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S.C. SUPREME COURT

IN 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 Lowe, 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 Building 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 Does 1-60, ... Defendants,

And

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 Lowe, individually, and on behalf of all others similarly situated, Tri-County Roofing, Inc., and WC Services, Inc., are ..... Respondents,

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II. Assuming that Newman and Harleysville require intervention by insurers, did the trial court err in denying Nationwide's Motion to Intervene?

STATEMENT OF THE CASE

This is an appeal from the ruling of the Honorable Jennifer B. McCoy that denied Appellant Nationwide Mutual Insurance Company's (hereinafter "Nationwide") Motion to Intervene. By Form 4 Order filed December 17, 2018, the Trial Court denied Nationwide's Motion. (R. p. 4.) On January 17, 2019, the Trial Court, by a second Form 4 Order, denied Nationwide's Motion for Reconsideration. (R. p. 5.)

This action was originally filed on or about February 13, 2015 as a construction defect action involving residential development located in Charleston County known as Palmetto Pointe at Peas Island. (R. p. 24.) The plaintiffs in this action are Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love (hereinafter collectively "Palmetto Pointe"). Plaintiff Jack Love is named as the representative of an alleged class of individual homeowners who suffered the damages outlined in the Complaint. (R. p. 70, ¶ 49.) A number of defendants were named in this lawsuit, including the developer, the general contractor, and Nationwide's named insured, W C Services, Inc. (hereinafter "WC Services").

The nature of the plaintiff's claim in this action is that the construction work performed by the defendants at the Palmetto Pointe at Peas Island project was defective. As alleged, the defective construction work caused water intrusion that resulted in consequential damage to building components and other property. (R. p. 69, ¶¶ 40-41.) Palmetto Pointe asserted causes of action for negligence/gross negligence and breach of warranty against WC Services. The Second Amended Complaint was the operative pleading when Nationwide moved to intervene. (See R. p. 61.)

Nationwide retained Jim Atkins, Esq. of the firm Clawson and Staubes to defend WC Services in this action. Nationwide is defending WC Services under reservation of rights. In a separate declaratory judgment action pending in federal court, Nationwide is contesting its coverage issues. (Answer to Am. Complaint, Countercl., and Cross-claims (ECF No. 26), FCCI Ins. Co. v. Island Pointe, LLC, *et al.*, Civ. Action No. 2:17-cv-1976-MBS (D.S.C. filed Oct. 2, 2017).)

On May 7, 2018, Nationwide joined several other liability carriers in moving to intervene in this action. (R. Appx. p. 3.) Nationwide's Motion to Intervene is based on certain portions of the court's opinions in Auto Owners Insurance Company v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) and Harleysville Group Insurance v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017), that appear to deny insurers the right to litigate coverage issues separately from the construction defect action, and to require insurers to intervene in order to get certain findings on the record prior to judgment. This appeal concerns the trial court's denial of Nationwide's Motion to Intervene.

Palmetto Pointe filed a Memorandum in Opposition to the Motions to Intervene on December 14, 2018. (R. p. 272.) Palmetto Pointe generally argued that intervention was not permissible under Rule 24, SCRCP, and the motions to intervene were procedurally defective.

Judge McCoy heard the carriers' Motions to Intervene on December 17, 2018. (R. p. 539.) Judge McCoy's Form 4 Order denying all carriers' Motions to Intervene was filed that same day. (R. p. 4.) Nationwide was not served with a copy of the order. Nationwide filed its Motion to Reconsider on January 4, 2019. (R. p. 338.) Judge McCoy denied all

of the carriers' Motions to Reconsider on January 17, 2019. (R. p. 5.) Nationwide was not served with a copy of the Order, but it received a copy of the Order on January 25, 2019.

Nationwide filed its Notice of Appeal on February 22, 2019. In so doing, Nationwide joined other carriers that had previously filed similar appeals. These appeals have been consolidated under Appellate Case Number 2019-000238.

After these appeals were filed, Judge McCoy considered the effect of these consolidated appeals on the upcoming trial. In response to a Motion for Continuance of Trial filed by the general contractor, Judge McCoy issued an Order Staying Case that was filed on April 5, 2019. (R. pp. 6-8.)

Palmetto Pointe filed a motion for reconsideration and/or a petition to lift the stay on April 16, 2019. (R. p. 362.) Judge McCoy heard the motion and issued another Order lifting the automatic stay on April 25, 2019. (R. pp. 581, 9.)

