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SC Court of Appeals

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

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

Ex Parte:

Builders Mutual Insurance Company, Nationwide Mutual
Fire Insurance Company, Nationwide Mutual Insurance
Company, and Nautilus Insurance Company, ... Appellants,

In Re:

Palmetto Pointe at Peas Island Condominium Property
Owners Association, Inc. and Jack Lowe, 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 Does 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 Lowe,
Individually, and on behalf of all others similarly situated,
Tri-County Roofing, Inc.; Stanley's Vinyl Fence Designs;
and WC Services, Inc. are Respondents,

**PETITION FOR REVIEW
PURSUANT TO RULE 241(d)(2) AND (d)(7), SCACR**

Appellant Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide Mutual Fire") submits this Petition for Review pursuant to Rule 241(d)(2) and (d)(7), SCACR. Nationwide Mutual Fire hereby petitions this Court for review of the trial court's Order lifting the automatic stay pending appeal under Rule 241(c), SCACR. The trial

court heard this matter and issued its Order on April 25, 2019. The ground for this petition is that the trial court, while acknowledging on the record that proceeding to trial will affect issues on appeal, nevertheless lifted the automatic stay.¹

LEGAL BACKGROUND

Nationwide Mutual Fire has provided the legal context for this appeal in its Motion to Transfer Case to the Supreme Court, which was filed on March 20, 2019. Nationwide Mutual Fire hereby incorporates its discussion from that Motion, a copy of which is attached, into this Petition for purposes of brevity.

FACTUAL BACKGROUND

This is a construction defect action involving a condominium known as Palmetto Pointe at Peas Island. Nationwide Mutual Fire issued a general liability policy to one of the contractor defendants in this action, Stanley's Vinyl Fence Designs (hereinafter "Stanley's").

The Complaint in this action was originally filed on February 13, 2015. Stanley's was named as a defendant in this action when the Amended Complaint was filed on November 4, 2016. Stanley's was served with the pleadings on November 9, 2016. Nationwide Mutual Fire undertook the defense of Stanley's under reservation of rights on or about April 18, 2017.

On August 8, 2017, the insurer for the general contractor for the Palmetto Pointe at Peas Island project filed a declaratory judgment naming as defendants Nationwide Mutual Fire and Stanley's. FCCI Ins. Co. v. Island Pointe, LLC, et al., Civ. Action No.

¹ The transcript of the hearing has been ordered and it will be filed in the record upon receipt.

2:17-cv-1976-RMG (D.S.C.). The undersigned was initially retained to defend Nationwide Mutual Fire in that action.

Nationwide Mutual Fire participated in two mediations in an attempt to settle the claims against Stanley's. After the second mediation failed, Nationwide Mutual Fire filed its Motion to Intervene in this action for the purpose of conducting factfinding to support an allocation between covered and non-covered damages, as recent South Carolina Supreme Court cases seem to require. See Harleysville Group Ins. v. Heritage Cmities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017); Auto Owners Insurance Company v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009). Nationwide Mutual Fire's Motion to Intervene was filed on May 20, 2018, nearly a year ago. (Exh. A: Mot to Intervene.) Other insurers filed motions to intervene at around the same time.

The motions to intervene were heard on December 17, 2018. The trial judge issued its Order denying the motions to intervene on December 18, 2018. The insurers' motions for reconsideration were denied on January 17, 2019. Nationwide Mutual Fire's Notice of Appeal of that Order was filed on February 22, 2019. (See Nationwide Mutual Fire's Notice of Appeal.) Two other insurers filed similar appeals.

The trial court, while acknowledging that the effect of the appeals may be jurisdictional, proceeded with the case. Nationwide Mutual Fire had no ability to challenge the trial court's actions since its motion to intervene had been denied. The trial court did not address the issue of the automatic stay until after other defendants filed motions for a continuance on April 3, 2019. (Exh. B: Mot. for Continuance.) On April 5, 2019, the trial judge issued an Order staying the case due to the automatic stay. (Exh. C: Order.)

On April 16, 2019, the Plaintiffs filed a Motion for Reconsideration and/or Petition to Lift the Stay. (Attached as Exh. D.) Nationwide Mutual Fire filed a responsive brief. (Exh. E.) The plaintiffs' motion was heard on April 25, 2019. Trial was scheduled to begin on May 6, 2019.

The trial judge acknowledged on the record that the trial is affected by issues on appeal. Nevertheless, she indicated she would lift the stay. Later that day, the trial judge issued her Order lifting the automatic stay and ordering the trial to go forward as scheduled on May 6, 2019. (Exh. F: Order.)

GROUND AND LEGAL ARGUMENTS

The trial court's Order Staying Case, which was filed on April 5, 2019, expressly found that "the Appellate Court has exclusive jurisdiction over this case at this time." At the hearing on the Plaintiffs' Petition to Lift the Stay, the trial court acknowledged that the trial is affected by issues on appeal. Based upon these findings, the trial court erred as a matter of law in lifting the automatic stay.

Pursuant to Rule 225, SCACR, the trial court may not act or issue orders that affect an issue on appeal. Arnal v. Fraser, 371 S.C. 312, 519, 641 S.E.2d 419, 422 (2007). The trial court cannot proceed because the appellate court has exclusive jurisdiction over matters on appeal. Id. at 518, 641 S.E.2d at 422; see also Bunkum v. Manor Props., 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996) (holding that after an appeal is filed, subject matter jurisdiction is transferred to the appellate court until the remittitur is issued). The automatic stay is jurisdictional, and any action taken by the trial court addressing an issue on appeal is void for lack of jurisdiction. Arnal, 371 S.C. at 522, 641 S.E.2d at 424.

Each action the trial court takes must be analyzed separately to determine whether it had subject matter jurisdiction to act. Id. at 519, 641 S.E.2d at 423.

The trial court order lifting the stay is appealable under Rule 241(d)(2), SCACR. The appellate courts have the final authority as to whether the automatic stay applies. State v. Cooper, 342 S.C. 389, 398, 536 S.E.2d 870, 875-76 (2000).

I. This case is subject to the automatic stay.

The general rule is that the service of the notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal. Rule 241(a), SCACR. The trial court retains jurisdiction over only matters that are not affected by the appeal. Id.

There are certain exceptions to the general rule that issues on appeal are automatically stayed. These exceptions are listed in Rule 241(b), SCACR. When an exception applies, there is no automatic stay of the order from which the appeal was taken. Tillman v. Oakes, 398 S.C. 245, 254, 728 S.E.2d 45, 50 (Ct. App. 2012). If an exception applies, the party seeking a stay must petition for supersedeas under Rule 241(c)(1), SCACR. This rule provides: “After service of the notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule. In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order . . . on appeal” “If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal.” Tillman, 398 S.C. at 255, 728 S.E.2d at 50-51.

This appeal involves the general rule. None of the exceptions set forth in Rule 241(b) apply. Thus, supersedeas is not necessary in this case. See Cooper, 342 S.C. at

399, 536 S.E.2d at 876 (holding that when no exception applies, the circuit court orders were automatically stayed by the filing of the notice of appeal).

II. The trial court erred in finding it had jurisdiction to proceed with trial because the trial is a matter affected by issues on appeal.

In addressing any request for relief while an appeal is pending, a trial court must first determine whether it has jurisdiction to act. The key question is “whether the lower court may proceed with the action during the pendency of the appeal, and this answer is governed by Rule 205, SCACR.” Tillman, 398 S.C. at 255, 728 S.E.2d at 51. “Under 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.” Id. The Court of Appeals explained:

Thus, the existence or nonexistence of a stay under Rule 241 does not control the [trial] court’s power to proceed with the action and address matters not affected by the appeal. Rather, the lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a ‘matter affected by the appeal’ under Rules 205 and 241(a).

Id.

The gist of the Plaintiffs’ argument is that the issues on appeal have nothing to do with the claims or defenses to be tried. The Plaintiffs’ argument fails because it is based solely upon one side of a disputed legal issue—the very issue on appeal. The Plaintiffs myopically assume the Supreme Court will rule in their favor, failing to consider the possibility that the Supreme Court may rule against them in the appeal. If the Supreme Court holds that an insurer must intervene in the underlying case in order to create a factual record to support certain coverage determinations, then the affected coverage determinations are claims or defenses to be tried in the underlying case. Since it is possible

that a ruling by the appellate courts could change the issues to be determined at trial, the issues on appeal directly affect the trial, and this Court is without jurisdiction to proceed.

The sole issue is whether the issue raised in the petition—in this case, the Plaintiffs’ request that the trial proceed despite the pending appeals—is a matter affected by the appeal. Tillman, 398 S.C. at 256, 728 S.E.2d at 51. Answering this question requires an examination of the issues on appeal and whether those issues would be affected if the trial is permitted to proceed. Id. This determination is a question of law for the courts. Kearney, 287 S.C. at 338 S.E.2d at 328 (holding that authority to resolve disputes as to whether an exception under Rule 241(b) applies is vested in the Supreme Court, not the Circuit Court); Cooper, 342 S.C. at 398, 536 S.E.2d at 875-76 (holding that the Court of Appeals also has authority to rule upon issues arising under Rule 241, which was formerly Rule 225. Tillman, 398 S.C. at 256 n.4, 728 S.E.2d at 51 n.4.)

The Supreme Court has defined the scope of what is affected by issues on appeal broadly. In Stokes-Craven Holding Corp. v. Robinson, the court held that a legal malpractice action did not accrue until after the appeal of the underlying matter was resolved. 416 S.C. 517, 534, 767 S.E.2d 485, 494 (2016). Citing Black’s Law Dictionary, the court defined “affect” as “to produce an effect on; to influence in some way.” Id. The court held that even issues in other cases may be stayed by an appeal if the issues in those cases depend in some way upon the issues on appeal.

The appeal in this case directly affects the trial. The basis for Nationwide Mutual Fire’s motion to intervene was that the Supreme Court of South Carolina has held that factual determinations as to the amount of covered damages must be made in the

underlying construction defect action. (Exh. A: Nationwide Mutual Fire Mot. to Intervene, ¶¶ 12-17, filed May 7, 2018.)

The Supreme Court held that “it is not the purpose of this declaratory judgment action to relitigate the issue of damages.” Newman, 385 S.C. at 198, 684 S.E.2d at 547. The Supreme Court further held that the insurer “had an opportunity to raise this matter when the issue of damages was litigated” in the underlying proceeding. Id. The court reasoned that the insurer “did not seek review of or otherwise contest the damages award” in the underlying proceeding. Id., n.5. Based on this analysis, the court ruled that the insurer was required to pay for damages that were not covered. Id. at 198, 684 S.E.2d at 546-47. The Supreme Court followed Newman with another case holding that the insurer waived its coverage defenses by failing to include, among other things, warnings regarding the need for an allocated verdict and the conflict of interest this would create for defense counsel, in its reservation of rights letter. Harleysville, 420 S.C. at 337-344, 803 S.E.2d at 297-301.

The results of Newman and Harleysville are premised upon the understanding that certain liability coverage determinations must be made in the underlying tort action. Newman expressly holds that certain issues must be raised in the underlying case, and that these issues cannot be asserted in a separate declaratory judgment action addressing insurance coverage. 385 S.C. at 198, 684 S.E.2d at 547. Thus, a liability insurer’s rights may be effectively adjudicated in the trial of the underlying construction defect action according to Newman and Harleysville.

The fact that the Supreme Court has not yet prescribed a procedure for obtaining factfinding as to the amount of covered damages in the underlying proceeding does not

diminish the possibility that an insurer's rights are adjudicated therein. Nationwide Mutual Fire has argued that due process does not allow a party to be denied a forum for adjudicating its rights. (Exh. A: Nationwide Mutual Fire Mot. to Intervene, ¶ 15.)

If Nationwide Mutual Fire's rights as to the amount of covered damages are to be adjudicated in the trial of this matter, then due process affords Nationwide Mutual Fire notice and the opportunity to be heard at trial. In order for this to occur, Nationwide Mutual Fire must be permitted to intervene, because counsel defending its insured cannot also represent Nationwide Mutual Fire due to a conflict of interest. (See Exh. A: Nationwide Mutual Fire Mot. to Intervene, ¶ 15, 17.)

The issue on appeal is whether Newman and Harleysville require that the rights of liability insurers be adjudicated along with the tort issues in the underlying construction defect action. If the Supreme Court holds that Nationwide Mutual Fire's rights are not adjudicated in this proceeding, then there is no need for Nationwide Mutual Fire to intervene. However, if the Supreme Court rules that Nationwide Mutual Fire's rights are adjudicated in this proceeding, then the upcoming trial must accommodate Nationwide Mutual Fire's due process rights of notice and the opportunity to be heard.

If the Supreme Court holds that special interrogatories or a special verdict form must be submitted to the jury at trial in order to obtain an allocation between covered and non-covered damages, there will be no way to "unscramble the egg" if this Court allows the trial to proceed a final judgment based upon a general verdict is rendered. Under Newman, this results in an insurer being forced to indemnify for damages that are not covered, which is an adjudication of the affected rights. This conclusively demonstrates that the upcoming trial is affected by the pending appeals.

Because the trial is a matter affected by the appeal, the trial court lacks subject matter jurisdiction to proceed at this time. Rule 205 and 241(a), SCACR. The trial court erred in pressing forward with trial when it had no jurisdiction to do so.

III. The trial court erred in lifting the automatic stay because the Plaintiffs failed to demonstrate grounds for lifting the stay.

When the automatic stay applies, as it does in this case, courts may lift the stay for only specified reasons. Rule 241(c)(2) provides factors the trial court must consider “[i]n deciding whether an order should issue pursuant to this Rule” The “order pursuant to this Rule” is either the order granting the petition to lift the automatic stay in cases involving the general rule, or the order granting supersedeas in cases in which an exception applies. See Rule 241(c)(1), SCACR. As discussed above, this case does not involve an exception and supersedeas is not necessary.

In determining whether to grant a petition to lift the automatic stay, this Court must consider “whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR. Since Plaintiffs are the movants, it is the Plaintiffs’ burden to demonstrate that an order lifting the stay is necessary to: (a) preserve jurisdiction of the appeal, or (b) prevent a contested issue from becoming moot.

Neither of these conditions are applicable in this case. The purpose of the stay under Rule 241 is “to determine whether the appealed *order* may be carried out or enforced.” Tillman, 398 S.C. at 255, 728 S.E.2d at 51. This Court’s orders denying Nationwide Mutual Fire’s motion to intervene are the orders on appeal. Since these orders did not grant the requested relief, no order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

The effect of the automatic stay is to prevent the trial court from carrying out or enforcing the appealed order during the pendency of the appeal. *Id.* at 255, 728 S.E.2d at 50-51. The appealed order barred Nationwide Mutual Fire from intervening in this matter. The automatic stay prevents the trial court from acting on its decision to deny Nationwide Mutual Fire's motion to intervene. Since the appeals concern which parties may participate in the trial and in what capacity, it is apparent that the trial court lacks jurisdiction to proceed with trial.

If the automatic stay remains in place, the only prejudice the Plaintiffs identified is delay. On the other hand, lifting the automatic stay forces all parties to undergo the time and expense of a trial that may be void *ab initio*.

The Plaintiffs did not even attempt to argue that grounds exist for lifting the stay under Rule 241(c)(2). In fact, the Plaintiffs argued that the automatic stay should be lifted because these factors could *not* be shown. The Plaintiffs are mistaken as to the application of the standard. Because lifting the stay was not necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot, the Plaintiffs' Petition to Lift the Stay should have been denied.

CONCLUSION

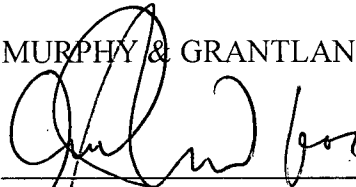
The trial court lacked authority to lift the automatic stay. Because the trial is a matter affected by the appeals, the trial court was divested of jurisdiction. The trial court's authority to proceed was limited to the narrow exceptions specified in Rule 241(c)(2).

The trial court acknowledged that the trial is a matter affected by issues on appeal. The trial court made no finding that the specified grounds were met for lifting the stay under Rule 241(c)(2). Consequently, the trial court erred in lifting the automatic stay.

Nationwide Mutual Fire has shown that an application for relief was made to the lower court, and that the trial court unjustifiably denied Nationwide Mutual Fire's request that the automatic stay remain in place. Accordingly, Nationwide Mutual Fire respectfully requests that this Court reverse the trial court and reimpose the automatic stay.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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

Timothy J. Newton, Esquire

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Attorney Nationwide Mutual Fire Insurance
Company

IN THE STATE OF SOUTH CAROLINA

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And

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Property Owners Association, Inc. and Jack Lowe,
Individually, and on behalf of all others similarly situated,
Tri-County Roofing, Inc.; Stanley's Vinyl Fence Designs;
and WC Services, Inc. are Respondents,

VERIFICATION

Cindy Thomas, being first duly sworn, deposes and says as follows:

My name is Cindy Thomas. I am an adjuster for Appellant Nationwide Mutual
Fire Insurance Company. I have read the foregoing Petition for Review and I have
knowledge of the facts set forth therein. The facts set forth in the Petition for Review are
true to the best of my knowledge.

This the 29th day of April, 2019

Cindy Thomas

Cindy Thomas

Commercial Casualty Field Consultant

Complex Claims Team – Construction Defect

Nationwide Mutual Fire Ins. Co.

SWORN to and subscribed before me
this 29 day of April, 2019.

Maria Williams-Lewis (L.S.)

Notary Public for South Carolina

My Commission Expires: 11/28/2021



IN THE STATE OF SOUTH CAROLINA

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Construction Services, Inc. Christopher N. Union; Builder
Services Group, Inc. d/b/a Gale Contractor Services;;
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And

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

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Review, via regular and electronic mail, on April 29, 2019, to the following attorneys of record for opposing partie(s):

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I certify that I have served the Appellant's Petition for Review, via electronic mail, on April 29, 2019, to the following attorneys of record for the following parties:

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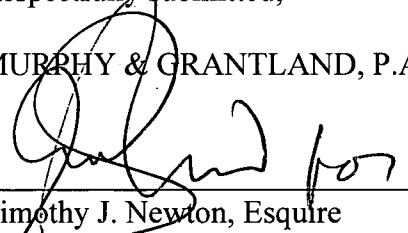
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Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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Attorneys Nationwide Mutual Fire
Insurance Company

Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Nationwide Mutual Insurance Company, et al.

☐ Plaintiffs

v.

Kelly Flooring Products, Inc., et al

☐ Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-10-0955

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

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- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Nationwide Mutual Insurance Company's Motion to Intervene

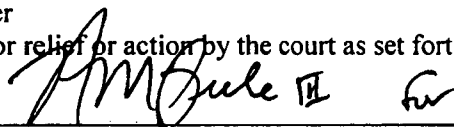
Estimated Time Needed: 20 minutes Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / X Defendant

May 3, 2018

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: 25.00

- ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2015-CP-10-00955

Nationwide Mutual Fire Insurance Company,
Petitioner,

IN RE:

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

Plaintiff,

vs.

Island Pointe, LLC, *et al.*,

Defendants.

**NOTICE OF MOTION AND
MOTION TO INTERVENE BY
NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY**

FILED
2018 MAY -7 PM 2:17
CLERK OF COURT

TO: ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to Rule 24(a)(1), SCRCP, or, in the alternative, pursuant to Rule 24(b)(2), SCRCP, Applicant, Nationwide Mutual Fire Insurance Company (hereinafter Nationwide) hereby moves to intervene in this action. The following Memorandum provides the grounds therefor. Because this Motion pertains only to allocation of damages that may be awarded for purposes of liability insurance, no claim or defense is pled for purposes of pleading requirement in Rule 24(c), SCRCP.

