

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

APR 29 2019

SC Court of Appeals

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 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 Building 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 on behalf of all others similarly situated, Tri-County Roofing, Inc., Stanley's Vinyl Fence Designs, and W C Services, Inc., are the Respondents.

Case No. 2019-000238

APPELLANT NAUTILUS INSURANCE COMPANY'S PETITION FOR EXPEDITED REVIEW OF ORDER LIFTING STAY WITH REGARD TO TRIAL SCHEDULED FOR May 6, 2019

Appellant Nautilus Insurance Company ("Nautilus") petitions this Court, pursuant to South Carolina Appellate Court Rule 241(d)(7), for an expedited review of the Order of Judge Jennifer B. McCoy of the Court of Common Pleas for Charleston County, South Carolina dated April 25, 2019 lifting the automatic stay in the appeal and order the trial to go forward in the lawsuit styled *Palmetto Pointe at Peas Island Condominium Property Owners Association and Jack Love, Individually, and on behalf of all others similarly situated v. Island Pointe, LLC, et al.*, Civil Action No. 2015-CP-10-00955 ("Palmetto Pointe Lawsuit"). Specifically, the Order allows the trial to go forward in the Palmetto Pointe Lawsuit on May 6, 2019. Nautilus requests review of the Order because the issues in the trial in the Palmetto Pointe Lawsuit are affected by Nautilus' current appeal regarding whether the circuit court improperly denied Nautilus' Motions to Intervene in the Palmetto Pointe Lawsuit for the limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or special verdict forms that address factual issues related to the indemnity coverage, if any under the policies. See Rule 49, SCRCP; *Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 341, 803 S.E.2d 288, 299 (2017) (explaining that "[t]he right to control the litigation carries with it certain

duties,” including “the duty not to prejudice the insured’s rights by failing to request special interrogatories, or a special verdict in order to clarify coverage of damages.”). Because the circuit court has lifted the automatic stay, the trial is scheduled to commence on May 6, 2019, and therefore, Nautilus requests immediate review of the circuit court’s Order.¹

FACTUAL BACKGROUND

In the Palmetto Pointe Lawsuit, Plaintiffs Palmetto Pointe at Peas Island Condominium Property Owners Association and Jack Love (collectively “Plaintiffs”) have brought suit against a number of defendants alleging defective design and construction of a condominium project known as Palmetto Pointe at Peas Island. Plaintiffs allege the buildings were improperly constructed and seek damages in the Palmetto Pointe Lawsuit regarding the alleged improper construction against a number of defendants, including Complete Building Corporation, Inc. (“CBC”) and Tri-County Roofing, Inc. (“Tri-County”).

CBC and Tri-County filed crossclaims against several defendants, including Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC (collectively “Miracle Siding”) and Elroy [sic] Alonzo [sic] Vasquez (“Vasquez”). CBC alleges Miracle Siding breached the warranties accompanying its work and alleges it is entitled to recover any amount it is adjudged to owe Plaintiffs or that it pays to Plaintiffs in settlement from Miracle Siding. Tri-County’s crossclaim includes the following causes of action: 1) Negligence; 2) Breach of Express and Implied Warranties; 3) Breach of Contract; and 4) Indemnity. CBC alleges Alonzo breached the warranties accompanying its work and alleges it is entitled to recover any amount it is adjudged to owe Plaintiffs or that it pays to Plaintiffs in settlement from Alonzo. Tri-County’s crossclaim

¹ In addition to the arguments presented here, Nautilus also joins in and adopts the arguments raised and presented in the Petitions of Builders Mutual Insurance Company and Nationwide Insurance Company.

includes the following causes of action: 1) Negligence; 2) Breach of Express and Implied Warranties; 3) Breach of Contract; and 4) Indemnity.

Nautilus issued successive commercial general liability policies to Miracle Siding for the policy periods following policy periods: February 16, 2005 to February 16, 2006; February 16, 2006 to February 16, 2007, and February 16, 2007 to February 16, 2008, cancelled effective July 15, 2007. The policies insure Miracle Siding for certain risks under the insuring agreement and exclude certain risks through policy exclusions. Nautilus has agreed to participate in the defense of Miracle Siding subject to a full and complete reservation of rights under the policies. Nautilus specifically reserved its right to disclaim indemnity coverage for damages awarded against Miracle Siding if those damages are not covered by the terms and conditions of the policies.

