THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2022-CP-10-00126

Ann and James Cavanaugh, Kiawah Development Partners, LLC, Knight Residential Group Charleston, LLC, H&J Services, LLC, Professional Roofers, Inc., Construction Applicators Charleston, LLC,

Respondents,

v.

Privilege Underwriters Reciprocal Exchange,

Appellant.

APPELLANT'S INITIAL BRIEF

R. Taylor Speer
FOX ROTHSCHILD LLP
2 W. Washington Street
Suite 1100
Greenville, SC 29601
Phone: (864) 751-7665
Attorney for Appellant

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 3

ARGUMENT 4

I. THE TRIAL COURT ERRED IN DENYING PURE'S MOTION TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(A), SCRCP BECAUSE PURE HAS A DIRECT AND SIGNIFICANT INTEREST THAT WILL BE IMPAIRED BY DENIAL OF INTERVENTION AND THAT CANNOT BE ADEQUATELY REPRESENTED BY THE CAVANAUGHS. 4

A. PURE Has an "Interest" Related to the Property Which Is the Subject of the Action. 5

B. Disposition of This Action Without PURE Would, as a Practical Matter, Impair or Impede PURE's Interest. 11

C. PURE's Interests Are Not Adequately Represented by the Cavanaughs. 15

II. THE TRIAL COURT ERRED IN DENYING PURE'S MOTION FOR PERMISSIVE INTERVENTION BECAUSE INTERVENTION WILL NOT DELAY OR PREJUDICE THE ADJUDICATION OF THE RIGHTS OF THE ORIGINAL PARTIES. 19

TABLE OF AUTHORITIES

Page(s)

Cases

Aetna Ins. Co. v. Charleston & W.C. Ry. Co.,
76 S.C. 101, 56 S.E. 788 (1907) 8

Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant,
302 S.C. 186, 394 S.E.2d 712 (1990) 5, 15

Ex parte Builders Mut. Ins. Co.,
431 S.C. 93, 847 S.E.2d 87 (2020) ..... *passim*

Calvert Fire Ins. Co. v. James,
236 S.C. 431, 114 S.E.2d 832 (1960) 8

Cummings v. United States,
704 F.2d 437 (9th Cir. 1983) 8

Fontaine v. Peitz,
291 S.C. 536, 354 S.E.2d 565 (1987) 4

Ex Parte Gov't Emps. Ins. Co. (Ex Parte GEICO),
373 S.C. 132, 644 S.E.2d 699 (2007) 9, 10

Hodge v. Kirkpatrick Development, Inc.,
130 Cal.App.4th 540 (Cal. Ct. App. 2005) 9, 12, 13

In re Horry County State Bank,
361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004) 3, 5

JLS, Inc. v. Pub. Serv. Com'n of W. Virginia,
321 F. App'x 286 (4th Cir. 2009) 16

McDonald v. E.J. Lavino Co.,
430 F.2d 1065 (5th Cir. 1970) 9

Navelski v. International Paper Company,
2018 WL 577979, Case No. 3:13cv445-MCR/CJK (N.D. FL. Jan. 28, 2018) 9

Seaside Resorts, Inc. v. Club Car Inc.,
308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992) 8

State v. McClinton,
369 S.C. 167, 631 S.E.2d 895 (2006) 4

Wichnoski v. Piedmont Fire Prot. Sys., LLC,
251 N.C. App. 385, 796 S.E.2d 29 (N.C. Ct. App. 2016) 9

Statutes

Unfair Trade Practices Act 12

Other Authorities

South Carolina Rules of Civil Procedure Rule 24 3

South Carolina Rules of Civil Procedure Rule 24(a)(2) ..... *passim*

South Carolina Rulse of Civil Procedure Rule 24(b)(2) ..... *passim*

6 Wright Miller, Federal Practice and Procedure,
Subrogation (1971) 656, Section 1546 9

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying PURE's Motion to Intervene as a matter of right under Rule 24(a), SCRCP given PURE's undisputed direct subrogation interest, impairment to PURE's ability to protect that interest, and inability of the Cavanaughs to adequately represent that interest?

