

90030

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Trial Court Case No. 2012-CP-10-3857
Trial Court Case No. 2012-CP-10-3858
Appellate Case No. 2019-000971
Appellate Case No. 2019-000974

RECEIVED
JUN 14 2019
SC Court of Appeals

Ex Parte:

Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and Hartford Underwriters Insurance Company, Appellants,

In Re:

Shipwatch Condominium Association, Inc., Plaintiff,

v.

Carolina Concrete Systems, Inc., Sisroy Engineering, LLC, Robert G. Sisroy, Individually, Terrence J. Mckelvey, Glasgow Roofing, Inc., Glasstec, Inc., Spectech, Inc., Sonneborn, Inc., Chimney Sweeps, Inc., Low Country Chimneys, Inc., EFCO Corp., W.C. Johnston Architectural Sales, Inc., Charleston Glass Company, Inc., First Exteriors, LLC; Acrocrete, Inc., BASF Corp., Gary Freeman Architect, Inc., Gary Freeman, Individually, Defendants,

Of whom Shipwatch Condominium Association, Inc., is the Respondent.

AND

In Re:

Oscar Mendiondo, individually and as Representative of a class of similarly situated Owners of Condominium Units in the Horizontal Property Regime known as Shipwatch Condominiums, Plaintiff,

v.

Carolina Concrete Systems, Inc., Sisroy Engineering, LLC, Robert G. Sisroy, Individually,

Terrence J. Mekelvey, Glasgow Roofing, Inc., Glasstec, Inc., Spectech, Inc., Sonneborn, Inc., Chimney Sweeps, Inc., Low Country Chimneys, Inc., EFCO Corp., W.C. Johnston Architectural Sales, Inc., Charleston Glass Company, Inc., First Exteriors, LLC; Acrocrete, Inc., BASF Corp., Gary Freeman Architect, Inc., Gary Freeman, Individually, Defendants,

Of whom Oscar Mendiondo, individually and as Representative of a class of similarly situated Owners of Condominium Units in the Horizontal Property Regime known as Shipwatch Condominiums, is the Respondent.

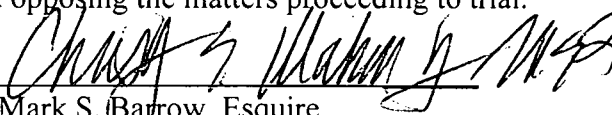
**PETITION PURSUANT TO RULE 241(D)(7), SCACR, ON BEHALF OF APPELLANTS
TO REVIEW CIRCUIT COURT ORDER LIFTING APPEAL STAY**

(EXPEDITED RELIEF REQUESTED)

Pursuant to Rule 241(d)(7) of the South Carolina Appellate Court Rules, Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company (collectively, "Hartford") petition for review of the Circuit Court's lifting of the automatic stay in the appeals and ordering the civil actions to trial on June 17, 2019.

Due to the exigent circumstances, with trial scheduled to begin Monday, June 17, 2019, Hartford requests expedited relief. Hartford incorporates by reference its attached submission to the Circuit Court in opposition to the motion to lift the stay which sets forth its grounds for opposing the lifting of the automatic stay and opposing the matters proceeding to trial.

June 14, 2019


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Christy E. Mahon, Esquire
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Post Office Box 12129
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Attorneys for Appellants Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

SHIPWATCH CONDOMINIUM
ASSOCIATION, INC.,

Plaintiffs,

vs.

