THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

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, Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, and Nautilus Insurance Company, Appellants,

In Re:

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, individually, and on behalf of all other 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.; Tallen 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 d/b/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.

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Final Brief of Respondent Tri-County Roofing, Inc.

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November 25, 2019

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STATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court properly held that South Carolina law does not permit a liability insurer to intervene in a tort action to protect its rights to contest coverage.

II. Whether appeal of a circuit court's denial of a motion to intervene is interlocutory and impermissible.

STATEMENT OF THE CASE

This is an appeal by Builders Mutual Insurance Company ("Buliders Mutual") from the circuit court's order denying the insurer's motion of partial intervention dated December 17, 2018 and filed on December 18, 2018 ("Order Denying Intervention"); and the circuit court's order denying Builders Mutual's subsequent motion to reconsider dated January 16, 2019 and filed on January 17, 2019 ("Order Denying Motion to Reconsider"). Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.'s and Jack Love's, individually, and behalf of all others similarly situated (together "Palmetto Pointe") commenced the construction defect action bearing Civil Action No. 2015-CP-10-00955 on February 13, 2015 in the Court of Common Pleas for Charleston County, SC, against numerous contractors, including Respondent Defendant Tri-County Roofing, Inc., ("Tri-County"), complaining about the construction of the buildings in the Palmetto Pointe at Peas Island development in Charleston County, SC (the "Civil Action"). (R. 24-41 and 58-79).

STANDARD OF REVIEW

In reviewing the denial of a Rule 24 motion, an appellate court must determine whether the trial court abused its discretion. S.C. *Tax Com. v. Union County Treasurer,* 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988); *Exparte Gov't Emples. Ins. Co. v. Goethe,* 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007); *Ex parte State ex rel. Wilson,* 391 S.C. 565, 579, 707 S.E.2d 402, 410 (2011).

FACTS

Complete Building constructed the Palmetto Pointe at Peas Island condominium development. (R. 64, ¶ 10). The development consists of forty townhome style condominiums located in twenty buildings and a clubhouse. (R. 63, ¶ 3). For part of the construction, Complete Building subcontracted with Tri-County to install roofs, siding and deck coatings for the construction of buildings. (R. 63, ¶ 1). The buildings were constructed in 2006 and 2007. (R. 274).

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. 63, ¶ 1). 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.

Builders Mutual issued numerous commercial general liability policies to Tri-County. (Builders Mutual's Brief p. 8). These policies were in effect during a portion of the period of time when progressive moisture damage to the condominiums is alleged to have occurred. Following the circuit court's denials of Builders Mutual's motion to intervene and its subsequent motion for reconsideration and other relevant motions, on May 6, 2019, the circuit court presided over a jury trial involving Tri-County Roofing and other Defendants in the Civil Action. Special interrogatories were not submitted to the jury as requested by Builders Mutual. On May 16, 2019, the jury returned a general verdict in favor of Palmetto Pointe against Tri-County Roofing, and other Defendants, in the amount of $6,500,000.00 in actual damages and $500,000.00 in punitive damages against Tri-County Roofing. (R. pp. 13-17).

ARGUMENT

It must be stressed from the onset that, by making its intervention motion in the Civil Action, Builders Mutual has created a conflict between Tri-County and its defense counsel, whom Builders Mutual has retained and is paying under its duty to defend. Builders Mutual's motion and its to-be-provided proposed interrogatories have a singular purpose – limiting its duty to indemnify Tri-County in the event an award is entered against Tri-County. Tri-County's paid-for defense counsel could not argue against Builders Mutual's motion to intervene, because its counsel cannot argue coverage issues. Thus, Tri-County had to retain personal counsel to defend Builders Mutual's motion.