The reservation of rights specifically sets forth in detail the various grounds upon which Nautilus may deny indemnity coverage to Miracle Siding, including, but not limited to, lack of property damage or an occurrence and contractual liability; damage to property; damage to your product; damage to your work; damage to impaired property or property not physically injured; recall of products, work or impaired property; and microorganisms, biological organisms, bioaerosols or organic contaminant exclusions contained in the policies. The contents of the reservation of rights also inform Miracle Siding that there also may be no coverage for damages awarded for the cost of repairing and replacing Miracle Siding's own defective work and product. Nautilus has also advised Miracle Siding in writing that Miracle Siding should take steps to allocate the verdict as to covered and non-covered claims and/or damages.

In addition, Nautilus issued successive commercial general liability policies to the named insured "Eloy Alonso" for the following policy periods: May, 17, 2007 to May 17, 2008; June 23, 2008 to June 23, 2009; June 23, 2009 to June 23, 2010; June 23, 2010 to June 23, 2011; and

June 23, 2011 to June 23, 2012. The policies insure Eloy Alonso for certain risks under the insuring agreement and exclude certain risks through policy exclusions. Nautilus was informed about the claims asserted against Vasquez by Plaintiffs, CBC, and Tri-County. Nautilus has agreed to participate in the defense of Alonso subject to a full and complete reservation of rights under the policies. Nautilus specifically reserved its right to disclaim indemnity coverage for damages awarded against Eloy Alonso if those damages are not covered by the terms and conditions of the policies.

The reservation of rights specifically sets forth in detail the various grounds upon which Nautilus may deny indemnity coverage to Alonso, including, but not limited to, lack of property damage or an occurrence; expected or intended injury; contractual liability; damage to property; damage to your product; damage to your work; damage to impaired property or property not physically injured; work completed by contractors and subcontractors; roofing operations – weather-related property damage; punitive damages; professional services; microorganisms, biological organisms, bioaerosols, or organic contaminants; limitation of coverage to designated operations; all operations covered by a consolidated (wrap-up) insurance program; and your work completed prior to specified date exclusions contained in the policies. The contents of the reservation of rights also inform Alonso that there also may be no coverage for damages awarded for the cost of repairing and replacing Alonso's own defective work and product. Nautilus has also advised Alonso in writing that Alonso should take steps to allocate the verdict as to covered and non-covered claims and/or damages. *See Harleysville*, 420 S.C. at 341, 803 S.E.2d at 299 (“Significantly, none of the reservation letters advised Heritage of the need for allocation of damages between covered and non-covered losses....”).

On April 18, 2018 and April 30, 2018, Nautilus filed Motions to Intervene in the Palmetto Pointe Lawsuit with regard to the policies issued to Miracle Siding and Eloy Alonso for the limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or special verdict forms that address factual issues related to the indemnity coverage, if any, afforded to Miracle Siding or Eloy Alonso for the claims asserted in the Palmetto Pointe Lawsuit. In addition, in the alternative, Nautilus requested an order, without conceding that such order was necessary, from the Court that Nautilus would not be bound by any judgment entered in the Palmetto Pointe Lawsuit such that Nautilus would be able to litigate all facts relevant to determination of the coverage afforded, if any, under the policies that Nautilus issued to its named insureds. On August 24, 2018, the Order Assigning Pre-Trial Matters to Judge McCoy was filed. A hearing was held on the Motions on December 17, 2018, and by Order dated December 18, 2018, the Court denied Nautilus' Motions. Nautilus filed a Motion to Alter or Amend Order with regard to its Motion to Intervene on December 31, 2018, and by Order dated January 17, 2019, and received by Nautilus on January 23, 2019, the Court denied Nautilus' Motion to Alter or Amend Order.