Nationwide is entitled to intervention as a commercial general liability ("CGL") carrier for Defendant STANLEY'S VINYL FENCE DESIGNS hereinafter ("STANLEY"), as its rights may be affected by a disposition of this case on the merits. This motion is made on the following grounds:

1. Nationwide issued Contractors policy number 61 AC 934-995-3001 to “Floyd W. Stanley d/b/a Stanley’s Vinyl Fence Designs.” This policy, including annual renewals, was in effect from October 11, 2004 until cancellation effective February 10, 2007 (hereinafter “the Policies”). The limits of coverage were \$500,000 per occurrence and in the aggregate for products-completed operations. A certified copy of this 2006-07 policy is attached as Exhibit A.

2. The Policies only cover “sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ . . . to which this insurance applies.” (Exh. A, Form ACP-0007, ¶ A.1.a.)

3. The Policies only apply to “property damage” if it is caused by an “occurrence.” (Id. at ¶ A.1.b.(1)(a).)

4. The Policies define “property damage” as physical injury to tangible property, including all resulting loss of use of that property. (Id. at ¶ F.16.) “Occurrence” is defined as “an accident, including continuous and repeated exposure to substantially the same general harmful conditions.” (Id. at ¶ F.12.)

5. Under the contractual terms of the Policies, as interpreted by South Carolina law, defective construction is not covered. Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011). However, resulting damage to otherwise non-defective components may constitute covered “property damage” caused by an “occurrence,” satisfying the requirements of the insuring agreement. Id.

6. Additionally, the contractual terms of the Policies exclude coverage for business risks such as defective construction. (Exh. A, Form ACP-0007, ¶¶ B.k. l., m., n., and o.)

7. The Policies contain various other exclusions which may require an allocation between covered and non-covered damages. (See Exh.A.)

8. Upon information and belief, the Plaintiff in this matter intends to present evidence of defective development and/or construction by STANLEY at the trial of this action.

9. To the extent damages are awarded against STANLEY for defective work or damage to STANLEY's work, the damages awarded are not damages to which the Policies apply, and they are therefore not covered.

10. To the extent damages are awarded against STANLEY that are subject to exclusions, the damages awarded are not covered.

11. The contractual terms of the Policies and South Carolina law require an allocation between covered and non-covered damages.

12. Nationwide contends that this allocation does not involve relitigating the issue of damages; it is rather a determination of the amount of covered damages under the contractual terms of the Policies and South Carolina law based upon a review of the evidence submitted at trial in this action. Nevertheless, the Supreme Court of South Carolina has recently held in *dicta* that this contractual allocation of covered damages may not be made in a separate coverage action. Harleysville Group Ins. v. Heritage Cmties, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 36 n.11).

13. The court did not clarify this holding in its final opinion. Harleysville Group Ins. v. Heritage Cmties, Inc., et al., 420 S.C. 321, 803 S.E.2d 288 (2017). Instead, the court cited a prior case in which allocation was not allowed due to failure to raise the issue in an underlying arbitration proceeding. See Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). In Newman, the court indicated that "it is not the purpose of this declaratory judgment action to relitigate the issue of damages." *Id.* Thus, it appears that South Carolina law may not allow insurers to obtain facts necessary for determinations involving liability coverage for construction defect claims in separate declaratory judgment actions.

14. Generally, insurers lack standing to intervene in underlying actions to determine liability. Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03 (2007); Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (1994) (citing Blue Cross and Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35 (1980)). These holdings were based upon the understanding that factual determinations for coverage purposes could be litigated in separate coverage actions. See Ex Parte GEICO, 373 S.C. at 137, 644 S.E.2d at 702; Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). Harleysville and Newman appear to contradict this prior understanding.

15. Notice and opportunity to be heard are fundamental requirements of due process. If Nationwide is denied any forum for obtaining facts necessary for its allocation for coverage purposes, then its due process rights are violated in violation of both state and federal law.

16. Furthermore, in Harleysville, the court referenced a burden-shifting procedure for allocating between covered and non-covered damages. 420 S.C. at 341, 803 S.E.2d at 299 (citing Duke v. Hoch, 468 F.2d 973, 976-77 (5th Cir. 1972)). Under Harleysville and Duke, the insurer has the burden of demonstrating that the plaintiff's claim against its insured includes damages for non-covered acts. Duke, 468 F.2d at 976. Once this is established by the insurer, the insured has the burden of proving the precise portion of the damages that are covered. Id. at 977 ("The burden of apportioning these damages is on the party seeking to recover from the insurer."). If the insured fails to provide sufficient evidence to support an allocation, none of the damages are covered. Id. Thus, failure to allow intervention by Nationwide may prejudice the rights of STANLEY and the Plaintiff, as third-party claimant.

17. If intervention is not permitted, Nationwide lacks any means of conducting discovery to ascertain the facts necessary to make a determination as to the amount of covered damages. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365,

373 (4th Cir. 2005) (holding that “an attorney in South Carolina who represents an insured owes the insured a duty of loyalty and cannot, for example, communicate information detrimental to the insured to the insurance company.”) (citing Rules 1.8(b) and 1.6 of the South Carolina Rules of Professional Conduct).

18. Accordingly, Nationwide hereby moves to intervene in this action for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages and participating in the drafting of a special verdict form or submitting special interrogatories to the jury to support an allocation of any damages award for purposes of a determination of covered and non-covered damages.

19. Under South Carolina law, a party seeking intervention under Rule 24(a)(2), SCRCPP, must: (1) establish timely intervention; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004).

20. Nationwide’s motion to intervene is timely. This motion is being filed well in advance of trial. This motion is not expected to significantly impact discovery. The amount of damages is determined by the factfinder in this action. Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001). Nationwide seeks only to obtain evidence for and to obtain findings to support an allocation, as a matter of contract, as to how much of the damages that may be awarded against STANLEY in this action are covered. See Rock Hill Tel. Co., Inc. v. Globe Communic’ns, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (holding that when indemnity is by contract, “the contract itself establishes the relationship between the parties”); Newman, 385

S.C. at 198, 684 S.E.2d at 546 (requiring a record supporting an allocation between covered and non-covered damages).

21. Nationwide has an interest relating to the property or transaction which is the subject of this action. As discussed above, this action represents the only forum in which Nationwide can obtain an allocation as to the amount of covered damages under the Policies.

22. Nationwide is in a position such that, without intervention, disposition of this action will impair or impede its ability to protect that interest. The Supreme Court appears to have held that if intervention is not sought, an insurer waives its right to seek an allocation as to the amount of covered damages. Harleysville, 420 S.C. at 343 n.11, 803 S.E.2d at 300 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547.

23. Nationwide is not adequately represented by other parties to this action. None of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the Plaintiffs and STANLEY are aligned against the interest of Nationwide. Indeed, federal courts often realign parties to coverage litigation to reflect the fact that the interests of the liability carrier are adverse to the interests of both the plaintiffs and the defendants in the underlying tort litigation. See Bi-Lo, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, C.A. No. 0:14-cv-00335-CMC, 2014 WL 12605522 at *7-8 (D.S.C. Apr. 30, 2014). When the interests of the party seeking intervention are adverse to the interests of the party litigants, "there is an obvious lack of adequate representation." In re Horry Bounty State Bank, 361 S.C. at 509, 604 S.E.2d at 726.

24. Accordingly, Nationwide has satisfied all of the elements for intervention as of right under Rule 24(a)(2). The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to this Court's discretion.

25. In the alternative, Nationwide also moves to intervene under Rule 24(b). Permissive intervention is allowed at the court's discretion based upon the existence of a common question of fact or law between the underlying litigation and the intervenor's claims or defenses. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988). Sound administrative procedure favors the disposition of all claims or defenses in a single action. Id. As discussed above, this action represents the only forum in which an allocation of covered versus non-covered damages can be made.

26. Nationwide's motion to intervene is made for the limited purpose of obtaining facts for and presenting the jury with a special verdict or special interrogatories for a finding as to allocation between covered and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (holding that intervention is appropriate for third-party challenges to protective orders).

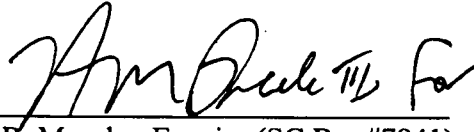
27. Upon information and belief, the granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original parties to the instant action, in that intervention is for the limited purpose of allocation will not impact the ability of the original parties to present their claims and/or defenses at trial.

Nationwide respectfully moves to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages under the Policy and participating in the submitting of a special verdict form or submitting special interrogatories to the jury in order to obtain findings of fact necessary for that allocation. The grounds for this Motion are set forth above.

[Signature page follows]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read "Timothy J. Newton", written over a horizontal line.

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Attorneys for Nationwide Mutual Fire Insurance
Company

Columbia, South Carolina
May 3, 2018

Exhibit B

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON)

CASE NO.: 2015-CP-10-0955

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

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

Island Pointe, LLC, Leonard T. Browne,
Complete Building Corporation, et al.

Defendant.)

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Defendant's Attorney:
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E-mail: rkendall@murphygrantland.com Other: _____

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion for Continuance of Trial

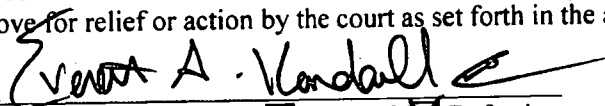
Estimated Time Needed: 15 min

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

04/01/2019
Date submitted

SECTION III: Motion Fee

- ☒ **PAID - AMOUNT: \$ 25.00**
☐ **EXEMPT:**
(check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2015-CP-10-0955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc., and Jack
Love, individually, and one behalf of all other
similarly situated,

Plaintiffs,

v.

Island Pointe, LLC, Leonard T. Browne,
Complete Building Corporation, *et al*

Defendants.

Tri-County Roofing, Inc.,

Third Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy
d/b/a Cornerstone Construction, *et al*

Third Party Defendants.

Creekside, Inc.,

Third-Party Plaintiff,

v.

Christopher N. Union,

Third-Party Defendants.

FILED
2019 APR -3 PM 1:22
JULIE J. ARMISTEAD
CLERK OF COURT

**MOTION FOR CONTINUANCE OF
TRIAL**

(EXPEDITED HEARING REQUESTED)

TO ALL PARTIES:

PLEASE BE ADVISED THAT DEFENDANTS LISTED BELOW hereby jointly move before this Honorable Court, and hereby request an expedited hearing, seeking a continuance of the trial of this matter, currently scheduled for May 6, 2019. This Motion is made pursuant to Rule 40(i)1) of the South Carolina Rules of Civil Procedure and Rule 205 of the South Carolina Rules of Appellate Procedure based upon the following grounds:

1. On March 27, 2018, Builders Mutual Insurance Company filed a Motion to Intervene in this matter. An order denying the Motion was issued December 17, 2018. The Motion to Reconsider was denied on January 16, 2019. On February 19, 2019, Builder's Mutual filed a Notice of Appeal and has subsequently filed a Motion to transfer the appeal to the South Carolina Supreme Court.
2. On April 30, 2018, Nautilus Insurance Company filed a Motion to Intervene in this matter. An order denying the Motion was issued December 18, 2019. The Motion to Reconsider was denied on January 17, 2019. On February 20, 2019, Nautilus filed a Notice of Appeal and has subsequently filed a Motion to transfer the appeal to the South Carolina Supreme Court.
3. On May 7, 2018, Nationwide Mutual Insurance Company filed a Motion to Intervene in this matter. An order denying the Motion was issued December 18, 2019. The Motion to Reconsider was denied on January 17, 2019. On February 22, 2019, Nautilus filed a Notice of Appeal and has subsequently filed a Motion to transfer the appeal to the South Carolina Supreme Court.
4. On January 18, 2019, FCCI Insurance Group filed a Motion to Intervene in this matter. No hearing has been held on this Motion.

5. All of the Motions to Intervene seek leave to participate in the trial of the case in order to present Special Interrogatories to the jury. As such, the denial of these Motions affects the mode of trial.
6. Upon information and belief, no motion or other action has been undertaken by any party to dismiss or expedite the pending appeals.
7. Upon information and belief, no motion to lift the stay imposed by SCRAP 205 has been filed by any party.
8. The trial of this case is expected to take ten days. The trial will involve the testimony of up to 30 witnesses, including six to eight experts. Many of the witnesses and experts will need to attend trial for most or all of the proceeding. Some of the witnesses will be traveling from out of state.
9. Preparation and attendance at the trial of this will result in significant effort on the part of the attorneys, parties and witnesses.

Pursuant to Rule 205 of the South Carolina Rules of Appellate Procedure, the trial court does not currently have jurisdiction to conduct a trial because it is directly affected by the appeal. It does not seem likely that the appeals will be withdrawn or otherwise resolved before May 6, 2019.

Given the significant burden and hardship that is imposed on parties and witnesses in preparing for a trial of this magnitude, fairness and judicial economy advise that the trial date of this case be continued until the Remittur is returned to the trial court.

To give effect and meaning to the Motion, an expedited hearing is requested.

WE SO MOVE.

MURPHY & GRANTLAND P.A

BY: Everett A. Kendall
Everett A. Kendall, II
4406B Forest Dr.
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2015. CP/D-955

I, the undersigned legal assistant of the law offices of Murphy & Grantland, P.A., Attorneys for Defendant Complete Building Corporation, Inc., do hereby certify that I have served a copy of the foregoing Motion for Continuance of Trial in connection with the above-referenced case placing same via Electronic Transmission and/or the U.S. mail, postage paid to:

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FILED
2015 APR -3 PM 1:23
CLERK OF COURT

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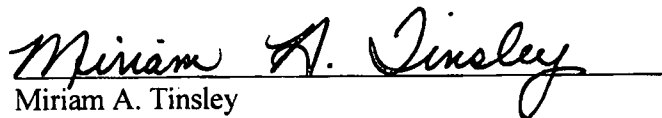
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Miriam A. Tinsley

Columbia, South Carolina
April 1, 2019

April 1, 2019

Re: Palmetto Pointe Peas Island Condominium v. Complete Building Corporation et al.
Civil Action No.: 2015-CP-10-00955
Our File No.: 6000-0007

Dear Ms. Armstrong:

Enclosed please find the original and one (1) copy of a Motion for Continuance of Trial in the above-referenced matter. Please file the original and return the remaining clocked copy to me in the envelope provided.

By copy of this letter to opposing counsel via electronic transmission, I am serving them with the same.

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

With kind regards, I am

Very truly yours,

MURPHY & GRANTLAND, P.A.



Everett A. Kendall, II

EAK/mat
Enclosures
cc: All counsel via electronic transmission

Exhibit C

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. AND JACK LOVE,
INDIVIDUALLY, AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

VS.

ISLAND POINTE, LLC; COMPLETE
BUILDING CORPORATION; TRI-COUNTY
ROOFING, INC.; CREEKSIDE, INC.;
AMERICAN RESIDENTIAL SERVICES, LLC
D/B/A ARS/RESCUE ROOTER
CHARLESTON; ANDERSEN WINDOWS,
INC.; ATLANTIC BUILDING
CONSTRUCTION SERVICES, INC. N/K/A
ATLANTIC CONSTRUCTION SERVICES,
INC.; 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.; CERTAINTED
CORPORATION; KELLY FLOORING
PRODUCTS, INC., D/B/A CARPET
BAGGERS; CORNERSTONE
CONSTRUCTION AND MARK MALLOY
D/B/A CORNERSTONE CONSTRUCTION;
MIRACLE SIDING, LLC AND WILSON
LUCAS SALES D/B/A MIRACLE SIDING,
LLC; MARK PALPOINT A/K/A MICAH
PALPOINT; ELROY ALONZO VASQUEZ;
CHRIS A/K/A JOHN DOE 61; ALDERMAN
CONSTRUCTION; STANLEY'S VINYL
FENCE DESIGNS; COHEN'S DRYWALL
COMPANY, INC.; MOSELY CONCRETE;
HAND A FRAMING CONSTRUCTION, LLC
A/K/A H&A FRAMING CONSTRUCTION,

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO. 2015-CP-10-0955

FILED
2016 APR -5 PM 2:59
CLERK OF COURT
JULIE A. HESTER

ORDER STAYING CASE

JM/11

LLC AND D/B/AH AND A FRAMING, LLC,)
H&A CONSTRUCTION, AND HAND A)
CONSTRUCTION; JMC CONSTRUCTION,)
INC.; JMC CONSTRUCTION, LLC; JOHN)
DOE 1-15,)

Defendants.)

COMPLETE BUILDING CORPORATION,)
INC.,)

Third-Party Plaintiff,)

VS.)

LEONARD T. BROWNE AND)
CHRISTOPHER N. UNION,)

Third-Party Defendants.)

CREEKSIDE, INC.,)

Third-Party Plaintiff,)

VS.)

CHRISTOPHER N. UNION,)

Third-Party Defendant.)

AMERICAN RESIDENTIAL SERVICES, LLC,)

Third-Party Plaintiff,)

VS.)

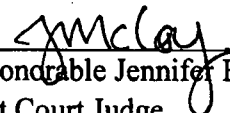
VICTOR HUGO HERNANDEZ; HERNANDEZ)
ELECTRIC, LLC; LILIANA ROJAS FLORES;)
MARTIN BARR D/B/A PORT CITY)
STRUCTURED WIRING; KELLER)
ELECTRIC, LLC; JOHN TOOLIN D/B/A)
JOHN F. TOOLIN HEAT AND AIR; RUSSELL)
"RUSTY" HILL D/B/A RUSTY'S HEATING &)
AIR; and WARREN ANDERSON,)

Third-Party Defendants.)

Pursuant to Rule 205 and 241 of the SCACR, and upon review of the Notices of Appeal filed by Builders Mutual Insurance Company and Nautilus Insurance Company on February 22, 2019, and the Notice of Appeal filed by Nationwide Insurance Company on February 28, 2019, the Appellate Court has exclusive jurisdiction over this case at this time. Therefore, the case is hereby STAYED.

AND IT IS SO ORDERED!

Charleston, South Carolina
April 5, 2019



The Honorable Jennifer B. McCoy.
Circuit Court Judge

Exhibit D

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF Charleston

CASE NO.: 2015-CP-10-0955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Elizabeth
A. Bushey, Individually, and on behalf of all others
similarly situated

☐

Plaintiff(s)

vs.

