THE STATE OF SOUTH CAROLINA

In the Supreme Court

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NOV 26 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; 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.

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S.C. SUPREME COURT

And

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

v.

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

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

FINAL REPLY BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY TO BRIEF OF PALMETTO POINTE AT PEAS ISLAND CONDOMINIUM PROPERTY OWNERS ASSOCIATION, INC., AND JACK LOVE, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

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REPLY ARGUMENT

Introduction

Appellant Builders Mutual Insurance Company ("Builders Mutual") submits the following reply to the Brief of Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, individually, and on behalf of all others similarly situated (together, "Palmetto Pointe"),

Builders Mutual moved to intervene on a limited basis at the trial for the purpose of submitting special interrogatories to the jury concerning damages. (R. pp. 97-113.) Respondent Palmetto Pointe objected to Builders Mutual being able to intervene. (R. pp. 272-304.) Over the objection of Builders Mutual, the circuit court tried the underlying action that resulted in a verdict against Tri-County Roofing for $6,500,000.00 in actual damages and $500,000.00 in punitive damages. (R. pp. 463-487.)(R. pp. 13-16.)[1] Palmetto Pointe did not seek to have the jury answer special interrogatories at trial pursuant to Rule 49, SCRCP); and there is now a general verdict. (R. pp. 13-16.)

Builders Mutual appreciates that Civil Action No. 2015-CP-10-00955 (the, "Civil Action") is at first to determine liability and damages for a construction defect claim – as it was in underlying construction defect actions in Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009)("Newman"), Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011)("Crossmann"), Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) ("Heritage Communities") and many other construction defect cases in South Carolina. However, to suggest that the Civil Action does

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

not bear on matters of insurance or is tangential to insurance is to disregard Newman and Heritage Communities and the negative legal consequences of a general verdict. In fact, Palmetto Pointe made insurance an issue from the start of the Civil Action. Palmetto Pointe commenced the Civil Action alleging that the exterior cladding on each of the buildings and the clubhouse, including the roofs, siding and deck coatings, were constructed incorrectly. (R. pp. 29-30, ¶¶ 20-29.) Palmetto Pointe alleged that such faulty construction then led to progressive weather-related moisture damages to framing and sheathing behind the cladding of each building:

> "The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property." (R. p. 29, ¶ 22.)
>
> "A preliminary inspection of Palmetto Pointe evidences failure of one or more components [of] the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of various and sundry building components, with consequential damages resulting there from. (R. pp. 29-30, ¶ 23.)
>
> "Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring each and every year since the completion of construction and constitute 'occurrences' of 'property damage' under the standard and/or typical general liability policies." (R. p. 30, ¶ 29.)

These allegations track the principles in Newman and Crossmann Communities. Palmetto Pointe pled these allegations to cause insurers to defend and pay indemnity to Palmetto Pointe for the damages sought in the Civil Action.[2]

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[2] The duty to defend is based on the allegations in the Complaint. City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund, 382 S.C. 535, 677 S.E.2d 574 (2009).

I. THE CIRCUIT COURT ERRED IN NOT ALLOWING BUILDERS MUTUAL INSURANCE COMPANY TO INTERVENE ON A LIMITED BASIS WHEN BINDING CASE LAW COMPELS INTERVENTION.

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

Palmetto Pointe insinuates that Builders Mutual's Motion to Intervene was untimely. (Palmetto Pointe Initial Brief, pgs. 5-6). Palmetto states that Builders Mutual filed its Motion to Intervene on March 27, 2018. (Palmetto Pointe Initial Brief, pg. 5). In a later sentence, Palmetto Pointe notes that the case was "more than four years old" at the time of trial in May 2019. (Palmetto Pointe Initial Brief, pg. 6). As discussed more in Builders Mutual's Brief, Palmetto Pointe served Tri-County Roofing with its Summons and Complaint on February 26, 2015. (R. p. 655.) Tri-County Roofing tendered the defense for the Civil Action to Builders Mutual by letter dated January 15, 2018 (R. pp. 335-337.) Builders Mutual acted promptly thereafter to file its Motion to Intervene in March 2018 and argued the motion at the first scheduled hearing in December 2018. Builders Mutual does not know the reason for Tri-County Roofing's delay in tendering the defense to Builders Mutual. Builders Mutual also does not know why it took four years for Palmetto Pointe to bring its case to trial.

