THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 15 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 and
Nationwide Mutual 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; TriCounty 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.; WC Services, Inc.; CRG Engineering, Inc.; Certainteed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60, Defendants,

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

v.

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

And

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

v.

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

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

INITIAL BRIEF OF PLAINTIFFS-RESPONDENTS

**Counsel identified on following page*

Justin O. Lucey
Joshua F. Evans
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mt. Pleasant, South Carolina 29464
P.O. Box 806 (29465)
(843) 849-8400

Attorneys for Plaintiffs-Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

This is *construction* litigation. Specifically, it is an action for money damages because of numerous construction defects (e.g., building code violations, deviations from industry standards etc.) throughout a 40-unit townhome complex (the "Complex"). This case is *not* about determining *insurance coverage*, but about determining the merits of the issues (claims and defenses) raised by the pleadings of the various named parties, i.e., the actual litigants themselves.

The named parties are those typical of multi-family construction-defect cases: owners (i.e., Plaintiffs[1]), the developer, the general contractor, lower-tier contractors, manufacturers, suppliers. Not one of them is an insurance company. The issues raised are likewise typical: Do the alleged construction defects exist? If so, how much damage did they cause? Who, if anyone, is liable for the damage? What it is the dollar amount of that liability? Should punitive damages be awarded? Not only are these issues capable of full and fair adjudication without any consideration of insurance coverage, their just adjudication depends on it.

Yet, this case is now before this Court on appeal at the insistence of two

[1] "Plaintiffs" refers to Plaintiffs-Respondents, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. (the "POA"), and Jack Love ("Mr. Love"), individually and on behalf of all others similarly situated.

insurance companies, Builders Mutual[2] and Nationwide Mutual[3] (collectively, "Appellants"), neither of them a party, neither of them having ever really even sought to become a "party" to begin with. To be clear, Appellants do not contend that the trial court wrongfully kept them out of this case as parties per se. Rather, they argue that the court erred in denying their so-called motions to "intervene," supposedly made "pursuant to Rule 24, SCRCP," for the "limited purpose" of participating in the drafting of a verdict form on which the jury would allocate any liability found against their respective insureds between covered and non-covered damages. (*See generally* Builders Mutual Mot. to Intervene; Nationwide Mutual Mot. to Intervene.)

As explained below, the trial court committed no reversible error in denying Appellants' motions to "intervene," and their appeal is without merit.

---

[2] "Builders Mutual" refers to Appellant Builders Mutual Insurance Company.

[3] "Nationwide Mutual" refers to Appellant Nationwide Mutual Insurance Company.

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying Appellants' motions to "intervene"?

A. Does Rule 24 even authorize the "limited" intervention Appellants sought: where the intervenor is granted some sort of quasi-party status, pleading no claim or defense and exempted from the discovery process but nonetheless able to affect the outcome of the case via the verdict form? And even if so, did Appellants comply with Rule 24 in any event?

B. Do this Court's decisions in *Newman*[4] and *Heritage*[5] require an insurer to intervene in an underlying action in order to establish facts for allocating between covered and non-covered damages? Is such a practice workable in any event?

C. Is it not the better—and indeed, under *Sims*,[6] the existing—practice for the underlying trial to proceed on the merits without insurer interference, but without prejudice to the insurer's right to a full and fair determination of any lingering insurance coverage issues in a separate adversarial proceeding in which it is a full-fledged party subject to the same governing procedural and evidentiary rules as the other parties?

II. Did the trial court err in proceeding with the trial of the underlying case despite the pendency of this appeal?

---

[4] *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009).

[5] *Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017).

[6] *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 134 S.E.2d 523 (1965).

COUNTER-STATEMENT OF THE CASE

This case was filed in the Charleston County Court of Common Pleas on February 13, 2015. (Summons; Compl.) The operative complaint (the "Complaint") is Plaintiffs' second amended complaint, filed November 2, 2017. (2d Am. Compl.) With the POA proceeding both as the entity responsible for common-element maintenance and as assignee of individual unit owners and Mr. Love proceeding both individually and as class representative for his fellow unit owners, the Complaint asserts various causes of action for money damages (actual and punitive)[7] because of numerous defects in the Complex's construction. (*See generally Id.*) Between the two of them, Plaintiffs sought recovery for all harm to all interests, common and individual, arising out of the alleged construction defects. (*See generally Id.*)

Plaintiffs' claims were directed against numerous named defendants, comprising the Complex's developer and various contractors (the general, subs, and sub-subs), manufacturers, and suppliers. Chief among those defendants for present purposes are Builders Mutual's insured, Tri-County Roofing, Inc. ("Tri-County"), and Nationwide Mutual's insured, WC Services, Inc. ("WC Services").