On February 22, 2019, Nautilus filed a Notice of Appeal regarding the Circuit Court's denial of the Motion to Intervene and Motion to Alter or Amend Order. By order dated April 5, 2019, the Circuit Court issued an order staying the case and acknowledging that in light of the pending appeals, including Nautilus' appeal, the Appellate Court had exclusive jurisdiction over the case. On April 16, 2019, Plaintiffs filed a Motion for Reconsideration of and/or Relief from Order Staying Case and/or Petition to Lift or Otherwise Modify any Stay as May Be Necessary for this Case to Proceed as Scheduled to Trial on the Merits Beginning May 6, 2019 ("Motion for Reconsideration"). The Circuit Court held a hearing on the Motion for Reconsideration on

April 25, 2019, and granted the Motion for Reconsideration that same day. Nautilus now files the instant Petition seeking expedited review of the Circuit Court's Order improperly lifting the stay.

LEGAL ARGUMENT

The South Carolina Appellate Court Rules provide that the circuit court may act only on those issues that are not affected by the appeal. Specifically, Rule 205, SCACR states:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

In addition, Rule 241(a) provides:

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

See Stokes-Craven Holding Corp. v. McKenzie, 416 S.C. 517, 532, 787 S.E.2d 485, 493 (2016) (explaining “the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal”); *Arnal v. Fraser*, 371 S.C. 512, 519, 641 S.E.2d 419, 422 (2007) (“Under Rule 205 and the last sentence of the above-portion quoted portion of Rule 225 [current 241], the lower court may not act or issue orders that affect an issue on appeal” and “[u]nder Rule 225 [current 241], the lower court may act only to enforce matters not stayed by the appeal.”)

In determining whether the stay should be lifted requires considering whether the matters are affected by the appeal. *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) (explaining that “[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal, but is specifically allowed to proceed with matters not affected by the appeal.”). Here, there is no question that the trial cannot proceed with regard to Nautilus’ insureds because the issues regarding a potential damages award are affected by the trial.

Nautilus has appealed from the Circuit Court’s denial of its Motions to Intervene.² The basis of Nautilus’ Motions is the reasoning of the South Carolina Supreme Court’s decisions in *Harleysville Group* and *Newman* referenced above. In *Newman*, the Supreme Court determined that because the record did not provide information regarding the portion of the damages of the arbitrator’s itemized list of damages were attributed to the removal and replacement of the defective stucco at issue in the case (which would not be covered), and such issue could not be relitigated in the declaratory judgment action, it could not determine what portion of the award was not covered under the policy. In making this determination, the Supreme Court explained the insurer “had an opportunity to raise this matter when the issue of damages was litigated

² The denial of Nautilus’ Motions is immediately appealable pursuant to Section 14-3-330 of the South Carolina Code of Law, which provides a statutory right to appeal and provides that the appellate court “shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal...[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action...” As illustrated in *Newman* and *Harleysville Group*, if Nautilus is not allowed to intervene in the trial in this matter for the purposes required by the South Carolina Supreme Court, if the jury awards damages and a general verdict is returned, Nautilus would be prohibited from protecting its interests and determining its duties and obligations under the policy or policies such that a substantial right would be affected with no recourse. Therefore, this is type of situation that Section 14-3-330 encompasses. In addition, it is our understanding that this Court has recently denied motions to dismiss similar appeals that were based on arguments that the appeals were interlocutory.

before the arbitrator, who issued a final, binding award on the merits.” *Newman*, 385 S.C. at 198, 684 S.E.2d at 547.

Again, the South Carolina Supreme Court determined that the insurer could not litigate certain issues in a subsequent declaratory judgment action because it had not requested special interrogatories or a special verdict to apportion covered versus non-covered damages in the jury award. In *Harleysville Group*, the Court quoted, with approval, the Tenth Circuit’s decision that “[t]he right to control the litigation carries with it certain duties,” including ‘the duty not to prejudice the insured’s rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.’” *Harleysville Group*, 420 S.C. at 341, 803 S.E.2d at 299 (quoting *Magnum Foods, Inc. v. Cont’l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994)). Like in *Newman*, clearly the Supreme Court was critical of the insurer because it did not request special interrogatories or a special verdict to apportion the damages awarded for damages potentially covered under the policy versus those not covered under the policy. Therefore, Nautilus has sought limited intervention in the Palmetto Pointe Lawsuit for the purposes identified by the South Carolina Supreme Court.