Nationwide and the other insurers petitioned for review of that order pursuant to Rule 241(d)(2) and (d)(7), SCACR. The Court of Appeals denied the Petitions by Order filed May 1, 2019. (R. p. 10.)

This trial of this action commenced on or about May 6, 2019. On May 16, 2019, the jury returned a verdict in favor of WC Services. (R. pp. 13-14.) The jury found that WC Services was not negligent and that it did not breach its implied warranty of workmanlike service.

On May 28, 2019, the Plaintiffs filed a Motion for a New Trial against WC Services. (R. pp. 524-533.) The denial of that motion is on appeal. [1]

[1] Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc., *et al.* v. Island Pointe, LLC, *et al.*, Appellate Case No. 2019-001520.) This Court denied Palmetto Pointe's Motion to Dismiss this appeal for lack of standing by Order dated October 7, 2019.

STANDARD OF REVIEW

This Court exercises *de novo* review of questions of law. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

ARGUMENT

I. Does South Carolina law require an insurer to intervene in an underlying action in order to establish facts for allocating between covered and non-covered damages?

This appeal concerns the procedure by which liability insurers may exercise their contractual right to obtain findings for allocating between and covered and non-covered damages under commercial general liability (CGL) policies. If intervention is required, Nationwide contends that the trial court erred in granting its motion to intervene.

This issue was briefed and set for oral arguments before the Supreme Court of South Carolina in a prior appeal. Ex Parte: Hartford Fire Ins. Co., *et al.*, In Re: The Harbour Cove Condo. Ass'n v. Centex Homes, *et al.*, Appellate Case No. 2017-002146. That appeal was settled before the oral arguments could be heard. Nationwide craves reference to the briefs filed in that appeal because the issues in this appeal are substantially similar.

A. The Tripartite Relationship

In order to provide context, it is helpful to review the history of this controversy and the usual posture in which this issue arises. Liability insurance insures against claims asserted against the insured by a plaintiff who is not a party to the insurance contract. Under CGL policies, insurers generally assume two duties: the duty to defend the insured and the duty to indemnify, *i.e.*, to pay damages awarded against the insured in favor of the plaintiff. Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977). The Fourth Circuit has aptly summarized the tripartite relationship between the plaintiff in a tort action, the defendant in a tort action, and the defendant's

liability insurer. In Twin City Fire Insurance Company v. Ben Arnold-Sunbelt Beverage Company of South Carolina, LP, the court explained:

> When a party with insurance coverage is sued, the insured notifies the insurance company of the suit. The insurance company, in turn, typically chooses, retains, and pays private counsel to represent the insured as to all claims. If the suit involves some claims that are covered under the insurance policy and some claims that are not covered, the insurance company typically will send a reservation of rights letter to the insured stating what claims the insurance company believes are covered and what claims it believes are not covered.

433 F.3d 365, 367 (4th Cir. 2005).

It is important to recognize that the tripartite relationship involves three separate parties: (a) the plaintiff, (b) the insured defendant, and (c) the liability insurer. When coverage issues exist, there are two separate disputes: (1) the underlying action brought by the plaintiff to establish liability against the insured defendant, which generally sounds in tort (hereinafter "the tort action"), and (2) the question of liability coverage for the claims against the defendant under the insurance contract. The coverage dispute is between the insurer and the insured, although the plaintiff has certain rights as a potential judgment creditor. Liability insurers may file a separate action to litigate coverage issues (hereinafter "the coverage action").

B. An Insurer's Duty to Defend

An insurer's duty to defend is based upon the allegations in the plaintiff's complaint. If the facts alleged create a possibility that the claim is covered, an insurer must defend. Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1995), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996). Nationwide's duty to defend is not at issue here because Nationwide has retained an attorney, Jim Atkins, to defend WC Services against the claims asserted by Palmetto Pointe in this case. (See R.

pp. 576-77.) However, the effect of Newman and Harleysville upon Nationwide's defense of WC Services is relevant to some issues in this appeal.

C. The Scope of Representation by Defense Counsel

Importantly, the Supreme Court has recently confirmed that the attorney an insurer retains to defend the insured (hereinafter "defense counsel") represents the insured defendant, and not the insurer. Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270 (2019). Defense counsel owes a fiduciary duty to the insured, but owes no such duty to the insurer. Id. at 271. The loyalties of defense counsel to the insured may not be divided. Id. at 273. South Carolina law does not allow the insurer to interfere with defense counsel's independence of professional judgment or to direct or regulate defense counsel's professional judgment in rendering legal services to the insured. Id. (citing Rules 1.8(f) and 5.4(c), RPC, Rule 407, SCACR). Thus, Attorney Atkins represents WC Services only—he cannot act on behalf of Nationwide. Nationwide's interests are not represented in this action unless it moves to intervene on its own behalf. (See R. pp. 576-77.)

