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SC Court of Appeals

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

Ex Parte: Builders Mutual Insurance Company, Appellant,

In Re:

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, individually, and on behalf of all others similarly situated, Plaintiffs, v. Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services-Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; W C Services, Inc., CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60.....Defendants.

Tri-County Roofing, Inc.....Third-Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Gutter Works, Inc. and Michael L. Segars d/b/a Gutter Works; Mr. Gutter; Litchfield Seamless Gutters & Windows, LLC and Thomas Litchfield d/b/a Litchfield Seamless Gutter; Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; and Chris a/k/a John Doe 61.....Third-Party Defendants.

And

Complete Building Corporation, Inc.....Third-Party Plaintiff,

v.

Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete.....Third-Party Defendants.

Of whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and behalf of all others similarly situated, and Tri-County Roofing, Inc. are the Respondents.

MOTION TO TRANSFER CASE TO THE SUPREME COURT

Pursuant to Rule 204(b), SCACR, Appellant Builders Mutual Insurance Company ("Builders Mutual"), moves to certify the case for immediate review by the Supreme Court.

The appeal arises from a civil action styled *Palmetto Pointe at Peas Island Condominium Property Owners Association et al. v. Tri-County Roofing, Inc. et al.* Civil Action No. 2015-CP-10-00955 (the "Civil Action"). The Plaintiffs in the Civil Action commenced the action against the developer, design professionals and contractors (collectively, "Defendants") who were involved in the original design and construction of the condominium buildings that comprise the Palmetto Pointe residential community. The Plaintiffs allege that the buildings were constructed improperly and seek damages against Defendants based on what Plaintiffs allege it will cost to make future repairs to the buildings. Plaintiffs will seek to satisfy any verdict in favor of the Plaintiffs from general liability insurance policies issued by insurers to Defendants.¹

Builders Mutual moved to intervene in the Civil Action for the limited purpose of having the Circuit Court submit a special verdict form and/or special interrogatories to a jury in order to

¹ Builders Mutual issued general liability insurance policies to Defendant/Respondent Tri-County Roofing, Inc. ("Tri-County Roofing"). Builders Mutual is providing a defense to Tri-County Roofing through Andrew Cole, Esq. of the law firm Collins & Lacy, P.C., pursuant to a reservation of rights.

allocate a verdict, if any, in favor of Plaintiffs and avoid the consequences of a general verdict that occurred to the insurers in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009) (“*Newman*”) and *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 332, 803 S.E.2d 288, 294 (2017) (“*Heritage Communities*”). The consequences in *Newman* and *Heritage Communities* were that the insurers were required to pay the entire verdict/award in the underlying actions even though parts of the verdict/award included non-insured damages.²

Plaintiffs and Tri-County Roofing objected to Builders Mutual being able to intervene in the Civil Action.³ The Circuit Court entered its Order/Statement of Judgment denying the Motion to Intervene filed by Builders Mutual. (Exhibit A). The Circuit Court did not provide an explanation for the ruling. Builders Mutual moved to have the Circuit Court reconsider its Order/Statement of Judgment, including to provide an explanation for the ruling, which the Circuit Court denied in its Order/Statement of Judgment Denying Motion to Reconsider. (Exhibit A).

² Builders Mutual submits that substantive issues of insurance coverage are established and will be addressed or discussed in the appeal with citations to the Supreme Court’s decisions in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011) (“*Crossmann*”) (“In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute ‘property damage,’ but the defective construction would not.”); *Newman*, 385 S.C. at 198, 684 S.E.2d at 546 (These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco—even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy—and serve as one of the bases for this Court’s acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured’s contractual liability which a CGL policy is not intended to cover.”). The present appeal concerns procedures. *Newman* and *Heritage Communities* did not provide definitive procedural guidelines which has resulted in insurers seeking to intervene on a limited basis in construction defect civil actions to guard against a general verdict. If there is a verdict in favor of Plaintiffs, the objective is to have separated beforehand or contemporaneously those costs which are to remove and replace Tri-County’s work (not covered) from those cost which are to repair “property damage” (potentially covered).

³ Tri-County Roofing hired personal counsel who objected to the Motion to Intervene filed by Builders Mutual.

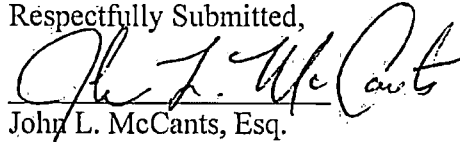
Builders Mutual filed a Notice of Appeal on February 19, 2019 with the Court of Appeals. The appeal presents at least one major issue that is recurring in construction defect civil litigation in South Carolina and will continue to recur: If there are to be consequences to a liability insurer for a general verdict, what procedures can an insurer follow to preclude those consequences or to assure there is an allocated verdict for insurance coverage purposes? Builders Mutual seeks certification for the Supreme Court to decide the issues to be presented and for Builders Mutual to be able to avoid the legal consequences of a general verdict of past precedent for the present Civil Action.

