

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

RECEIVED

JUN 14 2019

S.C. SUPREME COURT

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 Love, individually, and on behalf of all others similarly situated, Plaintiffs,

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; W C Services, Inc., CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60.....Defendants.

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

v.

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

And

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

v.

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

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

INITIAL BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN NOT ALLOWING LIMITED INTERVENTION BY BUILDERS MUTUAL INSURANCE WHEN BINDING CASE LAW COMPELS INTERVENTION?

II. DID THE CIRCUIT COURT ERR IN LIFTING THE AUTOMATIC APPEAL STAY WHEN THE CIRCUIT COURT LACKED JURISDICTION TO DO SO?

STATEMENT OF THE CASE

This is an appeal from the circuit court's Form 4 Statement of Judgment/Order Denying Motion of Insurers for Limited Intervention dated December 17, 2018 and filed on December 18, 2018 ("Order Denying Intervention"); and the circuit court's Form 4 Order Denying Motion to Reconsider dated January 16, 2019 and filed on January 17, 2019 ("Order Denying Motion to Reconsider"). Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.'s and Jack Love's, individually, and behalf of all others similarly situated (together "Palmetto Pointe") commenced Civil Action No. 2015-CP-10-00955 on February 13, 2015 in the Court of Common Pleas for Charleston County, SC, against numerous contractors, including Respondent Defendant Tri-County Roofing, Inc., ("Tri-County Roofing"), complaining about the construction of the buildings in the Palmetto Pointe at Peas Island development in Charleston County, SC (the "Civil Action"). (Complaint and Second Amended Complaint). Palmetto Pointe served Tri-County Roofing with its Summons and Complaint on February 26, 2015. ("Affidavit of Service"). Tri-County Roofing tendered the defense for the Civil Action to Appellant Builders Mutual Insurance Company ("Builders Mutual") by letter dated January 15, 2018 ("Tender Letter").

Builders Mutual issued insurance policies with commercial general liability coverage ("CGL") to Tri-County Roofing. Builders Mutual served its Notice of Motion and Memorandum in Support of Motion For Limited Intervention Pursuant to Rule 24, SCRPC, to Have Court Submit a Special Verdict Form and/or General Verdict Form Accompanied by Answer to Interrogatories Pursuant to Rule 49, SCRPC, on March 22, 2018 ("Motion to Intervene"). Other insurers for Defendants in the Civil Action also filed similar motions seeking to intervene. Tri-County Roofing filed its Memorandum in Opposition to Builders Mutual Insurance Company's

Motion to Intervene on December 14, 2018 (“Tri-County Memorandum in Opposition to Motion to Intervene). Palmetto Pointe served its Memorandum in Opposition to Motions to Intervene on December 13, 2018 (“Palmetto Pointe’s Memorandum in Opposition to Motion to Intervene”). The Motion to Intervene, as well as the other insurers’ motions, were first scheduled for a hearing and came before the circuit court on December 17, 2018.

The circuit court filed its Order Denying Motion to Intervene on December 18, 2018. On December 27, 2018, Builders Mutual filed and served its Notice of Motion and Motion to Reconsider Form 4 Judgment in Civil Case Denying Motion to Intervene (“Motion to Reconsider”). The circuit court filed its Order Denying Motion to Reconsider on January 17, 2019.

Builders Mutual filed and served its Notice of Appeal on February 19, 2019 to appeal the Order Denying Motion to Intervene and the Order Denying Motion to Reconsider (“Notice of Appeal”). Builders Mutual filed a Motion to Transfer the Case to the South Carolina Supreme Court on February 27, 2019 pursuant to Rule 204(b), SCACR (“Motion to Transfer Case”). Palmetto Pointe filed a response with the Supreme Court stating that it took no position with regard to the Motion to Transfer the Case (“Palmetto Pointe Response to Motion to Transfer Case”). The Supreme Court issued an Order dated May 30, 2019 granting the Motion to Transfer the Case (“Order Granting Motion to Transfer Case”).

On April 3, 2019, Defendant Complete Building Corporation (“Complete Building”), and other Defendants, filed their Motion for Continuance of Trial (Expedited Hearing Requested)(“Motion for Continuance”). On April 5, 2019, the circuit court issued its Order Staying Case that reads as follows: “[p]ursuant to Rule 205 and 241 of the SCACR, upon review of the Notices of Appeal filed by Builders Mutual Insurance Company and Nautilus Company on

February [19], 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.” (“Order Staying Case”).

On April 16, 2019, Palmetto Pointe filed its Motion for Reconsideration of and/or Relief from Order Staying Case and/or Petition to Lift Stay or Otherwise Modify Any Stay as May be Necessary for this Case to Proceed as Scheduled to Trial On the Merits Beginning on May 6, 2019 (the “Petition to Lift Stay”). On April 22, 2019, Builders Mutual served its Memorandum in Opposition by Appellant Builders Mutual Insurance Company to Petition to Lift Stay (“Memorandum in Opposition to Petition to Lift Stay”).

On April 25, 2019, the circuit court issued a Form 4 that states, “Plaintiff’s Petition to Lift the Automatic Stay is granted and trial will proceed [on] May 6, 2019.” (“Order to Lift Stay”). On April 26, 2019, Builders Mutual filed its Petition Pursuant to Rule 241(d)(7), SCACR, on Behalf of Appellant Builders Mutual Insurance Company to Review Circuit Court Order Lifting Appeal Stay (Expedited Relief Requested) for the Honorable H. Bruce Williams to review the decision of the circuit court (“Petition to Review Circuit Court”). On April 29, 2019, Palmetto Pointe filed its Plaintiff-Respondents’ Return to Petition of Appellant Builders Mutual Insurance Company for Review of Circuit Court Order Lifting Stay and Cross-Motion to Dismiss Appeal, Grant Limited Remand, or Otherwise Confirm That Trial May Proceed as Scheduled (“Palmetto Pointe Return to Petition to Review Circuit Court Order and Motion to Dismiss Appeal”). The Honorable James E. Lockemy issued an Order for the Court of Appeals on May 1, 2019, stating, “Appellants motions requesting that this court stay the trial court to begin trial May 6, 2019 are denied. The trial may proceed as scheduled. The motion to dismiss

this appeal is denied.” (“Order Denying Petition to Review Circuit Court and Denying Motion to Dismiss Appeal”).

Starting on May 6, 2019, the circuit court presided over a jury trial involving Tri-County Roofing and other Defendants in the Civil Action. On May 16, 2019, the jury returned a general verdict in favor of Palmetto Pointe against Tri-County Roofing, and other Defendants, in the amount of \$6,500,000.00 in actual damages and \$500,000.00 in punitive damages (Verdict Form). Pursuant to S.C. Code Ann. § 15-38-15 (1976), the circuit court held an apportionment hearing wherein the jury apportioned five (5%) percent of the \$6,500,000,00 verdict to Defendant Wilson Lucas Sales d/b/a Miracle Siding and five (5%) percent of the \$6,500,000,00 verdict to Defendant Eloy Vasquez (“Special Verdict Form”). The jury also found that Completed Building Corp. was entitled to indemnity from Tri-County Roofing in the amount of \$1,000.00.

STANDARD OF REVIEW

The decision to grant or deny a Rule 24(a)(2), SCRPC, motion is reviewed under an abuse of discretion standard. Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990). An appellate court exercises de novo review of questions of law. Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009).

ARGUMENT

STATEMENT OF FACTS

Complete Building constructed the Palmetto Pointe at Peas Island condominium development. (Complaint, ¶ 10). The development consists of forty townhome style condominiums located in twenty buildings and a clubhouse. (Complaint, ¶ 3). For part of the construction, Complete Building subcontracted with Tri-County Roofing for the company to install the roofs, siding and deck coatings for the construction of buildings. (Complaint, ¶ 1). The buildings were constructed in 2006 and 2007. (Palmetto Pointe Memorandum in Opposition to Motion to Intervene, pg. 3).

Palmetto Pointe commenced the Civil Action alleging that the exterior cladding on each of the buildings and the clubhouse, including the roofs, siding and deck coatings, were constructed incorrectly. (Complaint, ¶ 1). Palmetto Pointe alleged that such faulty construction then led to progressive weather-related moisture damages to framing and sheathing behind the cladding of each building:

“The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.” (Complaint, ¶ 22).

“A preliminary inspection of Palmetto Pointe evidences failure of one or more components [of] the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of various and sundry building components, with consequential damages resulting there from. (Complaint, ¶ 23).

“Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring each and every year since the completion of construction and constitute ‘occurrences’ of ‘property damage’ under the standard and/or typical general liability policies.” (Complaint, ¶ 29).

To support its claims for damages, Palmetto Pointe produced an itemized estimate for repairs that includes the removal and replacement of the (allegedly defectively installed) roofs, siding and deck coatings on each building and repairs to moisture damaged framing and sheathing. (“Estimate”). The itemized estimate states that the total cost to repair for the twenty buildings and clubhouse would be approximately \$15,257,512.00. (Estimate Trial Exhibit 677). The estimate segregates and itemizes the cost to remove and replace the siding, roofs and deck coatings separately from the cost to repair weather damaged sheathing and framing and segregates the cost to remove and replace the other claddings on the buildings. (Estimate Trial Exhibit 677).

