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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, 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 REPLY BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY TO INITIAL BRIEF OF RESPONDENT TRI-COUNTY ROOFING, INC.

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REPLY ARGUMENT

Introduction

Appellant Builders Mutual Insurance Company ("Builders Mutual") submits the following reply to Respondent Tri-County Roofings, Inc.'s ("Tri-County Roofing") Initial Brief.

The circuit court erred in not allowing Builders Mutual to intervene on a limited basis at the trial for the purpose of submitting special interrogatories to the jury concerning damages. Tri-County Roofing objected to Builders Mutual being able to intervene. ("Tri-County Memorandum in Opposition to Motion to Intervene"). Over the objection of Builders Mutual because of the appeal, the circuit court tried the underlying action that resulted in a verdict against Tri-County Roofing for $6,500,000.00 in actual damages and $500,000.00 in punitive damages. ("Memorandum in Opposition to Petition to Lift Stay")(Verdict Form). Neither Tri-County Roofing nor Palmetto Pointe sought to have the jury answer special interrogatories at trial. (Tri-County Initial Brief Pg. 8 of 17). There is now general verdict for which Tri-County Roofing and Palmetto Pointe seek insurance.

Before replying more specifically to the arguments made by Tri-County Roofing in its Initial Brief, Builders Mutual wishes to point out the following mistakes or omissions in Tri-County Roofing's Initial Brief. First, Tri-County Roofing included two issues in its Statement of Issues, and Tri-County Roofing does not appear to have addressed the second one. There is a randomly inserted page thirty-one (31) in Tri-County's Initial Brief, which numbers seventeen (17) pages. Builders Mutual will address page thirty-one (31) in more detail in this reply.

Second, Tri-County Roofing does not address or challenge the second issue on appeal in Builders Mutual's Initial Brief, which second issue addresses the argument that the circuit court lacked subject matter jurisdiction to proceed to trial because of the appeal. Third, Tri-County

Roofing does address Builders Mutual's argument that Tri-County Roofing should be estopped from contending that Builders Mutual is bound by the general verdict because Tri-County Roofing objected to Builders Mutual being able to intervene. The corollary to the foregoing is that Tri-County Roofing should also be estopped now from allocating the general verdict because it would be speculative and improper, and require inadmissible evidence, to do so. Fourth, Tri-County Roofing makes various clear misstatements about the contents of Builders Mutual's Initial Brief that Builders Mutual will address in the following reply.

Builders Mutual also notes that since Builders Mutual filed its Initial Brief, the circuit court has reduced the total jury verdict from $7,000,000.00 to $5,300,000.00 based on a post trial motion for setoff. (Form 4 Filed July 23, 2019).[1]

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

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. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). In assessing intervention, a court should consider each case in the context of the unique facts and circumstances, view intervention liberally, consider the pragmatic consequences for intervention and avoid a rigid application of Rule 24, SCRCP. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714.

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[1] The jury awarded $6,500,000.00 in actual damages and $500,000.00 in punitive damages against Tri-County Roofing. ("Verdict Form").

Tri-County Roofing does not challenge the timeliness of the Builders Mutual's Motion to Intervene or that Builders Mutual has demonstrated that its interest is inadequately represented by either Tri-County Roofing or Palmetto Pointe. Tri-County Roofing challenges the second and third criteria listed in Berkeley Elec. concerning an intervenor's interest in the litigation and whether denying intervention impairs or impedes the intervenor's ability to protect that interest. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714. First, Tri-County makes a misstatement about what is contained in Builders Mutual's Initial Brief. Tri-County Roofing writes that Builders Mutual does not address the "threshold issue of standing." (Tri-County Roofing Initial Brief Pg. 11 of 17). To the contrary, Builders Mutual addressed "standing" starting on page 16 of its Initial Brief and explained at length therein how this construction defect case warrants standing for Builders Mutual. (Builders Mutual Initial Brief Pg. 16).

