

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT, IN AND
FOR ST. JOHNS COUNTY, FLORIDA

JAMES T. TREACE and ANGELINE G.
TREACE,

CASE NO.: CA-06-0815

DIVISION: 55

Plaintiffs,

vs.

HARBOUR ISLAND JOINT VENTURE III; JC
DESIGN MANAGEMENT COMPANY, a Florida
corporation; HUNTINGTON BUILDERS, INC., a
Florida corporation; DOESN'T MEAN
ANYTHING, INC., a Florida corporation; and
STEVENSON DESIGN AND DEVELOPMENT
OF JACKSONVILLE, INC., a Florida corporation,

Defendants. /

STEVENSON DESIGN AND DEVELOPMENT
OF JACKSONVILLE, INC., a Florida corporation,

Third-Party Plaintiff,

vs.

RYSKON CONSTRUCTION, INC., a Florida
corporation; RAKE BROTHERS ENTERPRISES,
INC., a Florida corporation; BARRY K. CHERRY,
an individual; and ARCHITECTURAL WINDOWS
& CABINETS, INC., a Florida corporation,

Third-Party Defendants. /

HARBOUR ISLAND JOINT VENTURE III; JC
DESIGN MANAGEMENT COMPANY, a Florida
corporation; HUNTINGTON BUILDERS, INC., a
Florida corporation; DOESN'T MEAN
ANYTHING, INC., a Florida corporation,

Cross-Claim Plaintiffs,

vs.

STEVENSON DESIGN AND DEVELOPMENT
OF JACKSONVILLE, INC., a Florida corporation,

Cross-Claim Defendant. /

FILED
CLERK OF COURT
ST. JOHNS COUNTY
2012 APR 17 PM 3:25

CA06-815

**PLAINTIFFS' NOTICE OF FILING PLEADING IN OPPOSITION TO MID-CONTINENT
CASUALTY COMPANY'S MOTION TO INTERVENE**

Plaintiffs give notice of filing the following pleadings in opposition to Mid-Continent Casualty Company's Motion to Intervene.

1. Crum & Forster Specialty Insurance Company's Motion for Limited Intervention and Incorporated Memorandum of Law filed in the Circuit Court of the Fourth Judicial Circuit, In and For Nassau County, Florida, Case No. 2010.CA-545, Division A. Dunes Club Villas Owners Assoc., Inc., et al. v. Dunes Club Villas Co., L.L.C., et al. Filed November 17, 2011.
2. LandSouth Construction, LLC's Response Opposing Crum & Forster Specialty Insurance Company's Motion for Limited Intervention filed in the Circuit Court of the Fourth Judicial Circuit, In and For Nassau County, Florida, Case No. 2010-CA-545, Division A. Dunes Club Villas Owners Assoc., Inc., et al. v. Dunes Club Villas Co., L.L.C., et al. Filed November 23, 2011.
3. Order on Crum & Forster Specialty Insurance Company's Motion for Limited Intervention signed by the Honorable Brian J. Davis, Circuit Judge for the Fourth Judicial Circuit, In and For Nassau County, Florida, Case No. 2010-CA-545, Division A. Dunes Club Villas Owners Assoc., Inc., et al. v. Dunes Club Villas Co., L.L.C. Signed December 8, 2011.

By 

Edward M. Whelan
Fla. Bar No. 0187100
Marsha A. McCoy
Fla. Bar No. 0805548
225 Water Street, Suite 1750
Jacksonville, FL 32202
(904) 354-1980
(904) 354-2170 (fax)

Attorneys for Plaintiffs, James T. Treace
and Angeline G. Treace

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished by U.S. Mail this 16 day of April, 2012 to:

James E. Kallaher, Esq.
Law Office of Bohdan Neswiacheny
151 College Drive, Suite 1
Orange Park, FL 32065

Carl D. Dawson, Esq.
Dawson/Orr, P.A.
233 E. Bay Street Suite 1010
Jacksonville, FL 32202

G. Michael Burnett, Esq.
6272 Dupont Station Court
Jacksonville, FL 32217


Huntington Builders, Inc.
c/o Stephen F. Chefan, President
15650 Enstrom Road
Wellington, FL 33414

Harbour Island Joint Venture III
c/o JC Design Management Company
as Managing Venturer of Harbor Island
Joint Venture, III
5301 N. Federal Highway, Suite 380
Boca Raton, FL 33487

Doesn't Mean Anything, Inc.
c/o Lee Rautenberg, President
7106 Ayrshire Lane
Boca Raton, FL 33496

Tracy L. Wenzel, Esq.
Heekin, Malin & Wenzel, P.A.
P.O. Box 477
Jacksonville, FL 32201

JC Design Management Company
c/o Ms. Judy Chefan
5301 N. Federal Highway, Suite 380
Boca Raton, FL 33487



Attorney

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR NASSAU COUNTY, FLORIDA

CASE NO. 2010-CA-545
DIVISION A

DUNES CLUB VILLAS OWNERS ASSOC.,
INC.; E. STEPHEN RAMSEY; and LUCILLE
M. RAMSEY,

Plaintiffs,

v.