[7] The Complaint also includes a cause of action for equitable relief in the form of a declaratory judgment and/or reformation with respect to the Complex's master deed, as well as standard requests for all allowable fees, costs, and interest, and such further relief as the court deems just and proper.

On March 27 and May 7, 2018, respectively, Builders Mutual and Nationwide Mutual filed motions, supposedly "pursuant to Rule 24," whereby they sought to "intervene" in this case for the "limited purpose" of trying to have the jury make factual findings to allocate their insured's liability between covered and non-covered damages. (*See generally* Builders Mutual Mot. to Intervene; Nationwide Mutual Mot to Intervene.) Neither of them submitted "a pleading setting forth the claim or defense for which intervention [was] sought" as required by Rule 24.

The trial court heard Appellants' motions to "intervene" on December 17, 2018, the Honorable Jennifer B. McCoy presiding. (*See generally* 12/17/18 Hr'g Tr.) Plaintiffs opposed the motions,[8] as did Tri-County, through its personal counsel. (12/17/18 Hr'g Tr. pp. 26:8–28:11.) The attorneys Appellants had appointed to defend their insureds ("Appointed Counsel")), however, were not comfortable taking any position on the motions:

Appointed Counsel for Tri-County

> I was retained by several insurance policies to defend Tri-County in this case. We had a construction law CLE about a week ago where this topic was one of the topics. And we had a heated discussion about what my role here as defense counsel for the insurer and hired by the insurance copy should be and whether or not we

[8] (*See Id.*; Pls.' Mem. in Opp'n to Mots. to Intervene, filed December 14, 2018.)

> should oppose it or whether or not we should stand for the insurance company.
>
> I will tell you I am not comfortable taking either of those positions. So officially -- because I don't think the answer is answered with any of the case law of what I should do, since I am in an inherent conflict of interest between my insurance carrier and my client.
>
> So officially I'm standing up to say *I'm not taking a position in this*, and I hope that whatever ruling we get it doesn't overcomplicate the trial. That's all I have.

(12/17/18 Hr'g Tr. pp. 28:22–29:13 (emphasis added).)

Appointed Counsel for WC Services

> My client in the case is [WC] Services. . . . [T]hey're insured by Nationwide [Mutual]. And as was previously stated by [Appointed Counsel for Tri-County] with respect to what you are hearing on the various motions to intervene, including one that has been filed by Nationwide [Mutual], *I am taking no position on the issue.*

(12/17/18 Hr'g Tr. p. 39:17–23 (emphasis added).)

The trial court denied the motions by order filed December 18, 2018,[9] and thereafter denied Appellants' motions for reconsideration by order filed January 17, 2019. (Form 4 Order filed January 17, 2019.) This appeal followed.

With the case more than four years old and more than six months past the trial-not-before date in its operative scheduling order (the fourth amended), it was

[9] (Form 4 Order filed December 18, 2018.)

set for a two-week, date-certain trial beginning May 6, 2019. Despite Appellants' attempt to stop it, and with the Court of Appeals' express authorization, the trial duly proceeded, notwithstanding the pendency of this appeal. (Ct. App. Order filed May 1, 2019 ("Appellants' motions requesting that this court stay the trial scheduled to begin May 6, 2019 are denied. The trial may proceed as scheduled.").)

STANDARD OF REVIEW

The decision to grant or deny a motion to intervene in an action pursuant to Rule 24 lies within the sound discretion of the trial court. *See Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990); *Hunnicutt v. Rickenbacker*, 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977). "This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006). Insofar as this appeal presents a pure issue(s) of law, however, "[t]his Court is free to decide questions of law . . . with no particular deference to the trial court." *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014).