Tri-County Roofing contends that Rule 24, SCRCP does not allow for "limited" intervention. First, Tri-County Roofing does not address Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991) that was cited in Builders Mutual's Initial Brief. In Davis v. Jennings, the Supreme Court permitted intervention by a newspaper company to unseal a court record. Davis v. Jennings, 304 S.C. at 505, 405 S.E.2d at 603. The Supreme Court recognized that Rule 24, SCRCP does not specifically provide for intervention by a party seeking access to sealed records but that courts find that Rule 24 is an appropriate procedure to do so. Davis v. Jennings, 304 S.C. at 503-54, 405 S.E.2d at 602. The Supreme Court also noted that the newspaper company's motion is distinguishable from those in which party-litigant status is sought. Davis v. Jennings, 304 S.C. at 504, 405 S.E.2d at 602-03.

The present appeal, of course, does not involve a newspaper freedom of information case. However, Davis v. Jennings supports Builders Mutual's position that circumstances may exist

that need special attention and warrant intervention; and that Rule 24, SCRCP does not otherwise rigidly require one to be named a party in a civil action.[2] The present circumstances are a recurring issue for insurers in numerous construction defects cases in South Carolina and, respectfully warrant special attention. Builders Mutual submits that its motion to intervene raises special circumstances and Rule 24, SCRCP is not so limited in its scope that intervention cannot be granted.

The Supreme Court is empowered to order procedures. As discussed in Builders Mutual's Initial Brief, South Carolina has Court-Annexed Alternative Dispute Resolution (ADR) Rules. Rule 6(b)(4), SCADR requires the physical attendance of insurers at mediations in South Carolina. In 2008, the Supreme Court issued Order 2008-06-26-02 to manage complex construction cases in the Ninth, Fourteenth and Fifteenth Judicial Circuits. Builders Mutual submits that the Supreme Court is (i) empowered to permit intervention or order a procedure that addresses the concerns with general verdicts in a construction defect cases and insurance coverage (ii) and can devise a procedure that does not reveal the presence of insurance to the jury.

Tri-County Roofing relies on Gov't Employee's Ins. Co., Ex parte, 373 S.C. 132, 644 S.E.2d 699 (2007). Builders Mutual discussed and distinguished Gov't Employee's Ins. Co. in its Initial Brief. 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. Morever, the insurer in Gov't Employee's Ins. Co. was not bound for coverage as were

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[2] Builders Mutual submits that naming an insurer as a party or disclosing that Tri-County Roofing is insured is not persmissble 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).

the insurers in Crossmann Communities of N.C., Inc. Co. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50 S.E.2d 589 (2011)("Crossmann") and Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009)("Newman").

B) 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 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; Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546. A CGL insurance policy does not insure the costs to remove or replace 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.

It undisputed that 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). Tri-County Roofing acknowledges that the underlying action is about alleged faulty construction that led to progressive weather-related moisture damage to framing and sheathing. (Tri-County Roofing Initial Brief Pg. 8 of 17). For the damages sought by Palmetto Pointe, the civil action is a good example of the need for parties to allocate the damages in an underlying trial to determine what damages are insured and not insured, in accordance with Newman and Crossmann, for a later declaratory judgment action.

An underlying theme in Tri-County Roofing's Initial Brief is to downplay the law in Newman and Crossmann on what damages are insured and not insured, and not accept responsibility for those damages that the law obligates Tri-County Roofing to pay. Simply put, Tri-County Roofing wishes to avoid allocating damages for it is concerned that doing so will reveal what the law requires Tri-County Roofing to pay. Tri-County Roofing side steps any discussion of its burden of proof for proving what part of the judgment includes insured damages. Legal authorities cited in Harleysville Grp. Ins. v. Heritage Communities, 420 S.C. 321, 803 S.E.2d 288 (2017) address the obligation of an insurer to inform the insured on the need to allocate damages and an insured's burden to allocate. See Duke v. Hoch, 468 F.2d 973, 977 (5th Cir. 1972). Tri-County Roofing does not and cannot dispute that it has been advised throughout the litigation on the differences in insured and uninsured damages and that an allocation must be done for insurance coverage.

Tri-County Roofing casts blame on Builders Mutual for trying to allocate the damages. Builders Mutual strongly disagrees with Tri-County Roofing's characterizations of Builders Mutual's motion to intervene and Tri-County Roofing's citation to Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933). Builders Mutual has a duty to defend and a duty to indemnify Tri-County Roofing for those damages that are *insured* under Builders Mutual's insurance policies. See Sloan Const. Co., Inc. v. Central Nat. Ins. Co. of Omaha, 269 S.C. 183, 236 S.E.2d 818 (1977). South Carolina law provides an insured must show there is no reasonable basis for the insurer's decision. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 486 S.E.2d 727 (1996). As discussed above, the law on insurance coverage for a construction defect claim is well settled in South Carolina; and the Supreme Court has been clear

on what are insured and uninsured damages. In this case, it is undisputed that Palmetto Pointe sought both kinds of damages.