Palmetto Pointe served Tri-County Roofing with its Summons and Complaint on February 26, 2015. (Affidavit of Service). Even though it tendered the Summons and Complaint to other insurers early in the Civil Action, that would provide a defense to it, Tri-County Roofing did not tender the defense for the Civil Action to Builders Mutual until January 15, 2018. (Tender Letter).

Builders Mutual issued insurance policies with commercial general liability coverage (“CGL”) to Tri-County Roofing.¹ Builders Mutual served its Motion to Intervene on March 22, 2018. Both Palmetto Pointe and Tri-County Roofing objected to the Motion to Intervene. The

¹ Builders Mutual issued CGL insurance policies to Tri-County Roofing for the following periods: 1) CPP 0035981 00 - 07/24/2009 to 07/24/2010; 2) CPP 0035981 01 - 07/24/2010 to 07/24/2011; 3) CPP 0035981 02 - 07/24/2011 to 07/24/2012; 3) CPP 0035981 03 - 07/24/2012 to 07/24/2013; and 4) CPP 0035981 04 - 07/24/2013 to 07/24/2014. Policy CPP 0035981 04 cancelled effective August 23, 2013. Builders Mutual also issued the following Commercial Umbrella Policies: 1) UMB 0023391 00 -10/15/2012 to 07/24/2013; and 2) UMB 0023391 01-07/24/2013 to 07/24/2014 -- UMB 0023391 01 cancelled effective August 23, 2013. Builders Mutual is providing a defense to Tri-County Roofing for the Civil Action by Andrew Cole, Esq. of Collins & Lacy, P.C. pursuant to a reservation of rights to contest whether damages being sought against Tri-County Roofing are insured by the insurance policies. (“Motion to Intervene”).

Motion to Intervene was first scheduled for a hearing and heard on December 17, 2018. The circuit court issued its Order Denying Motion to Intervene on December 18, 2018. Builders Mutual served its Motion to Reconsider on December 27, 2018. The circuit court filed its Order Denying Motion to Reconsider on January 17, 2019. Although requested to do so, the circuit court did not provide a reason for its decisions.

The filing of the Notice of Appeal on February 19, 2019 imposed an automatic stay. See Rule 205, SCACR, Rule 241, SCACR. On April 3, 2019, Complete Building, and other Defendants, filed a Motion for Continuance (of Trial) given some uncertainty as to whether a trial scheduled to start on May 6, 2019 would go forward in light of the appeal. In response, on April 5, 2019, the circuit court issued its Order Staying Case, which acknowledged the appeal stay and thus continued the trial.

On April 16, 2019, Palmetto Pointe filed its Petition to Lift Stay, and after a hearing, the circuit court issued its Order to Lift Stay allowing the Civil Action to proceed to trial on May 6, 2019. The circuit court did not provide a reason for its ruling. (Order to Lift Stay)(Transcript Pg. 45 - L 14-15). On April 26, 2019, Builders Mutual filed its Petition to Review Circuit Court with the Honorable H. Bruce Williams. On April 29, 2019, Palmetto Pointe served its Return to Petition to Review Circuit Court Order. The Honorable James E. Lockemy issued an Order for the Court of Appeals on May 1, 2019, stating that the trial may proceed on May 6, 2019, but the motion to dismiss the appeal was denied. (Order Denying Petition to Review Circuit Court and Denying Motion to Dismiss Appeal).

Starting on May 6, 2019, the circuit court presided over a jury trial involving Tri-County Roofing and other Defendants in the Civil Action. Palmetto Pointe and Tri-County Roofing did not have the circuit court submit special interrogatories to the jury as requested by Builders

Mutual. On May 16, 2019, the jury returned a general verdict in favor of Palmetto Pointe against Tri-County Roofing, and other Defendants, in the amount of \$6,500,000.00 in actual damages and \$500,000.00 in punitive damages against Tri-County Roofing. (Verdict Form). As evident by the estimate in the sum of \$15,257,512.00, the jury rendered a compromised verdict. (Estimate Trial Exhibit 677).

Pursuant to S.C. Code Ann. § 15-38-15 (1976), the circuit court held an apportionment proceeding wherein the jury apportioned five (5%) percent of the \$6,500,000.00 verdict to Defendant Wilson Lucas Sales d/b/a Miracle Siding and apportioned five (5%) percent of the \$6,500,000.00 verdict to Defendant Eloy Vasquez. (“Special Verdict Form”). Tri-County Roofing was not permitted to apportion damages because the jury found the company grossly negligent. (See S.C. Code Ann. § 15-38-15(F)). The jury also found that Completed Building was entitled to indemnity from Tri-County Roofing for the amount of \$1,000.00.

I. THE CIRCUIT COURT ERRED IN NOT ALLOWING BUILDERS MUTUAL INSURANCE COMPANY TO INTERVENE ON A LIMITED BASIS WHEN BINDING CASE LAW COMPELS INTERVENTION.

A) The Circuit Court Did Not Provide a Reason for Denying the Motion to Intervene.

At the hearing held on December 17, 2018, the circuit court did not rule from the bench on the Motion to Intervene but took it under advisement and deferred a ruling. (Transcript Pg. 40 L 16-23). The circuit court denied the Motion to Intervene using a Form 4 dated December 17, 2018 that does not state a reason for the denial. (Order Denying Intervention). Builders Mutual moved to reconsider, in part, for the circuit court to issue an order that contains factual findings and legal conclusions. (Motion to Reconsider, pg. 4). The circuit court denied the Motion to Reconsider using a Form 4 that does not state a reason for the denial. Rule 52, SCRPC, states, “[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12

or 56 or any other motion except as provided in Rule 41(b).” Kinghorn as Trustee for the Mildred Ann Kinghorn Trust dated 28 April 2004 v. Sakakini, 426 S.C. 147, 825 S.E.2d 748 (Ct. App. 2019). Since it does not know the reason for the circuit court’s ruling, Builders Mutual will address its arguments in support of the Motion to Intervene and those made in opposition by Palmetto Pointe and Tri-County Roofing.

B) Intervention Should be Liberally Granted, Analyzed For The Pragmatic Consequences, and a Circuit Court Should Avoid Rigid Applications of Rule 24, SCRPC.

Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712. Intervention may be of right or permissive; intervention of right is governed by Rule 24(a), SCRPC.² In analyzing intervention for a particular case, the South Carolina Supreme Court has recognized that intervention controversies arise in a myriad of contexts. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714. The Supreme Court has stated the following about intervention:

We interpret the rules to permit liberal intervention particularly where as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected. Accordingly, [the Supreme Court] must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2). Each case will be examined in the context of its unique facts and circumstances.

Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714.

Rule 24(a)(2), SCRPC, permits intervention as of right based on the following criteria:

(1) there is a timely application; (2) movant asserts an interest relating to the property or

² Builders Mutual moved to intervene pursuant to Rule 24(b), SCRPC, as well and maintains that the Supreme Court should allow permissive intervention in the alternative if intervention pursuant to Rule 24(a)(2), SCRPC, is disallowed.

transaction which is the subject of the action; (3) movant demonstrates 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) movant demonstrates that its interest is inadequately represented by other parties. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714 (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)).

1) Builders Mutual's Application Was Timely.

Builders Mutual's application was timely. Pursuant to Rule 24, SCRCF, a party may intervene only upon timely application. South Carolina courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. Ex parte Reichlyn, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993). Builders Mutual submits that it has met the timeliness requirement.

First, although Tri-County Roofing was served with the Summons and Complaint on May 26, 2015, Tri-County Roofing did not tender the defense for the Civil Action to Builders Mutual until January 15, 2018. (Affidavit of Service)(Tender Letter).³ Within two weeks of receiving the tender, Builders Mutual attended a scheduled mediation for all the parties in the Civil Action on January 30 and 31, 2018⁴; and Builders Mutual advised Tri-County Roofing that

³ Palmetto Pointe's statement in its Memorandum in Opposition to Motions to Intervene (pg. 14, L 8) that Builders Mutual had been defending Tri-County Roofing for three years before filing the Motion to Intervene is simply wrong.

⁴ Pursuant to Rule 6, SCADR, insurers are required to attend mediations in civil actions in South Carolina; and Builders Mutual did so in this Civil Action. Builders Mutual was required to participate in proceedings for the Civil Action but was prevented from participating in other parts of the Civil Action to allow Builders Mutual to protect its interest.

it would provide a defense pursuant to a reservation of rights.⁵ Builders Mutual then served its Motion to Intervene on March 22, 2018. The first time the Motion to Intervene was scheduled to be heard by the circuit court was on December 17, 2018. As did other insurers with motions to intervene pending, Builders Mutual appeared before the Honorable Jennifer B. McCoy on December 17, 2018 and argued its Motion to Intervene.