D. An Insurer's Duty to Indemnify

This appeal concerns Nationwide's duty to indemnify. A liability carrier's duty to indemnify is generally based upon facts developed in the tort action by the plaintiff against the insured. Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001). However, all of the facts necessary for a coverage determination are not necessarily developed in the tort action.

E. Evidence Developed in the Tort Action

The plaintiff's tort claims against a defendant contractor in a construction defect action depend upon a finding that the contractor violated applicable building codes,

deviated from industry standards, or constructed housing that the builder knew or should have known posed a serious risk of physical harm. Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989). In the Harbour Cove appeal, the Condominium Association succinctly summarized the types of evidence typically presented in a construction defect action. (R. pp. 717-18.) The homeowners typically hire an engineering or architectural expert to identify violations of building codes, industry standards, and safety standards. The homeowners also usually hire a construction professional to provide an estimate of the repair costs. (Id.) If the case is tried, this evidence is presented to a jury, which returns a verdict based upon its view of the amount of the damages. See Harleysville, 420 S.C. at 331, 803 S.E.2d at 293-94.

The homeowner plaintiffs are typically concerned mostly with recovery of their repair costs. They therefore seek a general verdict that specifies only the total amount of the damages awarded. (See R. pp. 717-18.) Any allocation of the jury verdict in the tort case typically involves specifying which damages are attributable to which defendant, if joint and several liability does not apply.

F. Issues Addressed in the Coverage Action

On the other hand, coverage issues turn on interpretation of the insurance contract between the contractor and the insurer. B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Some insurance coverages apply on a claim-by-claim basis. For example, "personal and advertising injury" coverage in CGL policies only covers specified types of claims. See Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distribs., Inc., 839 F. Supp. 376, 381 (D.S.C. 1993) ("The policy specifically defines 'personal injury' as an injury arising out of one or more of the five enumerated offenses.").

When evaluating a claim under that coverage, a court only need find that one of the causes of action is covered in order to find that the entire claim is covered. Owners Ins. Co. v. Clayton, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005). However, construction defect claims involve claims for "property damage," which is a separate coverage. (R. p. 144.)

The analysis for "property damage" claims is very different. CGL policies [2] do not cover faulty workmanship; they only cover liability claims for "property damage" caused by an "occurrence." (R. Appx. p. 22, ¶ A.1.b.(1)(a).) This distinction is not only a result of the policy language and judicial interpretations in case law, it has been codified by statute in South Carolina. S.C. Code Ann. § 38-61-70(B)(2) (Rev. 2015). It is also grounded in the public policy of preventing insureds from being indemnified from their own unlawful acts. Hendrix v. Employers Mut. Liab. Ins. Co. of Wis., 78 F. Supp. 84, 87 (E.D.S.C. 1951).

CGL policies only cover "claims of faulty workmanship that causes an accident." Isle of Palms, 319 S.C. at 16, 459 S.E.2d at 320. When construction defects cause water intrusion, the "occurrence" is the accidental and unforeseen water intrusion. Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc., 835 F. Supp. 2d 104, 107 (D.S.C. 2011). The "property damage" is the water damage to building components that were not defectively installed. Crossmann Cmties. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011).

Thus, the coverage determination is granular in nature. It is based upon a component-by-component analysis as to: (a) which building components were installed by

[2] Nationwide's policies in this case were written on a non-standard form. However, Nationwide's policies are similar to CGL policies for purposes of the issues in this appeal.

the insured contractor (*i.e.*, the insureds "scope of work"); (b) which building components within the insured's scope of work were defectively installed; (c) whether the defectively installed building components caused water intrusion or some other type of "occurrence;" and (d) which building components were damaged by the water intrusion or other "occurrence" (*i.e.*, the "resulting damage"); and (e) which repair costs relate to the resulting damage as opposed to the faulty work.

None of these factual determinations are relevant to the tort action. Moreover, the above analysis only applies to the insuring agreement. Analysis of policy exclusions may require additional factual determinations to be made.

G. Overlapping Issues

Some coverage issues involve resolution of questions that are also at issue in the underlying tort action. For example, a plaintiff may proceed against the insured in the tort case based solely on negligence, even though there is evidence of intentional harm, in order to avoid losing coverage. Is an insurer bound by factual findings in the tort case when it had no opportunity to litigate them? The Supreme Court settled this question more than 50 years ago. Under principals of collateral estoppel, an insurer is not bound by factual findings in the tort case if its interests were not aligned with the insured's. Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965).