Island Pointe, LLC; Leonard T. Browne; Complete
Building Corporation; Tri-County Roofing, Inc.;
Creekside, Inc.; American Residential Services,
LLC d/b/a ARS/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.; WC
Services, Inc.; CRG Engineering, Inc.; Certainteed
Corporation; Kelly Flooring Products, Inc. d/b/a
Carpet Baggers; and John Doe 1-60

☐

Defendant(s)

Check box above indicating submitting party

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Name, SC Bar No. and Address of Plaintiff's Attorney

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Telephone: (843) 724-6671
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Name, SC Bar No. and Address of Defendant's Attorney

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Murphy & Grantland, P.A.
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(803)256-2233
rkendall@murphygrantland.com

☒ MOTION HEARING REQUESTED (attach *written* motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (COMPLETE SECTIONS II and III)

SECTION I: HEARING INFORMATION

Nature of Motion: Plaintiffs' Motion for Reconsideration of and/or Relief from Order Staying Case

Estimated Time Needed: 30 minutes

Court Reporter Needed?: ☒ YES ☐ NO

SECTION II: MOTION TYPE

☒ Written Motion Attached

☐ Form Motion -

I hereby move for relief or action by the Court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff(s) ☐ Defendant(s)

Dated: April 16, 2019

SECTION III: MOTION FEE

☒ PAID - AMOUNT \$ 25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency w. Indigent Party

☐ Sexually Violent Predator Act

☐ Post-Conviction Relief

☐ Motion for Stay Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, *SCRCP*)

☐ Proposed order submitted at request of the Court; or, reduced to writing
from motion made in open court per judge's instructions

Name of Court Reporter: _____	
☐ Other: _____	
JUDGE'S SECTION	JUDGE: _____
☐ Motion Fee to be paid upon filing of the attached order	CODE: _____ DATE: _____
☐ Other: _____	
CLERK'S VERIFICATION	
Collected by: _____ (print name)	Date Filed: _____
☐ MOTION FEE COLLECTED: _____	
☐ CONTESTED – AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-10-0955

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; COMPLETE
BUILDING CORPORATION; TRI-COUNTY
ROOFING, INC.; CREEKSIDE, INC.;
AMERICAN RESIDENTIAL SERVICES, LLC
d/b/a ARS/RESCUE ROOTER
CHARLESTON; ANDERSEN WINDOWS,
INC.; ATLANTIC BUILDING
CONSTRUCTION SERVICES, INC. n/k/a
ATLANTIC CONSTRUCTION SERVICES,
INC.; 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.; CERTAINTED
CORPORATION; KELLY FLOORING
PRODUCTS, INC., d/b/a CARPET BAGGERS;
CORNERSTONE CONSTRUCTION and
MARK MALLOY d/b/a CORNERSTONE
CONSTRUCTION; MIRACLE SIDING, LLC
and WILSON LUCAS SALES d/b/a MIRACLE
SIDING, LLC; MARK PALPOINT a/k/a
MICAH PALPOINT; ELROY ALONZO
VASQUEZ; CHRIS a/k/a JOHN DOE 61;
ALDERMAN CONSTRUCTION;
STANLEY'S VINYL FENCE DESIGNS;
COHEN'S DRYWALL COMPANY, INC.;
MOSELY CONCRETE; HAND A FRAMING
CONSTRUCTION, LLC a/k/a H&A
FRAMING CONSTRUCTION, LLC and d/b/a
H AND A FRAMING, LLC, H&A
CONSTRUCTION, and HAND A

Priority Matter
Expedited Hearing Requested

**PLAINTIFFS' 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**

FILED
2019 APR 16 PM 4:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

CONSTRUCTION; JMC CONSTRUCTION,)
INC.; JMC CONSTRUCTION, LLC; JOHN)
DOE 1-15,)
)

Defendants.)

COMPLETE BUILDING CORPORATION,)
INC.,)
)

Third-Party Plaintiff,)
)

v.)
)

LEONARD T. BROWNE and CHRISTOPHER)
N. UNION,)
)

Third-Party Defendants.)

CREEKSIDE, INC.,)
)

Third-Party Plaintiff,)
)

v.)
)

CHRISTOPHER N. UNION,)
)

Third-Party Defendant.)

AMERICAN RESIDENTIAL SERVICES,)
LLC,)
)

Third-Party Plaintiff,)
)

v.)
)

VICTOR HUGO HERNANDEZ;)
HERNANDEZ ELECTRIC, LLC; LILIANA)
ROJAS FLORES; MARTIN BARR d/b/a)
PORT CITY STRUCTURED WIRING;)
KELLER ELECTRIC, LLC; JOHN TOOLIN)
d/b/a JOHN F. TOOLIN HEAT AND AIR;)
RUSSELL "RUSTY" HILL d/b/a RUSTY'S)
HEATING & AIR; and WARREN)
ANDERSON,)
)

Third-Party Defendants.)

NOW COME Plaintiffs, by and through their undersigned counsel, pursuant to Rules 59(e) and/or 60(b), SCRCR, and/or Rule 241, SCACR, as well as any other applicable law (procedural and substantive), and hereby move this Honorable Court to reconsider and/or otherwise grant relief from its Order Staying Case, filed April 5, 2019 (the “Stay Order”),¹ and/or petition the court 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.

INTRODUCTION

By way introduction, Plaintiffs will cut to the chase about what they are asking the Court to do and, most respectfully, why the Court should do it. Despite a perhaps unwieldy title, at bottom, the instant filing presents the Court with this straightforward request: *Please do not further delay the trial of this case (which is already over four years old and is, without question, ready for adjudication on the merits) on account of the pending appeal taken by the Appellant Insurers² (who are themselves not parties to the case, and whose appeal has nothing at all to do with the respective claims and defenses of the actual case parties), but instead determine that the case should proceed to trial beginning May 6, 2019, as indeed it is duly scheduled to proceed but for the Stay Order.* As explained below, contrary to what the Continuance Seeking Defendants³ represented to the Court (in the motion for continuance that seems to have prompted the Stay Order⁴), the Court has jurisdiction to conduct the scheduled trial and, most respectfully, under

¹ Plaintiffs received written notice of entry of the stay order on April 8, 2019.

² The “Appellant Insurers” are, collectively, Builders Mutual Insurance Company (“Builders Mutual”), Nautilus Insurance Company (“Nautilus”), and Nationwide Insurance Company (“Nationwide”).

³ Specifically, the “Continuance Seeking Defendants” are, collectively, Defendants Complete Building Corporations, Creekside, Inc., and Mosley Concrete.

⁴ Filed April 3, 2019, the motion was made on the ground, simply asserted by the Continuance Seeking Defendants in conclusory fashion, that because of the Appellant Insurers’

both the governing law and guiding principles of equity, should exercise it. Indeed, this point is proved by Exhibits A, B, and C, all of which are attached hereto and incorporated herein by reference, which not only contradict the Continuance Seeking Defendants' assertion that the Court may not proceed with trial, but in the cases of Exhibits A and B (which are comprised of pertinent record materials from other recent cases where, in the face of non-party insurers' eve-of-trial appeals from the denial of so-called motions to "intervene," our Court of Appeals twice confirmed the trial court's ability to proceed with trial) flat out disprove this delay tactic.

BACKGROUND

Now some two months into its fifth year, this residential construction defect lawsuit was filed on February 13, 2015. In short, the case is about alleged defects and damage throughout a 40-unit townhouse complex, i.e., whether, in fact, they exist, and, if so, who, if anyone, is liable for them. It has been fully discovered and is ready to be fully adjudicated in this Court *on the merits*—in other words, the issues actually framed by the parties' respective pleadings, i.e., *all* the claims and defenses actually in issue between the actual named parties to the case, are ripe for decision.

The operative scheduling order for this case is the *Fourth* Amended Consent Scheduling Order, filed May 16, 2018. It provides that "[t]h[e] case is subject to being called to trial not before August 15, 2018 or six (6) months from the date of service of any defendant still in the case at time of trial, whichever is the later of the two dates." By order filed August 24, 2018, the case was assigned to Her Honor "to hear and handle all pre-trial motions, including scheduling orders." Thanks to Her Honor's help in finding and reserving a two-week term of court capable

appeal this Court "does not currently have jurisdiction to conduct a trial because it is directly affected by the appeal." (Mot. for Continuance p. 2.)

of accommodating litigation of this size, by the time of the Stay Order, the case had been duly set for a date-certain trial beginning May 6, 2019.

According to the Stay Order, however, because of the appeals taken by the Appellant Insurers, “the Appellate Court has exclusive jurisdiction over this case at this time[,]” and “[t]herefore, the case is . . . STAYED.” (Stay Order p. 3.) The Appellant Insurers’ appeals of course relate to the Court’s (correct) decision to deny their respective motions to “intervene” (purportedly made pursuant to Rule 24, SCRCPP), which motions asked not that they be made “parties” to the litigation, only that they be recognized—albeit in some unnamed, pleading-free capacity—as having a status that would allow them, at such future time as the matter was taken up during trial, to voice input about what the verdict form should look like—and, to be clear, not about what it should look like in respect of any issue necessary to a full and final adjudication of the merits of the actual controversy before this Court, but in fact solely in respect of insurance coverage matters that are not before this Court.⁵

Thus, as it stands, the situation is this: After more than four years of discovery and other preliminaries, this case is in fact ready for trial on the merits, and in spite of the difficulty in finding sufficient court time to actually conduct a trial in a case of this size, this case is in fact (but for the Stay Order) actually set to begin trial on May 6, 2019; however, the actual parties to

⁵ See (Builders Mutual Mot. to Intervene p. 15 (moving to intervene “for the limited purpose of participating in the drafting and the court’s submission of a special verdict form and/or general verdict form accompanied by answer to interrogatories to the jury pursuant to Rule 49, SCRCPP, so that the jury can allocate damages as discussed herein that are being sought against [their respect insureds]”)); (Nautilus Mot. to Intervene p. 4 (“seek[ing] leave pursuant to South Carolina Rule of Civil Procedure 24 to intervene in the Lawsuit for the limited purpose of requesting special interrogatories in the event a general verdict is entered against [its insured]”)); (Nationwide Mot. to Intervene p. 7 (“mov[ing] to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages under [its] Policy and participating in the submitting of a special verdict form or submitting special interrogatories to the jury in order to obtain findings of fact necessary for that allocation”))).

the case must nonetheless hurry up and wait on the resolution of their respective claims and defenses (and, of course, in practical terms, the long awaited redress or relief that hinges thereon) while *nonparties*—nonparties who are, after all, nonparties because this Court has already correctly determined that they should be nonparties—appeal the denial of their supposed right to be heard (not even necessarily to be agreed with) during trial (which trial, of course, their actions are presently preventing) as to the form of a verdict that their names will not be on, in respect of matters of insurance that are not before this Court. (Of course, to be clear, of the actual case parties, it is only Plaintiffs who stand to lose from needless delay. For Plaintiffs, no trial means they cannot possibly win; for everyone else it means just the opposite. This point is well illustrated by the fact that none of the Continuance Seeking Defendants is even insured by any of the Appellant Insurers. In other words, the Continuance Seeking Defendants do not actually have any interest in the substance of the issues involved in the pending appeal. Thus explains the conclusory way in which they represented to the Court the supposedly dire jurisdictional consequences of the pending appeals: Why would they want the Court to have jurisdiction to try the case—they might actually have to try it.)

To put it charitably, any delay in the trial of this case on account of the Appellant Insurers' appeal is a dollar waiting on a dime. Worse yet, it is "heads I win, tails you lose" for the Appellant Insurers, who, by making unmeritorious motions to "intervene" and duly lost them, have effectively won the right to derail the entire case—a case which they are not, and ought not to be, a part of in the first place. (And, again, all the other actual case parties but Plaintiffs are, quite literally, happy to sit back and watch.) In truth, though, the Appellant Insurers do not have this right, and most respectfully, this Court should not allow them to exercise it.

PERTINENT LAW

While it is true that, “[u]pon the service of the notice of appeal, the appellate court . . . ha[s] exclusive jurisdiction *over the appeal*; the lower court . . . [still] ha[s] jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241.” Rule 205, SCACR (emphasis added). Moreover, as Rule 205 makes expressly clear, “Nothing in the[] [South Carolina Appellate Court] Rules . . . prohibit[s] the lower court . . . from proceeding *with matters not affected by the appeal*.” (emphasis added).

Rule 241 furthers this point, clarifying what it means for the appellate court to have, as Rule 205 puts it, “exclusive jurisdiction *over the appeal*” (emphasis added). “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*.” Rule 241(a) (emphasis added). “This automatic stay continues in effect for the duration of the appeal unless lifted by order of the *lower court, . . . appellate court, or judge or justice of the appellate court*.” *Id.* (emphasis added). “The *lower court . . . retains jurisdiction over matters not affected by the appeal* including the authority to enforce any matters not stayed by the appeal.” *Id.* (emphasis added).

Thus, even where an appeal is properly taken and the automatic stay applies, the trial court (this Court here) has jurisdiction over matters not affected by the appeal and, moreover, is duly empowered to lift the automatic stay. Indeed, it is to this Court (the trial court) that the party seeking to have the stay lifted is supposed to turn first for relief: “Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay . . . must first be made to the lower court . . . which entered the order or decision on appeal.” Rule 241(d)(1). “In determining whether an order should issue pursuant to this

Rule, the . . . court . . . should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2).

Moreover, and although completely unmentioned by the Continuance Seeking Defendants, the mere fact that a notice of appeal is filed/served does not necessarily have any jurisdictional consequence at all. Only a properly taken appeal, i.e., an appeal taken where there is in fact a right of immediate appeal, affects jurisdiction—and then only as to matters affected by the appeal, as explained above. If an appeal is not properly taken it is a nonevent insofar the continued progress of the case in the trial court is concerned. *See S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay proceedings in the lower court.”).

GROUND

1. **In two other recent cases presenting this exact situation, the Court of Appeals has twice confirmed the trial court’s ability to proceed with trial.**

See generally **Exhibits A** and **B**.

2. **As was previously recognized by the Honorable Roger M. Young, Sr., a fellow judge of this Court, the presiding trial judge has discretion to assess whether an appeal prohibits it from going forward with trial, and when the trial judge is of the opinion that the appeal does not operate to prevent trial from going forward, the trial court should proceed with trial unless ordered not to by the appellate court. In other words, where there is good reason to question whether an appeal has any rightful impact on the continued progress of the case in the trial court, it is proper for the trial judge to recognize the same and proceed to trial as duly scheduled, putting the onus on any party seeking to stop such a trial to seek and obtain relief in the appellate court.**

See **Exhibit A** at p. 35; **Exhibit C**; *cf. Tillman v. Tillman*, 420 S.C. 246, 251, 801 S.E.2d 757, 760 n.1 (Ct. App. 2017) (“We are not persuaded by Appellant’s statement in his brief that the appeal was necessary because the motion to amend could not be heard in circuit

court before trial. *There may be a strategy motivating the appeal other than tactical delay, but we cannot think of a rational one.*") (emphasis added).

3. There is good reason to question whether the Appellant Insurers' appeals have any rightful impact on the continued progress of this case before this Court.

See generally Exhibits A and B. As stated above, in both of these cases, the Court of Appeals specifically confirmed the trial court's authority to proceed with trial. It should also be noted that, as reflected in Exhibit A at pp. 40–43, the Court of Appeals specifically questioned whether the orders on appeal were immediately appealable, requesting that the parties brief the matter. No such briefs were ever filed, however, because the matter quickly settled and the appeal was dismissed. See Exhibit A at pp. 44–49.

Moreover, the right to appeal is controlled by statute. The pertinent statute here is S.C. Code Ann. § 14-3-330. Essentially, it would allow for the Appellant Insurers' appeals if the challenged orders involved the merits or affected a substantial right of the Appellant Insurers.

The Continuance Seeking Defendants do not even suggest the challenged orders involve the merits—and indeed they do not. The Continuance Seeking Defendants do, however, assert the “substantial right” prong of the statute is implicated. (*See* Mot. for Continuance p. 2 (asserting that the appealed orders “affects the mode of trial”).) Most respectfully, this is simply not so.

It must be remembered that what the Appellant Insurers called motions to “intervene” were in fact nothing of the sort, but rather, as explained above, something altogether different from the concept of intervention envisioned under Rule 24. There is no South Carolina law whatsoever granting the Appellant Insurers the right to “intervene” as they asked—indeed, the

Court's correct denials of the motions reflects this point. Simply put, having established no such substantial right, the Appellant Insurers were not denied a substantial right.

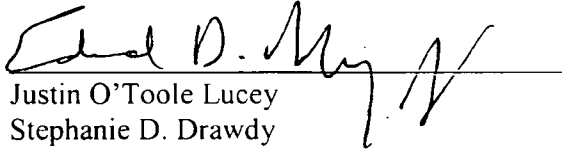
4. **As Judge Young also recognized, where, as here, a stay of the challenged orders is not necessary to preserve the jurisdiction of the appeal or to prevent a contested issue from becoming moot, and the circumstances are such that a stay of the orders is not in the interests of justice or judicial economy, the matter should proceed in the trial court. This reason supports lifting or otherwise modifying any stay that might otherwise be called for here as may be necessary for this case to proceed as scheduled to trial on the merits beginning May 6, 2019.**

See Exhibit C at p. 2.

WHEREFORE, Plaintiffs so move/petition for relief as stated above, allowing this case to proceed to trial to determine the validity of the respective claims and defenses of the actual parties plaintiff and defendant, who are indeed the only parties who actually have substantial rights to be adjudicated here. Again, Plaintiffs respectfully request an expedited hearing on this matter. Plaintiffs reserve all rights to supplement this motion/petition with any further briefing/argument or submission(s) as the Court may allow or require.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
JUSTIN O'TOOLE LUCEY, P.A.

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Attorneys for Plaintiffs

Dated: April 16, 2019

2015-CP-10-0955
CERTIFICATE OF SERVICE

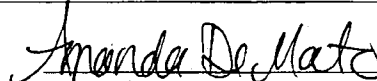
I, the undersigned legal assistant of the law office of Young Clement Rivers, LLP, do hereby certify that I have served a copy of the foregoing Plaintiffs' Motion for Reconsideration of and/or Relief from Order Staying Case and/or Petition to Lift or Otherwise Modify Any Stay as May Be Necessary for This Case to Proceed as Scheduled to Trial on the Merits Beginning May 6, 2019 by electronic transmission and/or U.S. Mail to the following counsel of record:

Everett A. Kendall, II Murphy & Grantland, P.A. 4406B Forest Dr. Columbia, SC 29206 rkendall@murphygrantland.com Attorneys for Complete Building Corporation	S. Markey Stubbs, Esquire Baker, Ravenel, Bender, LLP P.O. Box 8057 Columbia, SC 29202-8057 mstubbs@brblegal.com Attorneys for Creekside, Inc.
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FILED
2019 APR 16 PM 4:35
JULIE J. ARMSTRONG
CLERK OF COURT

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Erin D. Dean, Esquire Post Office Box 2055 Beaufort, South Carolina 29901-2055 (843) 524-1116 <u>erindean@tgdcpa.com</u> Attorney for Warren Anderson	Christopher M. Ramsey, Esq. Bostic Law Group, P.A. 2236 Ashley Crossing Drive Charleston, South Carolina 29414 cramsey@bosticlaw.com Attorney for Island Pointe, LLC
Andrew N. Cole, Esquire Collins & Lacy, PC P.O. Box 12487 Columbia, SC 29211 acole@collinsandlacy.com Attorneys for JMC Construction, Inc. and JMC Construction, LLC	Christopher Adams, Esq. James L. Williams, Esq. Collins & Lacy, P.C P.O. Box 12487 Columbia, SC 2921 Attorneys for Martin Barr d/b/a Port City Structured Wiring


Amanda DeMato
April 16, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Employers Mutual Casualty
Company,

Petitioner,

IN RE:

Phillip Jefferson,

Plaintiff,

vs.

James White Construction, LLC and
James White, Individually,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2016-CP-10-4055

**PETITIONER'S NOTICE OF
MOTION AND MOTION TO
INTERVENE**

FILED
2017 DEC 29 AM 11:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service hereof, exclusive of the date of service, or at such time as the Court may determine, the undersigned attorneys for the proposed intervenor, Employers Mutual Casualty Company ("EMC"), will move the Court for an order pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, permitting EMC to intervene in the above-captioned action, outside the presence of the jury and for the limited purpose of protecting its interest under certain commercial general liability policies and commercial umbrella policies issued by it to James White Construction, LLC ("JWC"). Specifically, EMC seeks to intervene in this action solely for the purpose of requesting, outside the presence of the jury, that special interrogatories and/or a special verdict or a general verdict form accompanied by interrogatories be submitted to the jury from which the parties can make a determination of the apportionment of damages for each cause of action, if

any, awarded to the plaintiff and against JWC and resolve issues of fact, from which a determination of insurance coverage (or lack thereof) may be made. See Rule 49, South Carolina Rules of Civil Procedure; *Harleysville Grp. Ins. Co. v. Heritage Cmty., Inc.* No. 27698, 2017 LEXIS 8 (S.C. Jan. 11, 2017) ("The 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.").