Builders Mutual has defended and is defending Tri-County Roofing since Builders Mutual was put on notice of the civil action in January 2018. ("Tender Letter"). As do other insurers, Builders Mutual seeks to pay for those damages that are insured under the law; and a reasonable interpretation of South Carolina Supreme Court precedent to date is that Builders Mutual must take an affirmative action in the underlying action to avoid the consequences of a general verdict. Builders Mutual tried to do so but was denied by the circuit court. Tri-County Roofing and Palmetto Pointe failed to do so. As a result, there is now a general verdict.

C) 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.

In two prior decisions, the South Carolina Supreme Court 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. Tri-County Roofing contends that Builders Mutual's reliance on Newman and Heritage Communities is misguided and tenuous.

Tri-County Roofing does not address the South Carolina circuit court decisions that adopt the position being taken by Builders Mutual in favor of intervention and federal court decisions cited in Builders Mutual's Initial Brief that utilize Rule 24 for limited intervention. 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).[3]

Builders Mutual believes that the interpretation of Newman expressed by Judge Nicholson in the Beresford Commons case bears restating to show that circuit judges interpret Newman to permit intervention by insurers and that Builders Mutual does not proceed on tenous grounds:

> 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 occured 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).

Contrary to Tri-County Roofing's assertions, Builders Mutual does not rely on dict[um] "that is buried in a footnote" in Newman. (Tri-County Roofing Initial Brief Pg. 11 of 17). Builders Mutual cited to the main text of Newman where 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. (*emphasis added*).
>
> 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)

[3] The federal court decisions are cited in Builders Mutual's Initial Brief.

> ("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.

While the Supreme Court expands on the above language in a footnote, Builders Mutual submits that the words in the main text are not dictum, and Builders Mutual cannot simply disregard the ruling as not having precedence. See Nash v. Tindall Corp., 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007). ("[D]ictum 'is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion by a court, but which, not being necessarily involved in the case, is not the court's decision.' ").[4]

Builders Mutual's reliance on Heritage Communities is not tenuous. In the underlying declaratory judgment action, for Heritage Communities, the Special Referee ruled that Harleysville Ins. Co. was obligated to pay the general verdict in part because the Special Referee did not believe he could parse the general verdicts for coverage purposes:

> 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.

Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294.

The Special Referee specifically cited to and relied on the paragraphs quoted above from Newman and stated the following: "[t]he [Supreme Court in Newman] refused to allow Auto-Owners to relitigate damages as have other courts. This Court likewise will not allow Harleysville to re-litigate the damages for to do so would be a clear invasion of the province of

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[4] The Honorable Alexander M. Sauders, Jr., once said, "[b]ut those who disregard dictum, either in law or life, do so at their peril." Yeager v. Murphy, 219 S.C. 485, n. 2, 488, 291 S.E.2d 393, 395, n. 2 (1987).

the jury." (Order of Special Referee in Heritage Communities, pg. 29-30). The Special Referee in Heritage Communities also found that the proffered evidence by experts for Harleysville Ins. Co., in the declaratory judgment action, to parse the general verdict, was irrelevant under Rule 401 and 402, SCRE. (Order of Special Referee in Heritage Communities, pg. 28). The Supreme Court did not criticize 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 300 n. 11. Builders Mutual submits that the Special Referee's ruling concerning parsing a general verdict was not a strained one and is in fact something that other judges grapple with in cases where there is a general verdict.[5] As it could not do with Newman, Builders Mutual could not simply disregard the legal consequenences to the insurer in Heritage Communities.

Tri-County Roofing misstates the contents of Builders Mutual's Initial Brief in stating that Builders Mutual cites to the dissent of Justice Costa M. Pleicones in Heritage Communities. (Tri-County Roofing Initial Brief Pg. 11 of 17). Builders Mutual does not cite to Justice Pleicones' dissent or otherwise discuss the dissent in its Initial Brief.