H. The Procedure under Sims

Under the Sims formulation, the tort action and the coverage action proceed on two separate tracks. In the tort action, the homeowner plaintiffs must prove that the building was defectively constructed by the insured, and that repair costs support an award of damages. In the coverage action, the insurer seeks to demonstrate that its insurance

contract does not cover all or certain portions of the damages award. Factual findings in the coverage action are made based upon the evidence produced in the coverage action, with the caveat that the insurer is bound by the amount of the judgment in the tort action and any factual findings made in the tort action upon issues in which the interests of the insured contractor and the insurer were sufficiently aligned. As long as South Carolina law followed Sims, there was no reason for an insurer to attempt to intervene in the tort action, and, indeed, intervention was generally not permitted.

I. Auto Owners v. Newman

In Newman, the Supreme Court included a cryptic statement in its opinion that drastically changed the result of the case. The court initially found that removal and replacement of the defectively installed stucco was not covered. Newman, 385 S.C. at 198, 648 S.E.2d at 546-47. Nevertheless, the Supreme Court ruled that the insurer was required to pay the entire judgment because "there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco." Id. at 198, 684 S.E.2d at 547. The court reached this surprising result based upon the following reasoning:

> 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. [FN5] See Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.").
>
> FN5. Auto–Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto–Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the

> arbitrator determined damages, Auto–Owners did not seek review of or otherwise contest the damages award.

Newman, 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5. Essentially, the court held that the insurer was required to indemnify the insured for non-covered damages because of a procedural misstep—the failure to raise the issue and obtain findings to support an allocation between covered and non-covered damages in the underlying arbitration proceeding.

It is difficult to discern how the court arrived at these conclusions. The point the court made does not appear to have been raised by the litigants—it first appears Supreme Court's re-filed opinion. Therefore, the precedential effect of this aspect of the Newman opinion is unclear. See E.E.O.C. v. Trabucco, 791 F.2d 1, 4 (1st Cir. 1986) (holding that the doctrine of *stare decisis* does not apply to issues that were not argued). Additionally, the ruling appears to be based upon unique aspects of the record before the court in that particular case. See 21 C.J.S. Courts § 186 (June 2019 Update) ("The principle of precedent requires that, when the facts are the same, the law should be applied the same.").

If the above-referenced portion of Newman is treated as binding precedent, then insurers are placed in an impossible position. They are required to somehow raise and obtain findings on issues upon which no party to the underlying case has an interest. This is easily demonstrated by the result in Newman—the entire claim was found to be covered. Since it is in the interest of the both the plaintiff homeowners and the defendant contractor that the entire claim be covered, neither party has any incentive to seek an allocated verdict. In this case, Attorney Atkins cannot request an allocated verdict to support a determination between covered and non-covered damages because he is required by law to represent only WC Services. Sentry, 826 S.E.2d at 271; Twin City, 433 F.3d at 367. The best result for

WC Services is that the entire amount of any judgment awarded against WC Services in this action be covered.

Nationwide would show that the above-referenced portion of the Newman holding is distinguishable in this case for several reasons. First, Nationwide did not represent WC Services in either this action or the separate coverage action. Nationwide hired Atkins, who is bound by law to represent only WC Services. (See R. pp. 576-77.) Second, neither this action nor the coverage action is an arbitration proceeding "made mandatory by the terms of" Nationwide's policies. Third, Nationwide has not "had an opportunity to raise" the issue and to obtain findings to support an allocation of damages for coverage purposes in this action because its motion to intervene was denied.

Nevertheless, in Newman the Supreme Court opined that "it is not the purpose of this declaratory judgment action to relitigate the issue of damages." Newman, 385 S.C. at 198, 648 S.E.2d at 541. This statement appears to directly conflict with Sims, and it is unclear whether the court intended to overrule Sims *sub silentio*. If Newman was intended to overrule Sims, then Nationwide may not be able to develop a factual record to support an allocation between covered and non-covered damages in the coverage action. Because of the unresolved conflict between Sims and Newman, Nationwide's only means of protecting its interests was to intervene in this action to prevent a waiver resulting from its failure to obtain findings that the court found to be missing in Newman.

J. Harleysville v. Heritage Communities

Opinions were divided as to how an insurer should proceed after the Newman opinion was released. Some insurers began filing motions to intervene, whereas others

took the position that Newman was distinguishable. It was hoped that courts would resolve the issue and provide guidance. However, Harleysville only added to the confusion.