Palmetto Pointe commits a significant portion of its Brief to standing and the ruling in Gov't Employee's Ins. Co., Ex parte, 373 S.C. 132, 644 S.E.2d 699 (2007). Builders Mutual briefed Gov't Employee's Ins. Co. in more detail in its Brief. Builders Mutual submits that reliance on Gov't Employee's Ins. Co. does not take into account the complexities of insurance coverage and allocation for construction defect cases in South Carolina. Importantly, Palmetto Pointe disregards that the insurer in Gov't Employee's Ins. Co. was *not* bound financially as were the insurers in Heritage Communities and Newman. Gov't Employee's Ins., 373 S.C. at

137, 644 S.E.2d at 702 ("GEICO maintains the ability to protect any economic interest which may be affected by the family court action").

Rule 24, SCRCP does not have a narrow application. In analyzing intervention, a court should consider each case in the context of the unique facts and circumstances, view intervention liberally, consider the pragmatic consequences for intervention and avoid a rigid application of Rule 24, SCRCP. Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Palmetto Pointes argues that Rule 24, SCRCP does not authorize limited intervention. (Palmetto Pointe Initial Brief, pg. 8). Palmetto Pointe does not cite a South Carolina appellate court decision that prohibits limited intervention; and fails to discuss South Carolina Supreme Court authority that does permit limited intervention. See Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 602-03 (1991). In brief, Davis v. Jennings is an example where the Supreme Court adopted a pragmatic approach to Rule 24 and standing and specifically allowed *limited* intervention. Davis v. Jennings, 304 S.C. at 504, 405 S.E.2d at 602-03 ("Newspaper's motion is distinguished from those in which party-litigant status is sought; rather, its motion is for the sole and limited purpose of challenging a protective order"). Davis v. Jennings is precedent for intervention outside the factual scenario where an intervenor seeks party-litigant status. Like the newspaper company in Davis v. Jennings, Builders Mutual seeks to have a limited role; and Builders Mutual seeks to do so because Supreme Court precedent has imposed significant legal consequences on insurers that do not act. Newman, 385 S.C. at 198, 684 S.E.2d at 546-47.

Palmetto Pointe argues that Rule 24 requires that a pleading, stating claims and defenses, must accompany the motion to intervene. (Palmetto Pointe Initial Brief pg. 13.) First, Builders Mutual submits that like the newspaper company in Davis v. Jennings, Builders Mutual does not

propose that it be a litigant in underlying action, as a named as a party, or make claims and defenses in the way the parties do in the Civil Action. Builders Mutual submits that the law on intervention provides for a more liberal, non-rigid, pragmatic application than what is argued for by Palmetto Pointe. Second, Builders Mutual submits that its comprehensive motion and memorandum in support of the Motion to Intervene, and appellate briefs, fully informed Palmetto Pointe of its position with regard to procedures and the relief sought in the Civil Action. (R. pp. 97-113.)(R. pp. 463-487.) Again, there is no prejudice to Palmetto Pointe in part because it made matters of insurance an issue from the start of the Civil Action.[3]

In arguing continually for a narrow application of Rule 24, Palmetto Pointe disregards that the Supreme Court is empowered to order procedures and has done so in the past. For example, Rule 6(b)(4), SCADR requires the physical attendance of insurers at mediations in South Carolina so this Court has recognized the role that insurers may play in civil litigation in South Carolina. As another example, in 2008, the Supreme Court issued Order 2008-06-26-02 to manage complex construction cases in the Ninth, Fourteenth and Fifteenth Judicial Circuits.

B) South Carolina Supreme Court Decisions Compel an Insurer to Take Some Action to Allocate Damages in a Construction Defect Case In Order to Litigate Insurance Coverage in a Declaratory Judgment Action.

Palmetto Pointe does not address the legal consequences to the insurers in Newman and Heritage Communities. Palmetto Pointe never mentions that the South Carolina Supreme Court required the insurers in Newman and Heritage Communities to pay the general verdicts where the Supreme Court or a lower court believed that one could not discern what parts of the verdict were covered and not covered by the applicable CGL insurance policies. Newman, 385 S.C. at 198, 684 S.E.2d at 547; Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294. In its short

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[3] (R. p. 26, lines 6-8; R. p. 29, lines 18-23; R. p. 30, lines 15-18.)

discussion of Newman, Palmetto Pointe does not address the ruling of the Supreme Court and how the Court reached that decision. Newman, 385 S.C. at 198, 684 S.E.2d at 546-47.