DUNES CLUB VILLAS CO., L.L.C., JAMES
O. HARDWICK; LANDSOUTH
CONSTRUCTION, LLC; KBJ ARCHITECTS,
INC.; and TRAVELERS CASUALTY AND
SURETY CO. OF AMERICA,

Defendants.

LANDSOUTH CONSTRUCTION, LLC,

Third-Party Plaintiff,

v.

COASTLINE UTILITY CONTRACTING,
INC.; DIVISION 7 WATERPROOFING &
CONCRETE RESTORATION, INC.;
HANSON ROOFING, INC.; DONALD
HUDSON; JACKSONVILLE TILE OUTLET,
INC.; KIS CONSTRUCTION, LLC; POWER
SOLUTIONS ELECTRIC, INC.; R&V EURO
CONSTRUCTION, LLC; REDI CARPET
SALES OF FLORIDA, INC.; SEXTON
PLUMBING CO., INC.; SOUTHEAST
WINDOWS & TRIM, INC.;
WATERPROOFING SPECIALISTS, INC.

Third-Party Defendants.

**CRUM & FORSTER SPECIALTY INSURANCE COMPANY'S MOTION FOR
LIMITED INTERVENTION AND INCORPORATED MEMORANDUM OF LAW**

Pursuant to Florida Rule of Civil Procedure 1.230, Crum & Forster Specialty Insurance Company ("Crum & Forster Specialty") hereby files its motion for limited intervention, and states as follows:

1. Crum & Forster Specialty, a liability insurer, seeks an order permitting it to intervene for the limited purpose of submitting, and participating in the preparation of, jury instructions and a special interrogatory verdict form for submission to the jury addressing factual issues related to several coverage issues under its insurance policies: (1) the amount of damages attributable to work self-performed by Crum & Forster Specialty's insured, LandSouth Construction, LLC ("LandSouth"), if any, as compared to damages attributable to LandSouth's subcontractors; (2) the amount of damages attributable to each of LandSouth's subcontractors, individually; (3) to the extent that damages are attributable to LandSouth and each of its subcontractors, the amount of those damages attributable to property that was physically damaged by defective work, as compared to damages sought solely to repair, replace, or remedy defective work; (4) the point in time at which property damage, if any, attributable to LandSouth and to each subcontractor was discovered or occurred; (5) the amount of damages attributable to property damage to property that was outside the scope of LandSouth's general construction contracts for the project (*i.e.*, damage to "other property"); (6) the amount of damages resulting from property damage attributable to mold; (7) the point in time at which property damage attributed to mold occurred or began to occur; and (8) the amount of damages attributable to "rip and tear."

2. Crum & Forster Specialty also requests that its limited participation and the existence of possible insurance coverage not be revealed to the jury by anyone, as any reference to insurance coverage would be improper and prejudicial. *See, e.g., South Motor Co. of Dade County v. Accountable Construction Co.*, 707 So. 2d 909, 911 (Fla. 3d DCA 1998) (holding it was reversible error to permit references to defendant's insurance coverage, explaining that the "danger with injecting evidence of insurance before the jury is that they 'might be influenced thereby to fix liability where none exists, or to arrive at an excessive amount through sympathy for the injured party and the thought that the burden would not have to be met by the defendant.'" (quoting *Carls Markets, Inc. v. Meyer*, 69 So. 2d 789, 793 (Fla. 1953))).

3. Crum & Forster Specialty is handling this claim under a reservation of rights and anticipates that a verdict for the plaintiffs in this case will result in one or more insurance declaratory judgment actions. The limited intervention sought is proper and necessary to preserve Crum & Forster Specialty's rights on the issue of what damages may be covered under the actual facts of this case, as opposed to the allegations of the underlying pleadings filed by the plaintiffs in this action. This is so because there is a risk that if Crum & Forster Specialty does not obtain a special jury verdict, and a general verdict is entered against LandSouth, Crum & Forster Specialty may later be held to have waived its right to assert that the damages awarded were not covered or were excluded under the Crum & Forster Specialty policies. *See Herrera v. C.A. Seguros Catatumbo*, 844 So. 2d 664 (Fla. 3d DCA 2003), discussed more fully below.