CAROLINA CONCRETE SYSTEMS,
INC.; SISNROY ENGINEERING, LLC
ROBERT G. SISNROY, INDIVIDUALLY;
TERRENCE J. MCKELVEY; GLASGOW
ROOFING, INC.; GLASSTEC, INC.;
SPECTECH, INC.; SONNEBORN, INC.;
CHIMNEY SWEEPS, INC.; LOW
COUNTRY CHIMNEYS, INC.; EFCO
CORP.; W.C. JOHNSTON
ARCHITECTURAL SALES, INC.;
CHARLESTON GLASS COMPANY,
INC.; FIRST EXTERIORS, LLC;
ACROCRETE, INC.; BASF CORP.;
GARRY FREEMAN ARCHITECT, INC.;
GARY FREEMAN, INDIVIDUALLY

Defendants.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

OSCAR MENDIONDO, INDIVIDUALLY
AND AS REPRESENTATIVE OF A
CLASS OF SIMILARLY SITUATED
OWNERS OF CONDOMINIUM UNITS
IN THE HORIZONTAL PROPERTY
REGIME KNOWN AS SHIPWATCH
CONDOMINIUMS,

Plaintiff,

vs.

CAROLINA CONCRETE SYSTEMS,
INC.; SISNROY ENGINEERING, LLC

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-10-3857

) HARTFORD FIRE INSURANCE
) COMPANY'S, HARTFORD CASUALTY
) INSURANCE COMPANY'S AND
) HARTFORD UNDERWRITERS
) INSURANCE COMPANY'S RETURN TO
) PLAINTIFFS' MOTION TO LIFT
) AUTOMATIC STAY

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-10-3858

Plaintiff's Motion to Stay threatens to interfere with the orderly resolution of the legal issues raised in Hartford's appeal. By its appeal, Hartford seeks to obtain clarification regarding whether the claims against its insureds, Carolina Concrete and First Exteriors, should proceed to a general verdict or whether, under *Harleysville*, the Court should submit a special verdict or special interrogatories to the jury. If *Harleysville* in fact requires the latter course, but this matter proceeds to a general verdict, the result would create unwarranted confusion.

Thus, the Motion to Stay contravenes the central purpose of Rule 241, SCACR, which is to preserve the jurisdiction of the appellate court. For these reasons, the Court should deny the Motion to Stay.

Lifting the Stay Would Impermissibly Affect the Issues on Appeal

The service of a notice of appeal gives the Court of Appeals "exclusive jurisdiction over the appeal; the lower court ... shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241." Rule 205, SCACR. The trial court retains power to "proceed[] with matters not affected by the appeal." *Id.* "As a general rule," therefore, an appeal "acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Rule 241(a), SCACR. Although "any party may move for an order lifting the automatic stay in cases which involve the general rule," the Court's discretion is not unlimited.

Critically, the rules direct that the Court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. A trial "court may not act or issue orders that affect an issue on appeal." *Arnal v. Fraser*, 371 S.C. 512, 519, 641 S.E.2d 419, 422 (2007); see *Grosshuesch v. Cramer*, 377 S.C. 12, 31 n.7, 659 S.E.2d 112, 122 n.7 (2008) ("while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal").

Proceeding with trial would undermine appellate jurisdiction, contrary to the express language of Rule 241(c)(2), SCACR, which authorizes lifting a stay only when “necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot” under Rule 241(c)(2), SCACR. Moreover, lifting the stay could impermissibly “affect an issue on appeal” under *Arnal*, 371 S.C. at 519, 641 S.E.2d at 422. Both of these inquiries point to the conclusion that the Court should deny the stay.

Adoption By Reference

Hartford incorporates by reference the arguments presented by Builders Mutual in *Ex parte Builders Mutual*, to the Court of Appeals to the extent not inconsistent with Hartford’s arguments. See Petition Pursuant to Rule 241(d)(7) (Apr. 26, 2019) (attached as Exhibit C, without attachments to original).

Hartford acknowledges that, in *Ex parte Builders Mutual*, the trial court granted the motion to lift stay pending appeal, and that the Court of Appeals denied the insurers’ petition for review of that order. Those non-precedential orders did not state the reasons for the rulings. By the time the Supreme Court certified the appeal on May 31, 2019, the case had already proceeded to a general verdict. Here, by denying the Motion to Lift Stay, the Court could aid the appellate process by ensuring that, should the Supreme Court wish, it can grant certification in a case that has not proceeded to a general verdict.