II. Did the trial court err in denying PURE's Motion to Intervene under Rule 24(b), SCRCP where PURE's claim has questions of law and fact in common with the Cavanaughs' action and intervention will not delay or impede the underlying action?

STATEMENT OF THE CASE

Privilege Underwriters Reciprocal Exchange ("PURE") appeals the Order Denying it's Motion to Intervene as subrogee of Plaintiffs, Ann and James Cavanaugh ("the Cavanaughs"). The Cavanaughs incurred property damage to their newly built Kiawah Island home from an indoor flood of August 5, 2019. The Cavanaughs filed a claim with PURE, their insurer, for the property damages and loss of use of their home and contents caused by the water loss, and PURE paid all of the Cavanaughs' submitted damages totaling $290,668.74.

Early into the claim, PURE retained subrogation counsel and an engineer to investigate the cause of the water leak to explore a potential subrogation claim. The investigation pointed to a loose plumbing

connection, and PURE notified the plumber and general contractor, H&J Services, LLC and Knight Residential Group Charleston, LLC, respectively, of its potential subrogation claim against them.

Some months after the loss, the Cavanaughs retained counsel, who informed PURE's subrogation counsel that, in addition to incurring the water loss, the Cavanaughs had other potential claims for additional defects with the house ("uninsured claims") unrelated to the water loss. The attorneys for PURE and the Cavanaughs attempted to reach an agreement on how they could jointly pursue both PURE's subrogation claim and the Cavanaughs' uninsured claims and how a future settlement from the potential targets or judgment against them would be distributed. However, they were not able to reach an agreement on how to jointly pursue the different types of claims despite over a year of efforts.

On February 2, 2022, PURE learned that the Cavanaughs had filed this lawsuit more than three weeks earlier on January 10, 2022. Despite being aware of PURE's subrogation lien and its intent to pursue its interest, the Cavanaughs' complaint made no mention of PURE's subrogation interest. Moreover, at no point before or after initiating this

lawsuit did the Cavanaughs or their counsel attempt to inform PURE that a complaint had been filed.

On February 9, 2022, one week after learning that the Cavanaughs had filed this lawsuit, PURE filed a Motion to Intervene pursuant to Rule 24, SCRCP. The Motion came before the Honorable Clifton B. Newman on March 25, 2022 and was denied by a written order of April 12, 2022. PURE served written Notice of Appeal on the Cavanaughs and all named Defendants on May 10, 2022 and filed the Notice of Appeal with this Court on May 11, 2022. PURE received an electronic copy of the transcript of the hearing on the Motion on June 18, 2022. On July 14, 2022, this Court granted PURE a 30-day extension of time to file its Initial Brief and Designation of Matters to be Included on the Record on Appeal to August 16, 2022.

STANDARD OF REVIEW

A ruling on a Motion to Intervene pursuant to Rule 24 is reviewed for an abuse of discretion. *In re Horry County State Bank*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004). "An abuse of discretion occurs when the circuit court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual

conclusions, the ruling is without evidentiary support; or, when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." *State v. McClinton*, 369 S.C. 167, 170, 631 S.E.2d 895, 896 (2006) (citing *Fontaine v. Peitz*, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987)).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING PURE'S MOTION TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(A), SCRCP, BECAUSE PURE HAS A DIRECT AND SIGNIFICANT INTEREST THAT WILL BE IMPAIRED BY DENIAL OF INTERVENTION AND THAT CANNOT BE ADEQUATELY REPRESENTED BY THE CAVANAUGHS.

Rule 24(a) of the South Carolina Rules of Civil Procedure permits anyone "with an interest relating to the property or transaction that is the subject of the action" that "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest" to intervene in an action as a matter of right, unless his interest is "adequately represented by existing parties."