Second, timeliness of the motion must be judged in relation to its purpose. See Order of The Honorable William H. Seals, Andrew and Diane Corvey v. Hall Custom Homes of South Carolina, No. 2009-CP-26-6392, pg. 5, (March 21, 2011). Builders Mutual is only seeking to intervene for the limited purpose of participating in the preparation of a special verdict form or written interrogatories (in accordance with Rule 49, SCRCF) for the jury to answer concerning damages. (Motion to Intervene, pg. 15). Such involvement necessarily depends on the evidence

⁵ The reservation of rights letter is a communication between Builders Mutual and Tri-County Roofing that is protected by Rule 26(b)(3), SCRCF. The reservation of rights letter is a communication by an insurer concerning the Civil Action and potential future litigation that is addressed to the named insured. Although Palmetto Pointe may wish to see the communication, there is no legal basis for doing so. Further, Tri-County Roofing did not otherwise raise an issue with the reservation of rights; and, as will be discussed, retained additional counsel to protect its interest concerning insurance coverage. Finally, while the production of the reservation of rights letter may be relevant in a declaratory judgment action, the production of the letter to a party other than the named insured has been allowed in only limited circumstances not applicable in the present matter. Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 337, 803 S.E.2d 288, 297 (2017) (“While we acknowledge that generally a third party will have no basis to assert any perceived inadequacies in an insurer's purported reservation of rights, under the unique facts of this case, we find the Special Referee did not err in allowing the POAs to raise these issues.”). Heritage Communities, 420 S.C. at 337-38, 803 S.E.2d at 29. (“We do recognize, however, that allowing a third party to challenge the adequacy of an insurer's reservation of rights is the exception and not the rule. However, based on the specific circumstances in this case, we conclude the Special Referee did not err in allowing the POAs to stand in the shoes of Harleysville's insured to challenge the adequacy of the reservation of rights letters.”).

introduced at a trial so the task of preparing interrogatories is one that is done late in the trial, much like jury charges and preparing the verdict form.

Builders Mutual submits that it would not be involved in any other aspects of the trial or discovery in the Civil Action. Builders Mutual's coverage counsel would not participate in the selection of a jury; nor would it present witnesses or introduce evidence. Builders Mutual's coverage counsel would not appear before the jury during the trial. Builders Mutual's coverage counsel would not be involved until it is time to prepare a verdict form and/or written interrogatories. Builders Mutual's coverage counsel's involvement will be limited to its counsel's communications with the court and other counsel and occurs outside the presence of the jury as a trial judge does in conducting a jury charge conference with counsel. Subject to any objections, and based on the submissions of all counsel and evidence that is in the record, the trial judge would determine what interrogatories, if any, may go to the jury.

Third, Palmetto Pointe and Tri-County Roofing were not surprised or prejudiced by the Motion to Intervene. From the start of the Civil Action, Palmetto Pointe has sought insurance coverage for the damages alleged in the Civil Action against Defendants including Tri-County Roofing. Palmetto Pointe alleged language in its Complaint that tracks the law on insurance coverage for a construction defect claim. See Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) ("Newman"); Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011) ("Crossmann"). The allegations were pled to trigger a defense by insurers for the defendant contractors and ultimately for indemnity.

"The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property." (Complaint, ¶ 22).

"A preliminary inspection of Palmetto Pointe evidences failure of one or more components [of] the exterior building envelopes; water intrusion into and through

the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of various and sundry building components, with consequential damages resulting there from. (Complaint, ¶ 23).

“Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring each and every year since the completion of construction and constitute ‘occurrences’ of ‘property damage’ under the standard and/or typical general liability policies.” (Complaint, ¶ 29).

It is obvious that from the start of the Civil Action that Palmetto Pointe and Tri-County Roofing have wanted insurers to pay for any settlements or judgments in the Civil Action.

2) Builders Mutual Does Have an Interest Relating to the Property or Transaction Which is the Subject of the Action; and Builders Mutual is in a Position That Without Intervention Disposition of the Action May Impair or Impede its Ability to Protect That Interest.

Builders Mutual’s interest is sufficient for intervention or it has standing. Builders Mutual submits that based on two South Carolina Supreme Court decisions to be discussed herein, Builders Mutual may be deprived of its legal rights and insurance benefits may be determined in the construction defect case if Builders Mutual is not allowed to intervene.

Tri-County Roofing relied on Gov’t Employee’s Ins. Co., Ex parte, 373 S.C. 132, 644 S.E.2d 699 (2007) to oppose the Motion to Intervene. In Gov’t Employee’s Ins. Co., the insurer GEICO brought a declaratory judgment action against an individual to determine the parties’ rights pursuant to an automobile insurance policy issued to an insured third person. Gov’t Employee’s Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700. After GEICO denied the individual’s claim, the individual filed an action in family court seeking an order validating his common law marriage to the insured. Gov’t Employee’s Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700. GEICO petitioned the family court to permit it to join the family court action pursuant to Rule 19, SCRPC, or to intervene pursuant to Rule 24, SCRPC. Gov’t Employee’s Ins. Co., 373 S.C. at

134, 644 S.E.2d at 700. The family court denied the motion to join and motion to intervene. Gov't Employee's Ins. Co., 373 S.C. at 134, 644 S.E.2d at 700.

The Supreme Court affirmed the decision of the family court. Gov't Employee's Ins. Co., 373 S.C. at 139, 644 S.E.2d at 703. The Supreme Court stated that a party must have standing in order to intervene. Gov't Employee's Ins. Co., 373 S.C. at 138, 644 S.E.2d at 702 (citing Bailey v. Bailey, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). "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'." Gov't Employee's Ins. Co., 373 S.C. at 138, 644 S.E.2d at 702. The Supreme Court found that GEICO's interest in the financial implications of the family court decision was peripheral to the subject matter and did not warrant intervention. Gov't Employee's Ins. Co., 373 S.C. at 138-139, 644 S.E.2d at 702.

Builders Mutual submits that reliance on Gov't Employee's Ins. Co. does not take into account the complexities of insurance coverage for construction defect cases in South Carolina; and Builders Mutual may be deprived of its legal rights and insurance benefits may be determined in the Civil Action if Builders Mutual is not allowed to intervene. The Supreme Court should consider the pragmatic consequences of the circuit court's ruling in this matter, avoid a rigid application of Rule 24(a)(2), SCRCP, and examine the appeal in the context of the facts and circumstances. See Berkely Elec., 302 S.C. at 189, 394 S.E.2d at 714. The appeal concerns a construction defect case that is like numerous other ones filed in South Carolina each year. The present appeal impacts numerous pending construction defect cases and ones that will be filed in the future. As do other insurers, Builders Mutual seeks a solution, a procedure for what is a common issue in the circuit courts for construction defect cases – specifically the legal consequences of a general verdict and insurance coverage.

a) South Carolina Insurance Coverage Law For Construction Defect Claims Is Well Established On What Damages Are Insured Versus Uninsured.

Under controlling South Carolina law, a standard CGL insurance policy does not insure all of the damages that Palmetto Pointe seeks to recover against Tri-County Roofing. A CGL insurance policy does not insure Tri-County Roofing's defective construction itself or the defective installation of the roofs or siding. Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 8, 747 S.E.2d 426, 430 (2013); Crossmann, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011); Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546 (2009). A CGL insurance policy does not insure the costs to repair Tri-County Roofing's defective work even if the cost of removing the defective work is incidental to repairing water damaged other property that may possibly be insured under a CGL insurance policy. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546. A CGL insurance policy does not insure the costs to replace Tri-County Roofing's defective work. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546-47.

A CGL insurance policy does not insure an insured's work itself but rather consequential risks that stem from an insured's work. Bennett & Bennett Constr., 405 S.C. at 8, 747 S.E.2d at 430. "CGL coverage 'is for tort liability for injury to persons and damage to *other* property and not for contractual liability of [the] insured for economic loss because [the] completed work is not that for which the damaged person bargained [.]'" Bennett & Bennett Constr., 405 S.C. at 8, 747 S.E.2d at 430 (emphasis in original). For example, the Supreme Court found that continuous water intrusion resulting from the defective installation of the stucco cladding on a home that caused water damage to wood sheathing and framing behind the stucco triggered an insured loss under the CGL insurance policy. Newman, 385 S.C. at 194, 684 S.E.2d at 545. The results in Newman and Crossmann have subsequently been codified in S.C. Code Ann. § 38-61-70(B)(2)

(1976).⁶ The insurance coverage principles discussed above were reaffirmed by the Supreme Court in Heritage Communities, 420 S.C. 321, 803 S.E.2d 288.