Conclusion

Lifting the stay would undermine the appellate courts’ orderly resolution of Hartford’s appeal, contrary to the language and purpose of Rule 241, SCACR. The Court should therefore deny the Motion to Lift Stay.

Columbia, South Carolina
June 14, 2019

Respectfully submitted,

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Meredith Brunton

for Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
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Columbia, South Carolina 29211

*Attorneys for Hartford Casualty Insurance
Company, Hartford Fire Insurance Company and
Hartford Underwriters Insurance Company*

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Defendant, do hereby certify that I have served a copy of the foregoing Return in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:


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Melissa H. Abbott

Columbia, South Carolina
June 14, 2019

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FEB 27 2019

SC Court of Appeals

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

Ex Parte: Builders Mutual Insurance Company, Appellant,

In Re:

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

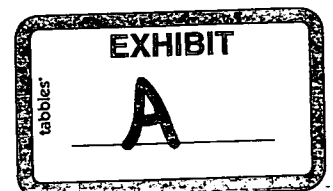
Tri-County Roofing, Inc.....Third-Party Plaintiff,

v.

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

And

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



v.

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

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

MOTION TO TRANSFER CASE TO THE SUPREME COURT

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

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

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

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

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

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

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

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

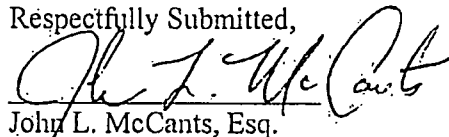
Builders Mutual filed a Notice of Appeal on February 19, 2019 with the Court of Appeals. The appeal presents at least one major issue that is recurring in construction defect civil litigation in South Carolina and will continue to recur: If there are to be consequences to a liability insurer for a general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

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

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

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

Respectfully Submitted,



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Fax: 803-252-3653

jmccants@rogerslewis.com

**ATTORNEY FOR APPELLANT BUILDERS
MUTUAL INSURANCE COMPANY**

February 27, 2019

Exhibit A

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
 Property Owners Association, et al.
 PLAINTIFF(S)

Island Pointe, LLC, et al.
 DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

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

FILED
 CLERK'S COURT
 2018 DEC 18 AM 9:39

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

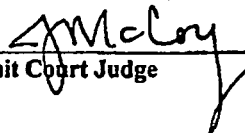
IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Motions for Intervention filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ends does not end the case.

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

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

	2764	12/17/18
Circuit Court Judge	Judge Code	Date

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

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

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

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

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


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

ORDER INFORMATION

This order ends does not end the case.

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

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

 Circuit Court Judge	2764	1/16/18
	Judge Code	Date

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

FEB 27 2019

SC Court of Appeals

Ex Parte: Builders Mutual Insurance Company, Appellant,

In Re:

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

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

v.

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

And

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

v.

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

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

PROOF OF SERVICE

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

cc:

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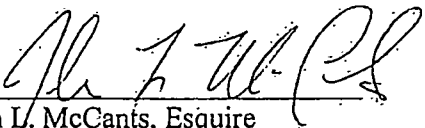
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February 27, 2019
Columbia, South Carolina

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February 27, 2019

Via Hand Delivery

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


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

Dear Mr. Shearouse:

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

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

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

Sincerely,

John L. McCants

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

RECEIVED

FEB 27 2019

SC Court of Appeals
RECEIVED

FEB 27 2019

S.C. SUPREME COURT

The Supreme Court of South Carolina

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,

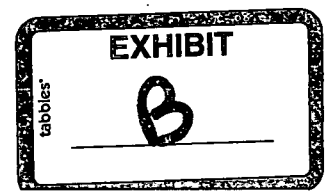
v.

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.