Intervention "should be liberally granted, particularly where judicial economy will be promoted by the declaration of rights of all

parties who may be affected." *In re Horry County State Bank*, 361 S.C. at 508, 604 S.E.2d at 725. The court must examine each case "in the context of its unique facts and circumstances" and consider "the pragmatic consequences of a decision to permit or deny intervention to avoid setting up a rigid application of Rule 24(a)(2)." *Id.* (citing *Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990)).

The first element of timeliness is not an issue as the Cavanaughs conceded and the court agreed that PURE timely moved to intervene. Order p. 2; Transcript p. 13, lines 18–20 ("No question that PURE has timely pursued its subrogation interest. We concede that point for all purposes."). For the reasons set forth below, PURE also satisfied the remaining three elements for intervention as a matter of right under Rule 24(a)(2).

A. PURE Has an "Interest" Related to the Property Which Is the Subject of the Action.

An intervenor must assert an interest relating to the property or transaction that is the subject of the action. Rule 24(a)(2), SCRCP. The interest need only be a "direct" interest; it does not need to be the *sole* interest. *Berkeley Electric Coop., Inc.*, 302 S.C. at 192, 394 S.E.2d at 716.

There is no dispute between the parties that PURE, having paid $290,668.74 as the insurer of the home, has a direct, actual, and substantial interest in the transaction which is the subject of the action. Counsel for the Cavanaughs conceded this interest at the hearing. Transcript p. 12, lines 1–4 ("But they've got some subrogation interest. We don't know the amount of it, etcetera. But yes, they have some interest. **[Elements] [o]ne and two are not an issue**.") (boldface added). The trial court did not contest this but "punted," stating, "I make no finding or ruling regarding the existence of a subrogation interest, its nature (whether equitable or contractual), or its amount." Order p. 1.

Instead, the court relied entirely on the unrelated and inapplicable case of *Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93, 847 S.E.2d 87 (2020). *Ex parte Builders* was a non-subrogation case involving a discrete liability insurance coverage issue that was ancillary to the main suit. The case was a construction defect lawsuit by a property owners' association against a group of construction contractors and subcontractors. *Id*. at 97, 847 S.E.2d at 89. At the end of the discovery period, and three years after the lawsuit was initiated, the contractors' liability insurers moved to intervene under Rule 24(a)(2) and 24(b), not

to preserve any subrogation claim (they had no such claims), but to gain standing during trial to help craft the jury verdict form. *Id*. at 98, 847 S.E.2d at 89. The liability insurers sought not to recover money but to have the jury itemize the damages against each of their insureds. *Id*. at 98, 847 S.E.2d at 89–90. The goal was a jury verdict that would clarify which portions of the damages were covered by the applicable commercial general liability ("CGL") policies thus obviating the need for a subsequent declaratory judgment action. *Id*. at 98, 847 S.E.2d at 90. In affirming the denial of the liability insurers' motion to intervene, the Supreme Court – unlike in our case – deemed the liability insurers factually to have no direct interest in the litigation. *Id*. The liability insurers' interest, if any, was technical at best, thus failing to satisfy the requirements of Rule 24(a)(2). *Id*.

The trial court's exclusive reliance on *Ex Parte Builders* on the interest element was in error as that case involved no subrogation claim, lien, or stake by a property insurer, but instead involved a last-minute ancillary effort to manipulate the jury verdict form by several liability insurers. The liability insurers' interest in the action was not real, actual, material, or substantial because, irrespective of the ultimate jury

award, they would be required to pay the amounts covered under the CGL policies.