ARGUMENT

I. The trial court did not err in denying Appellants' motions to "intervene."

A. Rule 24 does not even authorize the "limited" intervention Appellants sought: where the intervenor is granted some sort of quasi-party status, pleading no claim or defense and exempted from the discovery process but nonetheless able to affect the outcome of the case via the verdict form. But even if it did, Appellants did not comply with Rule 24 in any event.

There are two types of intervention under Rule 24: intervention of right and permissive intervention. Intervention of right is addressed subsection (a), which provides as follows:

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

Accordingly, to be successful, an applicant for intervention of right must first timely apply and then, absent a statutory right to intervene, show that they have an interest relating to the property or transaction that is the subject of the action, that disposition of the action may impair or impede their ability to protect that interest, and that their interest is not already adequately represented by an existing party(ies). *See* Rule 24(a). Failure to establish even one of these

requirements precludes intervention. *Ex Parte Reichlyn*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993) (denying intervention motion due to untimeliness and declining to review remaining Rule 24(a)(2) factors because "failure to satisfy any one of the four requirements precludes intervention").

It is axiomatic that a party must have standing to intervene in an action pursuant to Rule 24. *Ex Parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 137, 644 S.E.2d 699, 701 (2007) ("*GEICO*"). Moreover, the trial court "must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2)." *Berkeley Electric Co-op.*, 302 S.C. at 189, 394 S.E.2d at 714; *see also GEICO*, 373 S.C. at 138, 644 S.E.2d at 702 ("[T]he Court should consider the practical implications of a decision denying or allowing intervention."). "Each case [must] be examined in the context of its unique facts and circumstances." *Berkeley Electric Co-op.*, 302 S.C. at 189, 394 S.E.2d at 714.

Permissive intervention of right is addressed subsection (b), which provides as follows:

> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original

parties.

Our court of appeals has likened permissive intervention to permissive joinder, stating, "It seems clear the better rule is that permissive intervention should be allowed *only where the prospective intervenor has a cause of action or defense it could bring or assert.*" *S.C. Tax Comm'n v. Union County Treasurer*, 295 S.C. 257, 263, 368 S.E.2d 72, 76 (Ct. App. 1988).

Regardless of whether intervention is sought of right or by permission, subsection (c) of Rule 24 sets forth the following procedure:

> **(c) Procedure; Notice to State When Validity of Statute Questioned.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the ground therefor and *shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.* The same procedure shall be followed when a statute of this State gives a right to intervene. When the constitutionality of a statute is drawn in question in any action in which the State or an officer, agency or employee thereof is not a party, the party shall also serve the motion on the Attorney General.

Although styled as motions to "intervene" "pursuant to Rule 24," in point of fact, Appellants' motions were no such thing, their substance and effect being something altogether different from the concept of intervention under Rule 24. Appellants did not ask to be made "parties" to this case, only to be recognized—albeit in some unnamed, non-pleading, discovery-exempt capacity—as having a status that would allow them, at such future time as the matter was to be taken up

during trial, to voice input about what the verdict form should look like[10]—and, to be clear, not about what it should look like in respect of any issue necessary to the determination of the subject matter actually before the trial court, but solely in respect of tangential matters of insurance coverage. *See, e.g., GEICO*, 373 S.C. at 137, 644 S.E.2d at 701 ("In this case, the family court had no need to ascertain or settle [the insurance company's] rights before it determined the rights of [the parties] in their action to recognize their common law marriage."); *id.* at 138–39, 644 S.E.2d at 702 ("[The insurance company's] interest is in the *financial implications* of the family court's decision, *which is peripheral to the subject matter before the court.*") (emphasis added); *id.* at 139, 644 S.E.2d at 703 ("[T]he subject matter of the family court action in the instant case is the validity of a common law marriage, *which does not involve a determination of insurance benefits.*") (emphasis added).