This motion is based on the following grounds:

1. EMC issued a series of commercial general liability and commercial umbrella policies of insurance to JWC with policy periods spanning from September 10, 2015 to September 10, 2017.

2. In this action, the plaintiff alleges that, from 2010 or 2011 until 2016, JWC has been dumping fill dirt on his property which JWC knew or should have known was not suitable for building upon. The plaintiff asserts negligence, negligent misrepresentation, nuisance, and trespass claims against JWC. See Amended Complaint. EMC is providing a defense to JWC in this action under a full and complete reservation of rights under the policies.

3. EMC maintains that there may not be coverage for some or all of the claims made by the plaintiff in the action because the claims and/or damages, if any, do not constitute an occurrence resulting in property damage and/or coverage is otherwise excluded under the policies.

4. EMC does not seek to actively participate in the pretrial or trial of this action other than to make a motion, at the appropriate time, to submit a special verdict form and/or special interrogatories to the jury, after the close of evidence. By proceeding in this manner, there will be no mention of insurance coverage during the trial and, therefore, no resulting

prejudice to the insured. EMC's intervention will also not cause delay or interference with the trial of this case.

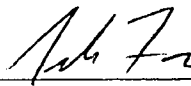
5. EMC's interests are not adequately nor completely represented by other parties to the action. As discussed above, EMC has an interest in the litigation separate from the actual defense of its insured. EMC also has an interest with regard to its obligation to indemnify JWC if a verdict is returned on any non-covered claims or damages.

6. Intervention as a matter of right in this case is warranted because EMC has an interest relating to the subject matter of this case and is so situated that in the absence of such intervention, the disposition of the action may, as a practical matter, impair or impede EMC's ability to protect that interest. Moreover, EMC's interest is not adequately represented by the existing parties, in that defense counsel retained to represent JWC may not advocate any coverage position which would be against the interest of JWC.

7. Alternatively, EMC is entitled to permissive intervention in that a determination of EMC's policies, coverages, exclusions and defenses in this action have common questions of fact relating to the damages, if any, that may be awardable to the plaintiff.

This motion is made pursuant to Rules 24(a) and 24(b) of the South Carolina Rules of Civil Procedure and is supported by the pleadings in this matter, a supporting memorandum, if filed, and all applicable statutory and common law.

Signature on following page.



Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580

Attorneys for Petitioner,
Employers Mutual Casualty Company

Greenville, SC
December 27, 2017

The undersigned certified that consultation with counsel would serve no useful purpose.



Nicholas A. Farr

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Frankenmuth Mutual Insurance)
Company,)
Petitioner,)
IN RE:)
Phillip Jefferson,)
Plaintiff,)
vs.)
James White Construction, LLC and)
James White, Individually,)
Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2016-CP-10-4055

**PETITIONER'S NOTICE OF
MOTION AND MOTION TO
INTERVENE**

BY

JULIE J. ADAMS
CLERK OF COURT

2018 JAN -8 PM 2:53

FILED

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service hereof, exclusive of the date of service, or at such time as the Court may determine, the undersigned attorneys for the proposed intervenor, Frankenmuth Mutual Insurance Company ("Frankenmuth"), will move the Court for an order pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, permitting Frankenmuth to intervene in the above-captioned action, outside the presence of the jury and for the limited purpose of protecting its interest under certain commercial general liability policies and commercial umbrella policies issued by it to James White Construction Co., LLC ("JWC"). Specifically, Frankenmuth seeks to intervene in this action solely for the purpose of requesting, outside the presence of the jury, that special interrogatories and/or a special verdict or a general verdict form accompanied by interrogatories be submitted to the jury from which the parties can make a determination of the apportionment

of damages for each cause of action, if any, awarded to the plaintiff and against JWC and resolve issues of fact, from which a determination of insurance coverage (or lack thereof) may be made. See Rule 49, South Carolina Rules of Civil Procedure; *Harleysville Grp. Ins. Co. v. Heritage Cmtys., Inc.* No. 27698, 2017 LEXIS 8 (S.C. Jan. 11, 2017) (“The 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.”).

This motion is based on the following grounds:

1. Frankenmuth issued a commercial general liability policy of insurance to JWC with a policy period spanning from September 10, 2013 to September 10, 2015.
2. In this action, the plaintiff alleges that, from 2010 or 2011 until 2016, JWC has been dumping fill dirt on his property which JWC knew or should have known was not suitable for building. The plaintiff asserts negligence, negligent misrepresentation, nuisance, and trespass claims against JWC. See Amended Complaint. Frankenmuth is providing a defense to JWC in this action under a full and complete reservation of rights under the policies.
3. Frankenmuth maintains that there may not be coverage for some or all of the claims made by the plaintiff in the action because the claims and/or damages, if any, do not constitute an occurrence resulting in property damage within its policy period and/or coverage is otherwise excluded under the policy.
4. Frankenmuth does not seek to actively participate in the pretrial or trial of this action other than to make a motion, at the appropriate time, to submit a special verdict form and/or special interrogatories to the jury, after the close of evidence. By proceeding in this manner, there will be no mention of insurance coverage during the trial and, therefore, no

resulting prejudice to the insured. Frankenmuth's intervention will also not cause delay or interference with the trial of this case.

5. Frankenmuth's interests are not adequately nor completely represented by other parties to the action. As discussed above, Frankenmuth has an interest in the litigation separate from the actual defense of its insured. Frankenmuth also has an interest with regard to its obligation to indemnify JWC if a verdict is returned on any non-covered claims or damages.

6. Intervention as a matter of right in this case is warranted because Frankenmuth has an interest relating to the subject matter of this case and is so situated that in the absence of such intervention, the disposition of the action may, as a practical matter, impair or impede Frankenmuth's ability to protect that interest. Moreover, Frankenmuth's interest is not adequately represented by the existing parties, in that defense counsel retained to represent Frankenmuth may not advocate any position which would be against the interest of JWC and may not attempt to protect Frankenmuth's coverage position.

7. Alternatively, Frankenmuth is entitled to permissive intervention in that a determination of Frankenmuth's policies, coverages, exclusions and defenses in this action have common questions of fact relating to the damages, if any, that may be awardable to the plaintiff.

This motion is made pursuant to Rules 24(a) and 24(b) of the South Carolina Rules of Civil Procedure and is supported by the pleadings in this matter, a supporting memorandum, if filed, and all applicable statutory and common law.

Signature on following page.



Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 10589
Greenville, South Carolina 29603
(864) 271-9580

Attorneys for Petitioner,
Frankenmuth Mutual Insurance Company

Greenville, SC
January 4, 2018

The undersigned certified that consultation with counsel would serve no useful purpose:


Phillip E. Reeves

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2016-CP-10-4058

Philip Jefferson,

Plaintiff,

vs.

James White Construction, LLC and James
White, Individually,

Defendants.

NOTICE OF MOTION AND
MOTION TO INTERVENE BY
FIREMEN'S INSURANCE COMPANY OF
WASHINGTON, D.C.
FOR THE LIMITED PURPOSE OF
SUBMITTING A SPECIAL VERDICT FORM
OR SPECIAL INTERROGATORIES

TO: ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to Rule 24(a)(1), SCRPC, or, in the alternative, pursuant to Rule 24(b)(2), SCRPC, Applicant, Firemen's Insurance Company of Washington, D.C. (hereinafter Firemen's) hereby moves to intervene in this action for the limited purpose of submitting a special verdict form or special interrogatories to the jury.

All America is entitled to intervention as a commercial general liability ("CGL") carrier for Defendants JAMES WHITE CONSTRUCTION, LLC and JAMES WHITE, INDIVIDUALLY hereinafter collectively ("James White Construction"), as its rights may be affected by a disposition of this case on the merits. This motion is made on the following grounds:

I. James White Construction is a named insured under four CGL policies (hereinafter collectively "the Policies") issued by Firemen's. Policy number CPA 0122862-4 was in effect from September 10, 2009 to September 10, 2010. The policy was renewed annually under policy numbers CPA 0122862-41 (2010-11), CPA 0122862-42 (2011-12), and CPA 0122862-43 (2012-13). All four policies contain commercial general liability (CGL) coverage with limits of \$1,000,000 per occurrence and \$2,000,000 in the aggregate. Copies of the Policies are attached as Exhibits A, B, C, and D respectively.

2. The Policies only cover "sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' . . . to which this insurance applies." (Exh. A, B, C, and D Form CG 0001, ¶ 1.A.1.a.)

3. The Policies only apply to "property damage" if it is caused by an "occurrence." (Id. at ¶ A.1.b.(1).)

4. The Policies define "property damage" as physical injury to tangible property, including all resulting loss of use of that property. (Id. at ¶ V.17.) "Occurrence" is defined as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions." (Id. at ¶ V.13.)

5. Under the contractual terms of the Policies, as interpreted by South Carolina law, defective construction is not covered. Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011). However, resulting damage to otherwise non-defective components may constitute covered "property damage" caused by an "occurrence," satisfying the requirements of the insuring agreement. Id.

6. Additionally, the contractual terms of the Policies exclude coverage for business risks such as defective construction. (Exh. A, B, C, and D Form CG 0001, ¶ 1.A.2.j., k., l., m., and n.)

7. The Policies exclude coverage for "bodily injury" or "property damage" arising out of the discharge, dispersal, seepage, migration, release or escape of "pollutants." The policy defines "pollutants" to mean various irritants or contaminants. (Exh. A, B, C, and D Form CG 0001, ¶ 1.A.2.f. and Form CG 2165 (12/04).)

8. Upon information and belief, the Plaintiffs in this matter intends to present evidence of defective construction by James White Construction at the trial of this action.

9. To the extent damages are awarded against James White Construction for defective construction, the damages awarded are not damages to which the Policies apply, and they are therefore not covered.

10. To the extent damages are awarded against James White Construction for "property damage" arising out of the discharge, dispersal, seepage, migration, release or escape of "pollutants," the damages awarded are not covered.

11. The contractual terms of the Policies and South Carolina law require an allocation between covered and non-covered damages.

12. Firemen's contends that this allocation does not involve relitigating the issue of damages; it is rather a determination of the amount of covered damages under the contractual terms of the Policies and South Carolina law based upon a review of the evidence submitted at trial in this action. Nevertheless, the Supreme Court of South Carolina has recently held in *dicta* that this contractual allocation of covered damages may not be made in a separate coverage action. Harleysville Group Ins. v. Heritage Cmities, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 36 n.11).

13. The court did not clarify this holding in its final opinion. Harleysville Group Ins. v. Heritage Cmities, Inc., et al., 420 S.C. 321, 803 S.E.2d 288 (2017). Instead, the court cited a prior case in which allocation was not allowed due to failure to raise the issue in an underlying arbitration proceeding. See Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). Thus, it appears that South Carolina law may not allow insurers to obtain facts necessary for determinations involving liability coverage for construction defect claims in separate declaratory judgment actions.

14. Generally, insurers lack standing to intervene in underlying actions to determine liability. Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03

(2007); Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (1994) (citing Blue Cross and Blue Shield of S.C. v. S.C. Indus. Comm'n., 274 S.C. 204, 262 S.E.2d 35 (1980)). These holdings were based upon the understanding that factual determinations for coverage purposes could be litigated in separate coverage actions. See Ex Parte GEICO, 373 S.C. at 137, 644 S.E.2d at 702. Harlevsille appears to contradict this prior understanding.

15. Notice and opportunity to be heard are fundamental requirements of due process. If Firemen's is denied any forum for obtaining facts necessary for its allocation for coverage purposes, then its due process rights are violated in violation of both state and federal law.

16. Accordingly, Firemen's hereby moves to intervene in this action for the limited purpose of participating in the drafting of a special verdict form or submitting special interrogatories to the jury regarding the amount of any damages award that is for covered damages.

17. Under South Carolina law, a party seeking intervention under Rule 24(a)(2), SCRPC, must: (1) establish timely intervention; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Cl. App. 2004).

18. Firemen's motion to intervene is timely. This motion is being filed in advance of trial, and it is not expected to impact discovery. The parties participated in a mediation held on December 21, 2017 in a good faith effort to resolve the case out of court, but a settlement could not be reached.

19. Firemen's has an interest relating to the property or transaction which is the subject of this action. As discussed above, this action represents the only forum in which Firemen's can obtain an allocation as to the amount of covered damages under the Policies.

20. Firemen's is in a position such that, without intervention, disposition of this action will impair or impede its ability to protect that interest. The Supreme Court appears to have held that if intervention is not sought, an insurer waives its right to seek an allocation as to the amount of covered damages. Harlevsille, 2017 WL 105021 at *7 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547.

21. Firemen's is not adequately represented by other parties to this action. None of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the Plaintiffs and James White Construction are aligned against the interest of Firemen's. Indeed, federal courts often realign parties to coverage litigation to reflect the fact that the interests of the liability carrier are adverse to the interests of both the plaintiffs and the defendants in the underlying tort litigation. See Bi-Lo, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, C.A. No. 0:14-cv-00335-CMC, 2014 WL 12605522 at *7-8 (D.S.C. Apr. 30, 2014). When the interests of the party seeking intervention are adverse to the interests of the party litigants, "there is an obvious lack of adequate representation." In re Horry County State Bank, 361 S.C. at 509, 604 S.E.2d at 726.

22. Accordingly, Firemen's has satisfied all of the elements for intervention of right under Rule 24(a)(2). The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to this Court's discretion.

23. In the alternative, Firemen's also moves to intervene under Rule 24(b). Permissive intervention is allowed at the court's discretion based upon the existence of a common question of fact or law between the underlying litigation and the intervenor's claims or defenses. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988). Sound administrative procedure favors the disposition of all claims or defenses in a single action. Id. As

discussed above, this action represents the only forum in which an allocation of covered versus non-covered damages can be made.

24. Firemen's motion to intervene is made for the limited purpose of presenting the jury with a special verdict or special interrogatories for a finding as to allocation between covered and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (holding that intervention is appropriate for third-party challenges to protective orders).

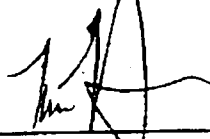
25. Upon information and belief, the granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original parties to the instant action, in that intervention is for the limited purpose of determining the form of the verdict to be submitted to the jury, and intervention will not impact the ability of the original parties to present their claims and/or defenses at trial.

Firemen's respectfully moves to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of participating in the drafting of a special verdict or submitting special interrogatories to the jury in order to obtain findings of fact necessary for an allocation between covered and non-covered damages under the Policies. The grounds for this Motion are set forth above.

[Signature page follows]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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Columbia, South Carolina 29260
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(803) 782-4140 (facsimile)
Email: tnewton@murphygrantland.com
*Attorneys for Firemen's Insurance Company or
Washington, D.C.*

Columbia, South Carolina
January 2, 2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PHILLIP JEFFERSON,

Plaintiff,

vs.

JAMES WHITE CONSTRUCTION, LLC, and
JAMES WHITE, individually,

Defendants.

2016-CP-10-4055
IN THE COURT OF COMMON PLEAS

Case No. 2016-CP-10-04055

**ORDER DENYING NON-PARTY
INSURERS' MOTIONS TO INTERVENE**

FILED
2018 MAY 16 PM 3:07
JULIE J. ARMSTRONG
CLERK OF COURT

The matter came before the Court upon separate Motions to Intervene filed by insurance carriers Employers Mutual Casualty Company, Firemen's Insurance Company of Washington, D.C. and Frankenmuth Mutual Insurance Company ("Insurers"). These carriers are insurers for Defendants James White Construction, LLC and James White, individually ("Defendants") and seek to intervene in this action, pursuant to Rule 24, SCRCF, for the limited purpose of submitting special interrogatories and/or verdict questions to the jury related to the allocation of covered and non-covered damages during the upcoming trial. I heard the motion in open court on January 12, 2018 at which time all parties and non-party Insurers appeared through their attorneys. I have reviewed the file along with all submissions and applicable law and considered arguments of counsel as well. Based upon the record and applicable law, I deny Insurers' Motions to Intervene for the reasons explained below.

FACTS

This case concerns allegations that unsuitable quality fill dirt was delivered and deposited on Plaintiff's property located on Huro Road in Mount Pleasant, South Carolina. Plaintiff filed his Amended Complaint on August 31, 2016. Insurers insured Defendants under a series of

Amel

policies applicable to Plaintiff's claims and hired counsel to represent Defendants under a reservation of rights at the onset of this litigation. On December 29, 2017 – almost 16 months after this action was commenced – Insurers filed the present motions, pursuant to Rule 24, SCRPC. This case is now set for a date certain trial beginning on June 18, 2018.

LAW

Rule 24(a), SCRPC, provides for intervention as of right (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Rule 24(b), SCRPC, allows permissive intervention when (1) a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Rule 24(b), SCRPC.

"The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (citing South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. Ex parte Government Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court's denial of an insurer's motion to intervene). "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRPC." Id. A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a "real party in interest." Id. "A real party in interest

... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Id.

ANALYSIS

Since the South Carolina Supreme Court published its opinion in the case of Harleysville Grp. Ins. V. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017), insurers have attempted to intervene in cases on the eve of trial for the purpose of submitting special interrogatories and/or verdict questions to the jury related to the allocation of covered and non-covered damages. However, the court's opinion in Harleysville opinion does not mandate that insurers have a right to intervene to ask special interrogatories or request special verdict forms.

In this matter, Insurers cannot meet the requirements for intervention under Rule 24, SCRPC. First, Insurers have not proffered a statutory right to intervene, conditional or otherwise. Second, Insurers do not have an interest in the property that is the subject of this action, located on Huro Road in Mount Pleasant, South Carolina, and Insurers do not have an interest in the underlying interactions between Plaintiff and Defendants that is the subject of this litigation. Insurers' interests arise solely out of their contracts of insurance with Defendants and those interests are not appropriate to be litigated or interjected into this action. Finally, if Insurers were to be permitted to intervene at this stage of the litigation then it would be to the detriment of Defendants, their insureds, as a result of an impermissible conflict of interest that would be created and the likelihood of confusing the jury.

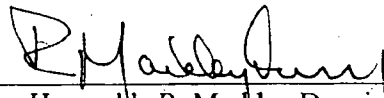
RdJ

ORDER

Accordingly, and based upon the foregoing, it is therefore

ORDERED, ADJUDGED AND DECREED that Non-Party Insurers Employers Mutual Casualty Company, Firemen's Insurance Company of Washington, D.C. and Frankenmuth Mutual Insurance Company's Motions to Intervene are Denied.

AND IT IS SO ORDERED.



The Honorable R. Markley Dennis, Jr.
Presiding Judge

May 16, 2018
Charleston, South Carolina

Rme/4

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No: 2016-CP-10-4055

Ex Parte: Frankenmuth Mutual Insurance Company
and Employers Mutual Casualty Company.....Appellants,

In re: Phillip Jefferson.....Respondent,

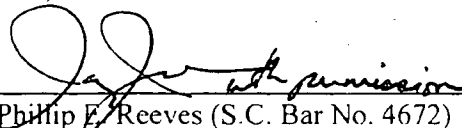
v.

James White Construction, LLC and James White, Individually Respondents,

NOTICE OF APPEAL

Pursuant to Rules 201 and 203 of the South Carolina Appellate Court Rules,
Appellants Frankenmuth Mutual Insurance Company and Employers Mutual Casualty
Company hereby appeal the Charleston County Court of Common Pleas Order Denying
Non-Party Insurers' Motions to Intervene, dated and filed May 16, 2018.