Here, the trial court ignored the distinction between a liability coverage interest and a property subrogation interest, ignored the fact that PURE's interest was expressly conceded, and ignored the long-settled principal in South Carolina and throughout the country that a subrogated property insurer *is* a real party in interest. *See Aetna Ins. Co. v. Charleston & W.C. Ry. Co.*, 76 S.C. 101, 56 S.E. 788, 788–89 (1907) (holding that when an insurance company has paid the policy of insurance to its insured, it becomes the real party in interest and has the right to bring a subrogation action); *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 114 S.E.2d 832 (1960); *Seaside Resorts, Inc. v. Club Car Inc.*, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992) ("It is ownership of the right sought to be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property."); *see also Cummings v. United States*, 704 F.2d 437, 440–41 (9th Cir. 1983) (holding that trial court abused its discretion in denying as untimely the subrogated insurer's application for intervention as of right where insurer was not seeking to introduce new issues into the case and there was no evidence

that allowing intervention would cause undue delay or prejudice); *Wichnoski v. Piedmont Fire Prot. Sys., LLC*, 251 N.C. App. 385, 396, 796 S.E.2d 29, 37–38 (N.C. Ct. App. 2016) (holding that subrogated insurers acquire "an interest—*i.e.*, recoupment of payment(s) made to the insured—in a lawsuit by the insured to recover damages arising out of the same event or transaction that triggered the insurance payment[s]" and reversing the trial court's order denying subrogated insurer's motion to intervene); *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1070–71 (5th Cir. 1970) (similar); *Hodge v. Kirkpatrick Development, Inc.*, 130 Cal.App.4th 540, 555 (Cal. Ct. App. 2005) (reversing trial court order that denied subrogated insurer's motion to intervene in construction defect case); *Navelski v. International Paper Company*, 2018 WL 577979, Case No. 3:13cv445-MCR/CJK (N.D. FL. Jan. 28, 2018) ("There is no question that the Intervenors have direct, substantial, and legally protected subrogation rights relevant to this suit."); 6 Wright Miller, Federal Practice and Procedure, Subrogation (1971) 656, Section 1546 (general rule in federal courts is that if the insurer has paid the entire claim, it is the real party in interest and must sue in its own name).

The case law cited in *Ex Parte Builders* is likewise inapplicable to this case. For example, in *Ex Parte Gov't Emps. Ins. Co. (Ex Parte GEICO)*, 373 S.C. 132, 644 S.E.2d 699 (2007), the insurer sought to intervene in a family court proceeding filed by the long-term partner of its insured seeking to validate their common law marriage. *Id*. at 134, 644 S.E.2d at 700. The Supreme Court affirmed the trial court's denial of the insurer's motion to intervene, holding that the insurer had no interest in whether its insured and his/her partner were in a valid common law marriage. *Id*. at 138–139, 644 S.E.2d at 702. The insurer's only interest was in the financial implications of the family court's decision which was "peripheral to the subject matter before the court." *Id*.

Conversely, PURE's interest in this action is significant: $290,668.74. PURE has paid all amounts submitted to it and is unaware of any unpaid insured damages arising from the water loss.[1] While the Cavanaughs may have uninsured losses related to their other

[1] At the hearing, counsel for the Cavanaughs suggested for the first time that the Cavanaughs were claiming they had uninsured losses arising from the water loss. Transcript p. 35. PURE is aware of no basis for this assertion. The trial court conducted no analysis either way.

construction defect claims, those claims are separate and distinct from PURE's claim regarding the water loss. As such, PURE has a direct, immediate, and significant subrogation interest making intervention in the instant case mandatory. On the second prong of Rule 24(a)(2), therefore, the court's ruling was an abuse of discretion in two ways: it was without any evidentiary support and applied the wrong legal principle from an inapplicable case.

B. Disposition of This Action Without PURE Would, as a Practical Matter, Impair or Impede PURE's Interest.

The trial court also improperly ignored all facts and misapplied *Ex Parte Builders* to conclude that PURE's interest would not be impaired or impeded if it is excluded from the litigation. The trial court applied the *Ex Parte Builders* reasoning *i.e.*, that the liability insurers could pursue coverage determination in a subsequent declaratory judgment action, to this case stating that "PURE's subrogation interest is protected by PURE's access to judicial determination of its fair share of the Plaintiffs' recovery, via interpleader or declaratory judgment action." Order p. 3. This supposed *ex post facto* legal "fix" is purely speculative. Even assuming that a later interpleader or declaratory judgment action will not be subject to dismissal for any number of reasons, "the standard

in deciding intervention is whether existing parties adequately represent the intervener's interest in the filed lawsuit, not whether the intervener has a remedy outside of intervention if the existing parties fail to adequately represent the intervener's rights." *Hodge*, 130 Cal.App.4th at 555. In other words, Rule 24(a)(2) does not ask if the interest – once damaged in the original proceeding – can be remedied later in a subsequent action, and the trial court abused its discretion in basing its ruling on this flawed application of the law.