Here, Appellants' argument really boils down to their supposed right to intervene pursuant to *Newman*, 385 S.C. 187, 684 S.E.2d 541, and *Heritage*, 420 S.C. 321, 803 S.E.2d 288. Appellants' misapprehension of these cases—i.e., why do not, and, most respectfully, cannot, mean what Appellants' say—is addressed below. For now, though, Plaintiffs would make this more simple point: The plain

[10] (*See* generally Builders Mutual Mot. to Intervene; Nationwide Mutual Mot. to Intervene.)

language of Rule 24(a)(1) refers to a right of intervention that is conferred by "statute," not by case law. Consequently, neither *Newman* nor *Harleysville* could have possibly conferred upon Appellants an "unconditional right to intervene" under Rule 24(a)(1).[11]

And Rule 24(a)(2) is likewise unavailing to Appellants because its plain language requires the intervenor to claim "an interest relating to the property or transaction *which is the subject of the action*." (emphasis added). Seeking, as they did, but "limited" intervention in this "underlying"[12] case—wherein they would not raise any claim or defense or, for that matter, even be known to the trier of fact—Appellants must necessarily concede that they do not have an interest in the actual subject matter of this action. But in any event, this Court has already determined that an insurer's interest in the financial implications of a lawsuit in which it does not itself have any claim or defense is insufficient to warrant intervention under Rule 24(a)(2). *GEICO*, 373 S.C. at 138–39, 644 S.E.2d at 702 ("We find that [the insurance company] does not have 'an interest relating to the property or transaction which is the subject of the action' as required by Rule 24(a)(2), SCRCP. Additionally, we hold that the family court correctly found [the insurance

[11] Likewise, neither decision could have conferred have possibly conferred upon Appellants a "conditional right to intervene" under Rule 24(b)(1), which, even in the context of permissive intervention, speaks solely in terms of "statut[ory]" rights.

company] lacked standing because *[the insurance company] does not have an interest in the subject matter of the family court action.* Stated differently, [the insurance company] has no real interest in whether Cooper and Goethe have a valid common law marriage. *[The insurance company's] interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court. This interest is insufficient to warrant [the insurance company's] intervention in Cooper's family court action under Rule 24(a)(2), SCRCP.*") (emphasis added). Indeed, even the plain language of Rule 24(b)(2), governing permissive intervention, requires that the "applicant [for intervention] [has a] claim or defense *in the main action* . . . ." (emphasis added).

Moreover, the plain—and mandatory—language of Rule 24(c) expressly requires that a motion to intervene "*shall* be accompanied by a pleading *setting forth the claim or defense for which intervention is sought.*" (emphasis added). The fact that Appellants did not do this shows that they did in fact fail to comply with Rule 24. The fact that they could not possibly have done this (i.e., that they did not actually have any claim or defense to plead) shows that they do not have a sufficient interest in this case's subject matter to intervene under Rule 24. And the fact that Rule 24 affirmatively requires a would-be intervenor to plead their claim or defense shows that Appellants' attempt at "limited" intervention here was

---

[12] (*E.g.*, Br. of Nationwide Mutual at Statement of Issues on Appeal Issue I.)

simply misplaced from the start.

B. *Newman* and *Heritage* do not require an insurer to intervene in an underlying action in order to establish facts for allocating between covered and non-covered damages. And such a practice would be unworkable in any event, creating an impermissible conflict of interest and unduly interfering with the proper adjudication of the on the merits.

In his dissent in *Heritage*, former Chief Justice Pleicones noted, "To the extent the majority relies upon *Newman* to suggest [the insurer] is 'at fault in not seeking an allocation of covered damages,' . . . there is no suggestion how [it] could have intervened in the[] [underlying] lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law." 420 S.C. 321, 363, 803 S.E.2d 288, 311 (2017) (Pleicones, J., dissenting) (citing *Sims*, 247 S.C. 82, 145 S.E.2d 523). Most respectfully, *to the extent the Heritage majority was indeed relying on Newman in this way*, Justice Pleicones makes a good point.

