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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

RECEIVED

Case No. 2015-CP-10-00955

MAR 20 2019

SC Court of Appeals

Appellate Case No. 2019-000238

Ex Parte:

Builders Mutual Insurance Company, Nationwide Mutual
Fire Insurance Company, Nationwide Mutual Insurance
Company, and Nautilus Insurance Company,Appellant,

In Re:

Palmetto Pointe at Peas Island Condominium Property
Owners Association, Inc. and Jack Lowe, individually, and
on behalf of all others similarly situated, Plaintiff,

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 Building
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 Does 1-60, Defendants,

And

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 Lowe,
individually, and on behalf of all others similarly situated,
and Stanley’s Vinyl Fence Designs and WC Services, Inc.
are Respondents,

MOTION TO TRANSFER CASE TO THE SUPREME COURT

Appellant Nationwide Mutual Insurance Company (hereinafter “Nationwide
Mutual”) hereby moves to certify this case for immediate review by the Supreme Court
pursuant to Rule 204(b), SCACR. The grounds for this motion to transfer jurisdiction
are as follows.

This appeal involves conflicting holdings by the Supreme Court of South Carolina that have caused great confusion as to issues of law that are frequently litigated. At the heart of this appeal is an issue of great public interest: Does South Carolina law require insurance issues to be intermingled and litigated together with the underlying civil actions filed by plaintiffs against insured defendants to establish liability and damages? The only court with authority to resolve these questions is the Supreme Court of South Carolina.

This appeal involves liability coverage for certain contractor defendants in this construction defect action. Nationwide Mutual issued policies to Defendant W C Services, Inc. (hereinafter “WC Services”), a subcontractor that allegedly performed certain work at Palmetto Pointe at Peas Island Condominium, which is the subject of this action. The Plaintiffs in this action allege that the buildings at issue were defectively constructed, and they seek damages for the cost of repairing the buildings. Upon information and belief, the Plaintiffs will seek a general verdict awarding damages against the defendants in this action, including WC Services. The Plaintiffs will seek to satisfy any verdict they may obtain against WC Services. from the policies Nationwide Mutual issued to WC Services.

Nationwide Mutual moved to intervene in this action in order to protect its right to allocate between covered and non-covered damages. The trial court denied Nationwide Mutual’s motion. (Orders filed December 18, 2018 and January 17, 2019, attached to Nationwide Mutual’s Notice of Appeal.)

Nationwide Mutual has also sought declaratory relief in a separate action pending in federal district court that involves liability coverage for this action. FCCI Ins. Co. v.

Island Pointe, LLC, et al., Civ. Action No. 2:17-cv-1976-MBS (D.S.C.). Due to the current state of the law, Nationwide Mutual is uncertain whether factfinding necessary to support an allocation between covered and non-covered damages should occur in the declaratory judgment action or in this construction defect action.

Longstanding South Carolina precedent holds that insurance issues are to be kept separate from issues of liability and damages. See Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). Consistently with this basic principle, South Carolina courts have followed the general rule that insurers may litigate coverage issues in separate actions. Specifically, the Supreme Court held over 50 years ago that insurers may litigate issues upon which their interests are not aligned with the interests of their insureds in separate coverage actions, even if those issues overlap with issues that were litigated in the underlying tort action. Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965).

As a corollary to the separation of coverage issues from underlying tort issues, the Supreme Court has held that insurers do not represent their insureds in the underlying tort actions. Instead, liability carriers hire attorneys to defend their insureds (hereinafter "defense counsel"), and defense counsel's sole loyalty is to the insured defendant.

Sentry Select Ins. Co. v. Maybank Law Firm, LLC, Op. No. 27865, 2019 WL 1052431, (S.C. Sup. Ct. filed Mar. 6, 2019) (Shearouse Adv. Sh. No. 10 at 11, 16); Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP, 433 F.3d 365, 372-73 (4th Cir. 2005). For this reason, the interests of liability insurers are not represented in underlying tort actions against their insureds.

In direct conflict with this longstanding precedent, the Supreme Court held in Auto Owners Insurance Company, Inc. v. Newman that the liability insurer waived its right to make an allocation between covered and non-covered damages by failing to raise the issue in the underlying arbitration proceeding. 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). The Supreme Court reasoned that “it is not the purpose of this declaratory judgment action to relitigate the issue of damages,” and that the liability carrier “had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator.” Id. These statements cannot be reconciled with Sims.