Palmetto Pointe contends that case law, i.e., Newman and Heritage Communities, cannot confer a statutory right to intervention on parties. (Palmetto Pointe Brief, pg. 12). Again, Palmetto Pointe disregards Davis v. Jennings, wherein the Supreme Court interpreted Rule 24, SCRCP to permit limited intervention in order to address a special circumstance. Davis v. Jennings, 304 S.C. at 504, 405 S.E.2d at 602-03.

With regard to Heritage Communities, Palmetto Pointe argues mostly in favor of the dissent by former Chief Justice Costa M. Pleicones and his reliance on Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965)("Sims"). As will be discussed further herein, Sims decision does not prohibit allocation and allocation is an insurance coverage issue that logically must happen in the underlying trial. Further, Palmetto Pointe contends that the Supreme Court in Heritage Communities did not rely on Newman because the majority did not address Newman. (Palmetto Pointe Initial Brief, pg. 18). First, the majority in Heritage Communities did not have to expressly address Newman, Rule 24, SCRCP or Rule 49, SCRCP because Harleysville Ins. Co. made the conscious decision not to intervene or request special interrogatories in favor of pursuing the option argued for now by Palmetto Pointe. (R. pp. 244-245.) Accordingly, Harleysville Ins. Co. could not raise the issue on appeal. Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962).

The Special Referee in Heritage Communities, however, is unambiguous in his reliance on Newman and the legal consequences to Harleysville Ins. Co. for *not* attempting to intervene pursuant to Rule 24, SCRCP and ask for special interrogatories pursuant to Rule 49, SCRCP. The Special Referee ruled that Harleysville Ins. Co. was obligated to pay the general verdict in

part because the Special Referee did not believe he could parse the general verdicts for coverage purposes. Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294. The Special Referee specifically cited to and relied on Newman, 385 S.C. at 198, 684 S.E.2d at 546-47, and stated the following: "[t]he [Supreme Court in Newman] refused to allow Auto-Owners to relitigate damages as have other courts. This Court likewise will not allow Harleysville to re-litigate the damages for to do so would be a clear invasion of the province of the jury." (R. pp. 243-244.) The Special Referee stated, "Harleysville made the decision not [to] file a motion to intervene or otherwise seek an allocated verdict as it could have done under Rule 24 and 49, SCRCP." (R. p. 245.) The Special Referee in Heritage Communities also found that the proffered evidence by experts for Harleysville Ins. Co., in the declaratory judgment action, to parse the general verdict, was irrelevant under Rule 401 and 402, SCRE. (R. p. 242.) The Supreme Court acknowledged the Special Referee's finding on the general verdict as an additional basis for the ruling that Harleysville Ins. Co. must pay the general verdicts (subject to the time on risk principle in Crossmann). Heritage Communities, 420 S.C. at 343 n. 11, 803 S.E.2d at 300 n. 11.

Builders Mutual submits that the proposed intervention is not an improbable procedure or a misapprehension of Supreme Court precedent. The Honorable William H. Seals, Jr. succinctly addresses the timing, nature and impact of intervention in the following:

> Selective seeks to intervene for a limited purpose. Selective seeks only the ability to request that the trial court submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury's verdict against the insureds, if a verdict is returned in favor of the Plaintiffs against any of the insureds. Selective does not seek to actively participate in the trial of this action, that is, with the limited exception of making a motion, if necessary, at the appropriate stage of the trial to submit a special verdict and/or special interrogatories to the jury. Selective is not seeking to participate in discovery. Selective is not attempting to delay the trial of this action. And finally, Selective is not seeking declaratory relief from this Court and is not asking this Court to determine any coverage issues. The jury will not be informed that Selective as intervened or is represented in the courtroom. Selective's motion for the submission of special interrogatories or a

> special verdict will occur entirely outside the presence of the jury. In light of the purpose of the proposed intervention, the motion cannot be deemed untimely, The insured have not shown any legal prejudice. There will be no delays in the litigation, and the Court has not been shown that any changes in trial strategy would result from Selective's intervention.

Order of The Hon. William H. Seals, Jr., Andrew and Diane Corvey v. Hall Custom Homes of South Carolina, (pg. 5) (March 21, 2011)(R. p. 182.)