Even though Justice Pleicones was writing in dissent, *Sims* itself is still good law. *Sims* addressed the extent to which an insurer is bound in respect to the question of coverage by facts found in the underlying action against its insured. While acknowledging the general rule that, yes, "where an insurance company has notice and opportunity to defend an action against its insured, the company is bound by pertinent material facts established against its insured, whether it appears in the defense of the action or not," 247 S.C. at 84–85, 145 S.E2d at 524, the *Sims*

Court recognized that this rule can only apply where the respective interests of the insurer and the insured in opposing the claim against the insured are identical, i.e., it can only apply where there is not a conflict of interest between the insurer and the insured, and that there is a conflict of interest between them—such that the rule cannot apply—where the insurer "cannot defend the insured . . . and at the same time protect its own interests." *Id.* at 88, 145 S.E.2d at 525–26. The very fact that Appellants have sought to "intervene" for the purpose of protecting their own interests is proof positive that this conflict exists here—a point which Appointed Counsel's inability to even take a position on Appellants' motions in the trial court well illustrates.

And more recently, in *Sentry Select Insurance v. Maybank Law Firm, LLC*, 426 S.C. 154, 826 S.E.2d 270 (2019), while holding that an insurer can bring a direct action for legal malpractice against the defense counsel it retained to defend its insured, this Court addressed concerns that allowing such an action would divide the attorney's loyalty between the client and the insurer. In overcoming those concerns, the Court underscored that it is the insured, not the insurer, who is the attorney's client; that it is the insured, not the insurer, to whom the attorney owes fiduciary responsibilities; and that it would be a violation of the South Carolina Rules of Professional Conduct for the attorney to permit the insurer to interfere with the attorney's independent professional judgment or the client-

lawyer relationship. *See Id.* at 160, 826 S.E.2d at 273.

If indeed the "limited" intervention Appellants sought is required, how would it—indeed, how *could* it—actually work in practice? Any verdict a jury renders must, of course, be based on the evidence presented. *See Bultman v. Barber*, 277 S.C. 5, 281 S.E.2d 791 (1981) (verdicts may not be permitted to rest upon surmise, conjecture or speculation). And, by definition, an intervening insurer would want the jury to answer a question(s) that it otherwise would not have had to answer, i.e., question(s) unnecessary to a determination of the merits, which, but for the injection of insurance coverage matters into the case, never would have been asked. Would not this require additional evidence to be presented to the jury that otherwise would not have had to be presented? If so, who is supposed to introduce, or object, to this evidence (whether documentary or testimonial)? Surely, Appointed Counsel cannot be involved in this, given the conflict of interest; but, of course, the insurer's coverage counsel cannot appear before the jury. *See* Rule 411, SCRE ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully."). And this is to say nothing of the rights of all parties—including, of course, plaintiffs, and other defendants for whom coverage is not an issue—to have their respective claims and defenses fairly determined in a proceeding free of undue complexity, confusion, and improper

influence. *Cf. Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); Rule 1, SCRCP ("These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.").[13]

---

[13] Both South Carolina courts and other jurisdictions recognize insurer intervention is inappropriate, even for the limited purpose of posing special interrogatories. *See S. C. Tax Com. v. Union County Treasurer*, 295 S.C. at 262, 368 S.E.2d at 75 (affirming denial of intervention, noting permissive intervention is premised on the theory that when claims or defenses share common questions of law or fact and is only practical when it would effectively eliminate the need for a duplicative proceeding); *accord Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2nd Cir. 1984) (affirming denial of insurer intervention when insurer argued "that a general verdict would make difficult, if not impossible, a precise determination as to the allocation of the jury's award and alleged that its intervention would not delay or impede the action" because, inter alia, the insurer had no great need for the relief sought and intervention by an insurer who supplied the insured's attorney could deter a settlement or could create a conflict of interest); *High Plains Coop. Ass'n v. Mel Jarvis Constr. Co., Inc.*, 137 F.R.D. 285 (D. Neb. 1991) (same); *Universal Underwriters Ins. Co. v. E. Cent. Alabama Ford-Mercury, Inc.*, 574 So. 2d 716 (Ala. 1990) (affirming trial court's denial of the motion to intervene, reasoning "when an insurer refuses to defend or defends under a reservation or rights, the insurer is not precluded from determining the coverage issue in a declaratory judgment action either before or after the resolution of the underlying action"); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Bakker*, 917 F.2d 22 (4th Cir. 1990) (Unpublished Disposition) (reasoning that if the insurer

Having said all this, given the obvious importance of Justice Pleicones's point *if* the *Heritage* majority were relying on *Newman* in the way he questions, the only reasonable conclusion that can be drawn from the fact that the majority did not address it is that the majority was *not* relying on *Newman* in that way. *Cf. State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature, or would defeat the plain legislative intention; and if possible will construe the statute so as to escape the absurdity and carry the intention into effect." (quoting *Stackhouse v. Rowland*, 86 S.C. 419, 422, 68 S.E. 561, 562 (1910))).