Tri-County Roofing disregards why Rule 24, SCRCP is not specifically addressed in Heritage Communities and Newman. Rule 24, SCRCP, and special interrogatories pursuant to Rule 49, SCRCP, were not issues in the appeal in Heritage Communities. Rule 24, SCRCP, and Rule 49, SCRCP, 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

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[5] Heritage Communities cites at least two federal court decisions that address how to deal with general verdicts and insurance coverage. Duke v. Hoch, 468 F.2d 973; Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491 (10th Cir. 1994).

option. (Order of Special Referee in Heritage Communities, pgs. 30, 31). Accordingly, Harleysville Ins. Co. could not raise the issue on appeal. Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962). In Newman, the Supreme Court raised the issue of allocating damages *sua sponte* in the Court's final decision and found that Auto-Owners Ins. Co. should have taken some affirmative action in the underlying arbitration to allocate the damages. See Newman, 385 S.C. at 198, 684 S.E.2d at 546-47. Like other insurers who have sought to intervene and circuit court judges who have agreed, Builders Mutual does not think it misconstrues Newman and Heritage Communities to require Builders Mutual to move to intervene.

D) Intervention Does Not Create a Conflict.

Intervention will not create a conflict in this case. First, Tri-County Roofing glosses over the fact that Tri-County Roofing retained additional counsel to represent Tri-County Roofing and appear in the underlying action. That counsel continues to represent Tri-County Roofing in this appeal. Whether retained counsel has a conflict or not is really immaterial in this civil action because of the appearance of additional counsel. There was not anything to prevent Tri-County Roofing, as a party, from utilizing Rule 49, SCRCP and asking the circuit court to submit special interrogatories to the jury.

As for retained counsel, Tri-County Roofing does not address Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 826 S.E.2d 270 (2019) and the Rules of Professional Conduct cited in Builders Mutual's Initial Brief. Builders Mutual submits that Sentry completely addresses the relation between an insurer and retained counsel and an insured. 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, 426 S.C. at 157, 826 S.E.2d at 271.

In situations where Tri-County Roofing's and Builders Mutual's interest diverge, Andrew Cole may not let Builders Mutual direct or regulate his professional judgment. Rule 1.8(f), RPC, Rule 407, SCACR; Rule 5.4(c), RPC, Rule 407, SCACR; Sentry, 426 S.C. at 160, 826 S.E.2d at 273. ("The attorney owes no separate duty to the insurer.").

Builders Mutual cannot require or direct retained counsel to request special interrogatories. Sentry, 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. After that, Tri-County Roofing must then rely on the advice of its own (here additional) counsel; and choose for itself whether to seek special interrogatories.

Builders Mutual does not submit that retained counsel take any action that is intended to benefit Builders Mutual to the detriment of Tri-County Roofing. No party, however, should be allowed to object to intervention simply to prevent intervention and later assert that an insurer is bound by a general verdict. See Heritage Communities, Inc., 420 S.C. at 356-57, 803 S.E.2d at 307-08. In cases where intervention is allowed, Sentry does mean that a retained defense counsel should challenge proposed interrogatories if those proposed are not supported by the evidence or record at trial. Retained defense counsel can and should also object if to do so is in the best interest of his client. It may be that defense counsel and counsel for Builders Mutual disagree on an interrogatory or the evidence. In this situation, there is a trial judge to decide the dispute and issue a ruling.

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

Builders Mutual filed a declaratory judgment action that is pending in the United States District Court.[6] The District Court can adjudicate "property damage" only after the verdict and, at which point, the District Court will know whether Tri-County Roofing is liable or not, and for how much, to Palmetto Pointe. Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 604, 748 S.E.2d 781, 791 (2013). However, the District Court is now faced with a general verdict as was the Special Referee in Heritage Communities. Accepting the logic of the special referee in Heritage Communities, Tri-County Roofing and Palmetto Pointe should not be able to parse a general verdict in a declaratory judgment action.

In the trial, the jury compromised the approximate $15,000,000.00 estimate and awarded $6,500,000.00 in actual damages against Tri-County Roofing.[7] (Verdict Form). Under these circumstances, the Special Referee in Heritage Communities would rule that it would be speculative and improper to allocate the verdict now or guess what the jury was thinking in rendering the $6,500,000.00 verdict. (Order of Special Referee in Heritage Communities, Pg. 31). Finally, 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).[8]

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[6] Civil Action No. 2:19-cv-01313-MBS pending in the United States District Court for South Carolina.