Harleysville is one of the most peculiar cases in recent memory. Much of the court's reasoning was based upon the law of other states. Its lead holding was that insurers waive all or nearly all coverage issues by failing to state the specific grounds for contesting coverage in their reservation of rights letters. Harleysville, 420 S.C. at 341, 803 S.E.2d at 299. The standard for demonstrating waiver appears to be that the insurer "knew precisely how to protects its interests, but elected to be purposefully vague." Id. It is difficult to understand how this standard could apply in any other case because the court failed to even mention, must less address, prior precedent directly holding that general reservation of rights letters were sufficient and that coverage could not be created by waiver and estoppel. Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Illinois, 338 S.C. 43, 53, 524 S.E.2d 847, 852 (Ct. App. 1999). A carrier following existing law could hardly be found to have knowingly failed to protect its interests and to have been purposefully vague. Moreover, certain aspects of the court's reasoning compounded the confusion as to how an insurer should proceed.

The trial court accepted the homeowner's contention that it would be "improper and speculative" to "somehow parse the jury verdicts" "to attempt to allocate" between covered and non-covered damages. Harleysville, Op. No. 27698, (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 26 n.11). The Supreme Court's initial opinion in the Harleysville case directly held, as an alternative ground for its ruling, that the insurer was barred from allocating between covered and non-covered damages because the court "had no basis upon which to make a logical assessment of the jury's purpose when it

awarded the general verdict" and "the dilemma now confronting Harleysville is of its own making." Id. at 36 n.11. The court cited the above-referenced portion of the Newman opinion in the footnote.

The court's reasoning in footnote 11 of the initial opinion in Harleysville directly conflicts with Sims. As discussed above, none of the parties to the tort case have an interest in developing a record and seeking findings to support an allocation between covered and non-covered damages. Therefore, an insurer should not be bound by the lack of such factfinding in the tort action when it litigates coverage issues in the coverage action. The amount of the judgment is, of course, binding. However, there is no need to attempt to read the minds of the jurors in the tort case. The coverage action turns on a completely different issue—the determination of covered damages under a contract. The total amount of the judgment is a factor to consider, along with the repair costs and expert testimony, in determining the amount of covered damages in the coverage action.

In the final opinion, the court receded from its alternate holding. The court merely mentioned that the trial court had found that the insurer failed to provide an adequate record for making an allocation for coverage purposes and cited Newman. Harleysville, 420 S.C. at 343 n.11, 803 S.E.2d at 300 n.11. The final opinion in Harleysville did nothing to resolve the conflict between Sims and Newman. The court cited Sims in another footnote, but there is no indication in the majority opinion that the court recognized the conflict between Sims and Newman. The dissent mentions Sims only in passing. Harleysville, 420 S.C. at 363, 803 S.E.2d at 311 (Pleicones, A.J., dissenting) (citing Sims after commenting that "there is no suggestion how Harleysville could have intervened in these lawsuits and

asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law.").

Furthermore, the court's reasoning in the portion of its opinion addressing reservation of rights letters appears to signal that the Supreme Court, if given the opportunity, would rule that insurers must intervene in order to obtain findings for an allocation between covered and non-covered damages. The court's opinion leans heavily on the proposition that an allocation of damages must be made in the underlying tort action. The opinion is replete with such references:

> Moreover, because an insurer typically has the right to control the litigation and is in the best position to see to it that the damages are allocated, courts have found that where an insurer defends under a reservation of rights, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus noncovered damages.

Harleysville, 420 S.C.at 338, 803 S.E.2d at 197-98.

> [W]hen an insurer [defends under reservation of rights,] the insurer not only has a duty to defend the claim, but also to disclose to its insured the insured's interest in obtaining a written explanation of the award that identifies the claims of the award attributable to each.

Id. at 339, 803 S.E.2d at 298 (quoting Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co., 819 N.W.2d 602, 618 (Minn. 2012)). After holding that Harleysville knew precisely how to protects its interests, but elected to be purposefully vague, the court explained:

> Significantly, none of the reservation letters advised Heritage of the need for an allocation of damages between covered and non-covered losses or referenced a possible conflict of interest . . . . 'The right to control the litigation carries with it certain duties,' including 'the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage for damages.'

Id. at 341, 803 S.E.2d at 299 (quoting Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491, 1498 (10th Cir. 1994)).