Respectfully submitted,



with permission

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Nicholas A. Farr (S.C. Bar No. 78769)
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June 13, 2018

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And

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87002

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2016-CP-10-04055

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JUN 13 2018

SC Court of Appeals

Ex Parte:

Firemen's Insurance Company of Washington, D.C., ... Appellant,

In Re:

Phillip Jefferson, ... Respondent,

v.

James White Construction, LLC and James White, Individually, ... Respondents.

NOTICE OF APPEAL

Appellant Firemen's Insurance Company of Washington, D.C. (hereinafter "Firemen's"), appeals the ruling of the Honorable R. Markley Dennis, Jr. filed May 16, 2018. Appellant received notice of the ruling denying Firemen's Motion to Intervene on

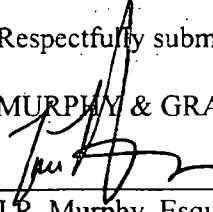
May 22, 2018. This action is set for trial beginning on Monday, June 18, 2018.

Firemen's appeal affects mode of trial. A copy of the final Order is attached.

June 13, 2018

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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Insurance Company and
Employers Mutual Casualty Company

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2016-CP-10-4055

PHILLIP JEFFERSON,
Plaintiffs,

vs.

JAMES WHITE CONSTRUCTION, LLC
and JAMES WHITE, individually
Defendants.

MOTION TO LIFT STAY
(Priority Matter)

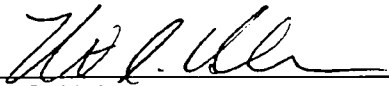
2018 JUN 13 PM 3:56
CLERK OF COURT

Pursuant to Rule 241 of the South Carolina Rules of Appellate Procedure, Plaintiff, Phillip Jefferson (hereinafter, "Mr. Jefferson") moves for an order to lift any stay associated with the Notices of Appeal filed on June 13, 2018 by non-parties Frankenmuth Mutual Insurance Company, Employers Mutual Casualty Company, and Firemen's Insurance Company of Washington, D.C. Pursuant to Rule 11, the undersigned counsel certifies that communication with opposing counsel could not timely be had and/or would serve no useful purpose.

The grounds for this motion is that the motions appealed upon involve non-parties to this action, and that the matters decided in the Orders have no bearing on any of the claims and defenses between the Plaintiff and Defendants.

WHEREFORE, Mr. Jefferson respectfully requests that the Court lift the stay as it may pertain to the Plaintiffs and Defendants, allow the trial to proceed on Monday, June 18, 2018, and/or require the non-parties post a bond in the amount of Plaintiff's demand.

HALVERSEN & ASSOCIATES, LLC

By: 

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Attorneys for the Plaintiff

June 15th, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No: 2016-CP-10-4055

Ex Parte: Frankenmuth Mutual Insurance Company
and Employers Mutual Casualty Company.....

Appellants,

In re: Phillip Jefferson.....

Respondent,

v.

James White Construction, LLC and James White, Individually..... Respondents,

APPELLANT FRANKENMUTH MUTUAL INSURANCE
COMPANY'S PETITION FOR WRIT OF SUPERSEDEAS TO
STAY TRIAL SCHEDULED FOR JUNE 18, 2018
IMMEDIATE ACTION REQUIRED: 1 BUSINESS DAY
UNTIL TRIAL

Appellant Frankenmuth Mutual Insurance Company ("Frankenmuth") petitions this Court to stay the trial scheduled for June 18, 2018, until the underlying appeal is resolved because the issues on appeal have a substantial effect on the trial of this matter. Significantly, Appellant has timely appealed an order denying its motion to intervene in this action for the purpose of requesting, outside the presence of the jury, that special interrogatories and/or a special verdict or a general verdict form accompanied by interrogatories be submitted to the jury from which the parties can make a determination of the apportionment of damages for each cause of action, if any, awarded to Respondent Phillip Jefferson and resolve issues of fact, from

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SC Court of Appeals

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which a determination of insurance coverage (or lack thereof) may be made. See Rule 49, South Carolina Rules of Civil Procedure; *Harleysville Grp. Ins. Co. v. Heritage Cmty., Inc.*, 420 S.C. 321, 341, 803 S.E.2d 288, 299 (S.C. 2017) ("The 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."). Due to the limited time until the current trial date, Appellant requests immediate review by this Court.¹

FACTUAL/PROCEDURAL HISTORY

Appellant Frankenmuth, along with Appellants Employers Mutual Casualty Company ("EMC") and Firemen's Insurance Company of Washington, D.C. ("Firemen's"), issued a series of commercial general liability policies of insurance to Respondent James White Construction, LLC ("JWC") which were in effect from September 10, 2009 to September 10, 2017. On August 4, 2016, Respondent Jefferson commenced a lawsuit in the Charleston County Court of Common Pleas against Respondents JWC and James White, individually, in which he alleges that, from 2010 or 2011 until 2016, JWC has been dumping fill dirt on his property which JWC knew or should have known was not suitable for building upon. The plaintiff asserts negligence, negligent misrepresentation, nuisance, and trespass claims against JWC. Appellants are providing a defense to JWC in this action under a full and complete reservation of rights under their respective policies.

Because there are questions as to whether some or all of the claims made and damages claimed by Respondent Jefferson in this matter are covered by their respective policies of insurance, Appellants each filed motions to intervene pursuant to Rule 24 of the South Carolina

¹ Because of the exceptional circumstances of this matter and the limited time for review, Appellant has included the order as provided to it by the Court. Appellant will provide a certified copy of the order when it is made available by the Charleston County Clerk's Office pursuant to Rules 241(1) and 241(4)(C).

Rules of Civil Procedure for the limited purpose of protecting their interests under their policies by requesting special interrogatories and/or a special verdict form be submitted to the jury if this matter proceeds to trial. (Ex. 1, Frankenmuth's Motion to Intervene). The motions were heard by Judge R. Markley Dennis, Jr, on January 12, 2018. By order dated May 16, 2018, Judge Dennis denied Appellants' motions to intervene. (Ex. 2, Order Denying Insurers' Motions to Intervene).

On June 13, 2018, Appellants filed a notice of appeal of Judge Dennis' May 16, 2018, order. Appellants informed Judge Roger Young, the trial judge set to preside over the June 18, 2018 trial of this matter, via email that a notice of appeal had been filed. (Ex. 3, Email correspondence between counsel and the trial court, dated June 13, 2018). Thereafter, Respondent Jefferson filed a motion to lift any stay generated by the notice of appeal pursuant to Rule 241 of the South Carolina Appellate Court Rules. (Ex. 4, Plaintiff's Motion to Lift Stay). On June 14, 2018, Judge Young informed the parties that the appeal did not automatically stay the trial and that, unless the appellate court ruled otherwise, the matter would proceed to trial on June 18, 2018. (Ex. 5, Email correspondence between trial court and counsel, dated June 14, 2018).

Appellant now petitions this Court and seeks a writ to stay the upcoming trial until resolution of the appeal.

STANDARD OF REVIEW

A supersedeas is an extraordinary writ, which appellate courts use only when necessary to preserve the fruits of a meritorious appeal, to avoid irreparable harm, or to prevent a miscarriage of justice. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) ("[T]he purpose...of a supersedeas...is to...preserve to appellant the fruits of a

meritorious appeal where they might otherwise be lost to him.”); *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 304, 69 S.E. 604, 606 (1910) (explaining that a supersedeas should be issued “only to the extent clearly made to appear to be necessary to prevent irreparable injury or a miscarriage of justice.”).

ARGUMENT

The June 18, 2018 trial should be stayed pending the outcome of the appeal because (1) the filing of a notice of appeal automatically stays the trial and (2) a stay of the trial is necessary to preserve the fruits of a meritorious appeal and to avoid irreparable harm to Appellant.

Rule 205, SCACR, provides an appellate court with exclusive jurisdiction over matters on appeal. The lower court may only proceed with matters not affected by the appeal. Rule 241(a), SCACR, in governing matters which are stayed while on appeal, provides as follows:

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.

Thus, a lower court may not act or issue orders that affect an issue on appeal, which would include, but not be limited to, proceeding to trial.

In *Tillman v. Oakes*, the Court acknowledged that the question of determining whether a lower court may proceed with a case once an order has been appealed is “a difficult one to answer.” 398 S.C. 245, 254, 728 S.E.2d 45, 50 (2012). The inquiry for this Court is whether Appellant and its appeal are affected by proceeding with the trial of this matter. The answer must be yes.

Appellant is an insurer providing a defense to Respondents-Defendants under a

reservation of rights. In *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, the South Carolina Supreme Court set forth certain duties of an insurer providing a defense to an insured under a reservation of rights, including the duty to ensure that a verdict entered against its insured is allocated between covered and non-covered damages. 420 S.C. 321, 341, 803 S.E.2d 288, 299 (2017) (quoting *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994) (“The 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.”).² Pursuant to this obligation, Appellant moved to intervene in this action solely to make such a request. The order denying this motion is at issue in this appeal.

If the matter proceeds to trial prior to a decision on Appellant’s appeal, the jury will not be presented with a special verdict form and/or special interrogatories. Rather, to the extent a verdict is entered against Respondents-Defendants, the verdict will be a general verdict. If faced with a general verdict, Appellant faces the possibility of having to indemnify its insureds for the entire verdict if at least one of several claims submitted to the jury is covered. *See Owners Ins. Co. v. Clayton*, 364 S.C.555, 561-62, 614 S.E.2d 611, 614-15 (2005). To prevent this inequity, the Court in *Harleysville* established that an allocated verdict must be obtained in the underlying trial. Appellant is attempting to comply with *Harleysville* but will be deprived of that opportunity

² It should be noted that *Harleysville* may also be construed to place a similar burden on the insured to request an allocated verdict. *See Harleysville*, 420 S.C. 321, 338-39, 803 S.E.2d 288, 297-98 (citing *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 618 (Minn. 2012) (holding that “when an insurer notifies its insured that it accepts the defense of a claim under a reservation of rights that includes covered and non-covered claims, the insurer not only has a duty to defend the claim, but also to disclose to its insured the insured’s interest in obtaining a written explanation of the award that identifies the claims or theories of recovery actually proved and the portions of the award attributable to each”). The Respondents-Defendants, however, have opposed Appellant’s motion to intervene to request such an allocation.

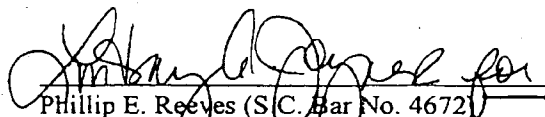
should this matter proceed to trial prior to a resolution of its appeal.

Appellant has a substantial interest in the outcome of the trial and preserving the ability to request that the jury be presented with a special verdict form and/or special interrogatories to obtain a determination of the damages, if any, attributable to covered and non-covered claims. Proceeding with a trial which may result in a general verdict if Respondents-Defendants are found liable to Respondent Jefferson prior to a decision on the merits of the appeal may either (1) render Appellant's appeal moot, leaving Appellant with the possibility of having to indemnify its insureds for an unallocated general verdict that includes covered and non-covered claims or (2) result in having to try the case a second time in the event Appellant's appeal is successful. As such, a supersedeas should be granted to preserve the fruits of a meritorious appeal, to avoid irreparable harm, and to prevent a miscarriage of justice. Further, Appellant contends that no bond or undertaking is required as a judgment has as a monetary judgment has not been entered in this matter.

CONCLUSION

For these reasons, Appellant respectfully requests this Court to issue a stay and to continue the trial of this matter until the appeal is resolved.

Respectfully submitted,



Phillip E. Reeves (S.C. Bar No. 4672)

Nicholas A. Farr (S.C. Bar No. 78769)

Gallivan, White & Boyd, P.A.

Post Office Box 10589

Greenville, South Carolina 29603

(864) 271-9580

Attorneys for Appellant

Greenville, South Carolina

June 15, 2018

STATE OF Michigan)
COUNTY OF Saginaw) VERIFICATION

PERSONALLY APPEARED before me, James Troester, 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.

James Troester
James Troester

SWORN to before me this
15th day of June, 2018.

Jennifer Moore
Notary Public for Saginaw County
My Commission Expires: July 4, 2023

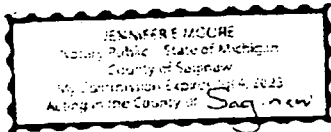


EXHIBIT 5

Nick Farr

From: Young, Roger <ryoungj@sccourts.org>
Sent: Thursday, June 14, 2018 2:10 PM
To: Dan
Cc: Yount, Adam; Brent Halversen; Emily Medlin; Young, Roger Law Clerk (Taylor Grooms); Nick Farr; Rogers; rteague@wardfirm.com; Phil Reeves; Tim J. Newton; paralegal@slotchiverlaw.com
Subject: Re: Phillip Jefferson v. James White Construction, LLC and James White, Individually (C.A. No. 2016-CP-10-4055) M&G File No.: 1465-0021

The word I get from Columbia is that this is one of those cases where the appellant thinks the appeal automatically stays the pending trial, and it is up to me to decide if I agree or not. They will only act if someone files something asking them to tell me to stop the trial.

I am of the opinion this appeal does not automatically stay the trial.

Therefore, unless I get something from the appellate courts telling me to stop, be ready to go to trial Monday. Please send me pre-trial briefs, voir dire and proposed jury charges by the end of the day Friday.

Roger Young

On 6/14/18, 12:52 PM, "Dan" <dan@slotchiverlaw.com> wrote:

Thank you Judge. We will await word from you. In the interim, please let us know if you want a Pre trial brief in advance of trial, assuming we are going forward.

Dan

Daniel S Slotchiver
Slotchiver & Slotchiver LLP
44 State Street
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843-577-6531

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error

> On Jun 14, 2018, at 11:00 AM, Young, Roger <ryoungj@sccourts.org> wrote:
>
> I have someone at the COA looking out for the appeal so they can make a decision as to whether the appeal stays the case. As of a few minutes ago the notice of appeal has not been filed with the COA. I will let you know what they decide when they get it and make a decision.
>
> RY
>
> From: "Yount, Adam" <ayount@hsblawfirm.com>

> Date: Wednesday, June 13, 2018 at 4:24 PM
 > To: Brent Halversen <Brent@halversenlaw.com>, Emily Medlin <emedlin@murphygrantland.com>, Roger Young <ryoungj@sccourts.org>, Taylor Grooms <ryounglc@sccourts.org>
 > Cc: "nfarr@gwblawfirm.com" <nfarr@gwblawfirm.com>, Rogers <JRogers@wardfirm.com>, "dan@slotchiverlaw.com" <dan@slotchiverlaw.com>, "rteague@wardfirm.com" <rteague@wardfirm.com>, "preeves@gwblawfirm.com" <Preeves@gwblawfirm.com>, "Tim J. Newton" <tnewton@murphygrantland.com>
 > Subject: RE: Phillip Jefferson v. James White Construction, LLC and James White, Individually (C.A. No. 2016-CP-10-4055) M&G File No.: 1465-0021
 >
 > Judge Young,
 >
 > Please have this confirm that Defendants join in the referenced Motion to Lift Stay.
 >
 > Thanks,
 >
 > Adam
 >
 >
 > [Haynsworth Sinkler Boyd, P.A.]<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.hsblawfirm.com_home.php&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskFWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=5n5qmcZzCeI8EA1ZF98idbOo3Ab_zwJZGhoRV7nLcwE&e=>
 > Adam N. Yount | Attorney | Haynsworth Sinkler Boyd, P.A.
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 > bio<https://urldefense.proofpoint.com/v2/url?u=http-3A__hsblawfirm.com_attorneys_adam-2Dn-2Dyount&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskFWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=G4N33f0dwrYnQLenzQXEUQm_fkjfaDUSQAAA_Hs9qlU&e=> |
 > vCard<https://urldefense.proofpoint.com/v2/url?u=http-3A__hsblawfirm.com_vcard_adam-2Dn-2Dyount&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskFWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=xW3Ty0ZBOVu9ANxGQ2WbRgGoPsO_POLjb-3edaK2TSw&e=> |
 > map<https://urldefense.proofpoint.com/v2/url?u=http-3A__maps.google.com_maps-3Fq-3D134-2BMeeting-2BStreet-2C-2BCharleston-2C-2BSC-26hl-3Den-26il-3D32.781971-2C-2D79.93176-26spn-3D0.024896-2C0.055575-26sll-3D34.852869-2C-2D82.394929-26sspn-3D0.01215-2C0.027788-26vpsrc-3D6-26hnear-3D134-2BMeeting-2BSt-2C-2BCharleston-2C-2BSouth-2BCarolina-2B29401-26t-3Dm-26z-3D15&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskFWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=3ISXaToY3mj4Wx6SF0EnU9dpZW8Qd3rIHnZqU4mjzc&e=>
 > email<<mailto:ayount@hsblawfirm.com>>
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 >
 > From: Brent Halversen [<mailto:Brent@halversenlaw.com>]
 > Sent: Wednesday, June 13, 2018 4:22 PM

> To: Emily Medlin; ryoungj@sccourts.org; ryounglc@sccourts.org
> Cc: nfarr@gwblawfirm.com; Rogers; dan@slotchiverlaw.com; rteague@wardfirm.com; Yount, Adam; preeves@gwblawfirm.com; Tim J. Newton
> Subject: RE: Phillip Jefferson v. James White Construction, LLC and James White, Individually (C.A. No. 2016-CP-10-4055) M&G File No.: 1465-0021

>
> Judge Young,
>
> Attached is the Plaintiff's Motion to Lift Stay associated with any of these notices of appeal that the various insurance companies have just filed this afternoon in our case. The Defendants in the case, through Adam Yount, have just indicated to me that they also join in this motion.

>
> Given that we have a one week date certain before your Honor that starts on Monday of next week, I am sure I speak for everyone in asking that the Court rule upon the motion as soon as possible in light of the number of people involved in trial preparation, travelling etc. We believe that any stay invoked by the filing of the notices should be lifted consistent with the rulings of other courts in South Carolina. I have attached one such ruling from Judge Newman to that effect. Thank you for your consideration.

>
> Brent
>
>
>
> _____
> Brent Souther Halversen, Esq.
> Halversen & Associates, LLC
> 171 Church Street, Suite 330
> Charleston, South Carolina 29401
> (843) 284-5790 tel.
> (864) 326-4844 fax.
> brent@halversenlaw.com<mailto:brent@halversenlaw.com>
> www.halversenlaw.com<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.halversenlaw.com_&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskfWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=M3WBaXYFWDlaS-yMM6XN1yieWkPjoiX9eFI77ItnWS4&e=>
> [Company logo]
>
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>
>

> From: Emily Medlin <emedlin@murphygrantland.com<mailto:emedlin@murphygrantland.com>>
> Sent: Wednesday, June 13, 2018 3:25 PM
> To: ryoungj@sccourts.org<mailto:ryoungj@sccourts.org>; ryounglc@sccourts.org<mailto:ryounglc@sccourts.org>
> Cc: nfarr@gwblawfirm.com<mailto:nfarr@gwblawfirm.com>; Rogers
<jrogers@wardfirm.com<mailto:jrogers@wardfirm.com>>; Brent Halversen
<Brent@halversenlaw.com<mailto:Brent@halversenlaw.com>>;
dan@slotchiverlaw.com<mailto:dan@slotchiverlaw.com>; rteague@wardfirm.com<mailto:rteague@wardfirm.com>;
ayount@hsblawfirm.com<mailto:ayount@hsblawfirm.com>;
preeves@gwblawfirm.com<mailto:preeves@gwblawfirm.com>; Tim J. Newton
<tnewton@murphygrantland.com<mailto:tnewton@murphygrantland.com>>
> Subject: Phillip Jefferson v. James White Construction, LLC and James White, Individually (C.A. No. 2016-CP-10-4055)
M&G File No.: 1465-0021

>
> Judge Young,
>
> I hope this email finds you well! The above-case matter is currently set for trial starting Monday morning, June 18, 2018. We have attached our Notice of Appeal filed on behalf of Firemen's Insurance Company of Washington, D.C. appealing the Order Denying our Motion to Intervene which was Ordered on May 16, 2018. Our Notice of Appeal is being hand-delivered today to the Court of Appeals for filing. All parties have been emailed and mailed a hard copy of the attached also.