Palmetto Pointe does not address that several circuit court judges have found that intervention is appropriate by an insurer. South Carolina circuit court judges have ruled that Newman and Heritage Communities in effect mandate that an insurer intervene. See e.g., Order of The Honorable J.C. Nicholson, Jr., Beresford Commons Homeowners Association, Inc. v. Portrait Homes- South Carolina et al., (January 17, 2017); (R. pp. 171-177.) Order of The Hon. William H. Seals, Jr., Ingram v. Lauderdale Bay Developers, LLC, (October 18, 2018); (R. pp. 188-194.) Order of The Hon. William H. Seals, Jr., Andrew and Diane Corvey v. Hall Custom Homes of South Carolina, (March 21, 2011); (R. pp. 178-184.) Order of the Honorable L. Casey Manning, Isaac Mitchell v. True Homes USA, Inc. (September 9, 2017). (R. pp. 185-187.)

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

Builders Mutual submits that delaying allocation for another proceeding is not what the Supreme Court permitted in Newman and is not what courts want the parties to do in construction defect cases where there are insured and uninsured damages.[4] Applying the rationality of the Special Referee in Heritage Communities, Palmetto Pointe cannot parse a general verdict in a declaratory judgment action. In the underlying trial, the jury compromised the approximate $15,000,000.00 estimate and awarded $6,500,000.00 in actual damages against

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

Tri-County Roofing. (R. pp. 643-653.)(R. pp. 13-16.) Under these circumstances, the Special Referee in Heritage Communities would rule that it would be speculative and improper to allocate the verdict in another proceeding or guess what the jury was thinking in rendering the $6,500,000.00 verdict. (R. p. 245.) Palmetto Pointe also sought damages for loss of use; however, the Verdict Form does not reflect how much, if any, was awarded by the jury for loss of use. (R. p. 69, ¶¶ 44-45.)(R. pp. 13-16.)[5] Other than to award punitive damages, the jury did not allocate the damages. (R. pp. 13-16.)

Palmetto Pointe relies on Sims to argue that allocating poses an insurmountable conflict and that a second proceeding is the only solution. (Palmetto Pointe Brief, pgs. 14-15). Again, Harleysville Ins. Co. relied on Sims in Heritage Communities to the detriment of Harleysville Ins. Co.[6] (R. pp. 242-245.)[7] Similarly, Auto-Owners Ins. Co. raised Sims in Newman and argued *against* intervention for allocating damages in the underlying construction defect claim; and the Supreme Court did not adopt this position. (R. p. 659; R. p. 668.)[8] [9]

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[5] In Heritage Communities, the Verdict Form reflected a separate recovery for loss of use. Heritage Communities, 420 S.C. at 331, 803 S.E.2d at 294.

[6] The Special Referee stated, "[u]nfortunately, Harleysville chose not to attempt to intervene and special interrogatories were not submitted to determine the basis upon which the jury awarded exemplary damages. The Court cannot now speculate." (R. p. 236.)

[7] The Special Referee stated, "Harleysville advised its insureds that if Harleysville intervened it would 'create' a conflict of interest so they would wait until after the verdict to litigate coverage." (R. p. 225, ¶ 39.)

[8] Auto-Owners wrote the following: "Auto-Owners should not be made to intervene or otherwise inject itself into the underlying arbitration proceeding between Ms. Newman and Trinity for the purpose of showing that certain damages may fall within insurance policy exclusions." (R. p. 659.)

[9] The Supreme Court found in Sims that the insurer was not bound by a judge's decision, in an auto collision non-jury trial, that the insured was only negligent. Sims, 247 S.C. at 89, 145 S.E.2d at 526. The Supreme Court discussed that it would pose a conflict for the insurer Nationwide to direct its retained counsel to argue that the insured acted intentionally and thus

The difference in Sims and this appeal concerning *allocation* is that there is not a present-day risk that retained defense counsel will develop a defense for Builders Mutual's benefit that prejudices counsel's client. First, Palmetto Pointe does not address that Tri-County Roofing retained additional counsel to represent Tri-County Roofing and appear in the underlying action. (R. pp. 305-314.)(R. p. 655.) Whether the counsel retained by insurers for Tri-County Roofing has a conflict or not is actually immaterial in this case because of the appearance of additional counsel. There was not anything to prevent Tri-County Roofing from utilizing Rule 49, SCRCP and asking the circuit court to submit special interrogatories to the jury.