The court's intent in making these references is difficult to discern because the reasoning is taken from the law of other states that have a completely different procedure for handling allocation of covered damages. Those states employ a burden-shifting mechanism wherein, once the insurer initially establishes that some damages are not covered, *the burden is on the insured* to provide an allocation of damages in the tort action *in order to be entitled to any coverage at all.* In the leading case, the court explained:

> Once [the insurer] established that part of the liability represented by the judgment was for noncovered acts, the burden became [the insured's] to prove the precise portion of the unallocated verdict representative of acts for which [the insurer] is responsible. . . . .
>
> There was no evidence or proof of any kind as to how the jury's verdict should be divided, and it necessarily follows that the party having the burden of proof on this matter has not met its burden. If the burden of proof is placed upon the [judgment creditor], this automatically makes the decision in favor of the [judgment creditor]; whereas, if the burden is on the [insurer], the decision automatically goes to the [insurer].

Duke v. Hoch, 468 F.2d 973, 377 (1972) (applying Florida law).

The requirements that the insurer notify the insured of a potential conflict of interest and of the need for an allocated verdict flow from this presumption. If the insurer is allowed to use its control of the defense to direct defense counsel not to request an allocated verdict, the insurer would always win because the insured (and/or judgment creditor) could never prove that at least some of the damages are covered (assuming Sims has been overruled). The requisite warnings in reservation of rights letters are designed to protect insureds from that harsh result. See Duke, 468 F.2d at 977-78, 979 (holding that the insurer's failure to properly warn the insurer relieved the insured of his burden of proof).

Florida law is diametrically opposite to South Carolina law as to the presumption that arises from an unallocated verdict. Under Florida law, the presumption arising from the lack of an allocated verdict is that the entire claim is not covered. In contrast, South

Carolina courts have held that the lack of an allocated verdict creates the presumption that the entire claim is covered. Newman, 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5; Harleysville, 420 S.C. at 332, 343, 803 S.E.2d at 294, 300 (affirming the trial court's ruling that due to the lack of an allocated verdict, the entire damages award was subject to Harleysville's duty to indemnify).

Under South Carolina law, it is the insurer that has an interest in an allocated verdict, not the insured. Therefore, the rationale for requiring the insurer to notify the insured of the need for an allocated verdict (but for the mere fact that the Supreme Court now requires such warnings) does not exist. Furthermore, the conflict of interest that concerned the Duke court runs in the opposite direction under South Carolina law. Since it is in the best interest of the insured under South Carolina law not to request an allocated verdict, it would create an impermissible conflict of interest for an insurer to instruct counsel defending the insured to request an allocated verdict in the tort action.

Thus, the Sims holding and the rationale underlying the Harleysville holding are in conflict. The Supreme Court's holding that an insurer must warn of the need for an allocated verdict and a potential conflict of interest implies that an insurer must intervene, when viewed through the prism of other applicable South Carolina law holding that an insurer must pay the entire judgment when there is no allocated verdict in the tort action. In South Carolina, the insured has no incentive for seeking an allocated verdict and the attorney defending the insured represents only the insured. It would be absurd for insurers to be deemed to have waived all coverage defenses by failing to warn of something that has no relevance—as if an automatic waiver were to result from an insurer's failure to warn that driving on the right side of the road in England is dangerous. Thus, Harleysville

appears to signal that Sims has been overruled and that insurers must intervene in the underlying tort action in order to seek an allocated verdict.

K. Uncertainty in the wake of Newman and Harleysville

After Harleysville, many trial courts continued denying motions to intervene, as Judge McCoy did in this case. However, other judges granted motions to intervene. (See R. pp. 18-22.) Several appeals have been filed on an interlocutory basis, including this appeal. See Harbour Cove, Appellate Case No. 2017-002146 (R. pp. 708-746); Ex Parte: Nationwide Mut. Fire Ins. Co. In Re: Beresford Commons Homeowners Ass'n, Inc. v. Superior Solutions, LLC, Appellate Case No. 2017-000202 (R. pp. 669-707.) Both bench and bar need guidance as to how to proceed.

L. Due Process Issues

In Sims, the court recognized that an insurer should not be precluded from relitigating issues determined in the tort action upon which there is a conflict of interest. 247 S.C. at 86, 145 S.E.2d at 525. The court explained the rationale for this rule:

> To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance.

Id. Although the court did not expressly so state, the court's reasoning reflects a fundamental principle of procedural due process. At a minimum, procedural due process affords a litigant notice and the opportunity to be heard. Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998). If the Newman / Harleysville rule is applied and insurers are barred from intervening, the result is that insurers are denied any forum for contesting the amount of coverage owed in cases involving "property damage" claims under CGL policies.