Despite Builders Mutual's complete breach of its duty to defend Tri-County, and the unreconcilable position in which Builders Mutual has put its insured and counsel it hired, Builders Mutual nevertheless argues that it should be allowed to step into this action to protect its interests. In reality, Builders Mutual's interests, which amount to no more than a self-serving desire to limit potential, and purely speculative, coverage, have no place in defective construction litigation. Builders Mutual had no claims to make or damages to allege in the Civil Action. It does not own the property that was at issue. It was not a contractor, subcontractor or supplier who might have performed negligent construction. And it is not part of the class of homeowners allegedly impacted by negligent construction. Its role is to fulfill its duty to defend Tri-County, which it was arguably doing until making its motion to intervene and driving a wedge between its insured and counsel for its insured.

As the law evolves in this area, and insurance companies attempt to push the boundaries of reasonableness, it seems fitting that some of this state's landmark decisions concerning the bad acts of insurance companies should still serve as a guide. See *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933) (finding that when there is a conflict of

interest, the insurer is "bound, under its contract of indemnity, and in good faith, *to sacrifice its interest in favor of those of the [insured]* [emphasis in original]."); *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 88, 145 S.E.2d 523, 526 (S.C. 1965). (holding that an insurer "cannot possibly defend the state court action and protect both its own interests and interests of its insureds.").

A. **Builders Mutual's reliance on *Newman* and *Harleysville* is misguided because the decisions make no mention of Rule 24, SCRCP, and they do not stand for a rule allowing an insurer to intervene; while remaining a non-party, solely to guard against a speculative duty to indemnify, and thereby creating a conflict of interest between Builders Mutual and Tri-County.**

Throughout its motion to intervene and its brief in support of this appeal, Builders Mutual relies heavily on our Supreme Court's decisions in *Auto-Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), and *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017) to argue that it should be allowed to intervene on a limited basis and provide specific jury interrogatories. (See Mot. and Brief; R. pp. 97-113). Again, the to-be-drafted interrogatories aim to distinguish between covered and excluded damages.

Builders Mutual's reliance on *Newman* and *Harleysville* is tenuous, at best. Neither decision makes mention of intervention as a mechanism for an insurer to parse covered and excluded damages. And at no point in the decisions does Rule 24, SCRCP, come up. Builders Mutual recognizes this issue, and it makes a concerning leap in logic by arguing, "[t]he Supreme Court did not hold that it would be improper for an insurer to intervene...." (R. p. 106). That is true, because intervention under Rule 24, SCRCP, was not before the Courts in those decisions. But, absence of an unfavorable rule of law does not equate to the presence of a beneficial rule of law. If it did, then every decision ever written could be used to advance undiscussed rules of

law, wholly conceived by parties and their counsel.

By relying on *Newman*, Builders Mutual is stuck with dicta, made in passing and buried in a footnote, which states, "[insurer] represented [insured] in binding arbitration, made mandatory by the terms of the insurance contract. [Insured] 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, [insured] did not seek review of or otherwise contest the damages award." *Newman* at 198, 547, n. 5.

Builders Mutual's reliance on *Harleysville* is more of a stretch. It is forced to quote language from the dissent that is actually harmful to its motion to intervene. (R. p. 106). In the dissent, Justice Pleicones argues, "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* [emphasis added]." *Harleysville*, 420 S.C. at 363, 803 S.E.2d at 311. (citing *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965)). In other words, even the dissent, which Builders Mutual attempts to use to its advantage, concludes that intervention is not proper because it would violate established conflict of interest laws.

Builders Mutual has attempted to read between the lines of these decisions and extract a rule of law that apparently only it has the ability to see.

B. **Builders Mutual does not have standing to intervene in this action, and its intervention on a limited basis would only serve to confuse the jury, create attorney-client conflicts and prejudice its insured, Tri-County.**

Builders Mutual runs through Rule 24 analysis, without addressing the threshold issue of standing. Our state's Supreme Court has held, "a party must have standing to intervene in an

action pursuant to Rule 24, SCRCP." *Ex Parte Government Employee's Ins. Co.* (GEICO)., 373 S.C. 132, 138 644 S.E. 2d 699, 702 (2007) (citing *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). A party is deemed to have standing if the party has a personal stake in the subject matter of a lawsuit and is a "real party in interest." *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) (quoting *Duke Power Co. v. South Carolina Public Service Comm'n*, 284 S.C. 81, 326 S.E.2d 395 (1985); *Dockside Ass'n. Inc. v. Detyens Simmons*, 285 S.C. 565, 330 S.E.2d 537 (Ct.App.1985)). "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Id.*