The Newman court compounded the confusion by further reasoning in a footnote that the liability carrier “represented” the insured in the underlying arbitration proceeding pursuant to the terms of the insurance contract. Id. at n.5. The Supreme Court has construed a liability insurer’s duty to provide a defense to carry with it a duty to represent its insured in other cases. See City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund, 382 S.C. 535, 550, 677 S.E.2d 574, 582 (2009) (holding that a liability carrier had a duty to assert an affirmative defense “on behalf of” its insured). These statements conflict with Supreme Court precedent holding that liability insurers do not represent their insureds; they merely provide defense counsel to represent their insureds. See Sentry Select, 2019 WL 1052431; Twin City, 433 F.3d 365, 372-73.

In Harleysville Group Insurance v. Heritage Communities, Inc., Op. No. 27698, 2017 WL 105021, (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 26 n.11), the Supreme Court initially held, as an alternative ground for its holding, that the liability insurer waived its right to allocate between covered and non-covered damages by failing to raise the issue in the underlying tort action. The Supreme Court

failed to clarify this ruling its final opinion. Harleysville, 420 S.C. 321, 343 n.11, 803 S.E.2d 288, 300 n.11 (2017) (noting that the trial court ruled that the insurer waived its right to allocate by failing to raise the issue in the underlying proceeding under Newman).

In holding that the liability insurer waived its right to allocate through defects in its reservation of rights letter, the Supreme Court's reasoning assumed that insurers have the ability to allocate between covered and non-covered damages in underlying tort actions. In particular, the Supreme Court repeated emphasized that liability insurers must warn that defense counsel has a conflict of interest and that insureds must seek a special verdict to allocate between covered and non-covered damages. Id. at 338-43, 803 S.E.2d at 297-300. These warnings are only relevant if coverage issues are litigated together with issues of liability and damages in the underlying tort action. Thus, the rationale for the court's holding in Harleysville conflicts in large measure with Sims and Sentry Select.

Finally, Newman and Harleysville conflict with Ex Parte GEICO and basic principles of due process. The Supreme Court has directly held that liability insurers lack standing to participate in underlying tort proceedings against their insureds. Ex Parte GEICO, 373 S.C. 132, 644 S.E.2d 699. On the other hand, the Supreme Court has held that liability insurers may not assert their interests through defense counsel because defense counsel's loyalty is solely to the insured. Sentry Select, 2019 WL 1052431. The apparent effect of Newman, Ex Parte GEICO, and Sentry Select is to foreclose an insurer's right to litigate an allocation between covered and non-covered damages in any forum. However, this would violate due process. See Sims, 247 S.C. at 86-87, 145

S.E.2d at 525 (explaining that insurers cannot be estopped by the acts of parties over whom they have no control); Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998) (holding that minimal procedural due process affords a litigant notice and an opportunity to be heard).

The immediate question in this appeal is whether the trial court erred in denying the insurers' Motions to Intervene. The larger question concerns the procedural mechanism by which allocation between covered and non-covered damages may be litigated in this State. As set forth above, the legal landscape on this issue is fraught with conflicting holdings by the Supreme Court. These conflicts can only be resolved by the Supreme Court.

Nationwide Mutual is mindful of the fact that the trial court has proceeded with the case and the trial date is approaching. The question whether the liability insurers are parties to this action should be resolved as expeditiously as possible in order to avoid undue delay to the litigants in this action.

For the reasons set forth above, this appeal involves issues of significant public interest and legal principles of major importance. Pursuant to Rule 204(b), SCACR, Nationwide Mutual joins the other appellants in moving to transfer this case to the Supreme Court of South Carolina.

[Signature Page to Follow]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read 'TJ Newton', written over a horizontal line.

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v.

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Charleston; Andersen Windows, Inc.; Atlantic Building
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Construction Services, Inc. Christopher N. Union; Builder
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Certainteed Corporation; Kelly Flooring Products, Inc.
d/b/a Carpet Baggers, and John Does 1-60, Defendants,

And

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

v.

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Cohen’s Drywall; and Mosley Concrete,Third-Party Defendants,

Of whom Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Jack Lowe,
individually, and on behalf of all others similarly situated,
and Stanley’s Vinyl Fence Designs and WC Services, Inc.
are Respondents,

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I certify that I have served the Appellant’s Initial Brief and Designation of
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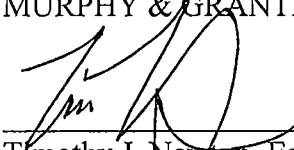
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