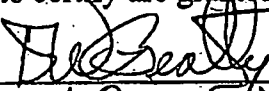
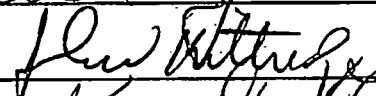


Alderman Construction; Stanley's Vinyl Fence Designs;
Cohen's Drywall; and Mosley Concrete, Third-Party
Defendants,

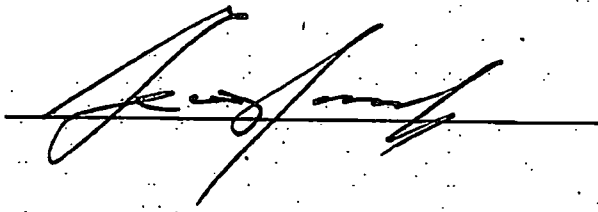
Of Whom Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Jack Love,
Individually, and on behalf of all others similarly
situated, and Tri-County Roofing, Inc. are the
Respondents.

Appellate Case No. 2019-000323

ORDER

Appellants ask this Court to certify this case from the court of appeals pursuant to
Rule 204(b), SCACR. The motions to certify are granted.


_____ C.J.

_____ J.

_____ J.

_____ J.



J.

Columbia, South Carolina

May ~~30~~, 2019

cc:

- John Lucius McCants, Esquire
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- Timothy J. Newton, Esquire
- The Honorable Jenny Abbott Kitchings

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
APR 26 2019
SC Court of Appeals

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,

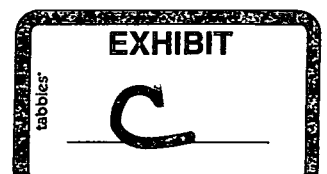
v.

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.

**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)

Pursuant to Rule 241(d)(7), SCACR, Appellant Builders Mutual Insurance Company
("Builders Mutual"), files this petition for the Honorable H. Bruce Williams of the Court of
Appeals to review the Order of the Honorable Jennifer B. McCoy dated April 25, 2019 that lifts
the automatic stay in the appeal and orders the civil action to trial on May 6, 2019. ("Stay Lift
Order")(Exhibit A).

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

buildings. Palmetto Pointe will seek to satisfy any verdict in favor of Palmetto Pointe from general liability insurance policies issued by insurers to Defendants.¹

Builders Mutual moved to intervene in the Civil Action for the limited purpose of having the Circuit Court submit a special verdict form and/or special interrogatories to a jury in order to allocate a verdict, if any, in favor of Palmetto Pointe and avoid the consequences of a general verdict that occurred to the insurers in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009) (“*Newman*”) and *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 332, 803 S.E.2d 288, 294 (2017) (“*Heritage Communities*”). The consequences in *Newman* and *Heritage Communities* were that the insurers were required to pay the entire verdict/award in the underlying actions even though parts of the verdict/award included non-insured damages.²

¹ Builders Mutual issued general liability insurance policies to Defendant/Respondent Tri-County Roofing, Inc. (“Tri-County Roofing”).

² Builders Mutual submits that substantive issues of insurance coverage are established and will be addressed or discussed in the appeal with citations to the Supreme Court’s decisions in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011) (“*Crossmann*”) (“In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute ‘property damage,’ but the defective construction would not.”); *Newman*, 385 S.C. at 198, 684 S.E.2d at 546 (These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco—even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy—and serve as one of the bases for this Court’s acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured’s contractual liability which a CGL policy is not intended to cover.”).

The present appeal concerns procedures. *Newman* and *Heritage Communities* did not provide definitive procedural guidelines which has resulted in insurers seeking to intervene on a limited basis in construction defect civil actions to guard against a general verdict. If there is a verdict in favor of Palmetto Pointe, the objective is to have separated beforehand or contemporaneously those costs which are to remove and replace Tri-County’s work (not covered) from those cost which are to repair “property damage” (potentially covered).