[7] The circuit court reduced the $6,500,000.00 verdict to $5,300,000.00 taking into account setoffs.

[8] 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.

Tri-County Roofing relies on Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965) to contend that Builders Mutual is protected in a subsequent declaratory judgment action. (Tri-County Initial Brief Pg. 15 of 17). The Supreme Court found in Sims that the insurer was not bound by a judge's decision, in an auto collision non-jury trial, that the insured was only negligent. Sims, 247 S.C. at 89, 145 S.E.2d at 526. The Supreme Court discussed that it would pose a conflict for the insurer to direct its retained counsel to argue that the insured acted intentionally and develop an exclusion to coverage for the insurer. Sims, 247 S.C. at 86, 145 S.E.2d at 525. In such circumstances, the insurer was not bound by the finding of negligence and could litigate in a later declaratory judgment insurance coverage action that the insured did act intentionally. Sims, 247 S.C. at 89, 145 S.E.2d at 526. To follow Sims, a South Carolina court will have to find that expert evidence in a declaratory judgment action is relevant and admissible to parse the general verdict and to do so is not speculative and improper – a retroactive look. Builders Mutual submits that the more recent decisions of the Supreme Court for construction defect claims and insurance do not permit the parties to do so.

Tri-County Roofing disregards the fact that Harleysville Ins. Co. relied on Sims in Heritage Communities to the detriment of Harleysville Ins. Co.[9] (See Order of Special Referee in Heritage Communities, pgs. 28-29, 30, 31).[10] Similarly, Tri-County Roofing does not address that in Newman, Auto-Owners Ins. Co. raised Sims and argued against intervention for

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[9] The Special Referee stated, "[u]nfortunately, Harleysville 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, pg. 22).

[10] The Special Referee stated, "Harleysville advised its insureds that if Harleysville 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).

allocating damages in the underlying construction defect claim; and the Supreme Court did not adopt this position. (See Petition for Clarification or Rehearing pg. 4).[11]

F) Intervention and Special Interrogatories Are Workable Civil Procedures.

Builders Mutual submits that Rule 49, SCRCP is a workable procedure, and a circuit court should not disregard the Rule because a case may be complex. The circuit court could have submitted interogatories to the jury to answer how much the jury awarded for the cost to remove and replace Tri-County Roofing's work and how much the jury awarded for water damaged other property. The evidence was in the record for the jury to do so. Contrary to Tri-County Roofing's statements or inferences, Builders Mutual submitted conceptual special interrogatories to the circuit court that were based on the actual pre-trial discovery in the underlying action. (Builders Mutual's Motion to Reconsider, pg. 17). The special interrogatories that the circuit court would *actually* submit to the jury would, of course, be based on the actual evidence and documents admitted as exhibits at trial. The actual special interrogatories in no way suggest insurance coverage to a juror.

Asking a jury to answer interrogatories is not nearly as complicated as other tasks required by juries in construction defect cases, including getting a jury to grasp building codes, industry standards and construction estimates. Further, after the general verdict in the underlying action, 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

[11] 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)

(5%) percent of the $6,500,000.00 general verdict to each. (Special Verdict Form). Albeit complicated, the jury was able to apportion the $6,500,000.00 verdict based on the evidence and documents admitted into evidence at trial. Morevover, Builders Mutual does not suspect that the jury thought that it was being asked to apportion damages for insurance reasons.

Tri-County Roofing does not address the fact that the task of allocating damages was practically completed before the trial based on Palmetto Pointe's estimate that it would ultimately present to the jury. (Estimate, Trial Exhibit 677, pgs. 2-11). Palmetto Pointe submitted its estimate at trial for the jury to award it approximately $15,257,512.00. (Estimate Trial Exhibit 677). As the Supreme Court can see, Trial Exhibit 677 is a detailed line item estimate and includes a itemization of the costs for repairs that track the principles in Newman and Crossmann. (Trial Exhibit 677).