4. Additionally, even if it is ultimately found by a court determining coverage that Crum & Forster Specialty can relitigate the facts after a general verdict, limited intervention is proper and necessary to avoid duplication of litigation, and will not prejudice the rights of the

parties. See *Employers Ins. of Wausau v. Lavender*, 506 So. 2d 1166, 1167 (Fla. 3d DCA 1987), discussed below.

5. Alternatively, should the Court not grant the limited intervention sought, it is requested to enter an order that Crum & Forster Specialty will not be bound by any judgment in this action, but can later relitigate the facts relevant to all issues of insurance coverage.

FACTS DEMONSTRATING NEED FOR SPECIAL VERDICT

Crum & Forster Specialty issued four commercial general liability insurance policies to LandSouth with policy numbers and policy periods as follows: GLO 081006 (July 1, 2005 to July 1, 2006), GLO 091215 (July 1, 2006 to July 1, 2007), GLO 101368 (July 1, 2007 to July 1, 2008), and GLO 131160 (July 1, 2008 to July 1, 2009). Copies of the policies are attached hereto as Exhibits "A" through "D," respectively.

On May 14, 2009, Dunes Club Villas Owners Association, Inc., C.J. Gideon, Cecile Gideon, E. Stephen Ramsey, and Lucille M. Ramsey filed the above-captioned lawsuit claiming damages arising out of the allegedly defective construction of the Dunes Club Villas Condominium in Amelia Island, Florida (the "Condominium"). The Condominium consists of four buildings (phases), each containing 14 residential units, with a combined total of 56 residential units. LandSouth served as general contractor for phases III and IV, and Hardaway Construction Corp. was the general contractor for phases I and II. Dunes Club Villas Company, LLC and James O. Hardwick served as the developers for the Condominium project.

After the complaint was amended on June 4, 2009, the claims concerning phases I and II and phases III and IV were subsequently severed. On June 16, 2010, the Association and E. Stephen Ramsey and Lucille M. Ramsey (owners of unit 1706 in phase III) filed a second

amended complaint solely relating to phases III and IV against Dunes Club Villas Company, LLC, James O. Hardwick, LandSouth, KBJ Architects, Inc., and Travelers Casualty and Surety Company of America. On June 16, 2010, the plaintiffs filed a second amended complaint, which is the current operative pleading in this matter.

Additionally, LandSouth filed a third-party complaint against various subcontractors involved in the construction of Phases III and IV of the Condominium, including Coastline Utility Contracting, Inc., Hanson Roofing, Inc., Division 7 Waterproofing & Concrete Restoration, Inc., Waterproofing Specialists, Inc., Southeast Windows & Trim, Inc., Donald Hudson, Redi Carpet Sales of Florida, Inc. (balconies), Jacksonville Tile Outlet, Inc. (balconies), Power Solutions Electric, Inc., KIS Construction, LLC, R&V Euro Construction, LLC, and Sexton Plumbing Co., Inc.

The insuring grant in all four Crum & Forster Specialty policies provides that Crum & Forster Specialty will pay those sums "that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property."

In *United States Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007), the Florida Supreme Court recognized that "there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'" *Id.* at 889. The court concluded that a subcontractor's faulty or defective work that damaged the completed and otherwise non-defective work of others caused "physical injury to tangible

property” and may thus fall within the CGL coverage grant. *Id.* at 889. Conversely, if “there is no damage beyond faulty workmanship or defective work, then there may be no resulting ‘property damage’”—and hence no possible coverage. *Id.* In other words, defective work performed by the insured, regardless of whether the insured performed the work itself or the work was performed by someone else on the insured’s behalf, cannot fall within the insuring grant of the policy if it is defective but causes no physical damage to the work of others. Accordingly, because most of the damages sought by the plaintiffs appear to be for defective work, these alleged damages would not qualify as property damage under the insuring grants and no coverage would be available therefor under the Crum & Forster Specialty policies.

In addition, the policies’ coverage grants further provide in pertinent part as follows: “This insurance applies to ‘bodily injury’ and ‘property damage’ only if . . . [t]he ‘bodily injury’ or ‘property damage’ occurs during the policy period.” Accordingly, even to the extent the plaintiffs’ alleged loss may involve property damage (as opposed to merely defective work), it still would not fall within the coverage grant of any of the four policies unless damage occurred during a policy period.

Each of the subject policies also includes the standard business risk exclusions “b” (“Contractual Liability”), “j” (“Damage to Property”), “k” (“Damage to Your Product”), “l” (“Damage to Your Work”), “m” (“Damage to Impaired Property or Property Not Physically Injured”), and “n” (“Recall of Products, Work or Impaired Property”). No coverage would be available to LandSouth to the extent these exclusions apply. Specifically, included as subsections to exclusion “j” (“Damage to Property”) are “j(5)” (precluding coverage for damage to that “particular part of real property on which you or any contractors or subcontractors working

directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations") and "j(6)" (precluding coverage for damage to that "particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it"). To the extent that LandSouth's work was ongoing during the entire effective period of policy number GLO 081006, no coverage would be afforded under this policy based on exclusions "j(5)" and "j(6)."