Although the Civil Action has been pending since February 12, 2015, Builders Mutual was only put on notice of a claim or the Civil Action against Tri-County Roofing by letter dated January 15, 2018. (Exhibit B). After attending a mediation on January 30 and 31, 2018, Builders Mutual moved to intervene in the Civil Action on March 22, 2018. Builders Mutual's motion to intervene was first scheduled and heard by the Circuit Court on December 17, 2018. Palmetto Pointe and Tri-County Roofing objected to Builders Mutual being able to intervene in the Civil Action. The Circuit Court entered its Order/Statement of Judgment denying the Motion to Intervene filed by Builders Mutual. (Exhibit C). Builders Mutual moved to have the Circuit Court reconsider its Order/Statement of Judgment, requesting the Circuit Court provide an explanation, which the Circuit Court denied in its Order/Statement of Judgment Denying Motion to Reconsider. (Exhibit D):

Builders Mutual filed its Notice of Appeal on February 19, 2019. (Exhibit E). 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. (Exhibit F). Palmetto Pointe filed a response with the Supreme Court stating that it took no position with regard to the Motion to Transfer the Case. (Exhibit G).³ The Motion to Transfer the Case is pending.⁴ The parties to the appeal are currently in the Initial Brief stage.

³ The Supreme Court granted a Motion to Transfer the Case, like the one filed by Builders Mutual, in a recent appeal filed by insurers in Appellate Case No. 2017- 02146 concerning the denials of motions to intervene in an underlying construction defect case. (Exhibit H). The parties in Appellate Case No. 2017- 02146 settled the appeal and underlying civil action shortly before scheduled oral arguments in the Supreme Court.

⁴ The appeal presents at least one major issue that is recurring in construction defect civil litigation in South Carolina and will continue to recur: If there are to be consequences to a liability insurer for a general verdict, what procedures can an insurer follow to preclude those consequences or to assure there is an allocated verdict for insurance coverage purposes?

On April 5, 2019, Judge McCoy issued an order stating, “[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. (Exhibit I).

On April 16, 2019, Respondent Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.’s and Jack Love’s, individually, and behalf of all others similarly situated’s (together “Palmetto Pointe”) filed their 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”)(Exhibit J).⁵ Builders Mutual filed a memorandum in opposition to the Petition to Lift Stay because it sought to lift the stay in an appeal and proceed with matters affected by the appeal. (Exhibit K).

On April 25, 2019, Judge McCoy heard oral arguments on the Petition to Lift Stay and issued the Stay Lift Order. (Exhibit A). The Stay Lift Order only states that the Plaintiff’s Petition to Lift the Automatic Stay is granted and trial will proceed May 6, 2019. Judge McCoy did not provide any factual findings or conclusions of law although requested to do so. Builders Mutual submits that the Circuit Court erred in lifting the automatic stay because the Circuit Court lacked jurisdiction to proceed with a trial involving Tri-County Roofing.⁶ Builders Mutual submits the Court of Appeals should reverse the Circuit Court.

⁵ The Petition to Lift Stay was not served on Builders Mutual as required by Rule 241(d)(5), SCACR.

⁶ The stay is automatic upon the filing of the Notice of Appeal. Rule 241(d)(3), SCACR.

The South Carolina Supreme Court Has Held that a Lower Court May Only Act As to Matters Not Stayed by an Appeal

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.

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).⁷

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.

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

⁷ 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.

appeal.”⁸ *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 lower 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. (emphasis added).

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. (emphasis added). 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 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)(Citations Omitted)(emphasis added).

Tillman v. Oakes, 398 S.C. at 255, 728 S.E.2d at 50-51.

⁸ Rule 225, SCACR is the predecessor to Rule 241, SCACR. For the purposes herein, the language is the same in each Rule.

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".

Judge McCoy erred in ruling that a trial can proceed on May 6, 2019 against Tri-County Roofing while the appeal is pending. There is no genuine dispute that 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"). *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E. 485, 494 (2016). Proceeding to trial raises 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 now 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." Rule 241(c)(2), SCACR. The Circuit Court did not do so. The Circuit Court offered no solution or alternative that will 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. Judge McCoy gave no grounds for lifting the stay and took no action to address preserving the appeal.

Maintaining the automatic stay does not prejudice Palmetto Pointe in any way or leave it without a remedy. First, Palmetto Pointe could seek a remand from an appellate court if the circumstances of the particular case require it. *Arnal*, 371 S.C. at 519, 641 S.E.2d at 422, fn. 4. Second, the fact is the Petition to Lift Stay was, *in substance*, a motion to dismiss the appeal, for which only the Court of Appeals has jurisdiction pursuant to Rule 240(a) – (b), SCACR.

