THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

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

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.

FINAL REPLY BRIEF OF APPELLANTS HARTFORD FIRE INSURANCE COMPANY AND HARTFORD CASUALTY INSURANCE COMPANY

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Briefing in the *Ex parte Builders Mutual (Palmetto Pointe)* appeal and in this case demonstrates that, except for a small minority voice among insurers, every stakeholder in CD litigation agrees that intervention is not workable. They approach the issue from different perspectives and have disagreements on peripheral points, but the bottom line is that homeowners associations, insureds, most insurers (including Hartford), and the South Carolina Association for Justice believe that allocation between covered and uncovered damages should occur in a separate action, under *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965). This Court should hold that intervention is neither necessary nor appropriate to preserve the right to allocation, and that it is sufficient for an insurer to reserve its rights on that ground under *Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017).

This reply brief addresses four ways in which Respondents The Havens Condominium Association et al. (collectively, "the Associations") and Centex Homes, Inc. ("Centex") take their to an extreme.

A. Hartford Moved to Intervene Because of Uncertainty in the Law.

Centex inaccurately portrays the insurers as eager to make "unprecedented efforts to interject their coverage defenses into the Underlying Actions." Centex Brief, p. 8. As detailed in Hartford's opening brief (p. 7), two trial court decisions, including the special referee's decision in *Harleysville v. Heritage*, have found intervention to be necessary to preserve an insurer's rights. Hartford disagrees with those decisions. The resulting uncertainty in the law compelled Hartford to move to intervene and appeal the denial of intervention, lest anyone contend after the fact that Hartford failed to take all steps necessary to preserve its right to seek an allocation.

B. Hartford's Motion Was Timely.

Hartford moved to intervene in December 2017, eighteen months before the motions hearing where Judge Newman denied intervention. (R. p.653.) Centex nevertheless contends that Hartford's motion to intervene was somehow untimely. This timeliness objection overlooks Judge Newman's actual findings.

Centex's timeliness argument would necessarily depend on the context of an individual case, and Centex made no case-specific objections here. (R. p.435–41.) It does not appear, therefore, that Centex preserved this argument.[1] To the extent that Centex preserved this issue by incorporating the transcript from a prior motions hearing in a different lawsuit, *Cypress Bend v. Centex Homes*, Judge Newman's reaction to Centex's timeliness objection in that case was that Hartford's motion was early, if anything, because the Circuit Court had not yet reached the stage of considering verdict sheets. (R. p.473.) Here, the Circuit Court expressly held: "The Court hereby denies intervention, irrespective of timing, on grounds that this Court finds that intervention would be prohibited at any time."[2] (R. p.7.)

Timeliness of intervention is an issue for a trial court to decide; this Court ordinarily does not make determinations regarding timeliness in the first instance. *Davis v. Jennings*, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991). Centex does not claim any prejudice, which is a key consideration on a claim of untimeliness. *Id.* Because the law on what qualifies as "property

[1] The Associations make a passing reference to timeliness at the end of § I.B.1.b of their brief. They clearly waived any timeliness objection, having made no such argument below.

[2] Centex inaccurately characterizes the Circuit Court's ruling, stating that 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." Centex Brief, at 23 (no record citation). Judge Newman made no such finding, instead denying intervention "irrespective of timing." (R. p.7.)

damage" in a CD action has been firmly established since 2009, *see Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009), no litigant can claim surprise when an insurer reserves its rights on this ground and seeks an allocation. Nor can Centex explain how, if intervention would be for the limited purpose of seeking special interrogatories or a special verdict sheet, an insurer would need to intervene at the outset of litigation—before discovery occurs, when the parties and the trial court cannot know what interrogatories the evidence might support. *See* Alex Sanders & John S. Nichols, TRIAL HANDBOOK FOR SOUTH CAROLINA LAWYERS § 35:7 (5th ed.) (noting that "interrogatories submitted to the jury must be based on the evidence and material to the case," and that inclusion of improper interrogatories can be grounds for reversal). Centex's timeliness objection lacks support in the record or the law.

C. The Association's Due Process Arguments Depend on Flawed Premises.

The Associations argue that, if intervention is warranted, they have a due process right to take discovery from the insurers on "all potential coverage positions" and to turn the CD trial into a simultaneous trial on coverage. They offer no authority or logic for the notion that coverage disputes would be at issue in the underlying CD case. The only purpose for Hartford's motion was to seek an allocation between those damages that, under settled South Carolina law, are and are not covered. *Auto Owners v. Newman*, 385 S.C. at 198, 684 S.E.2d at 546. It did so because, under a plausible reading of *Harleysville* and *Newman* (argued by other litigants and adopted in *Ingram, supra*), an allocated verdict is necessary to create a factual record for such an allocation.

Even if intervention were necessary, nothing in *Harleysville* or *Newman* suggests that the insurer's participation would make it a party. It is well-settled that limited-purpose intervention need not make the intervenor a full-fledged "party-litigant." *Davis*, 304 S.C. at 504, 405 S.E.2d at 602–03 (vacating order denying "Newspaper's motion to intervene in order to object to the sealing of the record," distinguishing cases "in which party-litigant status is sought," and recognizing that

the motion was "for the sole and limited purpose of challenging a protective order"). Countervailing policy concerns would prevent insurers from becoming party-litigants. To do so would inject prejudicial insurance issues into the trial. *See* Rule 411, SCRE; *Todd v. Joyner*, 385 S.C. 509, 514, 685 S.E.2d 613, 616 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009). The few courts permitting intervention have imposed conditions precisely to avoid injecting insurance issues into trial. *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1325, 1327 (S.D. Ala. 2003). Taking discovery from insurers would also violate Rule 26(b)(3), SCRCP, which protects against the disclosure of materials "prepared in anticipation of litigation or for the trial" by or for the insured or its insurer.

D. If Intervention Was Necessary, It Follows That Hartford Had Standing.

Finally, regarding standing, Hartford recognizes that it is difficult to reconcile intervention with *Ex parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007). That point is relevant when reading this Court's decision in *Harleysville Group. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), in determining what this Court did or did not hold. But if the "mandatory intervention" reading of *Harleysville* were correct, it would necessarily follow that Hartford had standing to move to intervene.

CONCLUSION

Hartford asks the Court to conclude that intervention in an underlying CD 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.

April 27, 2020

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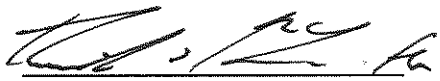

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