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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

Ex Parte:

Builders Mutual Insurance Company 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 AMICI CURIAE BRIEF OF HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY INSURANCE COMPANY AND HARTFORD UNDERWRITERS INSURANCE COMPANY

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REPLY ARGUMENT

Introduction

Appellant Builders Mutual Insurance Company ("Builders Mutual") submits the following reply to the Amici Curiae Brief of Hartford Fire Insurance Company, Hartford Casualty Insurance Company and Hartford Underwriters Insurance Company (together, "Hartford").

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.) Respondents Tri-County Roofing, Inc. ("Tri-County Roofing") and 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"), both objected to Builders Mutual being able to intervene. (R. pp. 305-314.)(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. p. 9.)(R. pp. 13-16.) [1] Neither Tri-County Roofing nor Palmetto Pointe sought to have the jury answer special interrogatories at trial pursuant to Rule 49, SCRCP. (Tri-County Initial Brief Pg. 8 of 17). There is now a general verdict for which Tri-County Roofing and Palmetto Pointe both demand that Builders Mutual pay the *entire* general verdict.

Hartford essentially seeks an advisory opinion that in construction defect cases in South Carolina an insurer does not have to intervene; and that a reservation of rights is sufficient to preserve the right to allocate damages in a separate declaratory judgment action. (Hartford Brief

[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).

Pg. 12). Hartford in effect asks the Supreme Court to adopt the procedure taken by Harleysville Insurance Company in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) ("Heritage Communities").

Builders Mutual submits that the procedure proposed by Hartford does not solve the conundrum of a general verdict and whether one can even parse a verdict after the fact for insurance coverage purposes. An insurer can write an informative reservation of rights letter, but if the parties to the underlying action do not allocate the verdict, the parties can only speculate thereafter in a later proceeding to parse the general verdict. As will be discussed, the Special Referee in Heritage Communities ruled that a retroactive look would be speculative and improper to do; and refused to admit expert evidence proffered by Harleysville Insurance Company attempting to allocate the general verdict. (R. p. 242.) The Supreme Court in Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009)("Newman") ruled that Auto-Owners Insurance Company had to pay the entire judgment, regardless of the reservation of right, because the judgment had not been allocated.

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.

Hartford organizes it argument around the reasons given by the Honorable Clifton Newman in his orders denying Hartford's motion to intervene in other construction defect cases. (Hartford Brief Pg. 6). First, Hartford cites to Gov't Employee's Ins. Co., Ex parte, 373 S.C. 132, 644 S.E.2d 699 (2007) for the proposition that an intervening party must have standing. Builders Mutual submits that reliance on Gov't Employee's Ins. Co. does not take into account the

complexities of insurance coverage for construction defect cases in South Carolina. Importantly, the insurer in Gov't Employee's Ins. Co. was *not* bound for coverage 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"). 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).

Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 602-03 (1991) is an example where the Supreme Court adopted a pragmatic approach to standing in order to address special circumstances where an intervenor would not become a named party. Davis, 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"). The Supreme Court is also 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. Builders Mutual submits that the Supreme Court (i) is empowered to permit intervention or order a procedure that addresses the concerns with general verdicts in construction defect cases and insurance coverage (ii) and can devise a procedure for trial that does not reveal the presence of insurance to the jury.

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.

In two prior decisions, the South Carolina Supreme Court required the insurer in each appeal to pay a general verdict arising in a construction defect civil action where the Supreme Court or a lower court believed that one could not discern what parts of the verdict were covered and not covered by the applicable CGL insurance policies. Newman, 385 S.C. at 198, 684 S.E.2d at 547; Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294. The Supreme Court stated the following:

> [W]e ***hold*** that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy. (*emphasis added*).
>
> Nevertheless, it is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. ***Auto–Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator***, who issued a final, binding award on the merits.[5] (emphasis added, footnote as appears in original). See Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.").

Newman, 385 S.C. at 198, 684 S.E.2d at 546-47.

Builders Mutual cannot simply disregard the language above as not having precedence. See Nash v. Tindall Corp., 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007). Further, any suggestion that Newman involved an arbitration which is different than a jury trial is not a sound distinction. An arbitrator can render a general award, which only identifies the amount of the award. MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849, 862 (4th Cir. 2010)("It is well settled that arbitrators are not required to disclose the basis upon which their awards are made and courts will not look behind a lump-sum award in an attempt to analyze their reasoning

process."). A general arbitration award has the same problem as a general jury verdict does with parsing.

In the underlying declaratory judgment action, for Heritage Communities, the Special Referee ruled that Harleysville Ins. Co. was obligated to pay the general verdict in part because the Special Referee did not believe he could parse the general verdicts for coverage purposes. Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294. The Special Referee specifically cited to and relied on the paragraphs quoted above from Newman and stated the following: "[t]he [Supreme Court in Newman] refused to allow Auto-Owners to relitigate damages as have other courts. This Court likewise will not allow Harleysville to re-litigate the damages for to do so would be a clear invasion of the province of the jury." (R. p. 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 Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011)("Crossman")). Heritage Communities, 420 S.C. at 343 n. 11, 803 S.E.2d at 300 n. 11.

Rule 24, SCRCP, and special interrogatories pursuant to Rule 49, SCRCP, were not issues in the appeal in Heritage Communities 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 Hartford. (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). In Newman, the Supreme Court raised the issue of allocating damages *sua sponte* in the Court's final decision. See Newman, 385 S.C. at 198, 684 S.E.2d at 546-47.

Several 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.) Permitting Builders Mutual to intervene in this case would unquestionably further serve judicial economy. In this case, if Builders Mutual were allowed to intervene, there would not be a general verdict; and the parties would have an allocation that can decide coverage without more and protracted litigation as the parties are currently engaging in via the pending appeals and litigation.