>
> Thank you,
> Emily
> [cid:image003.png@01D28B5E.CB6890A0]
> Murphy & Grantland, P.A.
> Emily Medlin, CP
> Paralegal/Legal Assistant to Chris Majure
> Legal Assistant to Tim Newton
> emedlin@murphygrantland.com<mailto:bpierce@murphygrantland.com>
> Post Office Box 6648
> Columbia, South Carolina 29260
> 803-782-4100 ext. 1307
> 803-782-4140 fax
>

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> _____
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The South Carolina Court of Appeals

Ex Parte: Frankenmuth Mutual Insurance Company and
Employers Mutual Casualty Company, Appellants,

In Re: Phillip Jefferson, Respondent,

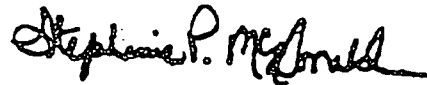
v.

James White Construction, LLC and James White,
individually, Respondent.

Appellate Case No. 2018-001094

ORDER

Appellants' motion to stay the trial is denied. Judge Roger M. Young, Sr. may proceed with the trial set for Monday, June 18, 2018.



FOR THE COURT

Columbia, South Carolina

FILED

cc:

The Honorable Roger M. Young, Sr.
Phillip E. Reeves, Esquire
Nicholas Andrew Farr, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire
Adam Noah Yount, Esquire
Brent Souther Halversen, Esquire

June 15, 2018



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccouris.org

June 18, 2018

Mr. Phillip E. Reeves, Esquire
PO Box 10589
Greenville SC 29603

Mr. Nicholas Andrew Farr, Esquire
PO Box 10589
Greenville SC 29603

Re: Ex Parte: Frankenmuth Mutual Insurance Company and Employers Mutual
Casualty Company
Appellate Case No. 2018-001094

Dear Counsel:

This Court has received your notice of appeal. A preliminary review of the order(s) challenged on appeal indicates it might not be immediately appealable.

Accordingly, it is requested that all counsel serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memoranda.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire
Adam Noah Yount, Esquire
Brent Souther Halversen, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

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FAX: (803) 734-1839
www.sccourts.org

June 18, 2018

Mr. John Robert Murphy, Esquire
PO Box 6648
Columbia SC 29260

Mr. Timothy J. Newton, Esquire
PO Box 6648
Columbia SC 29260

Re: Ex Parte: Firemen's Insurance Company of Washington, D.C.
Appellate Case No. 2018-001103

Dear Counsel:

This Court has received your notice of appeal. A preliminary review of the order(s) challenged on appeal indicates it might not be immediately appealable.

Accordingly, it is requested that all counsel serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memoranda.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Brent Souther Halversen, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire

The South Carolina Court of Appeals

Ex Parte: Frankenmuth Mutual Insurance Company and
Employers Mutual Casualty Company, Appellants,

In Re: Phillip Jefferson, Respondent,

v.

James White Construction, LLC and James White,
individually, Respondents.

Appellate Case No. 2018-001094

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2016CP1004055

ORDER

It appears to the satisfaction of the Court that the above case has been fully and finally settled by agreement between the parties. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED

June 29, 2018

cc:

Phillip E. Reeves, Esquire

Nicholas Andrew Farr, Esquire

Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire
Adam Noah Yount, Esquire
Brent Souther Halversen, Esquire

The South Carolina Court of Appeals

Ex Parte: Firemen's Insurance Company of Washington,
D.C., Appellant,

In Re: Phillip Jefferson, Respondent,

v.

James White Construction, LLC and James White,
Individually, Respondents.

Appellate Case No. 2018-001103

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2016CP1004055

ORDER

It appears to the satisfaction of the Court that the above case has been fully and finally settled by agreement between the parties. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Elaine Allen, Deputy
CLERK

Columbia, South Carolina

FILED

June 29 2018

cc:

John Robert Murphy, Esquire

Timothy J. Newton, Esquire

Brent Souther Halversen, Esquire

Daniel Scott Slotchiver, Esquire

John Elliott Rogers, II, Esquire

Ginger D. Goforth, Esquire

Carl Reed Teague, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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FAX: (803) 734-1839

www.sccourts.org

July 17, 2018

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Ex Parte: Frankenmuth Mutual Insurance Company and Employers Mutual
Casualty Company
Lower Court Case No. 2016CP1004055
Appellate Case No. 2018-001094

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A
copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Phillip E. Reeves, Esquire
Nicholas Andrew Farr, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire
Adam Noah Yount, Esquire
Brent Souther Halversen, Esquire

Exhibit A p. 48



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 17, 2018

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Ex Parte: Firemen's Insurance Company of Washington, D.C.
Lower Court Case No. 2016CP1004055
Appellate Case No. 2018-001103

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: John Robert Murphy, Esquire
Timothy J. Newton, Esquire
Brent Souther Halversen, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-6897

Montclair Property Owners Association (a South Carolina Non-Profit Corporation) and Montclair Property Owners Association Board of Directors for and on behalf of all owners of the Montclair Horizontal Property Regime,

Plaintiffs,

vs.

Bruce E. Kinney, Individually and as an incorporation for Montclair Homes, LLC; Montclair Homes, LLC, a South Carolina Limited Liability Company (Declarant-Master Deed); Cremco, LLC, an Illinois Limited Liability Company; Montclair Associates Limited Partnership, an Illinois Limited Liability Company; Montclair Property Owners Association a/k/a Montclair Homeowners Association (Grantor Control Period); Bruce Kinney as an officer or director in the Montclair Property Owners Association a/k/a Montclair Homeowners Association (Grantor Control Period), a SC non-profit corporation; Church Creek Construction, LLC and Larry Elsey, Individually and d/b/a ECI or Elsey Construction a/k/a Elsey Construction, Inc.; and Roger Lockey;

Defendants.

FILED
2012 SEP 13 PM 4:13
JULIE J. ARMSTRONG
CLERK OF COURT

**MOTION TO INTERVENE
FOR THE LIMITED PURPOSE OF REQUESTING SPECIAL INTERROGATORIES
AND/OR SPECIAL VERDICT FORM**

Alea London, LTD ("Alea"), pursuant to Rule 24 of the South Carolina Rules of Civil Procedure (SCRCP), and other applicable law, hereby moves before the Court to enter an order

permitting Alea to intervene in the civil action for the limited purpose of participating in a request for special verdict form and/or general verdict form accompanied by written interrogatories pursuant to SCRCP 49.¹

Alea issued insurance policies with general liability coverage to Defendant Church Creek Construction LLC ("Church Creek"), effective, with the noted exception, for the following periods: 1) July 25, 2003 to July 25, 2004; 2) July 25, 2004 to July 25, 2005; and 3) July 25, 2005 to July 25, 2006 (together, "Policy").² The third policy period cancelled effective October 18, 2005. The Policy provides in part that the insurance applies to "property damage" as defined in the Policy, only if the "property damage" occurs during the policy period.

¹ RULE 49. SPECIAL VERDICTS AND INTERROGATORIES

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

² Copies of the Policy will be made available for review.

The civil action is a construction defect one. The Plaintiff, the Montclair Property Owners Association, Inc., alleges that Church Creek is liable for alleged construction defects in condominium buildings. Plaintiff alleges progressive property damages caused by an occurrence. (See Third Amended Complaint ¶ 35). Plaintiff alleges that the damages have progressed since 2003. (See Third Amended Complaint ¶ 35).

**Insurance Coverage Law for a Progressive Property
Damage Construction Defect Claim**

The allegations made by Plaintiff will be governed in part by the recent South Carolina Supreme decision in Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011)(“Crossmann”). In Crossmann, the South Carolina Supreme Court addressed insurance coverage for a construction defect case related to a building’s exterior envelope and resulting progressive water intrusion damages to other parts of a building. The facts in Crossmann are similar generally to the ones in the present matter. Crossmann Communities of North Carolina, Inc. constructed the condominium buildings that suffered from construction defects and resulting water intrusion damages. In a lawsuit, the homeowners alleged that Crossmann Communities defectively installed the exterior siding on the buildings, which resulted in water penetration and progressive damage to other parts of the buildings. Crossmann Communities settled with the homeowners and then filed a declaratory judgment action seeking to have the insurers reimburse Crossmann Communities for the amount paid in settlement.

Crossmann may be divided into two parts. The first part is the Supreme Court’s analysis of the insuring agreement portion of the policy. The Supreme Court analyzed whether the facts written above constituted an “occurrence” of “property damage” as written in the insuring agreement portion of the policy and decided in other insurance coverage decisions around the

country. Crossmann, 395 S.C. at 46, 717 S.E.2d at 592.³ In finding the facts did constitute an “occurrence” of “property damage”, and an insured loss in that case, the Supreme Court recognized that there may be insured and uninsured losses in a construction defect claim. See Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. The Supreme Court stated, “[i]n 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.” Crossmann, 395 S.C. at 50, 717 S.E.2d at 594.

The second part of Crossmann is the Supreme Court’s analysis of the allocation of multi-year, progressive property damages, as alleged by Plaintiff in their pleadings, between insurer(s) and the insured. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. The Supreme Court adopted a “time on risk” formula for allocating progressive property damages that may occur over multiple years. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. The Supreme Court described the formula it adopted as follows: “[t]he basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.” Id. at 65, 717 S.E.2d at 601. Moreover, the Court stated, “[b]y making the denominator the total number of years during which the damage progressed, a policyholder who chose not to purchase coverage for certain years will be left with the

³ The parties in Crossmann stipulated that they would not argue the applicability of any policy exclusions. Crossmann, 395 S.C. at 46, 717 S.E.2d at 592. The parties presented the coverage question on the basis of the presence or absence of an “occurrence”. Crossmann, 395 S.C. at 46, 717 S.E.2d at 592.

responsibility for whatever portion of the total loss is attributed to those uninsured years.” *Id.* at 65, 717 S.E.2d at 601 Fn. 14.

The Court concluded, “[t]his formula is not a perfect estimate of the loss attributable to each insurer’s time on the risk. Rather, it is a *default rule* that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof. However, absent such proof, assuming an even progression is a logical default.” *Id.* In summary, the Supreme Court stated as follows:

In sum, we construe the standard CGL policy to require that each insurer cover only that portion of a loss attributable to property damage that occurred during its policy period. In light of the difficulty in proving the exact amount of damage incurred during each policy period, we adopt the formula above as the default method for allocating shares of the loss. Trial courts may vary from this default formula where appropriate to the circumstances of a particular case, but they must remain faithful to the premise that each insurer is responsible only for a pro rata portion of the total loss, and each pro rata portion must be defined by the insurer’s time on the risk.

Id. at 66, 717 S.E.2d at 603.

The purpose of the motion herein is to do as instructed in Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009)(“Newman”) and segregate damages. In Newman, the South Carolina Supreme Court also addressed the issue of insurance coverage for construction and design defects related to a building’s envelope and resulting water intrusion claims to other portions of the building structure. The facts in Newman involved a construction defect claim arising out of the construction of a single family house. The homeowner and homebuilder submitted the claim to binding arbitration; and Auto Owners Insurance Company provided defense counsel to the builder pursuant to an insurance policy with commercial general liability coverage. The arbitrator awarded damages to the homeowner based on a contractor’s

itemized cost of repair proposal that included an estimate for the costs to remove and replace the stucco siding, as well as an allowance to repair any water-damaged sheathing and framing that may be found once the stucco was removed from the house.

After the arbitrator issued the award, Auto-Owners filed a declaratory judgment civil action with respect to the issue of insurance coverage for the removal and replacement of the stucco system and the allowance for any resulting water damaged sheathing and/or framing. The trial court ruled in favor of the homeowner holding that the policy covered both the cost for the removal and replacement of the stucco and the allowance for any water damaged sheathing and framing. Auto-Owners appealed.

The Supreme Court in Newman held that while there was an occurrence of property damage, i.e., faulty construction, performed by a subcontractor to the builder (insured), that resulted in physically damaged sheathing and framing (property damage), the CGL policy did not cover the cost to remove and replace the stucco and relied on Exclusion N, the "Recall of Products, Work or Impaired Property" exclusion :

C. Damages awarded for replacement of the defective stucco

Auto-Owners finally argues that even if an "occurrence" warrants recovery for the Homeowner's property damage, the trial court erred in determining that the CGL policy covered the arbitrator's itemized allowance for replacing and repairing the defective stucco itself as an incidental cost to repairing the damage to other property. We agree.

Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself. Specifically, the policy exclusion provides that the insurance does not cover damages "claimed for any loss, cost or expense ... for the repair, replacement, adjustment, removal or disposal of ... 'Your product'; ... 'Your work'; or ... 'Impaired property'; if such product, work or property is withdrawn ... from use ... because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." 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. See L-J 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.

Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546.

Although the Supreme Court ruled that Exclusion N excluded coverage for the removal and replacement of the stucco, the Supreme Court nonetheless required Auto-Owners to pay the entire judgment (removal and replacement included) because it found that Auto-Owners had not addressed the issue in the underlying arbitration. The Supreme Court stated the following:

Nevertheless, it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. 5 (Citation Omitted)

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

Footnote 5 reads as follows:

Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547

The Supreme Court did not provide specific guidance on how an insurer is to raise the

matter of insurance coverage in the underlying liability civil action. SCRPC 24 permits intervention as of right where the party seeking intervention submits a timely application, the party claims an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and the interest of the party may not be adequately represented by the existing parties. Ken's Cabana, LLC v. Flemington Props., LLC (Ex parte Horry County State Bank), 604 S.E.2d 723 (S.C. Ct. App. 2004). Alea meets the requirements, thus entitling it to intervene as a matter of right.

Alea's application is timely. Alea is seeking to intervene for the limited purpose of participating in the special interrogatories and/or the verdict form. At this time, the preparation of these documents is not even imminent. Further, the trial in the civil action will not be delayed, and Alea assures the court that its motion to intervene will not delay or disrupt the legal proceedings prior to trial.

The next requirement to consider is whether Alea claims an interest relating to the property or transaction that is the subject of this action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest. Based upon Newman and South Carolina law discussed below, Alea satisfies the requirement.

The construction defect civil action should be free of the mention of insurance. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962) ("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

In recognition of potentially divergent interests among insurers and insureds, the Rules of Professional Conduct, Rule 407, SCACR, mandate that counsel for Church Creek owes a duty of loyalty only to Church Creek, not Alea, if their interests diverge. Specifically, Comment 11 of Rule 1.8, RPC, Rule 407, SCACR states:

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. . . . Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.

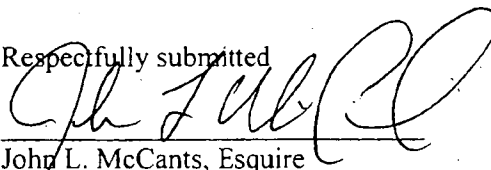
Further, Rule 5.4(c), RPC, Rule 407, SCACR states, "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Accordingly, when Alea retained counsel to defend Church Creek under a reservation of rights, that counsel represented *only* Church Creek's interests, and *not* Alea's interests, with respect to any duty to present evidence as to categories of damages which may fall within a policy exclusion.

The Supreme Court has a long history of not allowing the existence of insurance to be introduced in litigation between a third party plaintiff and an insured. Hence, Alea should not be made to intervene as a named party, to be identified to a jury or otherwise appear in the underlying trial between Plaintiff and Church Creek. See Dobson v. American Indemnity Co., 227 S.C. 307, 87 S.E.2d 869, 870 (1955). The bar exists to prevent a jury's liability determination from being improperly influenced or prejudiced. See also Cox v. Employers Liability Assur. Corp., 191 S.C. 233, 236, 196 S.E. 549, 550 (1938) ("The writer of this opinion, after twelve years' experience upon the trial bench, knows of no more effective method of embalming a defense than that of informing a jury in a negligence case that the defendant in the

suit is protected against their verdict by liability insurance.”); Horsford v. Carolina Glass Co., 92 S.C. 236, 258-59, 75 S.E. 533, 541 (1912) (“There can be no doubt on the bench or at the bar that, in an action by an employee against his employer to recover damages for personal injury, both reason and authority forbid bringing into the evidence or argument the fact that defendant is protected by employer’s liability insurance. Such evidence or argument has a manifest and strong tendency to carry the jury away from the real issue and to lead them to regard carelessly the legal rights of the defendant on the ground that someone else will have to pay the verdict.”).

If this Court finds that Alea is not entitled to intervention as of right under SCRCP 24(a), Alea respectfully requests that it be entitled to permissive intervention under SCRCP 24(b) for the above reasons.

Respectfully submitted



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ATTORNEY FOR ALEA LONDON LTD

September 11, 2012

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

MONTCLAIR PROPERTY OWNERS
ASSOCIATION (A SOUTH CAROLINA
NON-PROFIT CORPORATION) AND
MONTCLAIR PROPERTY OWNERS
ASSOCIATION BOARD OF
DIRECTORS FOR AND ON BEHALF
OF ALL OWNERS OF THE
MONTCLAIR HORIZONTAL
PROPERTY REGIME,

PLAINTIFFS,

vs.

BRUCE E. KINNEY, INDIVIDUALLY
AND AS AN INCORPORATOR FOR
MONTCLAIR HOMES, LLC;
MONTCLAIR HOMES, LLC, A SC
LIMITED LIABILITY COMPANY
(DECLARANT - MASTER DEED);
CREMCO, LLC, AN ILLINOIS
LIMITED LIABILITY COMPANY;
MONTCLAIR ASSOCIATES LIMITED
PARTNERSHIP, AN ILLINOIS
LIMITED PARTNERSHIP;
MONTCLAIR PROPERTY OWNERS
ASSOCIATION A/K/A MONTCLAIR
HOMEOWNERS ASSOCIATION
(GRANTOR CONTROL PERIOD);
BRUCE E. KINNEY AS AN OFFICER
OR DIRECTOR IN THE MONTCLAIR
PROPERTY OWNERS ASSOCIATION
A/K/A MONTCLAIR HOMEOWNERS
ASSOCIATION (GRANTOR CONTROL
PERIOD), A SC NON-PROFIT
CORPORATION; AND CHURCH
CREEK CONSTRUCTION, LLC.

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2008-CP-10-6897

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

*Entered 10/19/08 PM 1:33
Canceled*

FILED

**ORDER DENYING ALEA'S
MOTION TO INTERVENE
FOR THE PURPOSE OF
REQUESTING SPECIAL
INTERROGATORIES**

This action arises from the conversion of the Montclair Apartments to condominium units. Plaintiffs filed the initial complaint in this matter on December 5, 2008. On January 12, 2010, Plaintiffs filed a Second Amended Complaint naming Church Street Construction, LLC ("Church Creek"), as an additional defendant. Church Creek answered the Second Amended Complaint on March 17, 2010. In the initial Consent Scheduling Order, signed on April 22, 2010, mediation was to be conducted on or before February 15, 2011, and the case was subject to be called for trial on or after March 15, 2011.