As evidenced by the pleadings and discovery produced in the Civil Action, Palmetto Pointe sought to recover the total cost to repair all construction defects and that which is “physical injury to tangible [other] property”. (Second Amended Complaint ¶¶ 42, 45, 46 and 67); (Estimate – Trial Exhibit 677). Some of the damages are potentially covered and some are not covered. Builders Mutual’s objective was to have separated, before a declaratory judgment action, those costs which are to remove and replace Tri-County’s work (not covered) from those costs which are to repair “property damage” (potentially covered). Builders Mutual seeks no more than a solution or a procedure that allows Builders Mutual to pay what the Supreme Court has found to be the *insured* damages rather than being compelled to pay the *uninsured* damages.

b) South Carolina Supreme Court Decisions Compel An Insurer To Take Some Action to Allocate Damages in a Construction Defect Case In Order to Litigate Insurance Coverage in a Declaratory Judgment Action.

i) Background for *Newman* and *Heritage Communities*.

In two decisions, the South Carolina Supreme Court has required the insurer in each appeal to pay a general verdict arising in a construction defect civil action where the Supreme Court or a lower court believed that one could not discern what parts of the verdict were covered and not covered by the applicable CGL insurance policies. Newman, 385 S.C. at 198, 684 S.E.2d at 547; Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294.

In Newman, a construction defect claim was brought by the owner against the builder of a house. Newman, 385 S.C. at 190, 684 S.E.2d at 542.⁷ The builder and the owner submitted the

⁶ Section 38-61-70(C) states, “[t]his Section is not intended to restrict or limit the nature or types of exclusions from coverage that an insurer, including a surplus lines insurer, may include in a commercial general liability insurance policy.”

owner's claims to binding arbitration. Newman, 385 S.C. at 190, 684 S.E.2d at 542. A hearing was held, and the arbitrator awarded the owner damages based on the cost to remove and replace the (defectively installed) stucco cladding and cost to repair the water damaged sheathing and framing behind the stucco. Newman, 385 S.C. at 190, 684 S.E. 2d at 542. The Supreme Court held that the cost to remove and replace the stucco was not covered by a CGL insurance policy, but the cost to repair the water damaged framing and sheathing behind the stucco was covered by the CGL insurance policy. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546.

Notwithstanding, the Supreme Court held that Auto-Owners Insurance Company was obligated to pay the *entire* arbitration award because the Supreme Court was unable to discern what part of the award was for the cost to remove and replace the stucco (not insured) versus the cost to repair water damaged sheathing and framing (insured). Newman, 385 S.C. at 198, 684 S.E.2d at 547. The Supreme Court stated the following:

[W]e 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.

Nevertheless, it is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed 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 (emphasis added, footnote as appears in original). See Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) (“Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.”).

Newman, 385 S.C. at 198, 684 S.E.2d at 546-47.

⁷ In Newman, Auto-Owners Ins. Co. retained defense counsel for the builder to defend the arbitration. Counsel retained to defend the builder was different than the counsel retained by Auto-Owners Ins. Co. to bring a declaratory judgment action to determine insurance coverage for the arbitration award.

In Newman the Supreme Court found that Auto-Owners Ins. Co. had the opportunity and should have taken some action to allocate the arbitration award during the arbitration proceeding for the purposes of later determining coverage. Newman, 385 S.C. at 198, 684 S.E.2d at 547.⁸ The Supreme Court stated, “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. at 198 n.5, 684 S.E.2d at 547 n.5.⁹

In Heritage Communities, the Supreme Court again addressed insurance coverage for construction defect cases. Heritage Communities, 420 S.C. at 331, 803 S.E.2d at 293-94. In Heritage Communities, the facts in the underlying (consolidated two) construction defect cases were similar to the facts in Newman. The plaintiff homeowners associations sought damages for the cost to remove and replace the siding and cost to repair water damaged sheathing and framing behind the siding. Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294. The juries rendered general verdicts in each civil action in favor of the plaintiff homeowners associations

⁸ The Supreme Court did not state what civil procedure Auto-Owners Ins. Co. should have used in the underlying arbitration. Rule 24, SCRCF, and Rule 49, SCRCF, were not an issue presented by the parties in Newman and was not cited by the Supreme Court in Newman.

⁹ The Special Referee interpreted the quoted language in Newman as follows: “Newman was a declaratory judgment action to determine if an arbitration award was covered under the CGL policy. Both covered and non-covered claims had been submitted to the arbitrator. The arbitrator issued a general award and did not allocate damages between covered and non-covered claims. The Court held that because the arbitrator did not allocate damages, Auto Owners would be liable for the entire award.” (Order of Special Referee in Heritage Communities, pg. 29).

for costs to repair damages that included both insured and non-insured damages. Heritage Communities, 420 S.C. at 331, 803 S.E.2d at 294.

After the verdicts, Harleysville Ins. Co. and the plaintiff homeowners associations litigated insurance coverage in a separate declaratory judgment action. Id. In the declaratory judgment action, the Special Referee ruled that Harleysville Ins. Co. was obligated to pay the general verdict because: 1) the Special Referee did not believe he could parse the general verdicts for coverage purposes; and 2) Harleysville Ins. Co.'s reservation of rights letter was inadequate in advising its insureds of the need to allocate a verdict;¹⁰ Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294. ("Although the Special Referee found that the costs to remove and replace the faulty workmanship were not covered under the policies, the Special Referee concluded that it would be improper and purely speculative to attempt to allocate the juries' general verdicts between covered and non-covered damages. Accordingly, the Special Referee ordered the full amount of the actual damages in the construction-defect suits would be subject to Harleysville's duty to indemnify in proportion with its time on the risk.").

Harleysville Ins. Co. appealed the ruling of the Special Referee concerning the adequacy of the reservation of rights letters. Id., 420 S.C. at 335, 803 S.E.2d at 296. The Supreme Court gave extensive attention to ruling on the reservation of rights letter and affirmed the Special Referee. Id., 420 S.C. at 343, 803 S.E.2d at 300. The Supreme Court affirmed the Special Referee's overall decision that Harleysville Ins. Co. must pay its time-on-risk share of the general verdict for one case and affirmed as slightly modified as to loss-of-use damages for the other case. Heritage Communities, 420 S.C. at 348, 803 S.E.2d at 303.

¹⁰ Payment of the general verdict was subject to the time-on-risk allocation principle in Crossmann which, of course, became law after Newman.

ii) Heritage Communities Does Not Abrogate or Limit Newman.

Builders Mutual appreciates that “a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.” Hutto v. Southern Farm Bureau Life Ins. Co., 259 S.C. 170, 174, 191 S.E.2d 7, 8 (1972) (citing 20 Am. Jur. (2d), Courts, § 190 (1965)). Intervention pursuant to Rule 24, SCRPC, and special interrogatories pursuant to Rule 49, SCRPC, were not issues in the appeal in Heritage Communities. Rule 24, SCRPC, and Rule 49, SCRPC, were not at issue in the appeal because Harleysville Ins. Co. made the conscious decision not to intervene or request special interrogatories in favor of pursuing another option – that is discussed later in this brief. (Order of Special Referee in Heritage Communities, pgs. 30, 31). Accordingly, on appeal, Harleysville Ins. Co. could not assign error to the Special Referee for something Harleysville chose not to do. Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962) (“A party may not complain on appeal of error or object to trial procedure which his own conduct has induced”).

The fact that intervention was not addressed in Heritage Communities and that there was an issue with a reservation of rights letter does not mean that an insurer can disregard Newman. In Newman, there was not an issue with a reservation of rights letter; and the Supreme Court found that Auto-Owners Ins. Co. should have taken some affirmative action in the underlying arbitration to allocate the damages. Newman is still precedent. The Supreme Court did not mention Newman negatively in Heritage Communities but discussed how the Court had formally adopted Newman in Crossmann for the kinds of damages that may covered. Heritage Communities, Inc., 420 S.C. at 337, 803 S.E.2d at 297. Further, the Supreme Court did not criticize at all the findings of the Special Referee for his inability to parse the general verdicts and acknowledged this finding as an additional basis for the ruling that Harleysville Ins. Co.

must pay the general verdicts (subject to the time on risk principle in Crossmann.) Heritage Communities, 420 S.C. at 343 n. 11, 803 S.E.2d at 301 n. 11.

iii) Circuit Courts Interpret *Newman* and *Heritage Communities* to Require Intervention.

As evident by Special Referee's ruling in Heritage Communities, lower courts interpret Newman as necessitating intervention and special interrogatories, or an insurer will bear the legal consequences. (Order of Special Referee in Heritage Communities, pgs. 29, 33). Builders Mutual submits that the Special Referee's reliance on Newman is not an isolated decision. In other construction defect civil actions, circuit court judges have found that insurers have a sufficient interest in a construction defect case to intervene and request special interrogatories. See e.g., Order of The Honorable J.C. Nicholson, Jr., Beresford Commons Homeowners Association, Inc. v. Portrait Homes- South Carolina et al., (January 17, 2017); Order of The Hon. William H. Seals, Jr., Ingram v. Lauderdale Bay Developers, LLC, (October 18, 2018); Order of The Hon. William H. Seals, Jr., Andrew and Diane Corvey v. Hall Custom Homes of South Carolina, (March 21, 2011); *contra* Order of the Hon. Clifton Newman, The Harbour Cove Condominium Association v. Centex Homes, No. 2014-CP-26-7634 (October 12, 2017).