Transferring a case to the Supreme Court “is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.” Rule 204(b), SCACR. The Supreme Court has granted certification in appeals, either on the motion of a party or the Court’s own motion, presenting recurring questions affecting liability insurers and insureds with respect to construction defect litigation. *See Heritage Communities; Crossmann; Newman; Bennett and Bennett Const., Inc. v. Auto-Owners Ins. Co.*, 405 S.C. 1, 747 S.E.2d 426 (2013); *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013); and *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005). Further, the Supreme Court granted a Motion to Transfer the Case, like the present one, in a recent appeal filed by insurers in Appellate Case No. 2017- 02146 concerning the denials of motions to intervene in an underlying construction defect case.⁴ Builders Mutual submits that absent intervention or an appeal, the trial in the Civil Action would have gone forward to an unallocated or general verdict. It thus makes eminent sense to resolve the issues raised by *Newman* and *Heritage Communities* before a trial in the Civil

⁴ The parties in Appellate Case No. 2017- 02146 settled the appeal and underlying civil action before oral arguments in the Supreme Court.

Action; and Builders Mutual submits that a most efficient way is certification under Rule 204(b), SCACR. For these reasons, Builders Mutual moves pursuant to Rule 204(b), SCACR for certification by the Supreme Court for immediate review of the case.

Respectfully Submitted,



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**ATTORNEY FOR APPELLANT BUILDERS
MUTUAL INSURANCE COMPANY**

February 27, 2019

Exhibit A

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
 Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

FILED
 CLERK OF COURT
 2018 DEC 18 AM 9:39

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.


IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Motions for Intervention filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ends does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details. E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2764	12/1718
Circuit Court Judge	Judge Code	Date

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
 Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
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- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

2019 JAN 17 AM 10:30
 CLERK OF COURT
 CHARLESTON COUNTY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.


IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Motions for Reconsideration of this court's ruling on Motions to Intervene filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ends does not end the case.

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Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
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 E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

 Circuit Court Judge	2764 Judge Code	1/16/18 Date
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THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

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SC Court of Appeals

Ex Parte: Builders Mutual Insurance Company, Appellant,

In Re:

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, individually, and on behalf of all others similarly situated, Plaintiffs, v. Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; W C Services, Inc., CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60.....Defendants.

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v.

Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Gutter Works, Inc. and Michael L. Segars d/b/a Gutter Works; Mr. Gutter; Litchfield Seamless Gutters & Windows, LLC and Thomas Litchfield d/b/a Litchfield Seamless Gutter; Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; and Chris a/k/a John Doe 61.....Third-Party Defendants.

And

Complete Building Corporation, Inc.....Third-Party Plaintiff,

v.

Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete.....Third-Party Defendants.

Of whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and behalf of all others similarly situated, and Tri-County Roofing, Inc. are the Respondents.

PROOF OF SERVICE

I certify that I have served the Motion To Transfer Case To The Supreme Court on Other Counsel of Record by depositing a copy of it in the United States Mail, postage prepaid, on February 27, 2019 addressed to their attorneys of record, listed as follows:

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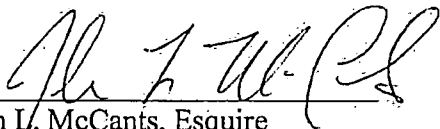
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February 27, 2019
Columbia, South Carolina

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February 27, 2019

Via Hand Delivery

South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
1231 Gervais Street
Columbia, SC 29201

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., et al. v.
Island Pointe, LLC, et al.
Circuit Court Case No.: 2015-CP-10-00955
Appellate Case No.: 2019-000238

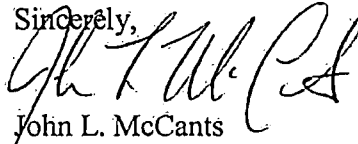
Dear Mr. Shearouse:

Enclosed please find the original and eight (8) copies of Builders Mutual Insurance Company's Motion to Certify to the South Carolina Supreme Court Under Rule 204, SCACR with the Proof of Service for filing along with a check in the amount of Fifty and 00/00 (\$50.00) Dollars representing the filing fee in connection with the above-referenced matter. Please file the original and six copies, and return the remaining two copies to the Courier which then will file a clocked copy with the Court of Appeals.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Sincerely,



John L. McCants

cc: South Carolina Court of Appeals
All Counsel of Record per Proof of Service

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SC Court of Appeals

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S.C. SUPREME COURT