

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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OCT 15 2019

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

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

v.

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

and

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

v.

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

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

**RESPONSE TO AMICUS CURIAE BRIEF OF HARTFORD FIRE INSURANCE
COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, AND HARTFORD
UNDERWRITERS INSURANCE COMPANY**

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S.C. SUPREME COURT

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South Carolina law establishes two procedural mechanisms to protect insurers' right to contest insurance coverage, an accurate reservation of right letter and a declaratory judgment action, that negate the need for insurer intervention into the underlying construction defect litigation. As briefed in Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love individually and on behalf of all others similarly situated, Initial Brief, which is hereby incorporated by reference, intervention is not appropriate. Many of Respondents' other positions align with those expressed by Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company (hereinafter collectively referred to as "*Amici*"). Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated (hereinafter "*Palmetto Pointe*") join *Amici* in those positions except as clarified herein.

ARGUMENT

I. SOUTH CAROLINA PRECEDENT DOES NOT (AND SHOULD NOT) REQUIRE NON-PARTY INSURANCE COMPANIES TO INTERVENE IN CONSTRUCTION DEFECT CASES TO PRESERVE THEIR RIGHT TO DISPUTE INSURANCE POLICY COVERAGE

Palmetto Pointe and *Amici* concur that our State law does not require intervention in construction defect cases "as the method to preserve [the insurers'] right to allocate between covered and uncovered damages". (*Amici Curiae* Brief, p. 1). Moreover, South Carolina precedent does not permit intervention of an insurer in these cases either, when an insured's ultimate liability to an injured third-party plaintiff is on trial.

A. Harleysville Group Insurance versus Heritage Communities, Incorporated¹ and Auto Owners Insurance Company versus Newman² Do Not Address Insurer Intervention

Neither *Harleysville* nor *Newman* require insurers to intervene in underlying construction defect trials to protect their interest in arguing covered versus uncovered damages. The oft-cited *Harleysville* Court reference to *Newman*³ occurred within a discussion of whether the insurer properly issued a reservation of rights letter. That is, the July 26, 2017 *Harleysville* determination addressed the sufficiency of an insurer's reservation of rights letters, issuance of which is the operative method for insurers to preserve their right to contest insurance policy coverage issues. The *Harleysville* Court made no mention of "intervention", except for the Honorable Costa M.

¹ 420 S.C. 321, 803 S.E.2d 288 (2017).

² 385 S.C. 187, 190, 684 S.E.2d 541, 542 (2009).

³ Specifically, the oft-cited *Harleysville* Court language reads:

We find there is evidence in the record to support the Special Referee's finding that Harleysville's reservation letters were insufficient to reserve its right to contest coverage of actual damages,¹¹ and therefore we affirm.¹²

420 S.C. at 343, 803 S.E.2d at 299. Footnote 11, referenced in the above quote, provides:

In addition to finding Harleysville's attempted reservation of rights to be insufficient, the Special Referee also found "the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict" as to the negligent construction, breach of warranty, and breach of fiduciary duty claims, and the Special Referee refused to "engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making." See *Newman*, 385 S.C. at 198, 684 S.E. 2d at 547 (finding that even though arbitrator's award improperly included amounts for replacing and repairing faulty workmanship itself, there was insufficient evidence in the record to allow the Court to determine which costs were solely attributable to the non-covered faulty workmanship and finding that the insurer's duty to indemnify therefore covered the entire award.).

Id. at n.11, 803 S.E.2d at 299 n.11.

Pleicones' single sentence in his dissenting opinion recognizing that an insurer's intervention in an underlying construction defect lawsuit – to assert a defense against coverage – could not occur “without creating an impermissible conflict of interest in violation of established South Carolina law”. See *Harleysville*, 420 S.C. at 363, 803 S.E.2d at 311 (citing *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965)).⁴ *Harleysville* instead focused on the consequence of inadequate notice to an insured of an insurer's coverage position: later prejudice of an insured's rights by “surprise” contests to coverage. See, e.g., *Harleysville*, 420 S.C. at 338-39, 803 S.E.2d at 297-98 (acknowledging an insured is placed at a disadvantage if not “provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage”).⁵