Moreover, as referenced above, in *GEICO*, 373 S.C. 132, 644 S.E.2d 699, a decision which neither *Newman* nor *Heritage* addresses, much less overrules, this Court flatly held that an insurer's mere financial interest in the outcome of litigation is insufficient to warrant intervention. *GEICO* was an insurance company's appeal of the family court's denial of its motion to join (pursuant to Rule 19, SCRCP) or intervene (pursuant to Rule 24) in a proceeding involving the validity of a common law marriage between Ronnie Cooper ("Cooper") and

---

were allowed to intervene in the underlying action in which its insureds are parties, the court "would be concerned with [the insurer's] intolerable position in the litigation that is potentially hostile to its own insureds").

Yolanda Goethe ("Goethe"). *Id.* at 134, 644 S.E.2d at 700. The insurance company had issued an auto insurance policy to Goethe under which Cooper claimed he was a Class I insured, and therefore entitled to stack its UIM coverage, because of his common law marriage to Goethe. *Id.* It was after the insurance company denied his claim to stack coverage that Cooper filed the family court proceeding (seeking an order validating his common law marriage to Goethe) into which the insurance company sought to join or intervene. *Id.* Despite the insurance company's contention that "the family court's decision on the parties' common law marriage would impact [its] ability to protect its interests under the insurance policy issued to Goethe," the family court denied the insurance company's motion. *Id.* at 135, 644 S.E.2d at 700.

In affirming the lower court's denial of the insurance company's motion to join or intervene, this Court held that, "although [the insurance company] may be affected by the outcome of the family court action,"[14] its interest in the family court was nonetheless insufficient to meet the requirements for joinder or intervention, explaining that the insurance company had "no real interest in the subject matter before the family court," only an "economic interest under the Goethe policy [that was] merely tangential to the family court action." *Id.*; *see also id.* at 138–39, 644 S.E.2d at 702 ("We find that [the insurance company] does

[14] *Id.* at 136, 644 S.E. 2d at 701.

not have 'an interest relating to the property or transaction which is the subject of the action' as required by Rule 24(a)(2), SCRCP. Additionally, we hold that the family court correctly found [the insurance company] lacked standing because [the insurance company] does not have an interest in the subject matter of the family court action. Stated differently, [the insurance company] has no real interest in whether Cooper and Goethe have a valid common law marriage. [The insurance company's] interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court. This interest is insufficient to warrant [the insurance company's] intervention in Cooper's family court action under Rule 24(a)(2), SCRCP.").

The United States District Court for the District of South Carolina[15] reached the same conclusion in the federal context with facts parallel to those at hand:

> [The insurance company] contends that because it would be required to fund at least part of Plaintiff's recovery *if* coverage under the Policy exists, it is the real party in interest and thus has an interest in the subject matter of this action. By this very statement, however, [the insurance company] acknowledges that is nothing more than a contingent interest in the present action as there has yet to be an adverse coverage determination by this Court in the declaratory judgment action filed by [the insurance company] on April 8, 2013. *[The insurance company] does not have an interest in the subject matter of this action, that is, Mr. Lewis's allegedly negligent operation of the Boat that, in turn, led to Mrs. Lewis's*

[15] South Carolina Rule 24 and Federal Rule 24 are identical in substance.

> *tort claim for damages against Defendants. Instead, [the insurance company's] interest is the amount it may have to pay Defendant Excel if Plaintiff wins. Stated differently, [the insurance company's] interest is in how much of any future award may be attributable to damages contemplated by the policy*. . . . In so holding, the Court is also persuaded by the well-established policy of preventing insurers who reserve the right to deny coverage from controlling the defense brought against its insured.