Each of the policies also contains a "Continuous or Progressive Injury and Damage Exclusion" endorsement (CFSGL163 (0405)), which precludes coverage for "'property damage' which has first occurred, or alleged to have first existed, or begun to occur prior to the effective date" of the respective policies. Also included in each of the policies is a "Fungi or Bacteria Exclusion" endorsement, which precludes coverage for mold, which has been claimed as causing some of the damages sought by the plaintiffs. Accordingly, these damages would also be excluded from coverage.

Additionally, policies GLO 091215, GLO 101368, and GLO 131160 each contain a "Self-Insured Retention Endorsement" (CFSGL164a (05 05)). SIR exhaustion is a condition precedent to coverage and, to date, the insured has failed to satisfy the applicable SIR(s).

MEMORANDUM OF LAW

Florida Rule of Civil Procedure 1.230 provides:

Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

Insurance companies, including liability insurance companies, have an interest in a pending tort litigation, and a right to intervene to protect their interests. In *Union Central Life*

Ins. Co. v. Carlisle, 593 So. 2d 505 (Fla. 1992), the Florida Supreme Court held that it was an abuse of discretion to deny a health insurer's right to intervene in a tort action when the health insurer had a subrogation right to the benefits it had paid. The insurer had to be given a meaningful opportunity to protect its interests, including the right to monitor the trial as a spectator and to participate by making appropriate motions to protect its interests. *Id.* at 507. See also *Provident Life & Accident Ins. Co. v. Prichard*, 636 So. 2d 731 (Fla. 4th DCA 1993) (finding that the trial court abused its discretion in denying insurer's motion to intervene, noting the parties' post-verdict attempt to delete an award for past medical expenses directly jeopardized the insurer's interest in recovering its payment of past medical bills).

In the context of liability insurance coverage, the Third District Court of Appeal has specifically endorsed the use of a special interrogatory jury verdict, as proposed in the instant case, for the determination of coverage issues. See *Employers Ins. Co. of Wausau v. Lavender*, 506 So. 2d 1166, 1167 (Fla. 3d DCA 1987). Although the Third District found in that case that the question of insurance coverage could be determined in a subsequent litigation, it noted that "litigation will be reduced, that a good deal of time will be saved, and that neither the plaintiff's nor the defendants' rights will be adversely affected" if the intervenor insurance company is permitted to prepare jury instructions and submit a special verdict interrogatory to the jury after liability is found. *Id.* at 1167. Consistent with *Lavender*, Crum & Forster Specialty here seeks to have special verdict interrogatories submitted to the jury in the event it finds liability against LandSouth.

Some appellate courts in Florida, including the Fourth District, hold that a liability insurer whose interests are adverse to those of its insured on the issue of coverage, is not bound

by factual findings in the initial tort adjudication. See *Ins. Co. of North America v. Whatley*, 558 So. 2d 120 (Fla. 5th DCA 1998) (factual issue of whether plaintiff was an employee, in which event "employee" exclusion applied); *Britamco v. Central Jersey Investments*, 632 So. 2d 138, 140 (Fla. 4th DCA 1994) ("Clearly, the insurer is not a party to the underlying wrongful death action and the insurer is not bound by the factual determinations made in the underlying liability lawsuit to which they are not a party, since the interests of the insured and the insurer are antagonistic towards each other in an initial tort adjudication where the issue of coverage is disputed"). See also *State Farm Mut. Auto Ins. Co. v. Brown*, 767 F. Supp. 1151 (S.D. Fla. 1991) (following *Whatley* and holding that a liability insurer was not bound by a finding of a negligent shooting in the underlying action and could relitigate the issue of whether the shooting was negligent or intentional); *aff'd without opinion*, 990 F.2d 1268 (11th Cir. 1991).

In *Herrera v. C.A. Seguros Catatumbo*, 844 So. 2d 664 (Fla. 3d DCA 2003), however, the Third District Court of Appeal held that a liability insurer was bound by a general verdict of liability against its insured because it failed to intervene in the underlying tort litigation to obtain a special jury verdict on facts that determine coverage. In *Herrera*, a liability insurer brought a declaratory action post-judgment to determine coverage in light of an exclusion for malicious acts. *Id.* The court noted that the insurer made no attempt to have the "final disposition result in a verdict that would provide a basis for consideration of the exclusionary clause." *Id.* at 668. Because one of the three claims against the insured would have supported coverage, and the insurer did not attempt to have the jury differentiate between the claims upon which damages were awarded, the insured was permitted to recover the full amount of the un-segregated damage award from the insurance company. *Id.* See also *Morrison v. Hugger*, 369 So. 2d 614 (Fla. 2d

DCA 1979) (finding that the insurer was liable for punitive damages awarded under a general verdict form).