The court further ignored the significant factual differences between PURE's subrogation interest in this case and the liability insurers' interests in *Ex Parte Builders*. Unlike in *Ex Parte Builders*, it is PURE, not the Cavanaughs, who are entitled to the damages awarded at settlement or by the jury for the water loss. Moreover, PURE, if excluded, is beholden to the Cavanaughs' own resources, motivations, and strategy, whereas the liability insurers in *Ex Parte Builders* had counsel representing their named insured defendants. Here, the Cavanaughs decided whom to sue, whom not to sue, what to claim and what not to claim – including failing to even mention the subrogation claim in the lawsuit. For example, the Cavanaughs have brought claims

under the Unfair Trade Practices Act and seek punitive damages against all defendants, including those responsible for the loose plumbing connection, while, on the other hand, PURE's proposed intervenor's complaint focuses on traditional breach of contract and tort theories and seeks only compensatory damages. *See* Mot. to Intervene, Ex. A.

As master of the complaint, the Cavanaughs could dismiss their case at any time. Should the Cavanaughs, having already been paid by PURE for the losses related to the water loss, decide to dismiss the case against the water loss defendants and focus on the other construction defect claims, PURE would be powerless to stop them. *See*, *e.g.*, *Hodge,* 130 Cal.App.4th at 553 (stating that absent intervention, the insurer is at the mercy of its insured's efforts and success in recovering from the responsible third party). Similarly, the Cavanaughs' settlement decisions would directly impact PURE's rights, including, among other things, depleting funds available for potential settlement of PURE's legitimate, provable claim for damages. Under any such scenario, a subsequent declaratory judgment action would not provide PURE with an after-the-fact, outside remedy as the trial court suggested.

In its motion and at the hearing, PURE provided the trial court with several practical examples of how its interests would be impaired or impeded by prosecution without it. These included:

- PURE would not be permitted to participate in discovery (Transcript p. 7, lines 13–14);
- PURE would not be permitted to participate in any confidential proceedings such as mediation (Transcript p. 7, lines 14–17);
- Participating in mediation is essential to having the full value of PURE's subrogation interest recognized (Transcript p. 7, lines 14–17);
- The Cavanaughs have no practical incentive to maximize recovery for the water loss because they have already been paid by PURE for their losses (Transcript p. 29, lines 7–13);
- PURE's expert performed the inspection of the Cavanaughs' house following the water loss and will presumably be relied upon by the Cavanaughs (Transcript p. 7–8, lines 23–25);

- If PURE's expert is deposed, he will need to have representation by counsel for PURE (Transcript p. 7–8, lines 25, 1–6).

The trial court failed to address or acknowledge any of these concerns. Instead, it improperly relied on speculation that PURE *might* be able to bring some sort of subsequent action in the hopes of curing its current inability to protect its rights. Order p. 3. Accordingly, on prong three of Rule 24(a)(2), the trial court abused its discretion by ignoring any evidentiary support and relying on pure speculation as to future legal "fixes" to PURE's present inability to protect its interests.