Lewis v. Excel Mech., LLC, 2013 WL 3762904 at *2 (D.S.C. July 16, 2013) (internal citations omitted) (emphasis added).[16]

Appellants do not have an interest in the property that is the subject of this action—Plaintiffs' homes. They do not have an interest in the underlying transaction that is the subject of this litigation—the development and construction of Plaintiffs' homes. They do not have any claim or defense to assert in the action. As in *GEICO*, the trial court properly denied intervention here. Appellants

[16] Courts sitting in other jurisdictions have similarly found that an insurer does not have a "direct, substantial, and protectable interest" in intervening for the limited purpose of proposing special interrogatories or submitting special verdict forms to the jury so that the theories on which the jury's verdict is based can be determined. *See, e.g., Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989) (affirming district court's rejection of insurer's claim to intervention as of right) (affirming district court's rejection of insurer's claim to intervention as of right); *Cooke v. Town of Colorado City, Ariz.*, 2013 WL 5302194 at *4 (D. Ariz. Sept. 19, 2013) (denying intervention of insurer when the insurer's interest in the litigation was limited to questions of coverage); *Folkstone Mar., Ltd. v. CSX Corp.*, 1989 WL 165059 at *4 (N.D. Ill. Dec. 28, 1989) ("The Insurer's interest arises solely from their contract with CSX, and the Insurers concede that their right of subrogation does not ripen until they have made a payment to CSX under the insurance contract"); *E. Cent. Alabama Ford-Mercury, Inc.*, 574 So. 2d at 722.

had/have no interest in the subject matter of this construction-defect litigation, only an economic interest under their respective insurance policies that was merely "tangential" and "peripheral" to the issues actually before the trial court.

C. The better practice—which is already what is called for under *Sims*—is for the underlying trial to proceed on the merits without insurer interference, but without prejudice to the insurer's right to a full and fair determination of any lingering insurance coverage issues in a separate adversarial proceeding in which it is a full-fledged party subject to the same governing procedural and evidentiary rules as the other parties.

As Nationwide Mutual itself makes clear, "[its] motion to intervene was made reluctantly," and "[t]he primary relief sought [in its appeal] is a ruling that reaffirms *Sims* and overrules *Newman* and *Harleysville* to the extent they conflict with *Sims*," adding, "[s]uch a ruling would moot [its] motion to intervene and this appeal." (Br. of Nationwide Mutual p. 24.) On this point, Plaintiffs and Nationwide Mutual are agreed, and Plaintiffs, too, would ask the Court to confirm *Sims's* validity and clarify that *Newman* and *Heritage* do not require insurer intervention or otherwise unduly inject needless considerations of insurance coverage into underlying proceedings.

II. The trial court did not err in proceeding with the trial of the underlying case despite the pendency of this appeal.

The mere fact that a notice of appeal is served does not necessarily have any jurisdictional consequence at all. It is only a proper appeal, i.e., an appeal taken from an order or decision that the aggrieved party (the appellant) actually has a

right to immediately appeal, that affects jurisdiction—and even then only as to matters affected by the appeal. *S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986) ("Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay proceedings in the lower court."); *see also* Rule 205, SCACR ("Nothing in these Rules shall prohibit the lower court from proceeding with matters not affected by the appeal.").

As this Court is well aware, the right to appeal is controlled by statute. Here, the pertinent statute is S.C. Code Ann. § 14-3-330, and the only conceivable question about its applicability is whether its "substantial right" provision was implicated by the trial court's denial of Appellants' motions to "intervene." The answer is no.

As explained above, what Appellants styled as motions to "intervene" were in fact nothing of the sort. What they challenge on appeal is not the denial of their requests to "intervene," but of their requests to be heard (not even necessarily to be agreed with) during trial as to the form of a verdict that their names would not be on, in respect of matters of insurance that were not before the court. The relief Appellants sought in their motions to "intervene" was not something that they had a right to under South Carolina law. *See GEICO*, 373 S.C. 138–39, 644 S.E.2d at 702 ("[A] party must have standing to intervene in an action pursuant to Rule 24 . .

. . A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a real party in interest. . . . We find that [the insurer] does not have an interest relating to the property or transaction which is the subject of the action . . . . Additionally, we hold that the family court correctly found [the insurer] lacked standing because [the insurer] does not have an interest in the subject matter of the family court action. Stated differently, [the insurer] has no real interest in whether Cooper and Goethe have a valid common law marriage. [The insurer's] interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court. This interest is insufficient to warrant [the insurer's] intervention . . . . .") (internal citations and quotation marks omitted) (emphasis added)).