⁴ Courts sitting in our, and other, jurisdiction(s) have recognized the inherent conflict that arises in similar cases of insurance companies' attempts at intervention. See, e.g., *Lewis v. Excel Mech., LLC*, No. 2:13-CV-281-PMD, 2013 WL 3762904, at *4 (D.S.C. July 16, 2013) (denying intervention of insurance company and finding that “injecting the issues of coverage and Excel's liability into this action would prejudice the Parties.”); see also *Hunter v. Peters*, No. 423946, 2001 WL 34093937, at *1–2 (Conn. Super. Ct. Dec. 13, 2001) (denying intervention by the insurer, stating “[t]he jury's job is to determine whether the plaintiff has satisfied his burden of proof on the asserted causes of action [and the insurer's] proposed interrogatories will provide a distraction from that task. In addition, allowing such intervention may create a potential conflict of interest for the attorney furnished by [the insurer] to represent [the insured *Nieto v. Kapoor*, 61 F. Supp. 2d 1177, 1195 (D.N.M. 1999), *aff'd*, 268 F.3d 1208 (10th Cir. 2001) (denying a motion for permissive intervention where the proposed intervenor/insurer's interests were “unquestionably antagonistic” to those of the defendant and therefore had the potential to prejudice the adjudication of his rights, since the defendant would “[n]ot only . . . have the burden of presenting a defense to Plaintiffs' accusations, but he will carry the additional burden of having his insurer interfere with his defense,” and also finding that the better course of action was to allow the insurance company's already commenced but stayed declaratory action to resolve the coverage conflict at the conclusion of the primary litigation), 268 F.3d 1208 (10th Cir. 2001).

⁵ The *Harleysville* decision, in this way, strikes at the heart of an insurer's obligation in its tripartite relationship. It recognized an insurer owes a “high fiduciary duty” to its insured when controlling the insured's defense and is bound, under its insurance contract, and in good faith, to sacrifice its interests in favor of those of the insured. See *Harleysville*, 420 S.C. at 339-40, 803 S.E.2d at 298 (citing *Weber v. Biddle*, 4 Wash. App. 519, 483 P.2d 155, 159 (1971) and *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346, 348 (1933)). How can an insurer fulfill its “high

Further, arbitration proceedings do not present the same risk of prejudice as jury trials. *Newman* involved a judgment issued by an arbitrator, not a jury.⁶ There are different considerations presented by a jury trial as opposed to an arbitration proceeding. There is less concern in arbitration proceedings that prejudice (or confusion) will result from consideration of insurance coverage questions, unlike in jury trials.

B. An Insurer's Interest In an Allocated Verdict Arises From Its (Potential) Duty to Indemnify

Amici's position that "*Harleysville* suggests the insurer's interest is more than financial" based on the *Harleysville* Court's cite to a Tenth Circuit case⁷ is tenuous. An insurer's duty to defend and protect an insured's interests above its own is well-established. *See, e.g., Hodges v. State Farm Mut. Auto. Ins. Co.*, 488 F. Supp. 1057, 1064–65 (D.S.C. 1980) ("Defendant construes its duty to defend more narrowly than would this court. A policy of insurance guarantees not just a defense as to the merits but a comprehensive defense designed to minimize the exposure of an

fiduciary duty" to defend the insured in the merits trial while simultaneously attempting to intervene on its own benefit in that trial? It seems unavoidable that an insurer would violate its "high fiduciary duty" (and present an irreconcilable conflict of interest) to its insured by intervening in the merits trial (that it is defending its insured in) to protect its potential financial responsibility for a verdict.

⁶ Moreover, an arbitrator's "suggestion", like that in *Newman*, does not in some way override established South Carolina law, which requires an insurer to litigate in the interests of the insured alone (for coverage), not on behalf of the insurer (who wishes to assert defenses to coverage). *See Sims*, 247 S.C. at 88, 145 S.E.2d at 526 (describing a "dilemma of conflicting interests" wherein an insurer "cannot possibly defend the state court action and protect both its own interests and the interests of its insureds").

⁷ *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1500 n.10 (10th Cir. 1994) (noting that the court was only considering what happened in the state court action "to ascertain the nature of the liability imposed there because that is important in determining whether, in light of *Dayton Hudson's* clear restrictions on insuring against punitive damages, Magnum may shift such liability to CNA, either pursuant to the CNA policy or through a claim of bad faith refusal to settle.").

insured. Insurers do not fulfill this comprehensive obligation by defending only as to liability. The defense must be proffered even if the liability issue is clearly to be resolved against the insured.”) Defense of the insured requires counsel, hired and paid by the insurer, to consider only what is in the interests of the insured in the course of the insured’s defense. Because the duty to protect an insured’s interests (including from prejudice) arises in the defense obligation context, it falls well within defense counsel’s fiduciary responsibilities, separate and apart from the insurer’s interest in its potential indemnification obligation. In other words, *Amici*’s position disregards that the insurer’s indemnification concerns are (and should remain) separate from the defense obligations an insurer is fulfilling during the merits trial via the defense counsel it appointed.⁸

Because it is a leap to read *Harleysville*, and the *Harleysville* Court’s reference to *Newman* therein, as an intended alteration of long-standing South Carolina precedent authorizing a separate declaratory judgment action to determine covered versus uncovered damages, this Court should decline to do so.