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

Builders Mutual submits that Newman and Heritage Communities do not permit a parsing of a general verdict in a declaratory judgment action.[2] Applying the rationality of the Special Referee in Heritage Communities, Tri-County Roofing and Palmetto Pointe cannot parse a general verdict in a declaratory judgment action. Builders Mutual submits that in the trial, the jury compromised the approximate $15,000,000.00 estimate and awarded $6,500,000.00 in

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

actual damages against 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. pp. 244-245.) 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.)[3]

Hartford cites to Judge Newman's reliance in his orders on Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965) to contend that an insurer can protect its interest in a separate declaratory judgment action. (Hartford Brief Pg. 8). To recall, Harleysville Ins. Co. relied on Sims in Heritage Communities to the detriment of Harleysville Ins. Co.[4] (R. pp. 242-245.)[5] 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.)[6]

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

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[3] 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.

[4] 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.)

[5] 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.)

[6] 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.)

Nationwide to direct its retained counsel to argue that the insured acted intentionally and thus 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.

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, Hartford does not address that Tri-County Roofing retained additional counsel to represent Tri-County Roofing and appear in the underlying action. 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.

Second, Hartford does not address Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 826 S.E.2d 270 (2019) and the South Carolina Rules of Professional Conduct cited in Builders Mutual's Brief. 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 insured."). As such, Builders Mutual submits that the conflict perceived by some for retained counsel is not an actual conflict at all in South Carolina.

Third, 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.

D) Intervention and Special Interrogatories Are Workable Civil Procedures.

Hartford relies on the argument that juries will be confused should insurers be allowed to intervene. (Hartford Brief Pg. 10). Builders Mutual submits that confusion, prejudice and chaos will not ensue, and South Carolina circuit court judges are well-equipped to manage their courtrooms. The South Carolina Appellate Court Rules, including the Rules of Professional Conduct, South Carolina Rules of Civil Procedure and South Carolina Rules of Evidence govern the parties. Rule 49, SCRCP is a workable procedure, and a circuit court judge should not disregard Rule 49, SCRCP because a case may be complex.

The circuit court in the underlying action could have submitted interogatories to the jury to answer how much the jury awarded for the cost to remove and replace Tri-County Roofing's work and how much the jury awarded for water damaged other property. The evidence was in

the record for the jury to do an allocation. (R. pp. 644-653.) 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. 643-653.) 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 parties could have addressed line item costs for the jury that can be reasonably understood and support answers to special interrogatories. Yes, the task would require some additional work and may be complicated. However, the alternative is a general verdict and further protracted litigation.

Asking the jury to answer special interrogatories is not overly complicated. To recall, after the general verdict in the trial of the underlying action, the circuit court conducted an apportionment hearing, in accordance with S.C. Code Ann. § 15-38-15 (1976), wherein the jury was requested to apportion the verdict as to Defendants Eloy Vasquez and Wilson Lucas Sales d/b/a Miracle Siding. The jury did so and apportioned five (5%) percent of the $6,500,000.00 general verdict to each. (R. p. 17.) Albeit complicated, the jury was able to apportion the $6,500,000.00 verdict based on the evidence and documents admitted into evidence at trial.

Hartford misses a critical point in proposing that parties be allowed to wait until a declaratory judgment action to allocate a general verdict. Although cited favorably by the Supreme Court in Heritage Communities, Duke, 468 F.2d 973, like other allocation cases, does not stand for the proposition that *no* allocation needs to be done in the trial for an underlying action; and a general verdict can simply be parsed in a later declaratory judgment action. See,

Duke, 468 F.2d at at 984.[7] 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 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.

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.

It is also worth remembering that the consequences to the insurer in Duke were much less significant than the consquences to the insurers in Newman and Heritage Communities. The insurer in Duke was not held liable for the entire verdict comprised of insured and uninsured damages. See Duke, 468 F.2d at 984. Again, the Special Referee in Heritage Communities did not conduct further proceedings to allow the insureds an opportunity to retrospectively attempt to allocate the general verdicts. (R. p. 248.) And, the Special Referee relied on Newman in part for this ruling. (R. p. 248.) In Newman, the Supreme Court did not remand for a further proceeding

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[7] 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.").

to allow the insured (or judgment creditor Newman) an opportunity to retrospectively attempt to allocate the arbitrator's award. The Supreme Court found that Auto-Owners Ins. Co. bore the consequences for the entire general award. Newman, 385 S.C. at 198, 684 S.E.2d at 547.

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

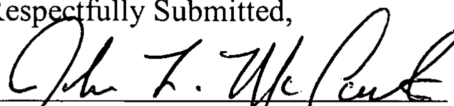
Palmetto Pointe and Tri-County Roofing objected to Builders Mutual being able to intervene. Hartford does not specifically address the legal consequences of the two parties doing so; and the two parties allowing a general verdict. Tri-County Roofing and Palmetto Pointe should be estopped from contending 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 and Tri-County Roofing should now bear the legal consequences for not seeking an allocation of the verdict.

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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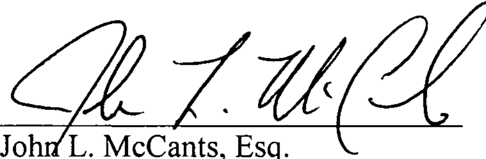
Attorney for Appellant Builders Mutual Ins. Co.

November 25, 2019

<u>Certificate of Counsel</u>

The undersigned hereby certifies that the 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, complies with Rule 211(b), SCACR.



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November 25, 2019

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

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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:

cc:

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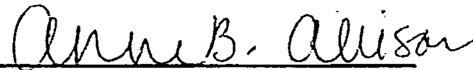

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November 26, 2019