The Honorable J.C. Nicholson, Jr. ruled in favor of Selective Ins. Co. being able to intervene on a limited basis in a construction defect case much like the present Civil Action and the underlying actions in Newman and Heritage Communities.¹¹ (Beresford Commons - Judge Nicholson Order, pg. 2). Judge Nicholson found that Selective Ins. Co. did have an interest in the subject matter of the litigation and that the disposition of the action may impede Selective's ability to protect its interest. (Beresford Commons - Judge Nicholson Order, pg. 3-4). Judge

¹¹ Judge Nicholson issued his Order on January 17, 2017. The Order, of course, preceded the Heritage Communities decision. Judge Nicholson relied on *Newman*.

Nicholson found that Selective sufficiently showed prejudice if intervention were denied.

(Beresford Commons - Judge Nicholson Order, pg. 6).

Judge Nicholson stated the following:

A denial would result in the impairment of [Selective's] interest in that Selective may ultimately be compelled to pay the entire judgment despite the fact that a portion of that judgment may not be a covered risk for which a premium was paid. That very result occurred in Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), and given the admonitions by the Supreme Court, this Court believes that Selective in fairness should be permitted to intervene in this action to prevent the same detrimental result from occurring here.

(Beresford Commons - Judge Nicholson Order, pg. 6).

The Honorable William H. Seals, Jr. ruled as Judge Nicholson did with the exception that Heritage Communities had been decided by the time Judge Seals ruled on the motion to intervene. (Ingram - Judge Seals' Order, pg. 3). Judge Seals found, "Selective's position is supported by the Supreme Court's recent decision in Harleysville Group Insurance v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017)." (Ingram - Judge Seals' Order, pg. 3).

- iv) Persuasive Authority Cited in *Heritage Communities* Places the Burden on the Insured and Judgment Creditor to Allocate Damages.

In Heritage Communities, the Supreme Court cited Duke v. Hoch, 468 F.2d 973 (5th Cir. 1972) as persuasive authority. Heritage Communities, 420 S.C. at 341, 803 S.E.2d at 299. Duke addresses insurance coverage for a non-allocated general verdict. Duke v. Hoch, 468 F.2d at 974. Duke may be read to hold that once an insurer adequately advises an insured of the need to allocate a verdict, the insurer has done what it must and will not bear the consequences should there be a general verdict. Duke v. Hoch, 468 F.2d 973. While the Supreme Court viewed Duke favorably, the Supreme Court did not follow Duke to its conclusion.

The facts in Duke involved a judgment creditor, like Palmetto Pointe, seeking insurance from a liability insurer for a judgment against an insured. Duke, 468 F.2d at 974. In Duke, the

verdict on the merits was a general verdict for a single sum and included covered and non-covered damages. Duke, 468 F.2d at 974. The Fifth Circuit Court of Appeals affirmed the lower court's finding that the insurer discharged the initial burden which was to show that the verdict included noncovered damages. Duke, 468 F.2d at 976. The burden then shifts: "[o]nce the [insurer] established that part of the liability represented by the judgment as for noncovered acts, the burden was then on the [judgment creditor] to prove the precise portion of the unallocated verdict representative of acts for which [an insurer] is responsible. Duke, 468 F.2d at 977 (citing Universal Underwriters Ins. Corp. v. Reynolds, 129 So. 2d 689, 691 (Fla. Dist. Ct. App. 1961); see also, Morris v. Western State Mut. Auto. Ins. Co., 268 F.2d 790, 793 (7th Cir. 1959) ("Where the judgment includes elements for which the insurer is liable and elements outside the range of coverage, apportionment of damages to the respective causes of action is a burden on the party seeking to recover from the insurer." (citation omitted)).

The Fifth Circuit found that the judgment creditor did not meet his burden. Duke, 468 F.2d at 978. The Fifth Circuit then concluded that unless the judgment creditor was relieved of the burden, the Fifth Circuit must affirm the lower court decision *in favor* of the insurer because the verdict was unallocated. Duke, 468 F.2d at 977-78. The Fifth Circuit found that the judgment creditor was relieved of his burden because the record was unclear whether defense counsel had advised the insured of the availability of a special verdict and the divergence of interest between the insured and insurer concerning the allocation of damages. Duke, 468 F.2d at 979.

The Fifth Circuit remanded with instructions for the district court to determine whether the insured was advised by its counsel to allocate damages at trial; and, *if not* advised, for the district court to re-hear parts of the action to allow the claimant an opportunity to retrospectively attempt to allocate the damages for the purposes of insurance coverage. Duke, 468 F.2d at 984.

The insurer was not held liable for the entire verdict comprised of insured and uninsured damages. See Duke, 468 F.2d at 984.

The South Carolina Supreme Court did not follow Duke to its conclusion. The Special Referee in Heritage Communities did not conduct further proceedings to allow the insureds an opportunity to retrospectively attempt to allocate the general verdicts. The Special Referee found that Harleysville Ins. Co. bore the consequences for the entire general verdicts. (Order of Special Referee in Heritage Communities, pgs. 34). Again, the Special Referee relied on Newman in part. (Order of Special Referee in Heritage Communities, pgs. 34). In Newman, the Supreme Court did not remand for a further proceeding to allow the insured (or judgment creditor Newman) an opportunity to retrospectively attempt to allocate the arbitrator's award. The Supreme Court found that Auto-Owners Ins. Co. bore the consequences for the entire general award. Newman, 385 S.C. at 198, 684 S.E.2d at 547. It is because of such precedent that Builders Mutual is compelled to move to intervene.

3) Builders Mutual's Interests Are Not Adequately Represented by Existing Parties.

Builders Mutual's interests are not adequately protected by existing parties. The burden of demonstrating inadequacy of representation is on Builders Mutual. Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716. This burden is minimal, and Builders Mutual need only show that the representation of its interests "may be" inadequate. Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716. The following factors are used in determining whether there is adequate representation:

[W]hether the existing representation is adequate: (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716.

First, it should be undisputed that Palmetto Pointe *may be* inadequate to represent Builders Mutual's position. Palmetto Pointe objected to Builders Mutual's being able to intervene. (Palmetto Pointe Memorandum in Opposition to Motion to Intervene). It should also be undisputed that Tri-County Roofing *may be* inadequate to represent Builders Mutual's interest. Tri-County Roofing also objected to Builders Mutual being able to intervene.¹² (Tri-County Roofing Memorandum in Opposition to Motion to Intervene). Tri-County Roofing retained additional counsel to advise it on insurance coverage for the construction defect case. (Notice of Appearance) (Tri-County Roofing's Memorandum in Opposition to Motion to Intervene). Tri-County Roofing made the decision to object to the Motion to Intervene and not pursue special interrogatories. (Tri-County Roofing's Memorandum in Opposition to Motion to Intervene).

As counsel retained for Tri-County Roofing by insurers, Andrew Cole's obligation is and was to his client Tri-County Roofing only, not Builders Mutual. See Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 157, 826 S.E.2d 270, 271 (2019). ("When an insurer hires an attorney to represent the insured, an attorney-client relationship arises between the attorney and the insured – his client. Pursuant to that relationship, the attorney owes his client – not the insurer – a fiduciary duty (citation omitted). Nothing we say in this opinion should be construed as permitting even the slightest intrusion into the sanctity of the attorney-client relationship, nor diminish to any degree the fiduciary responsibilities the attorney owes his client."). In situations where Tri-County Roofing's and Builders Mutual's interest diverge,

¹² Tri-County Roofing retained construction lawyers Steven L. Smith, Esq., Zachery J. Closser, Esq. and Samuel M. Wheeler, Esq. of Smith Closser, P.A. to appear in the Civil Action and object to the Motion to Intervene. (Tri-County Roofing's Memorandum in Opposition to Motion to Intervene).

Andrew Cole may not let Builders Mutual direct or regulate his professional judgment. Id. at 273; Rule 1.8(f), RPC, Rule 407, SCACR; Rule 5.4(c), RPC, Rule 407, SCACR.¹³ While the Supreme Court in Newman spoke of Auto-Owners Ins. Co. controlling the defense, Builders Mutual cannot require or direct counsel to request special interrogatories. Sentry Select Ins. Co., 426 S.C. at 160, 826 S.E. 2d at 273. (“[W]e emphasize the insurer may not intrude upon the privilege between the attorney it hires and the attorney’s client – the insured.”) Builders Mutual can only advise Tri-County Roofing of the need to do so. Once done and as done in this case, Tri-County Roofing must then rely on the advice of its own counsel.

Given that Palmetto Pointe will not do so (and did not) and Tri-County Roofing will not do so (and did not), there was no one left in the courtroom to do so other than Builders Mutual. Thus, Builders Mutual should be allowed to do so.

C) A Declaratory Judgment Action Does Not Protect an Insurer From a General Verdict.

