and Unfairly Prejudicial.

After considering the information and arguments before it, the Trial Court explained that allowing Appellants an opportunity to interject special interrogatories and/or special verdict forms would "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." (R.p.7; Order p.7). The Trial Court properly surveyed the situation posed by Appellants' efforts to intervene.

By interjecting special verdict forms and/or interrogatories to the jury, it stands to reason Respondent, plaintiffs in the Underlying Actions, and the Subcontractors would all be required to introduce evidence and make arguments to the jury as to how the jury should complete the verdict form or answer the interrogatories. Requiring counsel for Respondents, Plaintiffs, and the Subcontractors to conduct this extra step, on top of defending Plaintiffs' claims and prosecuting cross-claims is unfairly prejudicial. Appellants' intervention would also add a complicated insurance coverage component to an already complicated litigation and necessitate additional levels of proof that are legally unnecessary to the current conduct of the Underlying Actions.

As is the case in the actions before the Court, most construction defect cases contain many parties with a litany of complicated construction issues. Permitting insurer intervention would result in the belated entry of numerous new parties seeking to insert coverage defenses for policies that range from 2001 to present. This scenario presents more than just a potential for confusion to the jury – it guarantees it. Furthermore, the burden placed on Appellants' Additional and Named Insureds to defend against the complicated construction defect claims only to be faced with late-arriving coverage issues would be unconscionable and certainly overburden the Court with delays through additional motions, and a host of competing jury instructions, special interrogatories and verdict forms from all parties.

iii. The Trial Court Correctly Determined that Intervention Would Delay and Compromise Judicial Determinations.

The Order further identifies that the Court concluded that intervention was unfavorable because it would compromise judicial determinations. Specifically, the Court noted that "addressing coverage issues in [the Underlying Actions] is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action." (R.p.6; Order p.6). Indeed, the Court correctly concluded that allowing the Appellants to pose questions to the jury regarding the extent of coverage under the Policies for damages alleged by Plaintiffs in the Underlying Action and then to allow the Appellants to further contest their duty to indemnify Respondents and Subcontractors for damages awarded by the jury would constitute two bites at the proverbial apple and would therefore create the potential for inconsistent outcomes.

Permitting intervention, deciding which, if any, questions should be asked of the jury, determining the vehicle for asking such questions, and other practice concerns relating the implementation of the "limited intervention" sought in Appellants' Motions to Intervene will certainly gum up the trial court's docket and further delay the disposition of these matters. Such

a strain on judicial resources is unjustified when Appellants have taken the opportunity to raise their coverage defenses in the pending Declaratory Judgment Action.

Further, permitting intervention in these cases would have wide-ranging practical impacts on civil litigation across the state. Allowing insurers to intervene will change the landscape of construction defect litigation in the practical aspect explained above. Moreover, intervention in these matters would certainly lead to a similar result in other civil cases where insurance is at issue, i.e. personal injury and/or car accident cases. In light of the above, the Trial Court was judicious and appropriately exercised its discretion in refusing to allow such a practice to take hold in the instant matters.

D. The Order Should Be Affirmed Because the Appellants' Application to Intervene Was Untimely.

Rule 24, SCRCP permits intervention only upon "timely application." Appellants contend that their Motions to Intervene were timely because they were filed once it became apparent that the construction defect lawsuits would proceed to trial such that Appellants' interests in obtaining allocated verdicts in the Underlying Actions became implicated. In fact, Appellants' Motions to Intervene were filed well-after Appellants issued reservation of rights letters to their insureds. To the extent that the Appellants complied with the requirements of Harleysville to notify their insureds of the need for an allocation of covered versus non-covered damages in their reservation of rights letter, they were certainly aware of their purported interests which they contend are sufficient to allow them to intervene at that time. Moreover, the Motions to Intervene were filed after years of discovery and motions practice in each of the Underlying Actions. The Trial Court correctly reasoned that if Appellants' intervention at the outset of litigation to present their coverage positions would be patently improper, allowing the desired quasi-intervention at the late stages of litigation to raise those issues is even more problematic. As a result, this Court should

affirm the Order for the additional reason that the Appellants' Motions to Intervene were untimely. See Rule 220(c), SCACR (The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal).

CONCLUSION

The Sims, Newman and Harleysville Opinions are not in conflict. Rather, they operate in concert to support the long-standing practice of litigating liability and coverage issues in separate actions. Moreover, the Trial Court properly considered Sims, Newman and Harleysville in denying the Motions to Intervene and determined that the limited rulings in Newman and Harleysville do not create the waiver issued raised by Appellants or otherwise require intervention. However, to the extent the Court believes Appellants' arguments necessitate clarification, Respondent respectfully requests the Court reaffirm its holding in Sims and set forth the holdings in Newman and Harleysville do not require intervention. In any event, the Trial Court's Order does not contain any abuse of discretion, properly considered the elements of Rule 24, SCRCP and should be affirmed.

[Signature Page to Follow]

Respectfully Submitted,

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Charleston, South Carolina
April 24, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman
Circuit Court Judge

Trial Court Case No. 2015-CP-26-002718
Appellate Case No. 2019-001055

RECEIVED

Apr 24 2020

S.C. SUPREME COURT

Ex Parte: Hartford Fire Ins. 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, Plaintiffs

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.

CERTIFICATION

Counsel listed below certifies that this Brief complies with Rule 211(b), SCACR.

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Dated: April 24, 2020
Charleston, SC