In reaching its conclusion, the *Herrera* court cited to the Florida Supreme Court's decision in *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061 (Fla. 1983), in which punitive damages were sought against the insured based on two theories of liability, only one of which was covered. Florida's Supreme Court held in *Bould* that the liability insurer was required to pay the punitive damage award because it had not requested additional instructions or the use of special verdicts:

[I]f the evidence raises a question as to whether the entire claim is beyond the coverage of the policy, the burden is upon the insurer to show that there is no coverage. Non-insurability is a defensive matter, with the burden resting on the insurer.

* * *

In the present dispute, if the instruction given by the trial court allowed the jury to award punitive damages for negligent hiring or on vicarious liability, the burden fell upon Hartford to request additional instructions or to use special verdicts. Neither was done, so Hartford cannot complain at this point. The record fails to show that the trial court committed error in entering judgment against Hartford.

Id. at 1065.

In the instant case, most of the damages alleged by the plaintiffs appear to be primarily for correcting the allegedly defective work of LandSouth or its subcontractors and would, therefore, not be covered under the Crum & Forster Specialty policies. Additionally, certain policy exclusions and endorsements may also apply to bar coverage. Accordingly, there is a risk that if Crum & Forster Specialty does not intervene to obtain a special verdict, it will be held to have waived its right to challenge coverage if a general verdict is entered. In that event, Crum & Forster Specialty's rights will be severely prejudiced.

In any event, even if it is later determined that it was not Crum & Forster Specialty's, but LandSouth's burden to obtain a special verdict, intervention is proper and necessary to avoid a duplication of litigation, and will not prejudice the rights of the parties. *See Lavender*, 506 So. 2d at 1167.

WHEREFORE, Crum & Forster Specialty respectfully requests that this Court grant its motion for limited intervention as set forth above. Alternatively, Crum & Forster Specialty requests that this court enter an order holding that Crum & Forster Specialty will not be bound by any judgment in this action, but can later relitigate the facts relevant to all issues of insurance coverage.

By: 

HOLLY S. HARVEY

Fla. Bar No. 970190

PERRY R. GOODMAN, ESQ.

Fla. Bar No. 050778

THORNTON, DAVIS & FEIN, P.A.

80 S.W. 8th Street, Suite 2900

Miami, Florida 33130

Tel: (305) 446-2646

Fax: (305) 441-2374


harvey@tdflaw.com

goodman@tdflaw.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile (without exhibits) and by U.S. mail (with exhibits) on November 17th, 2011 to all parties on the attached service list.

By:


HOLLY S. HARVEY

Fla. Bar No. 970190

PERRY R. GOODMAN, ESQ.

Fla. Bar No. 050778

SERVICE LIST

R. Thomas Roberts, Esq.
Marshall Dennehey Warner Coleman &
Goggin
200 West Forsyth Street, Suite 1400
Jacksonville, FL 32202

Adam G. Adams
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Blvd., Suite 1500
Jacksonville, FL 32207

Harris Brown, Esq.
Harris Brown, PA
7077 Bonneval Road, Suite 210
Jacksonville, FL 32216

D. Jeffrey Grate, Esq.
Neil L. Wilcove, Esq.
Freeman Mathis & Gary
100 Galleria Parkway, Suite 1600
Atlanta, GA 30339-5948

Alfred L. Frith, Esq.
The Frith Law Group, P.A.
228 Annie Street
Orlando, FL 32806

Marc J. Tannen, Esq.
Steven G. Schwartz, Esq.
Schwartz Law, PLC
6751 North Federal Highway, Suite 400
Boca Raton, FL 33487

Gary D. Vasquez, Esq.
Vasquez & Tosko, LLP
Landmark Center Two, Suite 525
225 East Robinson Street
Orlando, FL 32801

Thomas Tollefsen, Esq.
Fulmer, LeRoy, Albee, Baumann & Glass,
P.L.C.
10161 Centurion Parkway, Suite 190
Jacksonville, FL 32256

Robert V. Fitzsimmons, Esq.
Dara L. Jebrock, Esq.
Rumberger, Kirk & Caldwell
Brickell Bayview Centre, Suite 3000
80 S.W. 8th Street
Miami, FL 33130-3037