In opposition to the Motion to Intervene, Palmetto Pointe and Tri-County Roofing argued that insurers are adequately protected from a general verdict in a separate declaratory judgment action. (Palmetto Pointe’s Memorandum in Opposition to Motion to Intervene, pg. 17); (Tri-County Roofing’s Memorandum in Opposition to Motion to Intervene, pg. 8). In its Memorandum in Opposition to Petition to Review Circuit Court, Palmetto Pointe argued that Builders Mutual had done what it needs to do to protect its interest in the Civil Action:

As Builders Mutual made clear in the Subject Petition, it was not only Plaintiffs, but its own insured, Defendant/Respondent Tri-County Roofing, Inc., who opposed its effort to “intervene” in this case. (Subject Petition p. 4 (“[Plaintiffs] and Tri-County Roofing objected to Builders Mutual being able to intervene in the Civil Action.”).) Having no means to force the trial court’s hand (as to

¹³ Andrew Cole advised the circuit court that he believed he had a conflict and took no position. (Transcript for Motion to Intervene Hearing, December 17, 2018; pg. 28 L 22 – 25; pg. 29 L 1-13).

intervention or the verdict form), and facing opposition from both their own insured and Plaintiffs, Builders Mutual has done all it can – and in turn all it could possibly be required – to do. And having done all it can do, it cannot later be accused of having failed to do something to protect its rights. Should there in fact be any good faith question after trial as to Builders Mutual’s indemnity obligation, both Sims and, indeed, Builders Mutual’s right to due process assure that its rights are protected as to any matters where its and its insured’s interests were not identical at trial – neither Newman nor Heritage Communities could possibly say otherwise.

Thus, Builders Mutual (and the other Appellant Insurers) will suffer no undue prejudice in terms of any binding determination of its rights via the trial of this case and any good faith coverage questions that exist can be fully and fairly litigated in a separate action. (And, indeed, where else could they possibly be litigated – there is just no way that they could possibly be litigated in this trial, i.e., in the trial of the underlying dispute, without undue prejudice to at least some party by the undue injection of insurance matters into this dispute.)

(Palmetto Pointe Memorandum in Opposition to Petition to Review Circuit Court, pg. 9-11).

First, a pending declaratory judgment action by itself does not protect an insurer from a general verdict or from the consequences borne by the insurers in Newman and Heritage Communities. Builders Mutual has filed a declaratory judgment civil action.¹⁴ Builders Mutual submits that no final action can be taken in the declaratory judgment action, to allocate damages, prior to a jury rendering a verdict in the Civil Action. See Columbia Insurance Company v. Reynolds, 225 F.Supp. 375, 381 (D.S.C. 2016) (declaratory judgment not ripe because verdict had not yet been entered in underlying suit). An allocation must logically be done in an underlying liability action and in conjunction with the rendering of a verdict. Insurance coverage for property damage cannot be decided until after the jury has rendered a verdict.¹⁵ The duty to

¹⁴ Builders Mutual Insurance Company v. Tri-County Roofing Inc and Palmetto Pointe at Peas Island Condominium Association, et al. (2:19-cv-01312-MBS).

¹⁵ The Palmetto Pointe jury rendered a defense verdict in favor of Defendant WC Services. (Verdict Form). Accordingly, there would be no reason for an insurer to file a declaratory judgment action because WC Services did not become legally obligated to pay Palmetto Pointe

indemnify is based on the evidence found by a jury at trial and it is reversible error to find there is a duty before a jury renders a decision. Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 604, 748 S.E.2d 781, 791 (2013) (“We hold the declaratory judgment action was procedurally proper save for a ruling on the issues regarding property damages as there are related questions of fact that must be decided by a jury on retrial.”)¹⁶; see also Ellett Bros., Inc. v. U.S. Fidelity & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001) (citing Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 314, 476 S.E.2d 708, 711 (1996) (“Clearly the right to recover, while it exists, does not ripen until decided by the finder of fact”)).¹⁷

Palmetto Pointe argues that the insurance coverage principles in Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965) apply to protect Builders Mutual from a general verdict. (Palmetto Pointe Memorandum in Opposition to Motion to Intervene, pg. 15); (Tri-County Roofing’s Memorandum in Opposition to Motion to Intervene, pg. 8); (Palmetto Pointe Memorandum in Opposition to Petition to Review Circuit Court, pg. 9-11). Sims involved insurance coverage for an automobile claim. Id. In Sims evidence indicated the insured intentionally caused a vehicle collision, and intentional acts were excluded from the insurance

in the Civil Action - the premise of a general liability policy. Trancik v. USAA Ins. Co., 354 S.C. 549, 581 S.E.2d 858 (Ct. App. 2003) (A third-party liability insurance contract or a CGL policy is an indemnity contract whereby an insurer agrees to pay an insured the amount for covered damages the insured may become legally obligated to pay a third party.).

¹⁶ Rhodes was an appeal of a declaratory judgment action for an underlying construction defect claim. The judge hearing the declaratory judgment action made factual findings regarding damages before the jury adjudicated or reached a verdict. The Supreme Court reversed this part of the lower court’s decision because what damages may be indemnified had not been determined by the jury in the underlying action.

¹⁷ In Ellett Bros., Inc., the Fourth Circuit Court of Appeals affirmed the dismissal of the action on the basis that the indemnity claim was not ripe because there had not been findings of fact. Ellett Bros., Inc., 275 F.3d at 388.

policy involved there. Nationwide refused to defend Sims in the underlying tort action. Id. In the subsequent indemnity case, Nationwide attempted to offer evidence that Sims' action was intentional and therefor excluded by the policy. Id. at 84, 145 S.E. 2d at 524. The trial court held Nationwide was precluded from entering this evidence since it did not do so in the underlying litigation between its insured and the third party. Id.

On appeal, the Supreme Court reversed the trial court's decision to preclude the insurer's ability to offer evidence as to the exclusion stating that the general rule – “where an insurance company has notice and opportunity to defend an action against its insured, the company is bound by pertinent material facts established against its insured, whether it appears in the defense of the action or not”- is inapplicable where the interests of the insured and insurer *diverge* in the underlying trial. Id. at 84-85, 145 S.E.2d at 524 (emphasis added). In recognizing that the interests of the insured and insurer can diverge, the Sims court wrote as follows:

It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance.

Id. at 86-87, 145 S.E.2d at 525 (quoting Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949).

First, following Sims was the option chosen by Harleysville Ins. Co. in Heritage Communities - to reserve all coverage issues for a separate proceeding and allocate a general verdict between covered and non-covered damages in the declaratory judgment proceeding – a retrospective look. (See Order of Special Referee in Heritage Communities, pgs. 28-29, 30,

31).¹⁸ The choice did not work for Harleystville Ins. Co.¹⁹ Notwithstanding a poor reservation of rights for coverage provided by Harleystville Ins. Co. to its insureds, the Special Referee found that he was unable to parse the general verdicts because it would be improper and purely speculative for him to do so. Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294. The Special Referee would be essentially guessing as to what the jury thought and did in rendering a verdict.²⁰ To have avoided the consequences of a general verdict, the Special Referee found that Harleystville could have attempted to intervene pursuant to Rule 24, SCRPC, and have asked the circuit court in the underlying construction defect cases to submit special interrogatories pursuant to Rule 49, SCRPC. (Order of Special Referee in Heritage Communities, pgs. 30, 33). The Special Referee relied on Newman for Harleystville Ins. Co. to do so. (Order of Special Referee in Heritage Communities, pgs. 29-30, 33).

Second, Auto-Owners Ins. Co. argued in Newman that the Supreme Court should follow Sims or a bifurcated proceeding. After the Supreme Court published its decision on September 8, 2009, Auto-Owners Ins. Co. filed its Petition for Clarification or Rehearing in which it addressed Sims and analyzed declaratory judgment actions and their relation to a prior verdict and liability

¹⁸ The Special Referee stated, “Harleystville advised its insureds that if Harleystville intervened it would ‘create’ a conflict of interest so they would wait until after the verdict to litigate coverage.” (Order of Special Referee in Heritage Communities, pgs. 11 no. 39).

¹⁹ The Special Referee stated, “[u]nfortunately, Harleystville chose not to attempt to intervene and special interrogatories were not submitted to determine the basis upon which the jury awarded exemplary damages. The Court cannot now speculate.” (Order of Special Referee in Heritage Communities, pgs. 22).

²⁰ The Special Referee also found that subsequent (proffered) evidence by an expert to approximately allocate the general verdicts in the declaratory judgment action would be irrelevant evidence under Rules 401 & 402, SCRE: “Mr. Baiden’s testimony would be irrelevant and speculative under Rule 401 & 402, SCRE, and therefore inadmissible even if the Court allowed Harleystville to attempt allocation of the general verdict. This attempt at relitigation of damages was addressed in Newman.” (Order of Special Referee in Heritage Communities, pgs. 28).

insurance. (See Petition for Clarification or Rehearing). Auto-Owners Ins. Co. argued against intervention based on Sims. (See Petition for Clarification or Rehearing pg. 4).²¹ The Supreme Court denied the Petition for Clarification or Rehearing. (See Petition for Clarification or Rehearing). It is because of such precedent that Builders Mutual is compelled to move to intervene.