To illustrate the itemization and relation to insurance coverage, one can see on page 3 of the estimate that there are cost entries under the "Demolition" (1730.00) entry. Under 1736.010, there is an entry for "remove exterior sheathing and studs (assumed 20% damage)". The direct cost to do this work is $46,488.00. Under Crossmann and Newman, this cost may be an insured sum because it is moisture damaged sheathing underneath Tri-County Roofing's alleged faulty siding installation. Under 1736.01, the second entry is "remove exterior (hard) siding". The direct cost to do this work is $64,740.00. On page 7, there is an entry entitled "hardi-siding" (6491.010), which is the direct cost to replace the siding or Tri-County Roofing's alleged defective work. The direct cost in this entry total $329,470.00. Under Crossmann and Newman, the costs to remove and replace Tri-County Roofing's alleged faulty construction are not insured losses.

The foregoing sample itemization illustrates how the damages relate to insurance coverage – which the jury will very likely not know and should not know. See Duke v. Hoch, 468 F.2d at 979 ("A request for indentification of the two types of damages reveal neither the precence of insurance nor the amount of coverage."). The parties could highlight line item costs for the jury that can be reasonably understood and support answers to special interrogatories. Yes, the task will require additional work and may be complicated – in the way that apportioning the $6,500,000.00 verdict among the parties was complicated.[12] However, the altenative is a general verdict. Builders Mutual submits the task of answering special interrogatories is no less difficult for a jury in the underlying action to do than it is for a jury to allocate the damages in a later declaratory judgment - *if* South Carolina law allowed a party to parse a general verdict in a declaratory judgment action.

Tri-County Roofing argues that the evidence may not be in the record in some cases; thus, there will be no evidence to support the use of interrogatories. First, this argument is a theoretical one because the evidence was in the record for the underlying action. Second, if not in the record, the answer is otherwise 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 is incumbent upon the parties, Palmetto Pointe or Tri-County Roofing, to make a record with enough evidence on the

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[12] Duke, 468 F.2d at 979 ("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.").

allocation of damages that does not leave a court hearing a declaratory judgment action with only a general verdict. They are the named parties in the civil action. Palmetto Pointe has the burden of proof on damages in the construction defect case, and Palmetto Pointe and Tri-County are the parties seeking insurance coverage for those damages. At trial in the construction defect case, the parties can decide how much or how little evidence to present to a jury. If the parties fall short, then the parties should bear the consequences – not Builders Mutual.

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

Tri-County Roofing does not address the legal consequences of Tri-County Roofing objecting to intervention and the decisions cited by Builders Mutual on the law of estoppel. Tri-County Roofing should be estopped from contending that Builders Mutual is bound by the general verdict. See Heritage Communities, 420 S.C. at 356, 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 corollary is that Tri-County Roofing should be estopped now from attempting to parse the general verdict.

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

Tri-County Roofing does not address Builders Mutual's argument that the circuit court erred in lifting the automatic stay when the circuit court lacked jurisdiction to do so. 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).[13] As such, the Supreme Court should rule that the circuit court lacked jurisdiction to lift the automatic stay, and proceed to trial and a jury verdict against Tri-County Roofing.

III. THE CIRCUIT COURT ORDERS ARE IMMEDIATELY APPEALABLE BECAUSE THEY AFFECT A SUBSTANTIAL RIGHT; AND BUILDERS MUTUAL HAS STANDING TO APPEAL.

As mentioned in the introduction to this reply, Tri-County Roofing includes a randomly inserted page thirty-one (31) in its Initial Brief. Tri-County Roofing appears to address interlocutory appeals and standing to appeal therein. First, the circuit court orders denying the motion to intervene are not interlocutory and are immediately appealable as matters involving a substantial right. S.C. Code Ann. § 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 Ann. § 14-3-330(2)) (emphasis added). Interpreting precisely the same statutory language,[14] the South Carolina

[13] 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.

[14] *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

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 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 is 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 is 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

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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...."

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.

Second, Tri-County Roofing appears to argue that Builders Mutual has no standing to appeal. Rule 201, SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence may appeal." First, the focus of Rule 201, SCACR, is on whether an appellant is someone *aggrieved* by an order. A party is aggrieved by an order when it operates on his or her rights of property or bears directly on his or her interest. Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (Hearn, C.J.) citing Cisson v. McWhorter, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970); Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation. Id. The circuit court orders do aggrieve Builders Mutual and affect its property and interest. The financial consequences of being forced to pay an entire judgment versus the amounts that are actually insured for a construction defect claim are significant and materially affect Builders Mutual's property and interest, clearly making Builders Mutual an aggrieved party.