Builders Mutual's "interest" in this action are similar to the "peripheral" interest of the parties who were denied intervention in both *GEICO* and *Bailey*. In *GEICO*, this Court held that an insurance carrier, which had denied its insured's claim to stack coverage on the grounds that the claimant was not a Class I insured, could not intervene in the family court proceeding in which the insured sought an order validating his common law marriage so that he could stack coverage as a Class I insured. *GEICO* at 139, 703. This Court held that GEICO did not have standing, as it did not have "an interest relating to the property or transaction which is the subject of the action," as required by Rule 24(a)(2). The Court instead found that "GEICO's interest is in the financial implications of the family court's decisions, which is peripheral to the subject matter before the court. This interest is insufficient to warrant GEICO's intervention . . .." *Id.*

In *Bailey*, two previous attorneys for the wife in a divorce action moved to intervene in the same divorce action to make claims for their fees. The Court held, "[w]e find that [the attorney's] interest as claimants asserting a right to attorney fees is peripheral and not the real interest at stake. Therefore, we hold that [they] lack standing to intervene in appellants' lawsuit."

Bailey, 312 S.C. at 458, 441 S.E.2d at 327.

Similar to the would-be intervenors in *GEICO* and *Bailey*, Builders Mutual lacks standing to intervene in this case, because the interest it asserts is not in the actual subject matter of the case; instead, it is merely an interest in the financial implications, specifically, coverage implications, of the jury's decision, which is peripheral to the subject matter that was before the lower court. At issue in the circuit court action was whether Tri-County performed negligent construction. And, as argued above, Builders Mutual is not a condominium owner who may have suffered damages, nor is it a contractor who may have caused damages. It simply wanted to step in, on a very limited basis, to guide the jury toward making a favorable coverage determination. In effect, Builders Mutual has attempted to assume control of this case by interjecting a *de facto* declaratory judgment action into jury deliberations.

Builders Mutual's desire to intervene on a very limited basis should be instructive about whether it has a real interest, and thus standing, in this action. It does not have a real interest, and it does not possess standing. Moreover, this tactic raises broader concerns, most of which Builders Mutual acknowledges, yet casts aside. First, Rule 24, SCRCP, does not mention intervention on a limited basis. Rule 24 allows for parties with an interest to come into an action as a party, not a ghost-writer of jury interrogatories. Builders Mutual knows it cannot be a party, because of the long-standing concerns about informing a jury as to the existence of insurance. (R. 110). In this regard, Builders Mutual wants to use its limited intervention as a weapon and a shield. It wants the benefit of obtaining coverage information from the jury, which it will use against Tri-County at a later time. Simultaneously, it wants its identity to be protected from the jury, because it knows that a jury might grant a bigger award, if it discovers Tri-County is being defended by Builders Mutual. This type of intervention is not written in Rule 24, SCRCP, and it

seems completely contrary to the intent of the rule, which, again, is to include – *as named parties* – parties that have a real interest.

Second, Builders Mutual's desire to intervene for this purpose assumed far too much about how testimony and evidence would be presented at trial. Moreover, regardless of how testimony and evidence was presented at trial, allowing Builders Mutual to intervene as requested would require it's insured to illicit testimony and evidence against itself in an effort to answer the special interrogatories. For example, assume that the Plaintiff's case and presentation of damages, as related to Tri-County's scope of work, does not distinguish between covered and excluded damages (which appears to be what in fact happened). The only way to combat that issue is to have defense counsel ask questions that parse damages and that put the jury in a position to answer the interrogatories. Builders Mutual has acknowledged that the counsel it hired to defend Tri-County cannot take such actions, because defense counsel is there to defend Tri-County, not steer testimony and evidence toward a favorable coverage position. (R. p. 110). Thus, requiring Tri-County to hire its own counsel to deal with this issue in the underlying matter that its insurer created. To ensure that it can provide interrogatories that make any sense, from evidentiary standpoint, Builders Mutual's "limited" intervention would highjack the litigation from afar in an effort to ensure that the record is developed appropriately, a notion repugnant to bedrock principles of insurer good-faith and fair dealings.