David A. Glenny, Esq.
Bice Cole Law Firm, P.L.
1333 S.E. 25th Loop, Suite 101
Ocala, FL 34471

P. David Brannon, Esq.
J.L. King, II, Esq.
Car Allison
305 South Gadsden Street
Tallahassee, FL 32301-1811

James E. Kallaher, Esq.
Law Office of Bohdan Neswlacheny
151 College Drive, Suite 5
Orange Park, FL 32065

Ann Licandro, Esq.
Ronald E. Reed, Esq.
Childs Reed, P.A.
1551 Atlantic Boulevard, 2nd Floor
Jacksonville, FL 32207

Dennis R. Schutt, Esq.
Michael J. Childers, Esq.
Schutt, Schmidt & Noey
2700-C University Boulevard. West
Jacksonville, FL 32217

Michael E. Milne, Esq.
Kubicki Draper, P.A.
201 South Orange Avenue, Suite 475
Orlando, FL 32801

Carl D. Dawson, Esq.
Dawson/Orr PA
233 East Bay Street, Suite 1010
Jacksonville, FL 32202

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR NASSAU COUNTY, FLORIDA

CASE NO. 2010-CA-545
DIVISION A

DUNES CLUB VILLAS OWNERS ASSOC.,
INC.; E. STEPHEN RAMSEY; and LUCILLE
M. RAMSEY

Plaintiffs,

v.

DUNES CLUB VILLAS CO., L.L.C., JAMES
O. HARDWICK; LANDSOUTH
CONSTRUCTION, LLC; KBJ ARCHITECTS,
INC.; and TRAVERS CASUALTY AND
SURETY CO. OF AMERICA,

Defendants.

LANDSOUTH CONSTRUCTION, LLC,

Third-Party Plaintiff,

v.

COASTLINE UTILITY CONTRACTING,
INC.; DIVISION 7 WATERPROOFING &
CONCRETE RESTORATION, INC.; HANSON
ROOFING, INC.; DONALD HUDSON;
JACKSONVILLE TILE OUTLET, INC.; KIS
CONSTRUCTION, LLC; POWER
SOLUTIONS ELECTRIC, INC.; R&V EURO
CONSTRUCTION, LLC; REDI CARPET
SALES OF FLORIDA, INC.; SEXTON
PLUMBING CO., INC.; SOUTHEAST
WINDOWS & TRIM, INC.;
WATERPROOFING SPECIALISTS, INC.

Third-Party Defendants.

DEBRA J. JEFFORD
CLERK OF THE CIRCUIT COURT
NASSAU COUNTY FL
PRO SE

004472

MNS

2011 NOV 28 PM 4:18

FILED

**LANDSOUTH CONSTRUCTION, LLC'S RESPONSE OPPOSING
CRUM & FORSTER SPECIALTY INSURANCE COMPANY'S MOTION
FOR LIMITED INTERVENTION**

COMES NOW, Defendant/Third-Party Plaintiff, LANDSOUTH CONSTRUCTION LLC, by and through its undersigned attorney, and files this Motion Opposing Crum & Forster Specialty Insurance Company's Motion for Limited Intervention and Incorporated Memorandum of Law, and in support thereof states:

1. On or about November 17, 2011, Crum & Forster Specialty Insurance Company (hereafter "Crum") filed its Motion for Limited Intervention asserting that it should be allowed to intervene in the above-captioned matter pursuant to Florida Rule of Civil Procedure 1.230.

2. As part of its proposed intervention, Crum requests that it be allowed to participate in the preparation and submission of jury instructions and a special interrogatory verdict form. Crum acknowledges that by doing so it intends to address "factual issues related to several coverage issues." Crum alleges that if they are not granted permission to intervene in the manner requested, they may be prejudiced in subsequent related proceedings.

3. Crum fails to assert a sufficient interest in the pending action and therefore it would be inappropriate to allow it to intervene. Before the question of intervention becomes a matter of judicial discretion, Florida law requires that the trial court determine that the interest asserted by the party seeking intervention be "of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." Fasig v. Florida Soc'y of Pathologists, 769 So. 2d 1151, 1153-54 (Fla. 5th DCA 2000) (citing Morgareidge v. Howey, 78 So. 14 (1918)). Where the outcome of the litigation at issue will have no binding effect on the party seeking to intervene, such interest cannot satisfy the threshold requirement for allowing intervention. See, Fasig, 769 So.2d at 1154 (noting that

interest at issue was not sufficient to warrant intervention where outcome of action would not limit or affect requesting party's defenses in subsequent suit).