The issue presented in Nautilus’ appeal is whether it should be allowed to intervene in the trial of this matter for the purpose of submitting special interrogatories or a special verdict form per the South Carolina Supreme Court’s decisions in *Harleysville Group* and *Newman* in connection with its insureds. Plaintiffs seek to move forward with that trial. Certainly, the trial is affected by the appeal. If the trial were allowed to go forward, particularly as to Nautilus’ insureds, and the Appellate Court were to determine that Nautilus should have been allowed to intervene to submit the special interrogatories or a special verdict form, there would need to be a new trial because this Court would not have had jurisdiction to conduct the trial, which is


unquestionably a waste of judicial resources. Plaintiffs failed to meet their burden in demonstrating that the matters were not affected by the appeal and were not entitled to the relief they were seeking. Therefore, the Circuit Court erred in granting Plaintiffs' Motion. Accordingly, the Circuit Court's Order lifting the stay should be reversed.

CONCLUSION

For these reasons, Nautilus respectfully requests that the Honorable H. Bruce Williams of the South Carolina Court of Appeals reverse the Circuit Court.

April 29, 2019

GALLIVAN, WHITE & BOYD, P.A.

By: 

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Attorneys for Appellant Nautilus Insurance
Company

STATE OF ARIZONA

)

VERIFICATION

)

COUNTY OF

)

PERSONALLY APPEARED before me, Todd Calvin, who after being duly sworn, says that he has read the foregoing Petition, knows the contents thereof, and that the same are true and correct to the best of his own knowledge, saving and excepting as to those matters alleged therein on information and belief, and, as to those, he believes them to be true.

Todd Calvin, Senior Claims Examiner
Nautilus Insurance Group

SWORN to before me this
26th day of April, 2019

Notary Public for Arizona
My Commission Expires: 11-9-2021



IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

APR 29 2019

Jennifer B. McCoy, Circuit Court Judge **SC Court of Appeals**

Ex Parte:

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And

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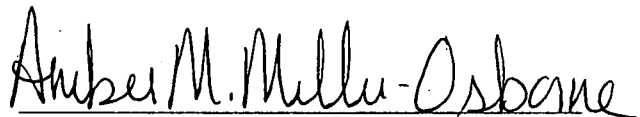
Of Whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated, Tri-County Roofing, Inc., Stanley's Vinyl Fence Designs, and W C Services, Inc., are the Respondents.

Case No. 2019-000238

CERTIFICATE OF SERVICE

I, the undersigned employee of Gallivan, White & Boyd, P.A., do hereby certify that I have caused the below referenced to be served via U. S. Mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the address(es) shown below.

<u>DOCUMENT:</u>	APPELLANT NAUTILUS INSURANCE COMPANY'S PETITION FOR EXPEDITED REVIEW OF ORDER LIFTING STAY WITH REGARD TO TRIAL SCHEDULED FOR MAY 6, 2019
<u>COUNSEL SERVED:</u>	All Counsel of Record (Via Email)



Amber M. Miller-Osborne
Legal Assistant

Columbia, South Carolina
April 29, 2019

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April 29, 2018

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APR 29 2019

SC Court of Appeals

VIA HAND DELIVERY

The Honorable H. Bruce Williams
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.,
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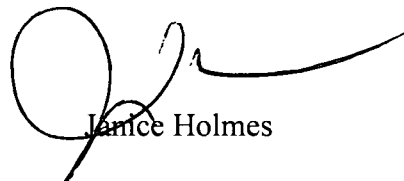
Dear Judge Williams:

Enclosed please find Appellant Nautilus Insurance Company's Petition for Expedited Review of Order Lifting Stay with Regard to Trial Scheduled for May 6, 2019 in the above-referenced matter.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.



Janice Holmes

JH:amo
Enclosures
Cc: All Counsel of Record (via email only)