C. PURE's Interests Are Not Adequately Represented by the Cavanaughs.

The trial court further erred in concluding that PURE's interests and the Cavanaughs' interests are sufficiently aligned such that PURE's intervention is not necessary. The "minimal" burden of establishing prong four of Rule 24(a)(2) involves a three-factor analysis: (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would

otherwise be absent. *Berkeley Electric Co-op., Inc.*, 302 S.C. at 191, 394 S.E.2d at 715 ("This burden is **minimal** and the applicant need only show that the representation of his interests **'may be'** inadequate.") (boldface added); *see also JLS, Inc. v. Pub. Serv. Com'n of W. Virginia*, 321 F. App'x 286, 289 (4th Cir. 2009) (applying similar federal standard for intervention as a matter of right and holding that movant need not show that representation by existing parties will *definitely* be inadequate due to adversity of interest, collusion, or nonfeasance; the movant need only demonstrate that representation of its interest *may be* inadequate in that regard).

The trial court neither recognized the minimal "may be inadequate" burden nor considered the evidence supporting it. First, substantial evidence exists to suggest that the Cavanaughs may not make all PURE's arguments to protect its subrogation lien, nor are they willing to do so. The evidence begins with the Cavanaughs' inability to agree on how to jointly pursue the claim prior to initiating suit. It continues with the Complaint itself, which was filed without PURE's knowledge, fails to even mention PURE's subrogation claim, and focuses more on fraud-based theories related to the house generally than on the uncomplicated

water loss claim. Indeed, on the first page of the Cavanaughs' brief submitted to the trial judge in opposition to the Motion to Intervene, the Cavanaughs themselves point out "the likelihood of cross-claims or subsequent litigation by the [Cavanaughs] against PURE," thus openly threatening to sue PURE. Pl.'s Mem. Opposing Motion to Intervene, p. 1.

The Cavanaughs' brief goes on to allege that PURE is making "irrational and heavy-handed demands," simply by seeking to recover the $290,668.74 PURE paid or at least have some say in how much of it PURE would receive.[2] *Id.* The brief describes the Cavanaughs' claims as garden variety, but PURE's claims as "a Pandora's box" or "a morass" or "clouding and complicating" their simple case, even though the Cavanaughs claim not just water damages but allege roofing defects, architectural issues, fraud, deception, unfair trade practices, punitive damages, attorney's fees, all of which are unrelated to PURE's

[2] The Cavanaughs' brief also demonstrates a significant amount of hostility towards PURE's lawyers, describing them as people the Cavanaughs "neither know nor wish to know." Pl.'s Mem. Opposing Motion to Intervene, p. 2.

straightforward subrogation claim for the water loss from a water line connection. *Id*. at p. 1–2. *See* Complaint.

Finally, the Cavanaughs' brief reveals no interest in securing a recovery for PURE. Instead, it reveals the Cavanaughs intent to "interplead the funds in court and let the judge decide." Pl.'s Mem. Opposing Motion to Intervene, p. 4. The Cavanaughs' counsel boldly highlighted this point at oral argument, stating that the Cavanaughs will only allow PURE "the trump card on the back end where they can keep the money tied up endlessly if necessary unless we come to reasonable terms." Transcript p. 19. None of this is advocacy for PURE.

Additionally, PURE brings a wealth of knowledge and expertise to the proceeding. Transcript p. 5–6. PURE retained counsel whose focus is subrogation construction cases. It was PURE's expert who performed the initial inspection of the house following the water loss and who can render opinions regarding the cause of the loss. Should the Cavanaughs proceed with their claim for the water loss, they will, presumably, have to rely on PURE's expert.

Ultimately, the trial court failed to acknowledge any of the above facts before it, simply shrugging them off by stating, "PURE's argument

on this point is limited to general assertions that each 'party has separate goals and interests', that PURE's and the Plaintiffs' 'interests [are] in conflict' and the like." Order p. 3. The trial court abused its discretion in deeming the minimal "may be inadequate" burden unmet when it failed even to acknowledge: (1) the Cavanaughs' and PURE's inability to agree on a joint pursuit; (2) the Complaint's failure to mention PURE's subrogation claim; (3) the Cavanaughs disagreement with PURE's legal theories; (4) the Cavanaughs' threats of suing PURE; (5) the fact that it is PURE's expert (and his work product) that are necessary to prove the improper plumbing connection; (6) the experience and expertise PURE's subrogation counsel brings to the case; and (7) the Cavanaughs' expectation of the settlement or judgment being potentially "tied up endlessly."