4. Crum alleges that the outcome of the current litigation will affect its ability to present coverage defenses in subsequent proceedings; this despite the fact that Crum acknowledges in its own memorandum of law that the great weight of authority in Florida holds that a "liability insurer whose interests are adverse to those of its insured on the issue of coverage, is not bound by factual findings in the initial tort adjudication." See also Vanguard Ins. Co. v. Townsend, 544 So. 2d 1153, 1157 (Fla. 5th DCA 1989) (where insurer has provided insured with reservation of rights agreement, it will not be bound by *res judicata* or collateral estoppel stemming from an underlying litigation).

5. Allowing Crum to intervene in the pending action in the manner requested would impermissibly inject new issues into the proceedings. See, Vanguard, supra. In Vanguard, a defendant insured under a homeowner's policy shot plaintiff and plaintiff sued. Id. at 1154. Defendant's insurance carrier sought to intervene and litigate whether defendant was covered by the existing insurance contract. In rejecting the insurer's request to intervene, the trial court and the Fifth DCA observed that the underlying action dealt primarily with damages, and that allowing the insurer to intervene for the purposes cited would "inject new issues" into the underlying action, including "coverage issues." Id. at 1154-55.

6. The instant litigation is focused on issues between a homeowners association, its general contractor, and various subcontractors – among others. As Crum itself admits—its intervention will twist the focus of the proceedings toward litigation of coverage issues. This is identical to the problem addressed in Vanguard, and here, as there, Crum's request for intervention should be denied.

7. Moreover, Crum's support for its intervention is based largely on coverage positions that are in dispute. Landsouth (and presumably other interested parties) disagrees with Crum's recitation of coverage. Crum's coverage position is both complex and overbroad. To that end, Crum's intervention would necessarily require resolution of the coverage dispute. Specifically, Crum's reliance on United States Fire Ins. Co. v. J.S.U.B., 979 So. 2d 871 (Fla. 2007), demonstrates that any special interrogatories would require resolution of the legal issues Crum seeks to inject in this litigation.


8. Crum correctly asserts that the pending litigation has been ongoing since mid 2009. In the few remaining weeks prior to trial, Crum admits it is now seeking to inject its own self-interest before the jury. Counsel for Crum verbally informed the undersigned counsel on November 22, 2011 that it had filed a declaratory action. Despite extensive discovery and years of litigation, Crum has only now sought declaratory relief. None of the coverage positions Crum asserts are new to the litigation. Most if not all of the legal support for intervention involves cases where a declaratory action was pending. As a result, it is clear that this un-served declaratory action is merely a last minute attempt to support Crum's legal position and further its own interest at the cost of its insured.

WHEREFORE, Defendant/Third-Party Plaintiff, LANDSOUTH CONSTRUCTION LLC, respectfully requests the Court enter an Order denying Crum's Motion for Limited Intervention and awarding any other relief this Court deems appropriate in order to protect LANDSOUTH CONSTRUCTION LLC's rights and interests.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Opposing Crum & Forster Specialty Insurance Company's Motion for Limited Intervention and Incorporated

Memorandum of Law has been furnished on this 23 day of November, 2011, by U.S. Mail and Facsimile to all parties on the attached service list.



Gary Weisman, Esq. (FBN 175390)
Older, Lundy & Weisman, Attorneys at Law
3014 West Palmira Avenue, Suite 301
Tampa, Florida 33629
Telephone: (813) 254-8998
Facsimile: (813) 839-4411
Counsel for Landsouth Construction, LLC.

SERVICE LIST

Facsimile #(904) 355-0019
Marshall Dennehey Warner Coleman & Goggin
R. Thomas Roberts, Esquire
200 West Forsyth Street, Suite 1400
Jacksonville, FL 32202

Facsimile #(904) 396-0663
Rogers, Towers, Bailey, Jones & Gay, PA
Adam G. Adams, Esquire
1301 Riverplace Blvd., Suite 1500
Jacksonville, FL 32207

Facsimile #(904) 356-1559
Harris Brown, PA
Harris Brown, Esquire
7077 Bonneval Road, Suite 210
Jacksonville, FL 32216

Facsimile # (770) 937-9960
Freeman, Mathis & Gary, LLP
Neil I. Wilcove, Esquire
D. Jeffrey Grate, Esquire
100 Galleria Parkway, Suite 1600
Atlanta, GA 30339

Facsimile #(407) 481-9171
Vasquez & Tosko, LLP
Gary D. Vasquez, Esquire
225 E. Robinson Street, Suite 525
Orlando, FL 32801-4313

Facsimile #(954) 707-4431
Fulmer, LeRoy, Albee, Baumann & Glass, PLC
Thomas Tollefsen, Esquire
10161 Centurion Parkway, Suite 190
Jacksonville, FL 32256