⁸ As a result, it should not matter to the insured’s defense counsel whether an allocated verdict benefits the insurance company, only whether an allocated verdict benefits the insured. There is no uniform answer to this question under South Carolina law, rather, this is a decision left to the fiduciary’s professional judgment who is defending the insured in the merits trial. *See, e.g., Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 373 (4th Cir. 2005) (“As part of exercising the lawyer’s professional judgment, an attorney in South Carolina who represents an insured owes the insured a duty of loyalty and cannot, for example, communicate information detrimental to the insured to the insurance company. *See* Rule 1.8(b), Rule 407, SCACR; Rule 1.6, Rule 407, SCACR (general confidentiality rule).”); *see also Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 61, 730 A.2d 51, 65 (1999) (recognizing that “even when an attorney is compensated or expects to be compensated by a liability insurer, [his or] her duty of loyalty and representation nonetheless remains exclusively with the insured”). To the extent defense counsel concerns itself with the insurer’s interest particularly, he has violated his fiduciary duty to his client, the insured.

C. Insurance Policy Coverage Questions Are Not Tried to a Construction Defect Suit Jury, Therefore, These Questions Will Not Be “Relitigated” in a Separate Declaratory Judgment Action

Amici point to language in the *Harleysville* Record on Appeal that the Special Referee noted an insurer could not “relitigate” damages between those covered and those un-covered. (*Amici Curiae* Brief, pp. 4-5). But, as a practical matter, which damages are “covered” by an insurance policy is not a question put to a jury. Litigants in an underlying construction defect suit do not present evidence addressed to insurance coverage, much less what constitutes “property damage”, “your work”, or damages excluded by exclusion “n” also known as the “sistership exclusion” because these concepts play no part in establishing (or defending against) a contractor’s liability to third party homeowners. As a result, a jury verdict, and the evidence adduced at trial, may be considered a starting point for insurance coverage disputes.⁹ See *Nationwide Mut. Ins. Co. v. Pasiak*, 327 Conn. 225, 268–69, 173 A.3d 888, 912 (2017) (recognizing “an insurer may litigate coverage issues previously litigated on which it had a conflict of interest with its insured or coverage issues on which material facts were not litigated and necessary to the underlying judgment”). Or, it may be necessary to decide coverage concerns within a reasonable time prior to the rendering of a verdict in the underlying suit. See, e.g., *Selective Way Ins. Co. v. Hosp. Grp. Servs., Inc.*, 2015 PA Super 146, 119 A.3d 1035, 1050–51 (2015) (finding coverage action’s timeline is measured by when the insurance company has a “sufficient factual basis to present averments” in a declaratory judgment complaint that the policy at issue does not provide coverage for claims made in the third party’s action, which could be, e.g., when the insurer receives the third

⁹ This scenario, where there is subsequent litigation on coverage, carries with it pitfalls. For instance, it allows an insurer to sit back and play its cards both ways.

party complaint, or after “the case develops and the claim is winnowed down to a recovery the insurance company believes is not covered by the policy”). In either instance, the subject matter and the parties to the coverage dispute are different than those before a jury who is seated in a tort action to determine a contractor’s liability to an injured homeowner. *See, e.g., Minnesota Lawyers Mut. Ins. Co. v. Antonelli, Terry, Stout & Kraus, LLP*, 355 F. App’x 698, 704, No. 09-1049, 2009 WL 4506462 (4th Cir. Dec. 4, 2009 (“Piecemeal litigation would therefore not result from the district court deciding the coverage issue because the scope of coverage is not at issue in the state proceeding.”). Section 58(1)(b) of the Restatement (Second) of Judgments, discussed *infra*, carries this concept forward.