Tri-County Roofing cites Ex Parte Condon, 354 S.C. 634, 583 S.E.2d 430 (2003) for its position that only a named party to the civil action may appeal an order. In Ex parte Condon, this Court dismissed an appeal by the South Carolina Attorney General pursuant to Rule 201, SCACR. The Attorney General was neither a party to the civil action nor the recipient of the

specific ruling that was being appealed in the civil action. The Attorney General's interest in the civil action was only a general one, based on his position as a state officer, and his belief that he was charged to protect the interest of South Carolina citizens at large. Ex parte Condon, 354 S.C. at 640, 583 S.E.2d at 433. Builders Mutual's particularized interest in the circuit court order is very different from the Attorney General's interest in Ex parte Condon. Builders Mutual submits that it is a "party" for purposes of Rule, 201(b) because it brought the motion giving rise to the order that is the subject of this appeal. As a result, Builders Mutual is clearly a party that was aggrieved by the ruling that is the subject of this appeal.

Ex parte Condon does not proscribe appeals by non-parties in all cases. Were that true, then even if the Attorney General had moved to intervene and been denied, he would have had no means of redress, as he would still not be a party to the suit. Such an outcome would be inconsistent with existing South Carolina law. See Berkeley Electric, 302 S.C. 186, 394 S.E.2d 712 (non-party whose motion to intervene was denied allowed to appeal); Ex Parte Johnson, 63 S.C. 205, 41 S.E. 308 (1902) (same). "Generally, the only persons who may appeal include a party to the action or proceeding below, *or to the judgment or order*, a legal representative of a party, or a person having privity of estate, title, or an interest that appears from the record." 4 C.J.S. Appeal and Error § 242 (2012). The term "party" is not narrowly construed by law:

> The term 'party' in a statute has been construed, not in the technical sense as necessarily importing a litigant before the court in the proceeding in which the judgment or order was rendered, but as including any one on whose interest it has a direct tendency to inure, and it has been held that one not a 'party' may nevertheless be a 'party aggrieved' within statutes governing the right of review. A statute granting a right to appeal by a person aggrieved has been given a liberal construction with regard to the word 'person,' as including a nonparty."

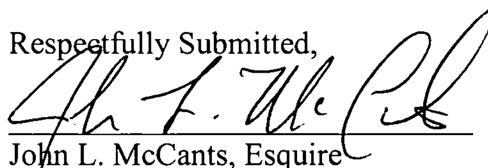
4 C.J.S. Appeal and Error § 242 (2012).

Rule 201(b), SCACR, has not been interpreted by our Supreme Court to require that an aggrieved party be a named party to have standing to appeal. See, e.g., Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986). Reading Rule 201, SCACR to require that one must always be a named party to a civil action to institute an appeal disregards the situation where a non-party is specifically aggrieved by an order or judgment of the court, as is the case for Builders Mutual in this matter.

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 and proceed to trial.

Respectfully Submitted,



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October 7, 2019

THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

RECEIVED
OCT 02 2019
S.C. 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, 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.

APPELLANT BUILDERS MUTUAL INSURANCE COMPANY'S PROOF OF SERVICE OF INITIAL REPLY BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY TO INITIAL BRIEF OF RESPONDENT TRI-COUNTY ROOFING, INC.

I certify that I have served Initial Reply Brief of Appellant Builders Mutual Insurance Company to Initial Brief of Respondent Tri-County Roofing, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on **October 2, 2019** addressed to their attorneys of record, listed as follows:

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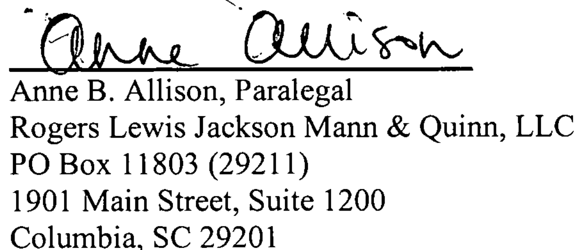

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