Even if intervention is required, significant due process concerns arise. The problem was succinctly stated by the homeowners in the Harbour Cove appeal: "Insurers have offered no suggestions as to how they propose the parties to this construction defect action [to] present evidence to sufficiently equip a jury with the information necessary to answer special interrogatories or a special verdict form." (R. p. 739.)

As discussed above, the questions that must be answered for purposes of allocating between covered and non-covered damages are very different from the questions presented to a jury for purposes of establishing liability and damages in the tort action. There is no guarantee that the jury will be presented with the evidence necessary to make an allocation for coverage purposes based solely upon evidence presented in the tort action. Moreover, unless the court permits the insurer and the parties seeking coverage to make opening and closing statements, the jury will have no framework for assessing the evidence and making findings of fact. Asking a jury to render a verdict upon issues that are only tangentially related to the trial is fair to no one—not the jury, not the trial court, and most of all, not to the litigants to the coverage dispute. Due process requires an opportunity to be heard, and requiring the finder of fact in the tort action to make an allocation for purposes of the coverage dispute does not afford the litigants a proper protection of this right.

Therefore, an interpretation of Newman and Harleysville that requires an insurer to intervene for only the limited purpose of submitting special interrogatories or a special verdict form to the jury in the tort action violates due process. Yet shutting insurers out altogether by denying an insurer any forum to litigate coverage issues under Newman and Harleysville results in an even more flagrant violation of due process.

M. Nationwide's Requested Relief

Therefore, Nationwide reluctantly moved to intervene in this action. Nationwide's desired relief is that the Court will reaffirm Sims and overrule Newman and Harleysville to the extent they conflict with Sims. However, in the alternative that intervention is required under Newman and Harleysville to protect Nationwide's right to obtain facts necessary to allocate between covered and non-covered damages in the pending coverage action, Nationwide respectfully requests that the Court reverse the trial court's ruling and allow Nationwide to intervene to the extent necessary to make such an allocation.

II. Assuming that Newman and Harleysville require intervention by insurers, the trial court erred in denying Nationwide's Motion to Intervene.

Under South Carolina law, a party seeking intervention under Rule 24(a)(2), SCRCP, must: (1) establish timely intervention; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004).

Nationwide's motion to intervene was timely because it was filed well in advance of trial. (See R. p. 114.) Nationwide's motion was filed on May 7, 2018 and the trial began on May 6, 2019. Because the requested intervention is limited to whatever is necessary to support an allocated verdict under Newman and Harleysville, it appears to involve only the submission of special interrogatories or a special verdict form to the jury at trial. Thus, neither Palmetto Pointe nor WC Services suffered any prejudice from any delay in Nationwide's filing of its motion to intervene.

The primary objection raised in opposition to the motions to intervene is lack of standing. "Only a party aggrieved by an order . . . may appeal." Rule 201(b), SCACR. An aggrieved party is one whose rights or interests are adversely affected by the trial court's order. Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). It is difficult to imagine a more prejudicial result than that reached in Newman—the insurer was required to pay a judgment that was not covered. 385 S.C. at 198, 684 S.E.2d at 546-47. If the court's reasoning in Newman is followed, an insurer's only forum for obtaining facts necessary for allocating between covered and non-covered damages is in this action. South Carolina law permits intervention under certain circumstances. Rule 24, SCRCP. Thus, Nationwide is aggrieved by the trial court's denial of Nationwide's Motion to Intervene.

The fact that Nationwide's preferred relief would moot the need for the requested intervention does not undermine Nationwide's status as an aggrieved party. If the Court holds that Newman and Harleysville overruled Sims and intervention is required, then the trial court's ruling will prejudice Nationwide. Because Newman and Harleysville appear to require intervention, Nationwide cannot adequately protect its interests without contesting its right to intervene until such time as the courts rule otherwise.

If the defense verdict in favor of WC Services becomes final, Nationwide's request for intervention would become moot. However, as long as the possibility remains that the Palmetto Pointe's claims against WC Services may be re-tried, Nationwide has standing to seek intervention to protect its right to allocate any verdict or judgment against WC Services.

In light of the legal background discussed above, the remaining requirements for intervention under Rule 24(a)(2) are met. If Newman and Harleysville require that

factfinding to support an allocation of damages for coverage purposes occur in the tort action, then Nationwide has an interest relating to the transaction which is the subject of this action. The result in Newman and Harleysville—that an insurer must indemnify for damages that are not covered if an allocated verdict is not obtained—demonstrates that without intervention, disposition of this action may impair or impede Nationwide's ability to protect its interests. Thirdly, Nationwide's interests are not adequately protected by other parties. Although Nationwide "controls" the defense, this "control" may not be exerted on its own behalf, but only on behalf of WC Services. Sentry, 826 S.E.2d at 273; Twin City, 433 F.3d at 367. Accordingly, Nationwide has satisfied all the elements for intervention as of right under Rule 24(a)(2). The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to the trial court's discretion.