Palmetto Pointe cites to Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 826 S.E.2d 270 (2019). Sentry explicitedly addresses the relation between an insurer, retained counsel and an insured in South Carolina. As counsel retained for Tri-County Roofing by insurers, Andrew Cole, Esq.'s obligation is and was to his client Tri-County Roofing only, not Builders Mutual. See Sentry, 426 S.C. at 157, 826 S.E.2d at 271 ("[T]he attorney owes the client – not the insurer – a fiduciary duty".). In situations where Tri-County Roofing's and Builders Mutual's interest diverge, Andrew Cole may not let Builders Mutual direct or regulate his professional judgment. Rule 1.8(f), RPC, Rule 407, SCACR; Rule 5.4(c), RPC, Rule 407, SCACR; Sentry, 426 S.C. at 160, 826 S.E.2d at 273. ("The attorney owes no separate duty to the insurer."). Further, Builders Mutual cannot require or direct retained counsel to request special interrogatories. See Sentry, 426 S.C. at 160, 826 S.E. 2d at 273. ("[W]e emphasize the insurer may not intrude upon the privilege between the attorney it hires and the attorney's client – the

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develop an exclusion to coverage for the insurer. Sims, 247 S.C. at 86, 145 S.E.2d at 525. Nationwide thus was not bound by the finding of negligence and could litigate in a later declaratory judgment insurance coverage action that the insured acted intentionally. Sims, 247 S.C. at 89, 145 S.E.2d at 526.

insured."). As such, Builders Mutual submits that the conflict perceived by Palmetto Pointe for retained counsel is not an actual conflict at all in South Carolina.

Importantly, courts draw a distinction between when different coverage issues should be raised or litigated. See Duke v. Hoch, 468 F.2d 973, 979 (5th Cir. 1972). In addressing how to handle an unallocated verdict, the Fifth Circuit draws a distinction between litigating "intentional versus negligence" conduct coverage cases (e.g., Sims) in a later declaratory judgment action versus having allocation issues addressed in the "main" trial. Duke, 468 F.2d at 982. Specifically addressing allocation, the Fifth Circuit stated, "that coverage problems capable of resolution at the main trial should be resolved." Duke, 468 F.2d at 982. Further, Duke, 468 F.2d 973, like other allocation cases, does not stand for the proposition that *no* allocation needs to be done in the main trial; and a general verdict can simply be parsed in a later declaratory judgment action. See, Duke, 468 F.2d at at 984. In Duke, the Fifth Circuit Court of Appeals remanded the case and called for a retroactive look at the damages under the facts of the case because the insured may not have been advised of the need to do an allocation during the main trial. Duke, 468 F.2d at 984. The Fifth Circuit did not propose that a retroactive look in a second proceeding be the standard procedure. See, Duke, 468 F.2d at 984. Further, it is illogical to require an insurer to advise an insured of the need to allocate a verdict in the main trial; but not have an insured actually do so in the main trial because allocation will be delayed and determined in a later proceeding.

D) Intervention and Special Interrogatories Are Workable Civil Procedures.

Rule 49, SCRCP is a workable procedure, and a circuit court judge should not disregard Rule 49, SCRCP because a case may be complex. Further, circuit court judges are well equipped to manage their trials. Palmetto Pointe argues that the evidence may not be in the record in some

cases; thus, there will be no evidence to support the use of interrogatories. First, this argument is a hypothetical one because the evidence was in the record for the jury to do an allocation. (R. pp. 644-654.) Palmetto Pointe disregards this critical point. Palmetto Pointe could have asked the circuit court to submit interogatories to the jury to answer how much the jury awarded for the cost to remove and replace Tri-County Roofing's work and how much the jury awarded for water damaged other property.[10] Trial Exhibit 677 is a detailed line item estimate and includes a itemization of the costs for repairs that track the principles in Newman and Crossmann. (R. pp. 643-654.)[11] Further, Trial Exhibit 677 does not suggest insurance to the jury. See Duke v. Hoch, 468 F.2d 973, 979 (5th Cir. 1972). ("A request for indentification of the two types of damages reveal neither the precence of insurance nor the amount of coverage.").

The Fifth Circuit also discussed the importance of having the confidence in jurors to fulfill their service and rightly do an allocation during the main trial:

> Assuming as we must that the jury will follow instructions and make a correct allocation, the insurance company loses no benefit to which it is validly entitled from having the jury earmark the losses. Arguably the jury might, while complying with instructions, at its option throw damages into that category which it will speculate is insured. This is too tenuous to deserve more than mention. There may, however, be some awkwardness in argument to the jury, but this is nominal when balanced against the consequences to the insureds.