D. Intervention By An Insurance Company Is Not a Procedural Solution

Most arguments have focused on mandatory intervention, but South Carolina law does not support permissive intervenor of an insurer in a construction defect suit either.¹⁰ Courts recognize that introduction of an insurance company’s concerns into construction defect litigation is no solution at all. *See, e.g., Bolt Factory Loftis Owners Ass’n Inc. v. Auto-Owners Ins. Co.*, No. 18CA1201, 2019 WL 3483901, at ¶14 (Colo. Ct. App. Aug. 1, 2019) *reh’g denied* (Aug. 22, 2019) (recognizing allowing an insurer to intervene to protect its contingent interest, springing from the liability phase of proceeding, would allow the insurer to interfere with the defense; unfairly restrict the insured, who faces the very real risk of an uninsured liability; and grant the insurer a double bite at escaping liability). Moreover, the duty to defend and the duty to indemnify are distinct in scope. *See Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha*, 269 S.C. 183, 186, 236 S.E.2d 818,

¹⁰ There are a variety of reasons this is so, which were correctly outlined by Judge Newman in two instances. *See* (Exhibit A).

820 (1977) (“The duty to defend is separate and distinct from the obligation to pay a judgment rendered against the insured.”). These distinctions cannot be disregarded when examining the repercussions of insurer intervention.

II. *SIMS* DEMONSTRATES WHY THERE IS NO NEED FOR INSURER INTERVENTION

The Court in *Sims* and the Restatement (Second) of Judgments points to the propriety of a separate declaratory judgment action to decide issues arising out of the insurer’s agreement to indemnify the insured. In *Sims*, the Court recognizes that a “judgment against an indemnitee does not decide issues as to the existence and extent of the duty to indemnify” and that a separate action is appropriate for resolution of indemnification disputes where “it was not possible for the [insurer]... to defend the insured, and at the same time [] protect its own interests” in the first. 247 S.C. at 87, 145 S.E.2d at 525. These concepts, deriving from Section 58 of the Restatement (Second) of Judgments, answer the intervention question before this Court in the negative. A *sub silentio* abrogation of *Sims*, which is good law and has been since 1965, should not occur.

Finally, as to the mootness exception raised by *Amici*, Palmetto Pointe believes that issue is not ripe; and the Court should entertain arguments on that if and when it does become a ripe question, not before, as this Court does not issue advisory opinions.

CONCLUSION

Palmetto Pointe asks the Court to hold that insurer intervention (of any kind) in construction defect actions is unnecessary, and that reservation of rights letters (which comply with *Harleysville*) and timely, separate declaratory judgment actions remain the operative means for insurers to protect their interests in contesting insurance coverage and allocating between covered and uncovered damages.

Respectfully submitted,



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Mount Pleasant, SC
October 11, 2019

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S.C. SUPREME COURT

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

BEACH VILLAS AT OCEAN KEYES PROPERTY OWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

OCEAN KEYES DEVELOPMENT, LLC, KEYE CONSTRUCTION CO., INC.,
RUSSELL P. BALTZER, FIRST EXTERIORS, LLC, CAREFREE EXTERIORS
INC., COASTAL STUCCO, INC., RICHARD H. CONSTRUCTION, LLC a/k/a
RICARDO HERNANDEZ d/b/a RICHARD FRAMING CONSTRUCTION,
RICHARD H. CONSTRUCTION, LLC a/k/a RICARDO HERNANDEZ d/b/a
RICHARD FRAMING CON., INC., BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP,
LLC, STEEL HOMES INTERNATIONAL, INC., RENAISSANCE STEEL
INSTALLATION, LLC n/k/a RENAISSANCE STEEL, LLC, BENCHMARK
STEEL SERVICE, LLC AND DIETRICH BUILDING SYSTEMS n/k/a
CLARKWESTERN DIETRICH BUILDING
SYSTEMS, LLC,

Defendants.

OCEAN KEYES DEVELOPMENT, LLC AND KEYE CONSTRUCTION
CO., INC.,

Third-Party Plaintiffs,

vs.

RENAISSANCE STEEL INSTALLATION, LLC f/k/a RENAISSANCE
STEEL, LLC n/k/a INNOVATIVE STEEL TECHNOLOGIES,
BENCHMARK STEEL ERECTORS, and TOTAL CONSTRUCTION, LLC,

Third-Party Defendants.