D) Intervention and Special Interrogatories Are Workable Civil Procedures.

Intervention is a workable procedure and is not unprecedented.²² First, the circuit court has the power to exercise reasonable control over the mode and order of the trial. Rule 611(a), SCRE. Rule 49, SCRCF, is a rule of civil procedure specifically formulated to have juries answer questions about the basis for their verdict. Builders Mutual is not seeking to do something that has no basis in civil procedure. In the end analysis, Builders Mutual is basically requesting that it

²¹ Auto-Owners wrote the following: “Auto-Owners should not be made to intervene or otherwise inject itself into the underlying arbitration proceeding between Ms. Newman and Trinity for the purpose of showing that certain damages may fall within insurance policy exclusions.” (See Petition for Clarification or Rehearing, pg. 4)

²² Intervention by an insurer for the limited purposes of participating in the drafting of a special verdict form or written interrogatories has been allowed by federal courts in civil cases where insurance coverage for the damages is an issue. In Plough, Inc. v. Int’l Flavors and Fragrances, Inc., 96 F.R.D 136, 137 (W.D. Tenn. 1982), the United States District Court permitted an insurer “to intervene [FRCP 24(b)] for the limited purpose of requesting that if the action is tried, written questions and interrogatories be submitted to the jury pursuant to Rule 49(a) of the Federal Rules of Civil Procedure.” In Fidelity Bankers Life Ins. Co. v. Wedco, Inc., 102 F.R.D. 41, (D. Nev. 1984), the United States District Court permitted an insurer to intervene to propose special interrogatories or verdicts. In doing so, the District Court reserved the right for all parties and the court to review and object to the submissions presented during the trial. Id. at 45-46. In Thomas v. Henderson, 297 F. Supp. 2d 1311 (S.D. Ala. 2003), the United States District Court permitted an insurer to intervene to propose special interrogatories or verdicts. Among other things, the District Court was mindful that, “[a]bsent an itemized jury verdict in this case, resolution of coverage issues at stake in the declaratory judgment action could be complicated considerably, as there would be no way to distinguish among the types of claims and damages embraced by any damages award the jury might render.” Id. at 1327. Like in Fidelity Bankers Life Ins., the District Court reserved the right for all parties and the court to review and object to the submissions presented during the trial. Id.

be a part of the process in order avoid the ultimate consequences of Newman and Heritage Communities. Builders Mutual submits that a circuit court should not avoid using Rule 49, SCRCF, because a construction defect case may be complex. The circuit court should proceed on the premise that Rule 49, SCRCF, is a civil procedure that can work as stated by the Fifth Circuit Court of Appeals in Duke in the following:

Assuming as we must that the jury will follow instructions and make a correct allocation, the insurance company loses no benefit to which it is validly entitled from having the jury earmark the losses. Arguably the jury might, while complying with instructions, at its option throw damages into that category which it will speculate is insured. This is too tenuous to deserve more than mention. There may, however, be some awkwardness in argument to the jury, but this is nominal when balanced against the consequences to the insureds.

Duke, 468 F.2d at 979.

Second, Builders Mutual submits that asking a jury to answer interrogatories is not nearly as complicated as other tasks required by juries in construction defect cases, including having a jury grasp building codes, industry standards, and construction estimates. In fact, after the general verdict in the Palmetto Pointe trial, the circuit court conducted an apportionment hearing, in accordance with S.C. Code Ann. § 15-38-15 (1976), wherein the jury was requested to apportion the verdict as to Defendants Eloy Vasquez and Wilson Lucas Sales d/b/a Miracle Siding. The jury did so and apportioned five (5%) percent of the \$6,500,000.00 general verdict to each. (Special Verdict Form). The jury was also asked to decide whether Defendant Complete Building was entitled to indemnity from Tri-County Roofing. The jury did so and awarded Complete Building \$1,000.00. (Verdict Form).

Builders Mutual submits that interrogatories tailored to how much a jury awards for removing and replacing the roofs and siding versus the cost to repair moisture damaged sheathing is much less complicated than Palmetto Pointe's burden of proof on liability and

damages overall. Also, the task was practically completed long before the trial based on Palmetto Pointe's estimate that it would ultimately present to the jury. (Estimate, Trial Exhibit 677, pgs. 2-11). Thus, the next step was simply for a jury to affirm how much of that estimate or what parts of that estimate, *if any*, would be awarded as damages against Tri-County Roofing. Builders Mutual submits that a circuit court can and does have control over the trial to complete this task and can do so without overly complicating the trial or confusing the jury.

Builders Mutual even submitted conceptual special interrogatories to the circuit court that may follow the expected testimony and evidence at trial. (Builders Mutual's Motion to Reconsider, pg. 17).

1. Do you find that Defendant Tri-County Roofing's work proximately caused any physical injury to tangible property for which Tri-County Roofing is liable to Plaintiffs?

Yes _____; No _____.

If you answer "No" to Interrogatory No. 1, do not answer Interrogatory No. 2.

2. If you answer "Yes" to Interrogatory No. 1, list the physically injured tangible property on the lines provided below. To answer this Interrogatory, you may use descriptions of property described in exhibits or in witnesses' testimony. In addition, if you answered "Yes" to Interrogatory No. 1, write the dollar amount in the blank below for the costs to repair the physically injured tangible property excluding any costs to remove and replace Tri-County's work.

Dollar Amount: _____.

3. Do you award any loss of use damages against Tri-County Roofing? If you answer "Yes", please write the dollar amount in the blank below.

Yes _____; No _____.

Dollar Amount: _____.

One may question how to proceed if there is no evidence in the record to support an allocation to answer interrogatories. The answer is straightforward. Under the majority rule, once an insurer establishes that part of the liability represented by a judgment is for noncovered damages, the proponent of insurance then has the burden to prove the precise portion of the unallocated verdict that represents insured damages. Duke, 468 F.2d at 977. Accordingly, it should be incumbent upon litigants, Palmetto Pointe or Tri-County Roofing, to make a record with enough evidence on the allocation of damages that does not leave a court hearing a declaratory judgment action with only a general verdict. They are the parties in the Civil Action. Palmetto Pointe has the burden of proof on damages in the construction defect case, and it is Palmetto Pointe that is seeking insurance coverage for those damages. At trial in the construction defect case, Palmetto Pointe can decide how much or how little evidence it wishes to present to a jury. If Palmetto Pointe falls short, then Palmetto Pointe should bear the consequences – not Builders Mutual.

Builders Mutual should not be made a named party in the Civil Action. First, Builders Mutual submits that naming an insurer as a party or disclosing that Tri-County Roofing is insured is not permissible under South Carolina law and is thus not a viable solution. See Major v. Nat'l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976); see also Trancik v. USAA Ins. Co., 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003).²³ Second, there is no language or inference in Rule 24, SCRCF, that mandates that a third-party seeking intervention must be

²³ For instance, a jury may render a verdict under the assumption that Tri-County Roofing's work is fully insured. This assumption would be wrong under South Carolina law.

named a party in a civil action. Builders Mutual submits that Rule 24, SCRPC, is broad enough in its purpose to include what Builders Mutual has sought to do. The Supreme Court decision in Davis v. Jennings is an example of an area of law where the Court has used Rule 24, SCRPC, outside its typical use. 304 S.C. 502, 450 S.E.2d 601 (1991). In Davis, a newspaper moved to intervene in order to object to the sealing of a record. Id. The Supreme Court recognized that Rule 24, SCRPC, does not specifically provide for intervention by parties seeking access to sealed records but that many courts hold that challenges to protective orders are appropriately raised through motions to intervene. Davis v. Jennings, 304 S.C. 502, 450 S.E.2d 601 (citing Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988)).

E) Palmetto Pointe and Tri-County Roofing Should Bear the Legal Consequences of a General Verdict.

The present appeal is different than Newman and Heritage Communities. Unlike the insurers in Newman and Heritage Communities, Builders Mutual did move to intervene and the need for an allocation of damages was briefed and argued extensively in advance of trial. Tri-County Roofing and Palmetto Pointe objected to Builders Mutual being able to intervene. There can be no dispute that the Motion to Intervene and subsequent proceedings to lift the automatic appeal stay before the circuit court and the Court of Appeals very clearly informed Tri-County Roofing and Palmetto Pointe of the need for an allocated verdict. Tri-County Roofing retained additional, personal counsel to advise the company on insurance coverage law in South Carolina for the construction defect case. Unlike the insureds in Heritage Communities, who were not informed of the need for allocated verdicts, Palmetto Pointe and Tri-County Roofing had counsel and were fully advised in the Civil Action of the need to allocate damages. The Motion to Intervene alone put all named parties in the Civil Action on notice of the need for an allocated verdict.