Duke, 468 F.2d at 979.

Palmetto Pointe could have addressed line item costs for the jury that can be reasonably understood and support answers to special interrogatories.

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[10] Again, Palmetto Pointe specifically made insurance an issue from the inception in its Complaint. (R. p. 29, ¶ 22; R. pp. 29-30, ¶ 23; R. p. 30, ¶ 29.)

[11] Builders Mutual craves reference to its Reply Brief to Tri-County Roofing where Builders Mutual illustrated in more detail how the allocation could have been presented to the jury.

Second, if not in the record, the answer is otherwise straightforward. Under the majority rule, once an insurer establishes that part of the liability represented by a judgment is for noncovered damages, the proponent of insurance then has the burden to prove the precise portion of the unallocated verdict that represents insured damages. Duke, 468 F.2d at 977; See also, Morris v. Western States Mut. Auto. Ins. Co., 268 F.2d 790, 793 (7th Cir. 1959)("Where the judgment includes elements for which the insurer is liable and elements outside the range of coverage, apportionment of damages to the respective causes of action is a burden on the party seeking to recover from the insurer."). Accordingly, it is incumbent upon the parties, Palmetto Pointe or Tri-County Roofing, to make a record with enough evidence on the allocation of damages that does not leave a court hearing a declaratory judgment action with only a general verdict. They are the named parties in the civil action. Palmetto Pointe has the burden of proof on damages in the construction defect case, and Palmetto Pointe and Tri-County are the parties seeking insurance coverage for those damages. At trial in the construction defect case, the parties can decide how much or how little evidence to present to a jury. If the parties fall short, then the parties should bear the consequences – not Builders Mutual.

There are consequences to there being a general verdict; and Palmetto Pointe offers no effective solution other than to delay all issues of insurance until a second or later proceeding. Importantly, Palmetto Pointe never answers two obvious questions: First, why did Palmetto Pointe not have the circuit court allocate the verdict when it had the chance to do so without the involvement of Builders Mutual? Again, the evidence was in the record. There was no legal impediment to Palmetto Pointe utilizing Rule 49, SCRCP. There is no conflict issue with Palmetto Pointe's counsel. Allocation is not altogether impossible to do. The jury was requested to apportion the verdict as to Defendants Eloy Vasquez and Wilson Lucas Sales d/b/a Miracle

Siding. The jury did so and apportioned five (5%) percent of the $6,500,000.00 general verdict to each. (R. p. 13.) Second, how can Palmetto Pointe now parse a general verdict without invading the province of the jury and using conjecture? Simply put, Palmetto Pointe objected to intervention to stop and prevent an allocation; and now wants to speculate over what the jury may have thought in reaching the verdict. These questions highlight the point that no party to the Civil Action did and no party will adequately protect the interest asserted by Builders Mutual seeking to allocate the verdict via intervention.

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

Palmetto Pointe objected to Builders Mutual being able to intervene. (R. pp. 272-304.) Palmetto Pointe does not address the legal consequences of it doing so; and Palmetto Pointe allowing a general verdict. Palmetto Pointe should be estopped from contending that Builders Mutual is bound by the general verdict. See Heritage Communities, 420 S.C. at 356, 803 S.E.2d at 307-08 (citing Mitchell v. Fed. Intermediate Credit Bank, 165 S.C. 457, 164 S.E. 136, 140 (1932) (noting a party may not use the same argument as both a shield and a sword); see also Duke, 468 F.2d at 980 (discussing Morris v. Western States. Mut. Auto Ins. Co., 268 F.2d at 793 (7th Cir. 1959)) ("The [Yancy] Court there held that one who suggests separate verdicts cannot be estopped to claim that a single verdict for one lacks proof of damages to two persons. The record before us discloses such suggestion was made by counsel for [the insurer] and opposed by the [plaintiff]"). The corollary is that Palmetto Pointe should also now bear the legal consequences for not seeking an allocation of the verdict. To allow otherwise is for Palmetto Pointe to guess at what the jury was thinking in rendering the compromised verdict. To allow Palmetto Pointe to parse the general verdict would require conjecture and speculation. Morris, 268 F.2d at 793. Doing so will also will also invade the province of the jury. (R. p. 244.)("This

Court likewise will not allow Harleysville to re-litigate the damages for to do so would be a clear invasion of the province of the jury").