The South Carolina Supreme Court Has Held that the Denial of a Motion to Intervene is Immediately Appealable

The order denying the motion to intervene is immediately appealable as a matter involving a substantial right. S.C. Code § 14-3-330(2). “An order affects a substantial right and is *immediately appealable* when it ‘(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action’” *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (quoting S.C. Code § 14-3-330(2)) (emphasis added). Interpreting precisely the same statutory language,⁹ the South Carolina Supreme Court held that an order denying a motion to intervene was immediately appealable—even though “the merits of the action hereinbefore mentioned [had] not been determined and as the trial of that action will still be necessary” - because insofar “as the rights of the [putative intervenor] are involved, the

⁹ *Johnson/Rutledge*, 63 S.C. at ___, 41 S.E. at 309 (“Section 11 of the Code provides that ‘the supreme court shall have exclusive jurisdiction to review upon appeal *** an order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.’”). The current statute, S.C. Code Ann. Section 14-3-330, provides identically under (2): “The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: ... (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken....”

order [denying intervention] affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken.” *Ex parte Johnson (Rutledge v. Tunno)*, 63 S.C. 205, ___, 41 S.E. 308, 309 (1902). *See also* 15 S.C. Jur. Appeal and Error § 23 South Carolina Jurisprudence (September 2017 Update) (“The refusal of a petition to intervene is directly appealable ‘[i]n so far as the rights of appellant are involved, the order affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken.’”); *Ex parte Wells*, No. 2012-MO-002, 2012 WL 10906587, at *1 & n.1 (S.C. Sup. Ct. filed March 7, 2012) (allowing immediate appeal of an order denying a request to intervene in an abuse and neglect action) (citing *Johnson/Rutledge*) (please note that this opinion states “[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by rule 268(d)(2), 8(d)(2), SCACR”); *Ex parte Carter v. L.C.*, No. 2015-001006, 2017 WL 164493, at *2 (S.C. Ct. App. filed January 13, 2017) (citing *Johnson/Rutledge* with favor that “an order denying a motion to intervene is immediately appealable”) (please note that this opinion states “[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by rule 268(d)(2), SCACR”).

The order denying Builders Mutual’s motion to intervene “in effect determine[d] the action and prevent[ed] a judgment from which an appeal might be taken,” within the meaning of *Johnson/Rutledge*, 63 S.C. at ___, 41 S.E. at 309. Builders Mutual therefore has a right to an immediate appeal under S.C. Code § 14-3-330(2) as has been established in South Carolina. In the present matter, the Circuit Court ruled on the merits, and therefore the case is clear that the denial of the motion to intervene is immediately appealable. *See Ex parte Johnson (Rutledge v. Tunno)*, *supra*. The question of whether Builders Mutual has any right or obligation to intervene is

inextricably intertwined with the merits of the controversy or a jury verdict involving Tri-County Roofing.

Palmetto Pointe relied on *South Carolina Public Service Authority v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 537 (1986) for the proposition that, “when an order is interlocutory and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, not does it stay further proceeding in the lower court.” First, it is critical to note that whether the appeal in *Arnold* was interlocutory, and not immediately appealable, was an issue before the South Carolina Supreme Court on a motion to dismiss the appeal. *Arnold*, 287 S.C. at 536, 340 S.E.2d at 585. Although the appeal has been pending for over two months, Palmetto Pointe has not moved to dismiss Builders Mutual’s appeal. When faced with an opportunity to express a position about the appeal, in response to Builders Mutual’s Motion to Transfer the Case to the South Carolina Supreme Court, Palmetto Pointe expressed no position (or objection) for the appeal.