II. THE TRIAL COURT ERRED IN DENYING PURE'S MOTION FOR PERMISSIVE INTERVENTION BECAUSE INTERVENTION WILL NOT DELAY OR PREJUDICE THE ADJUDICATION OF THE RIGHTS OF THE ORIGINAL PARTIES.

Rule 24(b) grants a trial court discretion to allow "anyone" to intervene under certain circumstances, including when the applicant's "claim or defense and the main action have a question of law or fact in

common." Rule 24(b)(2), SCRCP. When exercising its discretion, the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* It is undisputed that PURE's claim and the main action have a question of law and fact in common. Despite this, the trial court denied PURE's motion for permissive intervention on the sole grounds that allowing intervention "likely would delay or prejudice the adjudication of the existing claims." Order p. 5. Again, the trial court improperly relied on *Ex Parte Builders* to reach this decision.

Ex Parte Builders is inapplicable to PURE's motion for permissive intervention in several ways. First, the liability insurers in *Ex Parte Builders* moved to intervene at the close of discovery, three years after the lawsuit was initiated. 431 S.C. at 98, 847 S.E.2d at 89. Having provided their insureds with defense counsel for the lawsuit, the liability insurers were well aware of the pending action and chose not to intervene until years of discovery had occurred, including over 40 depositions, and the date for trial was approaching. *Id*. at 102, 847 S.E.2d at 91. Here, PURE moved to intervene only weeks after it learned that the Cavanaughs had filed this lawsuit and before any discovery occurred.

None of the existing parties will suffer any delay or prejudice in the discovery process if PURE is permitted to intervene because, at best, discovery has just begun.

Second, the *Ex Parte Builders* court held that allowing intervention "would (1) unnecessarily complicate the construction defect action, including altering the [plaintiff's] burden of proof and possibly delaying the trial, and (2) create a conflict of interest for the Insureds' counsel, who were supplied to them by the Insurers." *Id.* at 102, 847 S.E.2d at 91–92. As to the first point, the court noted that without the liability insurers' intervention, the plaintiff was not required to categorize its damages into those covered by the applicable CGL policies and those not covered by the CGL polices. *Id.* If the liability insurers were granted intervention and permitted to request special jury interrogatories and verdict forms, the plaintiff would have a heightened burden of proof to itemize its damages into categories corresponding to coverage in each CGL policy, thereby placing an additional burden of proof on the plaintiff. *Id.* However, as the court noted, the burden of proof concerning the coverage dispute was a matter properly left to the insurers and their insureds, not the plaintiff. *Id.* Additionally, given that three years of

discovery had passed prior to the liability insurers' attempt to intervene, the parties had conducted over 40 depositions in which the questions relevant to a special verdict or special interrogatory were not asked. *Id*.

None of the court's concerns in *Ex Parte Builders* are relevant or applicable in the instant case. First, PURE is seeking to intervene as a plaintiff. The burden of proof, therefore, will be on PURE and the Cavanaughs. Allowing PURE to intervene will in no way shift or heighten the Cavanaughs' burden of proof. Moreover, in addition to their claim for damages attributable to the water loss, the Cavanaughs have also brought claims against a number of additional contractors and subcontractors for defects to the roof and exterior painting of the house, among others. The plumbing subcontractor at fault for the water loss cannot possibly be held liable for roofing or exterior paint defects and vice versa. Therefore, irrespective of PURE's involvement in the case, the jury will have to determine the fault of each defendant and apportion damages caused by each of the construction defects at the Cavanaughs' home.