Nationwide is also entitled to permissive intervention under Rule 24(b). Nationwide has a defense in common with a factual question that is at issue in this action. This is so because Newman held that unless an insurer raises the issue and obtains factual findings to support an allocation between covered and non-covered damages in the tort proceeding, it loses its right to litigate the issue in a separate coverage action. 385 S.C. at 198, 684 S.E.2d at 547.

Finally, Nationwide's Motion to Intervene was not procedurally defective. Rule 24(c) requires that the motion "state the ground therefor" and that it "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Nationwide is not seeking to assert any legally cognizable cause of action that would require a separate Complaint. Nationwide is not suing any of the parties to this action

through its motion to intervene. Furthermore, Nationwide is not asserting a defense to any claim asserted by Palmetto Pointe in this action. Thus, there is no basis for a separate Answer.

Rule 24 does not specify that a motion to intervene be accompanied by a *separate* pleading. The rule only requires that such a motion be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Under the flexible notice pleading provisions of the Rules of Civil Procedure, technicalities that elevate form over substance are not to be construed to deprive a litigant of their day in court. Patton v. Miller, 420 S.C. 471, 492-93, 804 S.E.2d 252, 263 (2017), reh'g denied (Sept. 27, 2017).

Palmetto Pointe cannot demonstrate that they were not provided adequate notice. Nationwide's Motion was accompanied by a detailed memorandum that specified its requested relief. As discussed above, the scope of the requested intervention did not include assertion of a claim or defense that would require a separately filed Complaint or Answer in this case. Therefore, Nationwide's Motion was not procedurally defective.

CONCLUSION

The Supreme Court appears to have held that if an insurer does not seek intervention in the underlying tort action, it waives its right to seek an allocation between covered and non-covered damages. Harleysville, 420 S.C. at 343 n.11, 803 S.E.2d at 300 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547. Accordingly, Nationwide moved to intervene in this action well ahead of trial to seek an allocation of the covered damages. However, the Trial Court improperly—and with no discussion—denied Nationwide's Motion to Intervene and deprived Nationwide of an opportunity to obtain an allocated verdict.

As discussed above, Nationwide's motion to intervene was made reluctantly. The primary relief sought is a ruling that reaffirms Sims and overrules Newman and Harleysville to the extent they conflict with Sims. Such a ruling would moot Nationwide's Motion to Intervene and this appeal.

However, in the alternative that Newman and Harleysville are upheld and Sims is overruled, or that intervention is found to be required on any other basis, Nationwide respectfully submits that it was aggrieved by the trial court's orders, and that Nationwide should be permitted to intervene on the basis the Court specifies.

Nationwide further requests that should the Courts rule that intervention is required, that the courts remand for further proceedings after guidance is provided, rather than simply ruling *carte blanche* that all damages awarded are covered, as was done in Harleysville and Newman. The Court should be mindful of the fact that a separate coverage action is pending, and the ruling in this action should be narrowly tailored to avoid depriving Nationwide of its day in court in the coverage action.

Respectfully submitted,

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November 25, 2019

IN 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 Lowe, 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 Building 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 Does 1-60, ... Defendants,

And

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 Lowe, individually, and on behalf of all others similarly situated, Tri-County Roofing, Inc., and WC Services, Inc., are ..... Respondents,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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Of whom

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Lowe, individually, and on behalf of all others similarly situated, Tri-County Roofing, Inc., and WC Services, Inc., are ..... Respondents,

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APPELLANT NATIONWIDE MUTUAL INSURANCE COMPANY'S PROOF OF SERVICE OF FINAL BRIEF

I certify that I have served the Appellant's Final Brief by depositing a copy of same in the United States Mail, postage prepaid, on November 25, 2019 addressed to the following counsel of record:

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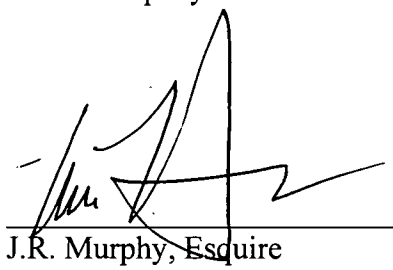

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