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

Pametto Pointe briefly discusses Builders Mutual's second issue concerning the circuit court lacking subject matter jurisdiction. First, Palmetto Pointe does not address Rule 241(a), SCACR and South Carolina appellate court decisions concerning subject matter jurisdiction cited in Builders Mutual's Brief. Builders Mutual craves reference to the more detailed discussion of these authorities in Builders Mutual's Brief without repeating the same herein.

Palmetto Pointe's position is that Builders Mutual did not have a "substantial right" that would allow it to appeal and thus the circuit court was free to proceed to trial.[12] Again, the circuit court did not provide a reason for lifting the stay. (R. p. 9.) In its Reply Brief to Tri-County Roofing, Builders Mutual discussed the law on what circumstances may constitute a "substantial right" and incorporates that more detailed discussion herein. In summary, the South Carolina Supreme Court has held that an order denying a motion to intervene was immediately appealable—even though "the merits of the action hereinbefore mentioned [had] not been determined and as the trial of that action will still be necessary" - because insofar "as the rights of the [putative intervenor] are involved, the order [denying intervention] affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken." *Ex parte Johnson (Rutledge v. Tunno)*, 63 S.C. 205, __, 41 S.E. 308, 309 (1902). The question of whether Builders Mutual has any right or obligation to intervene is inextricably intertwined with the merits of the controversy or a jury verdict involving Palmetto Pointe and Tri-County Roofing.

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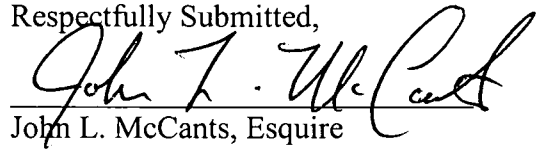
12 S.C.Code Ann. § 14-3-330.

Conclusion

The Supreme Court should reverse the circuit court and permit intervention by Builders Mutual. In the alternative, the Supreme Court should hold that the burden was on Palmetto Pointe and Tri-County Roofing to have allocated damages during trial and to have prevented a general verdict in order to determine insurance coverage; and that Palmetto Pointe and Tri-County Roofing bear the legal consequences for not doing so. Additionally, the Supreme Court should reverse the circuit court because the circuit court lacked jurisdiction to lift the automatic appeal stay and proceed to trial.

Respectfully Submitted,



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November 25, 2019

Certificate of Counsel

The undersigned hereby certifies that the Final Reply Brief Of Appellant Builders Mutual Insurance Company To Brief Of Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc., And Jack Love, Individually, And On Behalf Of All Others Similarly Situated, Plaintiffs, complies with Rule 211(b), SCACR.

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November 25, 2019

THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

RECEIVED

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

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

v.

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

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

v.

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

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

APPELLANT BUILDERS MUTUAL INSURANCE COMPANY'S PROOF OF SERVICE OF FINAL BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY, FINAL REPLY BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY TO AMICI CURIAE BRIEF OF HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY INSURANCE COMPANY AND HARTFORD UNDERWRITERS INSURANCE COMPANY, FINAL REPLY BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY TO BRIEF OF PALMETTO POINTE AT PEAS ISLAND CONDOMINIUM PROPERTY OWNERS ASSOCIATION, INC., AND JACK LOVE, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS AND FINAL REPLY BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY TO BRIEF OF RESPONDENT TRI-COUNTY ROOFING, INC.

I certify that I have served the Final Brief Of Appellant Builders Mutual Insurance Company, Final Reply Brief Of Appellant Builders Mutual Insurance Company To Amici Curiae Brief Of Hartford Fire Insurance Company, Hartford Casualty Insurance Company And Hartford Underwriters Insurance Company, Final Reply Brief Of Appellant Builders Mutual Insurance Company To Brief Of Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc., And Jack Love, Individually, And On Behalf Of All Others Similarly Situated, Plaintiffs And Final Reply Brief Of Appellant Builders Mutual Insurance Company To Brief Of Respondent Tri-County Roofing, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on **November 26, 2019** addressed to their attorneys of record, listed as follows:

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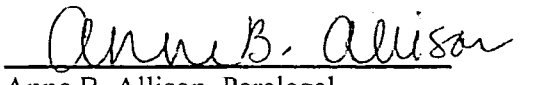

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