Third, whether an appeal concerning a motion to intervene (by insurers) is immediately appealable has been decided by the Court of Appeals adversely to Palmetto Pointe’s position in two recent appeals. The Court of Appeals denied motions to dismiss appeals concerning intervention based on arguments made by the respondents that the appeals are interlocutory and not immediately appealable: *Order, Beresford Commons Homeowners Ass’n, Inc. v. Portrait Homes-South Carolina, LLC, et al.*, Appellate Case No. 2017-000202 (March 7, 2017); *Order, Ex Parte: Hartford Fire Insurance Company In Re: The Harbour Cove Condominium Association*, Appellate Case No. 2017-002146 (January 24, 2018). (Exhibit L). The present appeal is no different.

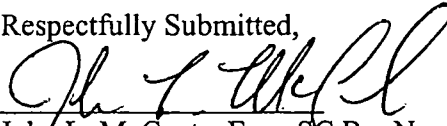
Palmetto Pointe Was Not Entitled to Emergency Relief

Palmetto Pointe sought emergency relief. The Notice of Appeal was filed on February 19,

2019. Palmetto Pointe did not explain why it waited until April 16, 2019 to ask a court to lift the stay as it may relate to a trial involving Tri-County Roofing. Second, throughout its Petition to Lift Stay, Palmetto Pointe discusses the passage of time, and the years gone by; and how Palmetto Pointe must now have a trial or it will be prejudiced. Under the Rules of Civil Procedure, Palmetto Pointe was allowed to move the case to the jury trial roster within six months of filing the Civil Action in 2015. Rule 40(d), SCRCPP. While one understands that a construction defect action may involve complex construction industry issues, Palmetto Pointe itself chose to lengthen the time for the action and make it unwieldy by suing numerous parties instead of the developer and general contractor alone. Palmetto Pointe bears responsibility for the passage of time.

Wherefore, Builders Mutual request that the Honorable H. Bruce Williams of the Court of Appeals reverse the Circuit Court.

Respectfully Submitted,



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**ATTORNEY FOR APPELLANT BUILDERS
MUTUAL INSURANCE COMPANY**

April 26, 2019

RECEIVED

JUN 11 2019

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2012-CP-10-3858

Ex Parte:

Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and Hartford Underwriters Insurance Company, Appellants,

In Re:

Oscar Mendiondo, individually and as Representative of a class of similarly situated Owners of Condominium Units in the Horizontal Property Regime known as Shipwatch Condominiums, Plaintiff,

v.

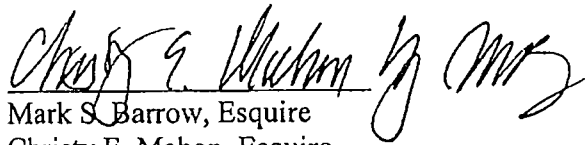
Carolina Concrete Systems, Inc., Sisroy Engineering, LLC, Robert G. Sisroy, Individually, Terrence J. Mckelvey, Glasgow Roofing, Inc., Glasstec, Inc., Spectech, Inc., Sonneborn, Inc., Chimney Sweeps, Inc., Low Country Chimneys, Inc., EFCO Corp., W.C. Johnston Architectural Sales, Inc., Charleston Glass Company, Inc., First Exteriors, LLC; Acrocrete, Inc., BASF Corp., Gary Freeman Architect, Inc., Gary Freeman, Individually, Defendants,

Of whom Oscar Mendiondo, individually and as Representative of a class of similarly situated Owners of Condominium Units in the Horizontal Property Regime known as Shipwatch Condominiums, is the Respondent.

NOTICE OF APPEAL

Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and Hartford Underwriters Insurance Company appeal the Honorable Roger M. Young, Sr.'s Order Denying Motions to Intervene dated June 10, 2019. Appellants received written notice of entry of the order on June 11, 2019.

June 11, 2019



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2012-CP-10-3858

RECEIVED
JUN 11 2019
SC Court of Appeals

Ex Parte:

Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and Hartford Underwriters Insurance Company, Appellants,

In Re:

Oscar Mendiondo, individually and as Representative of a class of similarly situated Owners of Condominium Units in the Horizontal Property Regime known as Shipwatch Condominiums, Plaintiff,

v.