Third, if Builders Mutual is allowed to provide interrogatories, then, undoubtedly, carriers for all the remaining Defendants will want to make sure they are afforded the opportunity to ask similar questions of the jury. In fact, there were several other similar intervention motions pending in the Civil Action. The jury likely would be utterly confused as to why it is answering hundreds of questions that do not seem to have any bearing on the overall

award of damages. Even more prejudicial to Tri-County and the other Defendants, the jury might see these interrogatories for what they really are – the presence of insurance and perceived pockets to pay larger awards. In turn, the jury might punish the Defendants with larger awards, not knowing that its answer to proposed interrogatories will put the Defendants in a position to come out of pocket for those awards.

All of these concerns amount to "practical considerations" that should be given significant weight by this Court. *GEICO,* 373 S.C. at 138 644 S.E. 2d at 702 (stating, "the Court should consider the practical implications of a decision denying or allowing intervention."). Based on these troubling practical considerations, along with Builders Mutual's complete lack of standing and Rule 24's silence on the issue of "limited" intervention, this Court should confirm the circuit court's rulings.

C. **Builders Mutual has the right to file a declaratory judgment action, which would provide it with a venue to argue whether it has a duty to indemnify Tri-County from a judgment be entered against Tri-County.**

Builders Mutual's venue for arguing coverage and contenting a duty to indemnify Tri-County is a declaratory judgment action.[1] The rule of law allowing an insurer to contest coverage in a subsequent and separate declaratory judgment action has been around for decades. In *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965), this Court specifically addressed the exact concern at issue in this case, and it recognized an exception to the general rule that an insurer is bound by a valid judgment against its insured to the existence and extent of liability. The Court stated the exception to the rule as follows: "[t]his rule is binding only as to

[1] Builders Mutual has filed such a declaratory judgment action against in Federal District Court, Builders Mutual Insurance Company v. Tri-County Roofing, Inc. and Palmetto Pointe at Peas Island Condominium Association, et al. (2:19-cv-01312-MBS)

issues relevant to the (underlying) proceeding; and that the judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the circumstances under which he was required to give indemnity do not exist." *Id.* at 87, 145 S.E.2d at 525. (citing Restatement of the Law of Judgment, Section 107(a), Comment (g)).

The purpose of this exception is to preserve and protect the insurer's interest in only paying those damages which are covered under the scope of the insurance policy, while also avoiding impermissible conflict. As argued above, the conflict of interest that Builders Mutual has created between defense counsel it hired and its insured may be the most compelling reason to deny Builders Mutual's appeal. The *Sims* court highlighted the issue and stated that if an insurer attempts to take actions similar to those taken by Builders Mutual in this case, it is put "in a dilemma of conflicting interests. It cannot possibly defend the state court action and protect both its own interests and interests of its insureds." *Id.* at 88, 145 S.E.2d at 526. Despite this clear conflict of interest, Builders Mutual has sought out to protect its own interest at the expense of its insured, which has been forced to pay personal counsel to step in and defend against Builders Mutual's impermissible attempt to intervene. Builders Mutual has put Tri-County on an island, and its actions run contrary to its duty to defend Tri-County in this case.

CONCLUSION

For all of the above-stated reasons, this Court should confirm the circuit court's rulings.

(Signature on following page)

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Certificate of Respondent Tri-County Roofing, Inc.

The undersigned certifies that the Final Brief of the Respondent Tri-County Roofing, Inc. complies with Rule 211(b), SCACR.

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Certificate of Service of Respondent Tri-County Roofing, Inc.'s Final Brief on All Counsel of Record

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I certify that, on the date indicated below, I served the Respondent Tri-County Roofing, Inc.'s Final Brief and the Certificate of Respondent Tri-County Roofing, Inc. regarding its compliance with SCACR 211(b) by United States Mail, postage prepaid, on the following Counsel of Record:

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