The First Amended Scheduling Order was filed on February 3, 2011. In that order, the Honorable Kristi Harrington granted the parties leave to request a "date certain" trial and ordered that the case was subject for trial on or after September 26, 2011. A Second Amended Consent Scheduling Order set the case for trial not before February 1, 2012. The Third Amended Consent Scheduling Order, signed on April 30, 2012, set the matter for a two-week date certain trial. The case has been mediated three times, and the trial is set to begin on Monday, October 1, 2012.

On September 13, 2012, Alea London, LTD ("Alea") filed a Motion to Intervene for the Limited Purpose of Requesting Special Interrogatories and/or a Special Verdict Form. Alea, the general liability carrier for Church Street Construction, seeks to submit special interrogatories to the jury to, presumably, assist with the division of any money damages between the covered and non-covered acts of its insured. The Court heard Alea's motion on September 26, 2012.

Rule 24(a) of the South Carolina Rules of Civil Procedure provides that:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"Thus, a party seeking intervention under Rule 24(a)(2) must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties." *In re Horry County State Bank*, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004). When a party seeks to intervene, "each case will be examined in the context of its unique facts and circumstances." *Id.*

At the outset, the Court finds Alea's application to be untimely. Alea's insured, Church Creek, was named a defendant in January of 2010. The case has been mediated three times, and over four months prior to the filing of Alea's Rule 24 motion, the court reserved a two-week date certain term for the trial of this case.

More significantly, Plaintiffs contend that intervention at this late date would prejudice them as discovery has been completed, and they have not conducted any discovery directed to address Alea's clear attempt to deny or severely limit coverage to its insured, Church Creek. Church Creek would likewise be prejudiced as it was not aware during discovery that its independent counsel would need to take depositions regarding coverage for his client as to the alleged negligent construction and resulting damage.

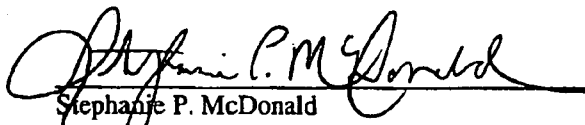
Further, Alea has failed to demonstrate that absent intervention, "disposition of this action may impair or impede its ability to protect" its interest in the underlying litigation. Alea's counsel acknowledged that the carrier analyzed and declined to file a declaratory judgment action addressing the coverage issues that it asserts are relevant in this case. Indeed, the questions which the parties in the underlying case have not yet asked (due to the unfortunate timing of Alea's motion) would still be appropriate in a declaratory judgment action addressing

the coverage issue. There is currently a federal declaratory judgment action pending, *Scottsdale Ins. Co. v. Montclair Associates Limited Partnership et al*, Civil Action No. 2:10-CV-03157, which Alea could have joined in order to address any legitimate coverage concerns arising from this litigation.

In the current case, Church Creek's trial counsel has continued to represent his client, Alea's insured - - for over two years, through voluminous discovery, numerous pre-trial motions, and the repeated mediations - - without objection from Alea or Alea's insured. Both Alea and its insured share the objective to minimize exposure to liability and to minimize any damages that could be awarded as a result of Church Creek's work on the Montclair conversion.

For these reasons, on the eve of the two-week trial set to begin on Monday, October 1, 2012, Alea's Motion to Intervene under Rule 24 of the South Carolina Rules of Civil Procedure is denied.¹

AND IT IS SO ORDERED.


Stephanie P. McDonald
Presiding Judge, Ninth Judicial Circuit

Dated: September 28, 2012

Charleston, South Carolina

¹ For the reasons set forth in the analysis of Rule 24(a), Alea's alternative Rule 24(b) request that it be entitled to permissive intervention under Rule 24(b) is likewise denied.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2008-CP-10-6897

Montclair Property Owners Association (a South Carolina
Non-Profit Corporation) and Montclair Property Owners
Association Board of Directors for and on behalf of all
owners of the Montclair Horizontal Property Regime; and
Church Creek Construction, LLC

Respondents.

v.

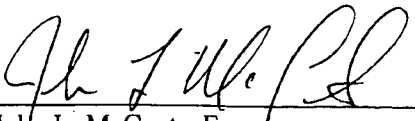
Alea London, LTD,

Appellant.

NOTICE OF APPEAL

Appellant, Alea London, LTD ("Alea"), hereby appeals the order of the Honorable
Stephanie P. McDonald issued orally on September 26, 2012, on Alea's Motion to Intervene For
the Limited Purpose of Requesting Special Interrogatories and/or Special Verdict Form.
Appellant has not received written notice of entry of the oral Order. Trial is scheduled to
commence on October 1, 2012.

September 28, 2012


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Circuit Court Judge
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The Honorable Julie J. Armstrong

Charleston County Clerk of Court
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2008-CP-10-6897

Montclair Property Owners Association (a South Carolina
Non-Profit Corporation) and Montclair Property Owners
Association Board of Directors for and on behalf of all
owners of the Montclair Horizontal Property Regime; and
Church Creek Construction, LLC

Respondents.

v.

Alea London, LTD,

Appellant.

EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS

Appellant, Alea London, LTD ("Alea"), moves before the South Carolina Court of Appeals for a Writ of Supersedeas requiring the trial court to not commence the trial of the civil action on Monday, October 1, 2012.

Appellant filed a Motion to Intervene For the Limited Purpose of Requesting Special Interrogatories and/or Special Verdict Form (the "Motion") on September 13, 2012. A copy of the Motion is attached hereto. The motion was heard by the Honorable Stephanie P. McDonald on September 26, 2012; and Judge McDonald denied the Motion by oral ruling during the hearing. Alea filed a Notice of Appeal on September 28, 2012. Judge McDonald ruled on Friday

afternoon, September 28, 2012, that she intends to proceed with the trial on Monday, October 1, 2012, despite the Notice of Appeal.

The South Carolina Code provides a statutory right to appeal and provides, in pertinent part, as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas . . . ;
- (2) **An 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**, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment

S.C. Code Ann. § 14-3-330.

Pursuant to subsection 14-3-330(2), the South Carolina courts have held that “when a trial court’s order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.” *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). Alea has a right to immediately appeal the trial court’s order denying intervention as of right under South Carolina Rule of Civil Procedure 24(a). An order refusing a petition to be made a party to a cause is appealable. *Rutledge v. Tunno et. al.*, 63 S.C. 205, 41 S.E. 308 (1902). The trial court’s order denying intervention as of right affects a substantial right of Alea—that is, to participate and protect its interests in this action in accordance with *Auto-Owners Insurance Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009). Proceeding with the trial may effectively moot the appeal. The *Flagstar* Court goes on to state that “these cases not only permit, but indeed require, immediate appeal in the event of a denial of a mode to trial

to which one is entitled as a matter of right. Failure to immediately appeal such an order forever bars appellate review." Flagstar, 341 S.C. at 72, 533 S.E.2d at 333.

The United States Supreme Court addressed the appeal of a motion to intervene under the Federal Rules of Civil Procedure in Brotherhood of Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). In Brotherhood of Trainmen, the U.S. Supreme Court held the following:

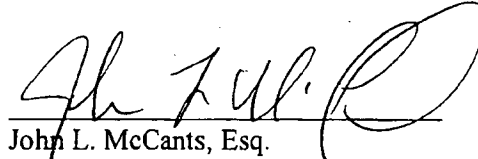
Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. *United States v. California Co-op. Canneries*, 279 U.S. 553, 556, 49 S.Ct. 423, 424, 73 L.Ed. 838. The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability.

But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. See *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 508, 61 S.Ct. 666, 668, 85 L.Ed. 975.

Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. **If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it.** In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the Brotherhood's right to intervene in the proceeding brought under s 16(12) of the Interstate Commerce Act.

Wherefore, Alea request that the Court of Appeals enter a Writ of Supersedeas commanding the trial court not to hold the trial of the civil action and recognize the Notice of

Appeal filed by Alea so that the appeal can proceed in the jurisdiction of the South Carolina Court of Appeals.



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September 28, 2012

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The Honorable Julie J. Armstrong
Charleston County Clerk of Court
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The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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September 28, 2012

Via U.S. Mail and Facsimile
Mr. John Lucius McCants
PO Box 2285
Columbia SC 29202

Re: Montclair Property Owners v. Alea London
Appellate Case No. 2012-213037

Dear Counsel:

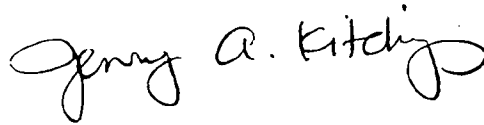
The following order has been endorsed on your Emergency Petition for Writ of Supersedeas in the above matter:

"Denied.

s/ John Cannon Few C.J.
For the Court

September 28, 2012."

Very truly yours,

A handwritten signature in cursive script, reading "Jenny A. Kitching". The signature is fluid and elegant, with a large, stylized initial "J".

CLERK

cc: Joseph Edwin Dapore
Edward D. Buckley, Jr.
Frank M. Cisa
Thomas Hayden Hessee
Roy Pearce Maybank
Thomas Bacot Pritchard
Timothy W. Bouch
Thomas C. Salane
The Honorable Stephanie McDonald

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2008-CP-10-6897

Montclair Property Owners Association (a South Carolina
Non-Profit Corporation) and Montclair Property Owners
Association Board of Directors for and on behalf of all
owners of the Montclair Horizontal Property Regime; and
Church Creek Construction, LLC

Respondents.

v.

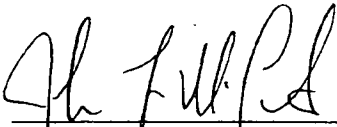
Alea London, LTD,

Appellant.

AMENDED NOTICE OF APPEAL

Appellant, Alea London, LTD ("Alea"), hereby appeals the Order of the Honorable
Stephanie P. McDonald Denying Alea's Motion to Intervene for the Purpose of Requesting
Special Interrogatories issued on September 28, 2012, and received by Appellant on the same
day. A copy of the Order is attached hereto.

October 1, 2012



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Attorney for Appellant

Other Counsel of Record:

FILED
2012 OCT -3 PM 1:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

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The South Carolina Court of Appeals

Montclair Property Owners Association (a South Carolina Non-Profit Corporation) and Montclair Property Owners Association Board of Directors for and on behalf of all owners of the Montclair Horizontal Property Regime; and Church Creek Construction, LLC,
Respondents,

v.

Alea London, LTD, Appellant.

Appellate Case No. 2012-213037

The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2008CP1006897

ORDER

This Court has received the "appellant's motion to dismiss appeal". No return has been received. Therefore, the appellant's motion to dismiss the notice of appeal is hereby granted. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

FILED

Feb 2, 2013

Columbia, South Carolina

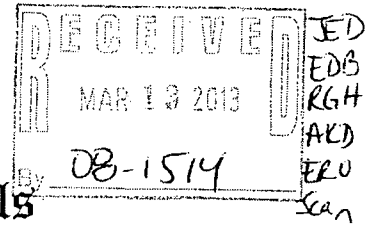
cc:

John Lucius McCants

Joseph Edwin Dapore

Edward D. Buckley, Jr.

Frank M. Cisa



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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March 11, 2013

The Honorable Julie J. Armstrong
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Charleston SC 29401-2210

REMITTITUR

Re: Montclair Property Owners v. Alea London
Lower Court Case No. 2008CP1006897
Appellate Case No. 2012-213037

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: John Lucius McCants
Joseph Edwin Dapore

Edward D. Buckley, Jr.
Frank M. Cisa

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2007-CP-07-3166

JIM LANCASTER, NANCY)
LANCASTER, ART HOLLAND,)
JEANNETTE HOLLAND, WENDELL)
TURNER, PHYLLIS TURNER, JACK)
BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND)
OTHERS SIMILARLY SITUATED,)
)
PLAINTIFFS,)

**ORDER REGARDING
INTERLOCUTORY APPEALS**

vs.)

GEORGIA-PACIFIC CORPORATION)
AND/OR GEORGIA-PACIFIC LLC,)
GRAYCO HOME CENTER, INC., DEL)
WEBB COMMUNITIES, INC., AN)
ARIZONA CORPORATION, RAZOR)
COMPONENT SYSTEMS, INC., A)
SOUTH CAROLINA CORPORATION,)
RAZOR ENTERPRISES, INC., A)
TEXAS CORPORATION, AND DJ)
CONSTRUCTION CO., LLC,)
)
DEFENDANTS.)

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JANET A. ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

THIS MATTER COMES BEFORE THE COURT via Defendant Del Webb Communities, Inc.'s ("Del Webb") request for a conference call. The requested conference call was held on May 11, 2012, during which the impact of the appeals recently taken by Del Webb and Defendant Georgia-Pacific Corporation and/or Georgia-Pacific LLC ("Georgia-Pacific") was discussed.

Both Del Webb and Georgia-Pacific have appealed six interlocutory orders that the Court has entered in the conduct of this class action. The Plaintiffs have filed motions in the Court of Appeals to dismiss the appeals taken by Del Webb and Georgia-Pacific on the grounds that the orders identified in their respective notices of appeal are interlocutory and not immediately

R

appealable. The Plaintiffs have also moved the Supreme Court to certify and expedite the appeals for its direct and immediate review; particularly, immediate and expedited consideration and disposition of their motions to dismiss the appeals.

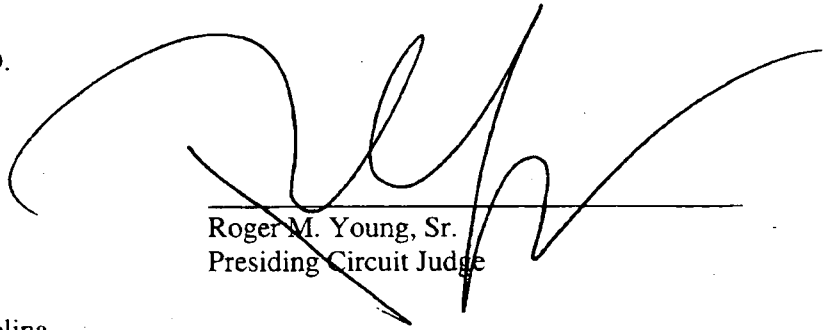
Del Webb asks this Court to rule that all of the orders identified in its notice of appeal are stayed because of its appeal, to include the present May 15, 2012 opt-out deadline set forth in the class notice, which notice was mailed to the putative class members by the Plaintiffs' counsel following this Court's order approving and authorizing class notice. Georgia-Pacific does not ask that the opt-out deadline be stayed, but asks for a stay of the Court's preliminary case management and scheduling order with respect to matters after the opt-out deadline.

After due consideration of this matter, I find that a legitimate question exists as to whether any of the interlocutory orders appealed by Del Webb and Georgia-Pacific is immediately appealable, and I am concerned that they are not. If the appeals are improperly taken, they should have no rightful impact upon the continued progress of this now four-plus-year old case. See S.C. Pub. Serv. Auth. v. Arnold, 287 S.C. 584, 340 S.E.2d 535 (1986) ("Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay proceedings in the lower court.") Moreover, I find that a stay of the appealed orders is not necessary to preserve the jurisdiction of the appeal or to prevent a contested issue from becoming moot. Further still, I find that, under the circumstances, a stay of the appealed orders is not in the interests of justice or judicial economy. Accordingly, I find that the orders identified in Del Webb and Georgia-Pacific's notices of appeal are and should be operative and decline the requests to stay these orders.

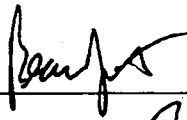
<SIGNED ON THE FOLLOWING PAGE>

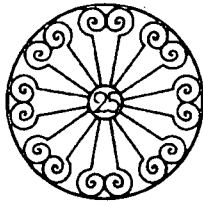
A handwritten signature in black ink, appearing to be a stylized 'P' followed by a flourish.

AND IT IS SO ORDERED.



Roger M. Young, Sr.
Presiding Circuit Judge


_____, South Carolina
Dated: 5/14/12



YCR LAW

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April 16, 2019

VIA HAND DELIVERY

Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.
and Elizabeth A. Bushey, Individually, and on behalf of all others similarly
situated v. Island Pointe, LLC, et al.
Case No.: 2015-CP-10-0955
YCR File: 15491-20150066

Dear Ms. Armstrong:

Enclosed please find a motion cover sheet and an original and two (2) copies of **Plaintiffs' 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** in the above-referenced matter. Please file the original and return the file-stamped copies to me. I have also enclosed a check in the amount of \$25.00 for the filing fee.

If you have any questions please do not hesitate to contact me.

With kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Edward D. Buckley, Jr.

EDB/akd

Enclosure(s)

cc: All Counsel of Record (VIA E-MAIL ONLY)
The Honorable Jennifer B. McCoy (VIA E-MAIL ONLY)

Exhibit E

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Nationwide Mutual Insurance Company,

Petitioner,

IN RE:

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

Plaintiff,

vs.

Island Pointe, LLC, *et al.*,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-10-00955

**MEMORANDUM IN OPPOSITION TO
PLAINTIFFS'
MOTION FOR RECONSIDERATION
AND/OR
PETITION TO LIFT STAY
BY
NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY**

TO: ALL COUNSEL OF RECORD:

Applicant, Nationwide Mutual Fire Insurance Company (hereinafter Nationwide) opposes Plaintiffs' Motion for Reconsideration and/or Petition to Lift the Stay because trial courts lack subject matter jurisdiction to act on matters that affect issues on appeal.

I. Motions to Reconsider may not be used to rehash issues that have already been heard and ruled upon.

Motions to reconsider should not be used to rehash arguments the court has already considered merely because the movant is displeased with the outcome. South Carolina v. United States, 232 F. Supp. 3d 785, 793 (D.S.C. 2017). Motions to reconsider are generally appropriate only when there has been an intervening change in controlling law, when there is newly discovered evidence, or to correct clear error of law or to prevent manifest injustice. Id.

None of the grounds for reconsideration exist in this situation. There has been no change in controlling law. Plaintiffs do not cite any newly discovered evidence to which they did not have

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JULIE J. ARMSTRONG
CLERK OF COURT

access before this Court's initial ruling. Nor can the Plaintiffs demonstrate any clear error or manifest injustice by the Order staying the case until the appeal is resolved, as will be discussed below in conjunction with the Petition to Lift the Stay. Accordingly, Plaintiffs' Motion for Reconsideration should be denied.

II. The Plaintiffs' Motion to Lift the Stay should be denied because it merely seeks reversal of issues upon which this Court has already ruled.

This Court's Order Staying Case, which was filed on April 5, 2019, expressly found that "the Appellate Court has exclusive jurisdiction over this case at this time." The Plaintiffs' Petition to Lift the Stay is merely a rehashing of its Motion for Reconsideration cloaked in a different form. In deciding whether to grant a petition to lift a stay, the trial court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. Neither of these factors applies in this case, as discussed below. Therefore, the Plaintiffs' Petition to Lift the Stay is improper, and it should be denied for the same reason as their Motion for Reconsideration.

III. On the merits, the Plaintiff's Motion to Lift the Stay should be denied because this Court lacks subject matter jurisdiction to proceed with trial.

Pursuant to Rule 225, SCACR, the trial court may not act or issue orders that affect an issue on appeal. Arnal v. Fraser, 371 S.C. 312, 519, 641 S.E.2d 419, 422 (2007). The trial court cannot proceed because the appellate court has exclusive jurisdiction over matters on appeal. Id. at 518, 641 S.E.2d at 422; see also Bunkum v. Manor Props., 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996) (holding that after an appeal is filed, subject matter jurisdiction is transferred to the appellate court until the remittitur is issued). The automatic stay is jurisdictional, and any action taken by the trial court addressing an issue on appeal is void for lack of jurisdiction. Arnal, 371 S.C. at 522, 641 S.E.2d at 424. Each action the trial court takes must be analyzed separately to determine whether it had subject matter jurisdiction to act. Id. at 519, 641 S.E.2d at 423.