Carolina Concrete Systems, Inc., Sisroy Engineering, LLC, Robert G. Sisroy, Individually, Terrence J. Mckelvey, Glasgow Roofing, Inc., Glasstec, Inc., Spectech, Inc., Sonneborn, Inc., Chimney Sweeps, Inc., Low Country Chimneys, Inc., EFCO Corp., W.C. Johnston Architectural Sales, Inc., Charleston Glass Company, Inc., First Exteriors, LLC; Acrocrete, Inc., BASF Corp., Gary Freeman Architect, Inc., Gary Freeman, Individually, Defendants,

Of whom Oscar Mendiondo, individually and as Representative of a class of similarly situated Owners of Condominium Units in the Horizontal Property Regime known as Shipwatch Condominiums, is the Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent and other counsel by depositing a copy of it in the United States Mail, postage prepaid, on June 11, 2019 addressed to their attorneys of record, listed as follows:

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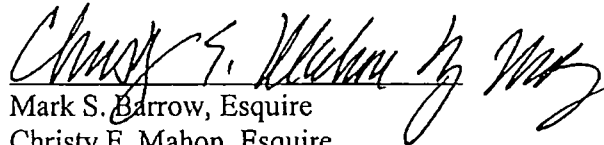
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2012-CP-10-3858

RECEIVED
JUN 14 2019
SC Court of Appeals

Ex Parte:

Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and Hartford Underwriters Insurance Company, Appellants,

In Re:

Oscar Mendiondo, individually and as Representative of a class of similarly situated Owners of Condominium Units in the Horizontal Property Regime known as Shipwatch Condominiums, Plaintiff,

v.

Carolina Concrete Systems, Inc., Sisroy Engineering, LLC, Robert G. Sisroy, Individually, Terrence J. Mckelvey, Glasgow Roofing, Inc., Glasstec, Inc., Spectech, Inc., Sonneborn, Inc., Chimney Sweeps, Inc., Low Country Chimneys, Inc., EFCO Corp., W.C. Johnston Architectural Sales, Inc., Charleston Glass Company, Inc., First Exteriors, LLC; Acrocrete, Inc., BASF Corp., Gary Freeman Architect, Inc., Gary Freeman, Individually, Defendants,

Of whom Oscar Mendiondo, individually and as Representative of a class of similarly situated Owners of Condominium Units in the Horizontal Property Regime known as Shipwatch Condominiums, is the Respondent.

PROOF OF SERVICE

I certify that I have served the Petition Pursuant To Rule 241(d)(7), SCACR on behalf of Appellants to review Circuit Court Order Lifting Appeal Stay on Respondent and other 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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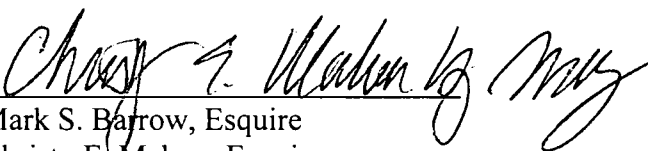
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June 14, 2019

A handwritten signature in black ink, appearing to read "Christy E. Mahon Esq.", written over a horizontal line.

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Company



SWEENEY WINGATE & BARROW P.A.

June 17, 2019

Reply to: Main Office

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RECEIVED
JUN 14 2019
SC Court of Appeals

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29202

RE: Oscar Mendiondo v. Carolina Concrete Systems, Inc. et al.
Civil Action No.: 2012-CP-10-3858
Our File: 4760-11991

Dear Ms. Kitchings:

Enclosed for filing is the original and two (2) copies of a Petition Pursuant to Rule 241(d)(7), SCACR on Behalf of Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and Hartford Underwriters Insurance Company in connection with this matter. Also enclosed please find our firm's check in the sum of \$50.00 representing the filing fee. Please file the original and return a clocked copy to me. Expedited relief is requested.

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

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

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.

Christy E. Mahon

CEM/mha
Enclosures

June 14, 2019

Page 2 of 2

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