Logic dictates that a right must first exist before it can be denied. Because the supposed substantial right upon which this appeal depends does not in fact exist, it was not—nor, of course, could it possibly have been—denied. Consequently, the trial court properly determined to proceed with the trial of this case because the appeal does not have, nor in fact has it ever had, any impact on that court's power to hear and determine this case.

Moreover, the question of the trial court's ability to proceed with the trial was directly raised to the Court of Appeals before trial, and that court expressly authorized the trial to go forward. (Ct. App. Order filed May 1, 2019

("Appellants' motions requesting that this court stay the trial scheduled to begin May 6, 2019 are denied. The trial may proceed as scheduled.").)

CONCLUSION

For the foregoing reasons, and, pursuant to Rule 208(b)(6), SCACR, for any other reason(s) supportive of their position which may be contained in any brief submitted in this matter (to include amicus briefs), which are hereby adopted by reference herein, Plaintiffs ask this Honorable Court to affirm the trial court. Moreover, Plaintiffs ask the Court to rule that an insurer must litigate questions about its obligations under its insurance policy in an action in which it is itself a party.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By: _____

Justin O. Lucey
Joshua F. Evans
415 Mill Street
Mt. Pleasant, South Carolina 29464
P.O. Box 806 (29465)
(843) 849-8400

Attorneys for Plaintiffs-Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated

Dated: 10/11/19

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
OCT 15 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 and
Nationwide Mutual Fire 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; TriCounty 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.; WC Services, Inc.; CRG
Engineering, Inc.; Certainteed Corporation; Kelly
Flooring Products, Inc. d/b/a Carpet Baggers and
John Doe 1-60, Defendants,

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

v.

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

And

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

v.

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

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

PROOF OF SERVICE

**Counsel identified on following page*

Justin O. Lucey
Joshua F. Evans
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mt. Pleasant, SC 29464
P.O. Box 806 (29465)
(843) 849-8400

Attorneys for Plaintiffs-Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated

On behalf of Justin O'toole Lucey, P.A., counsel for Plaintiffs-Respondents, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated, I certify that the **INITIAL BRIEF OF PLAINTIFFS-RESPONDENTS** was served on all other parties to this appeal on October 11, 2019, a copy thereof deposited in the U.S. Mail properly posted for delivery to the following addressees:

John Lucius McCants, Esquire
ROGERS LEWIS JACKSON
MANN & QUINN, LLC
P.O. Box 11803
Columbia, SC 29211

Attorneys for Appellant
Builders Mutual Insurance Company

J.R. Murphy, Esquire
Timothy J. Newton, Esquire
MURPHY GRANTLAND, P.A.
P.O. Box 6648
Columbia, SC 29260

Attorneys for Appellants
Nationwide Mutual Insurance Company
and Nationwide Mutual Fire
Insurance Company

Steven M. Klepper, Esquire
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, MD 2120

and

Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
SWEENY, WINGATE & BARROW, P.A.
P.O. Box 12129
Columbia, SC 29211

Attorneys for Amici Curiae

Steven L. Smith, Esquire
Zachary J. Closser, Esquire
Samuel M. Wheeler, Esquire
SMITH CLOSSER, P.A.
P.O. Box 40578
Charleston, SC 29423

Attorneys for Respondent
Tri-County Roofing, Inc.

G. Troy Thames, Esquire
WILSON, JONES, CARTER & BAXLEY, PA
421 Wando Park Blvd., Ste. 100
Mt Pleasant, SC 29464

Attorneys for Respondent
Stanley's Vinyl Fence Designs

James A. Atkins, Esquire
CLAWSON AND STAUBES, LLC
126 Seven Farms Dr., Ste. 200
Charleston, SC 29492

Attorneys for Respondents
WC Services, Inc.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

By: _____

Justin O. Lucey
Joshua F. Evans
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mt. Pleasant, SC 29464
P.O. Box 806 (29465)
(843) 849-8400

Attorneys for Plaintiffs-Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated

Dated: 10/11/19