Any order this Court issues relating to the stay is appealable under Rule 241(d)(2), SCACR. It does not appear that a petition for supersedeas is necessary for appellate review. The appellate courts have the final authority as to whether the automatic stay applies. State v. Cooper, 342 S.C. 389, 398, 536 S.E.2d 870, 875-76 (2000).

A. Law governing the determination whether to issue an order lifting the automatic stay or granting supersedeas.

The general rule is that the service of the notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal. Rule 241(a), SCACR. The trial court retains jurisdiction over only matters that are not affected by the appeal. Id.

There are certain exceptions to the general rule that issues on appeal are automatically stayed. These exceptions are listed in Rule 241(b), SCACR. When an exception applies, there is no automatic stay of the order from which the appeal was taken Tillman v. Oakes, 398 S.C. 245, 254, 728 S.E.2d 45, 50 (Ct. App. 2012). If an exception applies, the party seeking a stay must petition for supersedeas under Rule 241(c)(1), SCACR. This rule provides: “After service of the notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule. In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order . . . on appeal” “If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal.” Tillman, 398 S.C. at 255, 728 S.E.2d at 50-51.

This appeal involves the general rule. None of the exceptions set forth in Rule 241(b) apply. Thus, supersedeas is not necessary in this case. See Cooper, 342 S.C. at 399, 536 S.E.2d at 876 (holding that when no exception applies, the circuit court orders were automatically stayed by the filing of the notice of appeal).

Rule 241(c)(2) provides factors the trial court must consider “[i]n deciding whether an order should issue pursuant to this Rule” The “order pursuant to this Rule” is either the order granting the petition to lift the automatic stay in cases involving the general rule, or the order granting supersedeas in cases in which an exception applies. See Rule 241(c)(1), SCACR. As discussed above, this case does not involve an exception and supersedeas is not necessary.

An example of a case in which supersedeas was necessary it provided in Kearney v. Allen, 287 S.C. 324, 338 S.E.2d 335 (1985). Kearney involved an application for a permit to sell alcohol. Id. at 325, 338 S.E.2d at 336. The South Carolina Alcoholic Beverage Control Commission (ABC) denied the permit. Id. However, the Circuit Court reversed the ABC. Id. While the appeal was pending, Kearney petitioned the Circuit Court for an order requiring ABC to issue a temporary permit, and the petition was granted. Id. at 328, 338 S.E.2d at 337. The Supreme Court superseded the Circuit Court’s order. Id.

In this case, this Court denied Nationwide’s Motion to Intervene, and those orders have been appealed. No further relief has been sought. This Court subsequently stayed the trial. There is no order granting relief that would need to be superseded in this case at present.

In determining whether to grant a petition to lift the automatic stay, this Court must consider “whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR. Since Plaintiffs are the movants, it is the Plaintiffs’ burden to demonstrate that: (a) an order lifting the stay is necessary to preserve jurisdiction of the appeal, or (b) to prevent a contested issue from becoming moot.

Neither of these conditions are applicable in this case. The purpose of the stay under Rule 241 is “to determine whether the appealed *order* may be carried out or enforced.” Tillman, 398 S.C. at 255, 728 S.E.2d at 51. This Court’s orders denying Nationwide’s motion to intervene are

the orders on appeal. Since these orders did not grant the requested relief, no order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

The key question at this juncture is “whether the lower court may proceed with the action during the pendency of the appeal, and this answer is governed by Rule 205, SCACR.” Tillman, 398 S.C. at 255, 728 S.E.2d at 51. “Under 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.” Id. The Court of Appeals explained:

Thus, the existence or nonexistence of a stay under Rule 241 does not control the [trial] court’s power to proceed with the action and address matters not affected by the appeal. Rather, the lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a ‘matter affected by the appeal’ under Rules 205 and 241(a).

Id.

After the trial court has ruled on whether to lift the automatic stay or to grant supersedeas to stay matters affected by the appeal when an exception applies, the aggrieved party may appeal the trial court’s decision. Rule 241(d)(2) and (7), SCACR. Should this Court grant the Plaintiffs’ Motion to Lift the Stay, Nationwide has the right to appeal that order in addition to the pending appeal of the orders denying Nationwide’s Motion to Intervene.

B. The Petition to Lift the Stay should be denied on the merits because the trial is affected by issues on appeal.

The gist of the Plaintiffs’ argument is that the issues on appeal have nothing to do with the claims or defenses to be tried. The Plaintiffs’ argument fails because it is based solely upon one side of a disputed legal issue—the very issue on appeal. The Plaintiffs myopically assume the Supreme Court will rule in their favor, failing to consider the possibility that the Supreme Court may rule against them in the appeal. If the Supreme Court holds that an insurer must intervene in the underlying case in order to create a factual record to support certain coverage determinations,

then the affected coverage determinations are claims or defenses to be tried in the underlying case. Since it is possible that a ruling by the appellate courts could change the issues to be determined at trial, the issues on appeal directly affect the trial, and this Court is without jurisdiction to proceed.

The orders Plaintiffs cited are not binding precedent because they are not published. Rule 268(d)(2), SCACR. Even if they were published, they are distinguishable because they involve petitions for supersedeas, which is not necessary in this case.

The sole issue is whether the issue raised in the petition—in this case, the Plaintiffs’ request that the trial proceed despite the pending appeals—is a matter affected by the appeal. Tillman, 398 S.C. at 256, 728 S.E.2d at 51. Answering this question requires an examination of the issues on appeal and whether those issues would be affected if the trial is permitted to proceed. Id. This determination is a question of law for the courts. Kearney, 287 S.C. at 338 S.E.2d at 328 (holding that authority to resolve disputes as to whether an exception under Rule 241(b) applies is vested in the Supreme Court, not the Circuit Court); Cooper, 342 S.C. at 398, 536 S.E.2d at 875-76 (holding that the Court of Appeals also has authority to rule upon issues arising under Rule 241, which was formerly Rule 225. Tillman, 398 S.C. at 256 n.4, 728 S.E.2d at 51 n.4.)

The Supreme Court has defined the scope of what is affected by issues on appeal broadly. In Stokes-Craven Holding Corp. v. Robinson, the court held that a legal malpractice action did not accrue until after the appeal of the underlying matter was resolved. 416 S.C. 517, 534, 767 S.E.2d 485, 494 (2016). Citing Black’s Law Dictionary, the court defined “affect” as “to produce an effect on; to influence in some way.” Id. The court held that even issues in other cases may be stayed by an appeal if the issues in those cases depend in some way upon the issues on appeal.

The appeal in this case directly affects the trial. The basis for Nationwide’s motion to intervene was that the Supreme Court of South Carolina has held that factual determinations as to

the amount of covered damages must be made in the underlying construction defect action. (Nationwide Mot. to Intervene, ¶¶ 12-17, filed May 7, 2018.)

The Supreme Court held that “it is not the purpose of this declaratory judgment action to relitigate the issue of damages.” Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). The Supreme Court further held that the insurer “had an opportunity to raise this matter when the issue of damages was litigated” in the underlying proceeding. Id. The court reasoned that the insurer “did not seek review of or otherwise contest the damages award” in the underlying proceeding. Id., n.5. Based on this analysis, the court ruled that the insurer was required to pay for damages that were not covered. Id. at 198, 684 S.E.2d at 546-47. The Supreme Court followed Newman with another case holding that the insurer waived its coverage defenses by failing to include, among other things, warnings regarding the need for an allocated verdict and the conflict of interest this would create for defense counsel, in its reservation of rights letter. Harleysville Group Ins. v. Heritage Cmities., Inc., 420 S.C. 321, 337-344, 803 S.E.2d 288, 297-301 (2017).

The results of Newman and Harleysville are premised upon the understanding that certain liability coverage determinations are made in the underlying actions brought against their insureds. Newman expressly holds that certain issues must be raised in the underlying case, and that these issues cannot be asserted in a separate declaratory judgment action addressing insurance coverage. 385 S.C. at 198, 684 S.E.2d at 547. Thus, a liability insurer’s rights are effectively adjudicated in the trial of the underlying construction defect action according to Newman and Harleysville.

The fact that the Supreme Court has not yet prescribed a procedure for obtaining factfinding as to the amount of covered damages in the underlying proceeding does not diminish the fact that an insurer’s rights are adjudicated therein. Nationwide has argued that due process

does not allow a party to be denied a forum for adjudicating its rights. (Nationwide Mot. to Intervene, ¶ 15.)

If Nationwide's rights as to the amount of covered damages are to be adjudicated in the trial of this matter, then due process affords Nationwide notice and the opportunity to be heard at trial. In order for this to occur, Nationwide must be permitted to intervene, because counsel defending its insured cannot also represent Nationwide due to a conflict of interest. (See Nationwide Mot. to Intervene, ¶ 15, 17.)

The issue on appeal is whether Newman and Harleysville require that the rights of liability insurers be adjudicated along with the tort issues in the underlying construction defect action. If the Supreme Court holds that Nationwide's rights are not adjudicated in this proceeding, then there is no need for Nationwide to intervene. However, if the Supreme Court rules that Nationwide's rights are adjudicated in this proceeding, then the upcoming trial must accommodate Nationwide's due process rights of notice and the opportunity to be heard.

Nationwide did not limit its request for intervention to the presentation of a special verdict form and/or special interrogatories to the jury. Nationwide's motion, which was made nearly a year ago, encompassed discovery and fact-finding as required by Newman and the mandates of due process. (Nationwide Mot. to Intervene, ¶ 17.) Nationwide's requested intervention is as broad as the scope of whatever Newman requires. Nationwide has requested declaratory relief as to coverage issues in a separate declaratory judgment action pending in federal court. Nationwide Mut. Fire Ins. Co. v. Floyd Stanley, Jr. d/b/a Stanley's Vinyl Fence Designs, et al., Civ. Action No. 2:18-1232-MBS. Nationwide's position is that due process affords Nationwide an opportunity to fully adjudicate its rights. Nationwide expects to litigate whatever issues Newman has withdrawn from the declaratory judgment action in this proceeding, and to adjudicate all remaining issues in the federal court action.

The problem here is that no one knows what Newman and Harleysville require. As the Plaintiffs recognize, insurance issues are normally kept separate from underlying tort issues in South Carolina. In addition, the Supreme Court has previously held that the rights of insurers are unaffected by the results of underlying tort actions. Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965) (holding that the insurer was allowed to relitigate the issue of whether the insured's actions were intentional or negligent in the coverage action, despite the result in the tort action). However, the court has more recently held that an insurer may not relitigate the issue of damages in a separate declaratory judgment proceeding. Newman, 385 S.C. at 198, 684 S.E.2d at 547.

Thus, a *bona fide* question of law exists as to what issues are to be tried in this matter. The issue on appeal is whether coverage questions must be determined along with liability and damages in the upcoming trial. Therefore, the trial is affected by issues on appeal, and it cannot proceed.

Nationwide recognizes that improper interlocutory appeals do not transfer jurisdiction to the appellate courts. Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees, 344 S.C. 522, 524-25, 544 S.E.2d 642, 643 (Ct. App. 2001). However, mode of trial appeals must be made immediately. Id. at 524, 544 S.E.2d at 643. From Nationwide's perspective, its appeal is not interlocutory because this Court's denial of its motion to intervene was a final order barring Nationwide from participation in this action. See S.C. Code Ann. § 14-3-330(3). If Nationwide waited until after trial to assert its appeal, the Plaintiffs would likely argue Nationwide waived its right to appeal by failure to timely assert it.

The Plaintiffs' argument that none of the insurers sought a continuance is without merit. This Court denied their motions to intervene. They were therefore unable to assert any motions in this action, whether for a continuance or otherwise. Additionally, another insurer filed a motion to intervene which has not yet been heard.

Finally, the Plaintiffs could also be prejudiced if this Court lifts the stay. If this Court proceeds with trial, the result could be mooted by the pending appeals. In Arnal, the court held that a contempt order was void *ab initio* because the trial court lacked jurisdiction due to an appeal. 371 S.C. at 522, 641 S.E.2d at 424.

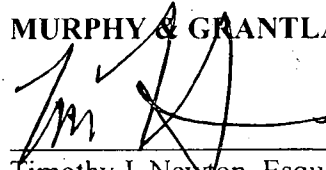
If the Supreme Court holds that the rights of Nationwide must be submitted to the jury at trial in order to obtain an allocation between covered and non-covered damages, there will be no way to “unscramble the egg” if this Court allows the trial to proceed. This conclusively demonstrate that the upcoming trial is affected by the pending appeals.

CONCLUSION

For the reasons set forth above, the Plaintiffs’ Motion for Reconsideration and/or Petition to Lift the Stay should be denied. .

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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April 22, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO: 2015-CP-10-00955

Nationwide Mutual Insurance Company,

Petitioner,

IN RE:

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

Plaintiff,

v.

Island Pointe, LLC, et al.,

Defendant.

CERTIFICATE OF SERVICE

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2019 APR 25 AM 11:39

FILED

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys
for Nationwide Mutual Insurance Company, do hereby certify that on **April 22, 2019**, I have
served a copy of the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION
FOR RECONSIDERATION BY NATIONWIDE MUTUAL FIRE INSURANCE COMPANY**, in
connection with the above-referenced case placing same via Electronic Transmission and/or the
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April Gonzalez
Legal Assistant

Columbia, South Carolina
April 22, 2019



MURPHY & GRANTLAND, P.A.

Timothy J. Newton
Direct dial 803-454-1242
tnewton@murphygrantland.com

April 22, 2019

Honorable Julie J. Armstrong, Clerk
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Nationwide Mutual Insurance Company v. Palmetto Pointe at Peas Island, et al. vs.
Stanley's Vinyl Fence Design, et al.
Civil Action No.: 2015-CP-10-0955
M&G File No.: 1150-0972

Dear Ms. Armstrong:

Enclosed please find an original and one (1) copy of the **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR PETITION TO LIFT STAY BY NATIONWIDE MUTUAL INSURANCE COMPANY** in connection with this matter. Please file the original of record and return the clocked copy in the self-addressed stamped envelope.

By copy of this correspondence, I hereby serve counsel of record with a copy of same.

Best Regards,

s/Timothy J. Newton
Timothy J. Newton

TJN/gag
Enclosures
cc: All Counsel of Record

Exhibit F

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 : ☐ Plaintiff ☐ Defendant
or
☐ 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

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: Plaintiff's Petition to Lift the Automatic Stay is GRANTED. Trial will proceed May 6, 2019.

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.

Circuit Court Judge

2764

Judge Code

4/25/19

Date

Certified Copy of Order

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.
PLAINTIFF(S)

Island Pointe, LLC, et al.

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ 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.
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NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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Julie J. Armstrong
Circuit Court Judge

2764
Judge Code

4/25/19
Date

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & F.C.
By *Julie J. Armstrong*
DEPUTY CLERK

Notice of Appeal



MURPHY & GRANTLAND, P.A.

Timothy J. Newton
Direct dial 803-454-1242
tnewton@murphygrantland.com

February 22, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Nationwide Mutual Insurance Company v. Palmetto Pointe at Peas Island
Condominium Property Owners Association, Inc., et al. Island Pointe, et al.
Civil Action No.: 2015-CP-10-00955
M&G File No.: 1150-0960

Dear Ms. Kitchings:

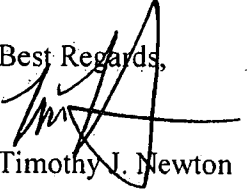
Enclosed for filing is the original Notice of Appeal along with one (1) copy of the Notice of Appeal to be stamped and returned to the courier. Also enclosed are the following:

- (1) Original Proof of Service for the Notice of Appeal and one (1) copy to be stamped and returned with the courier;
- (2) Copies of the Orders which are to be challenged on appeal;
- (3) A filing fee of \$100.00.

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.

Best Regards,


Timothy J. Newton

TJN/
Enclosures

cc: The Honorable Clerk of Court for Charleston County
All Counsel of Record

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

Case No. 2015-CP-10-00955

Ex Parte:

Nationwide Mutual 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 / Respondent,

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 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 / Respondents,

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

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 6, ... Third-Party Defendants / Respondents,

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

v.

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

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 W C Services, Inc. are Respondents,

NOTICE OF APPEAL

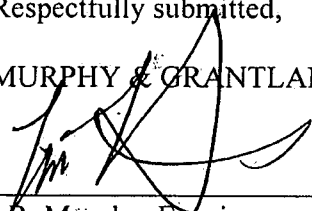
Appellant Nationwide Mutual Insurance Company (hereinafter "Nationwide"),
appeals the Orders of the Honorable Jennifer B. McCoy filed December 18, 2018 and
January 17, 2019. Appellant received notice of the entry of the Order denying
Nationwide's motion to reconsider the trial court's denial of its motion to intervene on
January 25, 2019. Copies of the trial court's orders are attached.

February 22, 2019

[Signature page follows]

Respectfully submitted,

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

FORM 4

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 : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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.

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.

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E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

A. McCoy
Circuit Court Judge

2764

Judge Code

1/16/18

Date

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

FORM 4

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 : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

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- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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.

Circuit Court Judge

2764
Judge Code

12/17/18
Date

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

Case No. 2015-CP-10-00955

Ex Parte:

Nationwide Mutual 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 / Respondent,

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 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 / Respondents,

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

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 6,..... Third-Party Defendants / Respondents,

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

v.

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

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 W C Services, Inc. are Respondents,

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Other Counsel of Record by
depositing a copy of it in the United States Mail, postage prepaid, on February 19, 2019
addressed to their attorneys of record, listed as follows:

cc:

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Motion to Transfer

80532

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

Case No. 2015-CP-10-00955

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,

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MAR 20 2019

SC Court of Appeals

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 Fire Insurance Company (hereinafter "Nationwide
Mutual Fire") 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 Fire issued policies to Defendant Stanley's Vinyl Fence Designs (hereinafter "Stanley's"), 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 Stanley's. The Plaintiffs will seek to satisfy any verdict they may obtain against Stanley's. from the policies Nationwide Mutual Fire issued to Stanley's.

Nationwide Mutual Fire 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 Fire's motion. (Orders filed December 18, 2018 and January 17, 2019, attached to Nationwide Mutual Fire's Notice of Appeal.)

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

Nationwide Mut. Fire Ins. Co. v. Floyd Stanley, Jr., et al., Civ. Action No. 2:18-cv-01232-MBS (D.S.C.). Due to the current state of the law, Nationwide Mutual Fire 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 repeatedly 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.

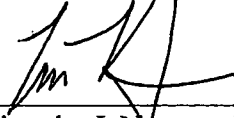
Nationwide Mutual Fire is mindful of the fact that the trial court has proceeded with the case and the trial date is approaching. The question whether the liability insurers are parties to this action should be resolved as expeditiously as possible in order to avoid undue delay to the litigants in this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

[Signature page follows]

Respectfully submitted,

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

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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

Case No. 2015-CP-10-00955

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.;
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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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Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent
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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,

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MAR 20 2019

SC Court of Appeals

v.

Cornerstone Construction and Mark Malloy d/b/a
Cornerstone Construction; Gutter Works, Inc. and Michael
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Seamless Gutters & Windows, LLC and Thomas Litchfield
d/b/a Litchfield Seamless Gutter; Miracle Siding, LLC and
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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,

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MAR 20 2019

SC Court of Appeals

I certify that I have served the Appellant's Initial Brief and Designation of
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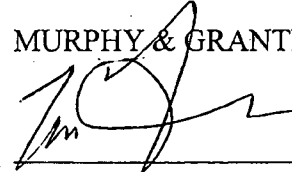
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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

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,

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Review, via regular and electronic mail, on April 29, 2019, to the following attorneys of record for opposing parties:

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