Lastly, even if PURE does request a special verdict form, discovery in the case had not yet begun at the time PURE filed its Motion to

Intervene. To the best of PURE's knowledge, as of the time of filing of this brief, no depositions have been conducted in the case. Therefore, if PURE is permitted to intervene, the Cavanaughs will have ample opportunity to seek discovery on issues that would be relevant to developing a special verdict form. Again, allocation of damages to each individual defendant is required whether PURE is involved in the action or not given the distinct nature of the claims brought by the Cavanaughs against the various defendants.

As to the *Ex Parte Builders* court's second point that intervention would create a conflict of interest for the insureds' counsel, this issue is irrelevant in the instant case. In *Ex Parte Builders*, the court's primary concern regarding a potential conflict of interest was that if the liability insurers were permitted to intervene and request a special verdict form, it would force the defendants to shift their presentation of evidence to essentially concede liability and focus instead on damages. 431 S.C. at 103, 847 S.E.2d at 93. Conversely, PURE has not, nor is it required to, provide the Cavanaughs with counsel to pursue their construction defect claims. As the plaintiffs in the case, there is no risk that allowing PURE to intervene would require the Cavanaughs to concede liability.

Therefore, the court's concern that a conflict of interest would prejudice the existing parties has no bearing on the instant case, and the trial court abused its discretion in failing to allow PURE to intervene under the circumstances.

CONCLUSION

PURE respectfully requests that this Court reverse the trial court's decision denying PURE's Motion to Intervene in the underlying action pursuant to Rule 24(a) of the South Carolina Rules of Civil Procedure, or in the alternative, Rule 24(b) of the South Carolina Rules of Civil Procedure.

Respectfully submitted this the 15th day of August, 2022.

/s/ R. Taylor Speer
R. Taylor Speer
SC Bar No. 100455
FOX ROTHSCHILD LLP
2 W. Washington Street, Suite 1100
Greenville, South Carolina 29601
Phone: (864) 751-7665
Fax: (864) 751-7800
tspeer@foxrothschild.com

Attorney for Appellant Privilege Underwriters Reciprocal Exchange

RECEIVED
Aug 15 2022
SC Court of Appeals

PROOF OF SERVICE

I hereby certify that on August 15, 2022, a true and correct copy of APPELLANT'S INITIAL BRIEF, was served via email on all Respondents as follows:

Benjamin A.C. Traywick
Alexandra Scott Williams
171 Church Street, Suite 340
Charleston, SC 29401
ben@bentraywicklaw.com
ali@bentraywicklaw.com
Attorneys for Respondents Ann and James Cavanaugh

Catherine Holland Chase
Stephen Augustus Griffith, Jr.
PO Box 993
Charleston, SC 29402
cchase@ycrlaw.com
sgriffith@ycrlaw.com
Attorneys for Respondent H&J Services, LLC

Beth Manning Lee
Lewis Gregory Cook Horton
PO Box 999
Charleston, SC 29402
Beth.lee@wbd-us.com
Greg.horton@wbd-us.com
Attorneys for Respondent Knight Residential Group Charleston, LLC

Donald J. Davis, Jr.
Kara S. Grevey
25 Calhoun Street, Suite 400
Charleston, SC 29401
kgrevey@ycrlaw.com
jdavis@ycrlaw.com
Attorneys for Respondent Kiawah Development Partners, LLC

Christopher H. Pearce
1314 Professional Drive
Myrtle Beach, SC 29577
cpearce@pearcelawgroup.com
Attorney for Respondent Construction Applicators Charleston, LLC

Timothy Cooper Dargan
Kevin W. Mims
1156 King Street
Charleston, SC 29403
tdargan@lmlawllp.com
kmims@lmlawllp.com
Attorneys for Respondent Professional Roofers, Inc.

/s/ R. Taylor Speer
R. Taylor Speer
SC Bar No. 100455
FOX ROTHSCHILD LLP
2 W. Washington Street, Suite 1100
Greenville, South Carolina 29601
Phone: (864) 751-7665
Fax: (864) 751-7800
tspeer@foxrothschild.com

Attorney for Appellant Privilege Underwriters Reciprocal Exchange