Palmetto Pointe and Tri-County Roofing should be estopped from contending that Builders Mutual is bound by the general verdict. See Heritage Communities, 420 S.C. at 355, 803 S.E.2d at 307-08 (citing Mitchell v. Fed. Intermediate Credit Bank, 165 S.C. 457, 164 S.E. 136, 140 (1932) (noting a party may not use the same argument as both a shield and a sword); see also Duke, 468 F.2d at 980 (discussing Morris v. W. States. Mut. Auto Ins. Co., 268 F.2d at 793 (“The [Yancy] Court there held that one who suggests separate verdicts cannot be estopped to claim that a single verdict for one lacks proof of damages to two persons. The record before us discloses such suggestion was made by counsel for Western and opposed by counsel for Mrs. Day.”)).

Palmetto Pointe moved to have the automatic appeal stay lifted to proceed to trial on May 6, 2019. (Petition to Lift Stay). Builders Mutual objected to the Petition to Lift Stay because of this appeal. Tri-County Roofing and Palmetto Pointe are parties to the Civil Action, and could have asked for the special interrogatories, and *have* the burden to do so for insurance coverage purposes. Duke, 468 F.2d at 977. Tri-County Roofing and Palmetto Pointe consciously passed up the obligation to do so at trial and allowed a general verdict.

To follow the logic of the Special Referee’s ruling in Heritage Communities that it would be improper and purely speculative to parse a general verdict; and the Supreme Court finding in Newman that it was not possible to determine how much of the final arbitration award consisted of insured damages, how can Palmetto Pointe and Tri-County Roofing prove at this point in the declaratory judgment action how much of the verdict is for covered damages? Palmetto submitted its estimate at trial for the jury to award it approximately \$15,257,512.00. (Estimate Trial Exhibit 677). The jury awarded \$6,500,000.00. (Verdict Form). Palmetto Pointe also sought

damages for loss of use; however, the Verdict Form does not reflect how much, if any, was awarded by the jury for loss of use. (Second Amended Complaint ¶¶ 44, 45) (Verdict Form).²⁴

II. THE CIRCUIT COURT ERRED IN LIFTING THE AUTOMATIC APPEAL STAY WHEN THE CIRCUIT COURT LACKED JURISDICTION TO DO SO.

Rule 205, SCACR, states as follows:

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

Builders Mutual submits that the circuit court's Order to Lift Stay was wrongly granted and is void. See Bradley v. Hullander, 266 S.C. 188, 222 S.E.2d 283 (1976). Rule 205, SCACR, concerns subject matter jurisdiction. See Arnal v. Fraser, 371 S.C. 512, 519, 641 S.E.2d 419, 423 (2007). The appellate court has exclusive jurisdiction over the appeal with the exception of matters not affected by the appeal; and the appellate court retains jurisdiction until the remittitur is sent to the lower court. Lancaster v. Georgia-Pacific Corp., 403 S.C. 136, 742 S.E.2d 867 (2013).²⁵

Rule 241(a), SCACR, provides:

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

²⁴ In Heritage Communities, the Verdict Form reflected a separate recovery for loss of use. Heritage Communities, 420 S.C. at 331, 803 S.E.2d at 294.

²⁵ The circuit court has jurisdiction to entertain petitions for writs of supersedeas, which is inapplicable herein. A supersedeas is a procedure to impose a stay where none existed in the first place or for one of the exceptions in Rule 241(b), SCACR.

Rule 241(a), SCACR, does not expand the power of a lower court. See Arnal, 371 S.C. at 519, 641 S.E.2d at 422. The Supreme Court has stated, “[u]nder Rule 205 and the last sentence of the above-quoted portion of Rule 225, the lower court may not act or issue orders that affect an issue on appeal. Under Rule 225, the lower court *may only act to enforce matters not stayed by the appeal.*”²⁶ Arnal, 371 S.C. at 519, 641 S.E.2d at 422 (emphasis added). Both Rule 205, SCACR, and Rule 241, SCACR, specifically limit the power of the circuit court to only do that which is not affected by the appeal.

The relation between Rule 205(b), SCACR, and Rule 241(a), SCACR, is addressed by the Court of Appeals in Tillman v. Oakes, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012). Writing for the Court of Appeals, now Justice John Cannon Few explains in more detail the two appellate court rules and the limited power of a circuit court during an appeal:

When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241. 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. *This is the purpose of a stay under Rule 241- to determine whether the appealed order may be carried out or enforced - not to determine whether the action may proceed in the lower court while the appeal is pending.*

*The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. The rule provides: “Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal...” 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. The rule states: “Nothing in these Rules shall prohibit the lower court ... from proceeding with matters not affected by the appeal.” Rule 205, SCACR; see also Rule 241(a), SCACR (“The lower court ... retains jurisdiction over matters not affected by the appeal...”). *Thus, the existence or**

²⁶ Rule 225, SCACR, is the predecessor to Rule 241, SCACR. For the purposes herein, the language is the same in each Rule.

nonexistence of a stay under Rule 241 does not control the family 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).

Tillman v. Oakes, 398 S.C. at 254-55, 728 S.E.2d at 50-51 (internal citation omitted) (emphasis added).

To summarize, the purpose of a stay under Rule 241, SCACR, is not to determine whether the action may proceed in the lower court while the appeal is pending. Second, the existence or nonexistence of a stay under Rule 241, SCACR, does not control the trial court's power to proceed with the action. Third, whether a lower court may proceed with an action during the pendency of the appeal is governed by Rule 205, SCACR. Fourth, a lower court's power to proceed is determined by whether the issue sought to be litigated before the trial court during the appeal is a matter affected by the appeal.

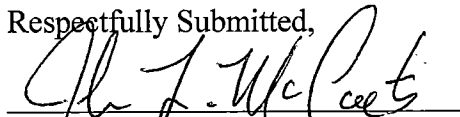
The circuit court erred in ruling that the trial could proceed on May 6, 2019 against Tri-County Roofing while this appeal is pending. Without question, proceeding to trial against Tri-County Roofing "affects" Builders Mutual's appeal. For the definition of the word "affects", the South Carolina Supreme Court cites to the definition of the word in Black's Law Dictionary 68 (10th ed. 2014) (defining "affect" to "produce an effect on; to influence in some way"); See Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 534, 787 S.E. 485, 494 (2016). Proceeding to trial raised the prospect that the issues on appeal may become moot if the action goes to trial against Tri-County Roofing and the jury delivers a general verdict. Builders Mutual moved to intervene and be a part of the trial so as to avoid a general verdict against Tri-County Roofing. The circuit court did not allow Builders Mutual to do so and whether Builders Mutual can do so is the issue on appeal.

Rule 241(c)(2), SCACR, states that a court “should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” The circuit court did not do so. The circuit court offered no solution or alternative to attempt to preserve the jurisdiction of the appeal or to prevent the appeal from potentially becoming moot. A lower court can take action that is necessary to preserve the appeal or prevent it from becoming moot. The converse is the rule too. A lower court cannot take action that does not preserve the appeal or that causes the appeal to become moot. The circuit court gave no grounds for lifting the stay and took no action to address preserving the appeal.

Conclusion

The Supreme Court should reverse the circuit court and permit intervention by Builders Mutual. In the alternative, the Supreme Court should hold that the burden was on Palmetto Pointe and Tri-County Roofing to have allocated damages during trial and to have prevented a general verdict in order to determine insurance coverage; and that Palmetto Pointe and Tri-County Roofing bear the legal consequences for not doing so. The Supreme Court should reverse the circuit court because the circuit court lacked jurisdiction to lift the automatic appeal stay.

Respectfully Submitted,



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June 14, 2019

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

RECEIVED
JUN 14 2019
S.C. SUPREME COURT

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 Love, individually, and on behalf of all others similarly situated, Plaintiffs,

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; W C Services, Inc., CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60.....Defendants.

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

v.

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

Certificate of Counsel of Appellant Builders Mutual Insurance Company
Circuit Court Case No.: 2015-CP-10-00955
Appellate Case No.: 2019-000238

And

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

v.

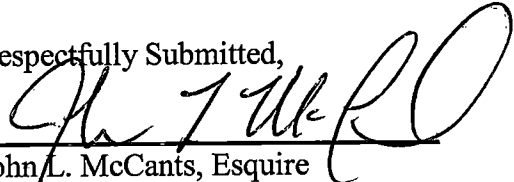
Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete.....Third-Party Defendants.

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

CERTIFICATE OF COUNSEL

In accordance with Rule 209(c), SCACR, the undersigned certifies that this Designation of Matter to be Included in Record on Appeal contains no matter which is irrelevant to the Appeal.

Respectfully Submitted,



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June 14, 2019

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

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In Re:

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v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; W C Services, Inc., CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60.....Defendants.

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

v.

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

And

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

v.

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

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

APPELLANT BUILDERS MUTUAL INSURANCE COMPANY'S PROOF OF SERVICE OF INITIAL BRIEF, DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL, AND CERTIFICATE OF COUNSEL

I certify that I have served Appellant Builders Mutual Insurance Company's Initial Brief, Designation Of Matter To Be Included In The Record On Appeal, And Certificate Of Counsel by depositing a copy of it in the United States Mail, postage prepaid, on **June 14, 2019** addressed to their attorneys of record, listed as follows:

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June 14, 2019