) IN THE COURT
) OF COMMON
) PLEAS
) FIFTEENTH
) JUDICIAL
) CIRCUIT
)
) CASE NO. 2014-
) CP-26-6573

) **ORDER**
) **DENYING**
) **MOTION OF**
) **INSURERS**
) **FOR LIMITED**
) **INTERVENTIO**
) **N**

THIS MATTER comes before this Court upon Motions of Canopus US Insurance Inc. ("Canopus"); Hartford Fire Insurance, Hartford Casualty Insurance Company and Hartford Underwriters Insurance Company (collectively "Hartford"); and Selective Insurance Company of

South Carolina ("Selective") seeking to intervene in the trial of this matter for the limited purpose of submitting special interrogatories to the jury regarding issues related to insurance coverage.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek to intervene for the "limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

- (1) definition of progressive damages;
- (2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;
- (3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and
- (4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

- (1) line item for the cost of removing and replacing the work of their respective insured(s);
- (2) cost of removing and replacing portions of the building damaged by the work

of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

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

BACKGROUND

At the outset of the hearing in this matter, counsel for Plaintiff agreed to allow each of the Insurers to fully intervene as named parties in the case and allow counsel for each of the Insurers to participate in the actual trial, including the questioning of witnesses and making of arguments to the jury. Each of the Insurers stated that they did not wish to intervene in this case as parties to

the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

Additionally, counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action. The Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP"). As our Supreme Court has held, "intervention is only appropriate where the party seeking intervention has 'a real proprietary interest in the subject matter of the proceedings;' an interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." *Ex parte Gov't Employee's Ins. Co. (GEICO) v. Goethe*, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (quoting *Bailey v. Bailey*, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in *GEICO*, the court affirmed the family court's denial of insurer's motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the Cypress Bend condominium project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Cypress Bend condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not appropriate to be litigated or interjected into this construction defect action.

Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

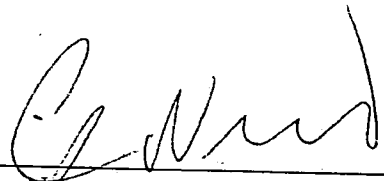
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 11, 2017



Clifton Newman
Presiding Judge

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTEENTH JUDICIAL
COUNTY OF HORRY)	CIRCUIT
)	
Harbour Cove Condominium Association, et al.,)	Civil Action No.: 2014-CP-26-7634
)	
)	ORDER DENYING MOTION OF
Plaintiffs,)	INSURERS FOR LIMITED
)	INTERVENTION
v.)	
)	
Centex Homes, et al.,)	
)	
Defendants.)	

This matter is before me upon separate Motions for Limited Intervention filed by multiple insurance carriers for insureds who are defendants in this action made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek to intervene for the "limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

- (1) definition of progressive damages;
- (2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;

(3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and

(4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

(1) line item for the cost of removing and replacing the work of their respective insured(s);

(2) cost of removing and replacing portions of the building damaged by the work of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

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

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

BACKGROUND

Each of the Insurers stated that they did not wish to intervene in this case as parties to the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP"). As our Supreme Court has held, "intervention is only appropriate where the party seeking intervention has 'a real proprietary interest in the subject matter of the proceedings;' an interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." Ex parte Gov't Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (*quoting* Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in GEICO, the court affirmed the family court's denial of insurer's motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the Harbour Cove Condominium project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Harbour Cove Condominium project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not

appropriate to be litigated or interjected into this construction defect action. Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

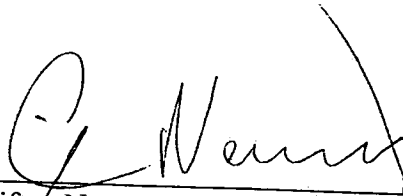
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12 2017

A handwritten signature in black ink, appearing to read "Clifton Newman", written over a horizontal line.

Clifton Newman
Presiding Judge

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

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

v.

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

and

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

v.

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

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

PROOF OF SERVICE

I, Justin Lucey, of Justin O'Toole Lucey, P.A., counsel for Respondents, certify that **RESPONDENT'S RESPONSE TO AMICUS CURIAE BRIEF OF HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, AND HARTFORD UNDERWRITERS INSURANCE COMPANY** 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:

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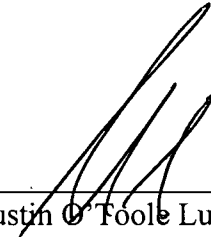
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S.C. SUPREME COURT

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By:


Justin O. Foole Lucey, Esq.

October 11, 2019
Mount Pleasant, SC