Facsimile #(305) 371-7580
Rumberger, Kirk & Caldwell
Robert V. Fitzsimmons, Esquire
Dara L. Jebrock, Esquire
Brickell Bayview Centre, Suite 3000
80 S.W. 8th Street
Miami, FL 33130-3037

Facsimile # (352) 351-0166
Bice Cole Law Firm, PL
David A. Glenny, Esquire
1333 S.E. 25th Loop, Suite 101
Ocala, FL 34471

Facsimile # (407) 481-9205
The Frith Law Group, PA
Alfred L. Frith, Esquire
228 Annie Street
Orlando, FL 32806-1208

Facsimile # (561) 367-1550
Schwartz Law, PLC
Mark J. Tannen, Esquire
Steven G. Schwartz, Esquire
6751 North Federal Highway, Suite 400
Boca Raton, FL 33487

Facsimile # (904) 396-3047
Childs Reed, PA
Ann Licandro, Esquire
Ronald E. Reed, Esquire
1551 Atlantic Blvd., 2nd Floor
Jacksonville, FL 32207

Facsimile # (904) 448-9440
Schutt, Schmidt & Noey
Dennis R. Schutt, Esquire
Michael J. Childers, Esquire
2700-C University Boulevard West
Jacksonville, FL 32217

Facsimile # (850) 222-8475
Carr Allison
P. David Brannon, Esquire
J.L. King, II, Esquire
305 South Gadsden Street
Tallahassee, FL 32301-1811

Facsimile # (904) 276-1751
Law Office of Bohdan Neswlacheny
James E. Kallaher, Esquire
151 College Drive, Suite 5
Orange Park, FL 32065

Facsimile # (407) 245-7685
Kubicki Draper PA
Michael E. Milne, Esquire
201 South Orange Avenue, Suite 475
Orlando, FL 32801

Facsimile # (904) 357-8534
Dawson Orr PA
Carl D. Dawson, Esquire
233 East Bay Street, Suite 1010
Jacksonville, FL 32202

12/8/11
7/17/11

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR NASSAU COUNTY, FLORIDA

CASE NO. 2010-CA-545
DIVISION A

DUNES CLUB VILLAS OWNERS ASSOC.,
INC.; E. STEPHEN RAMSEY; and LUCILLE
M. RAMSEY,

Plaintiffs,

v.

DUNES CLUB VILLAS CO., L.L.C., JAMES
O. HARDWICK; LANDSOUTH
CONSTRUCTION, LLC; KBJ ARCHITECTS,
INC.; and TRAVELERS CASUALTY AND
SURETY CO. OF AMERICA,

Defendants.

LANDSOUTH CONSTRUCTION, LLC,

Third-Party Plaintiff,

v.

COASTLINE UTILITY CONTRACTING,
INC.; DIVISION 7 WATERPROOFING &
CONCRETE RESTORATION, INC.;
HANSON ROOFING, INC.; DONALD
HUDSON; JACKSONVILLE TILE OUTLET,
INC.; KIS CONSTRUCTION, LLC; POWER
SOLUTIONS ELECTRIC, INC.; R&V EURO
CONSTRUCTION, LLC; REDI CARPET
SALES OF FLORIDA, INC.; SEXTON
PLUMBING CO., INC.; SOUTHEAST
WINDOWS & TRIM, INC.;
WATERPROOFING SPECIALISTS, INC.

Third-Party Defendants.

REDI CARPET SALES OF FLORIDA, INC.,

Fourth-Party Plaintiff,

v.

KTI, INC., MASTER CARPET & TILE
CORP., and MASTERPIECE TILE, MARBLE
& CARPET, INC.

Fourth-Party Defendants.
/

JACKSONVILLE TILE OUTLET, INC.

Fourth-Party Plaintiff,

v.

OLIVEIRA OF JAX CORP., JP MARBLE
AND TILE CORP., FIALLOS CUSTOM
FLOORING, INC.,

Fourth-Party Defendants.
/

**ORDER ON CRUM & FORSTER SPECIALTY INSURANCE COMPANY'S
MOTION FOR LIMITED INTERVENTION**

THIS CAUSE is before the Court on the motion for limited intervention of Crum & Forster Specialty Insurance Company ("Crum & Forster Specialty"). The Court, having reviewed the file and being otherwise duly advised, upon the record, it is hereby

ORDERED AND ADJUDGED as follows:

1. Crum & Forster Specialty's motion for limited intervention is hereby denied.

2. ~~Crum & Forster Specialty will not be bound by any judgment in this action, but
can later relitigate the facts relevant to all issues of insurance coverage.~~

DONE AND ORDERED in Chambers at the Nassau County Courthouse this 8th day
of December, 2011.


BRIAN J. DAVIS
CIRCUIT JUDGE

Copies furnished to all counsel of record.