

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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NOV 26 2019

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

Ex Parte:

Builders Mutual Insurance Company, 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., and W C Services, Inc., are the Respondents.

RECORD ON APPEAL
VOLUME I of II

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NOV 26 2019

S.C. SUPREME COURT

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.
PLAINTIFF(S)

Island Pointe, LLC, et al.

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motions for Intervention filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2764

Judge Code

12/17/18

Date

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

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PLAINTIFF(S)

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DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant
	or
	☐ Self-Represented Litigant

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- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motions for Reconsideration of this court's ruling on Motions to Intervene filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

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 Circuit Court Judge	2764 Judge Code	1/16/18 Date

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. AND JACK LOVE,
INDIVIDUALLY, AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

VS.

ISLAND POINTE, LLC; COMPLETE
BUILDING CORPORATION; TRI-COUNTY
ROOFING, INC.; CREEKSIDE, INC.;
AMERICAN RESIDENTIAL SERVICES, LLC
D/B/A ARS/RESCUE ROOTER
CHARLESTON; ANDERSEN WINDOWS,
INC.; ATLANTIC BUILDING
CONSTRUCTION SERVICES, INC. N/K/A
ATLANTIC CONSTRUCTION SERVICES,
INC.; 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.; CERTAINTED
CORPORATION; KELLY FLOORING
PRODUCTS, INC., D/B/A CARPET
BAGGERS; CORNERSTONE
CONSTRUCTION AND MARK MALLOY
D/B/A CORNERSTONE CONSTRUCTION;
MIRACLE SIDING, LLC AND WILSON
LUCAS SALES D/B/A MIRACLE SIDING,
LLC; MARK PALPOINT A/K/A MICAH
PALPOINT; ELROY ALONZO VASQUEZ;
CHRIS A/K/A JOHN DOE 61; ALDERMAN
CONSTRUCTION; STANLEY'S VINYL
FENCE DESIGNS; COHEN'S DRYWALL
COMPANY, INC.; MOSELY CONCRETE;
HAND A FRAMING CONSTRUCTION, LLC
A/K/A H&A FRAMING CONSTRUCTION,

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO. 2015-CP-10-0955

FILED
2019 APR -5 PM 2:59
JULIE J. ARMSTRONG
CLERK OF COURT

ORDER STAYING CASE

Jm/1

LLC AND D/B/AH AND A FRAMING, LLC,)
H&A CONSTRUCTION, AND HAND A)
CONSTRUCTION; JMC CONSTRUCTION,)
INC.; JMC CONSTRUCTION, LLC; JOHN)
DOE 1-15,)

Defendants.)

COMPLETE BUILDING CORPORATION,)
INC.,)

Third-Party Plaintiff,)

VS.)

LEONARD T. BROWNE AND)
CHRISTOPHER N. UNION,)

Third-Party Defendants.)

CREEKSID, INC.,)

Third-Party Plaintiff,)

VS.)

CHRISTOPHER N. UNION,)

Third-Party Defendant.)

AMERICAN RESIDENTIAL SERVICES, LLC,)

Third-Party Plaintiff,)

VS.)

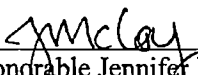
VICTOR HUGO HERNANDEZ; HERNANDEZ)
ELECTRIC, LLC; LILIANA ROJAS FLORES;)
MARTIN BARR D/B/A PORT CITY)
STRUCTURED WIRING; KELLER)
ELECTRIC, LLC; JOHN TOOLIN D/B/A)
JOHN F. TOOLIN HEAT AND AIR; RUSSELL)
"RUSTY" HILL D/B/A RUSTY'S HEATING &)
AIR; and WARREN ANDERSON,)

Third-Party Defendants.)

Pursuant to Rule 205 and 241 of the SCACR, and upon review of the Notices of Appeal filed by Builders Mutual Insurance Company and Nautilus Insurance Company on February 22, 2019, and the Notice of Appeal filed by Nationwide Insurance Company on February 28, 2019, the Appellate Court has exclusive jurisdiction over this case at this time. Therefore, the case is hereby STAYED.

AND IT IS SO ORDERED!

Charleston, South Carolina
April 5, 2019



The Honorable Jennifer B. McCoy.
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant
	or
	☐ Self-Represented Litigant

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NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Petition to Lift the Automatic Stay is GRANTED. Trial will proceed May 6, 2019.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

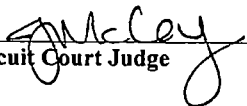
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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

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 Circuit Court Judge	2764 Judge Code	4/25/19 Date

The South Carolina Court of Appeals

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 others similarly situated, Plaintiffs,

v.

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

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

v.

Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction; Gutter Works, Inc. and Michael L. Segars d/b/a Gutter Works; Mr. Gutter; Litchfield Seamless Gutters & Windows, LLC and Thomas Litchfield d/b/a Litchfield Seamless Gutter; Miracle Siding, LLC and Wilson Lucas Sales d/b/a

Miracle Siding, LLC; Mark Palpoint a/k/a Micah Palpoint; Elroy Alonzo Vasquez; and Chris a/k/a John Doe 61, Third-Party Defendants.

And

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

v.

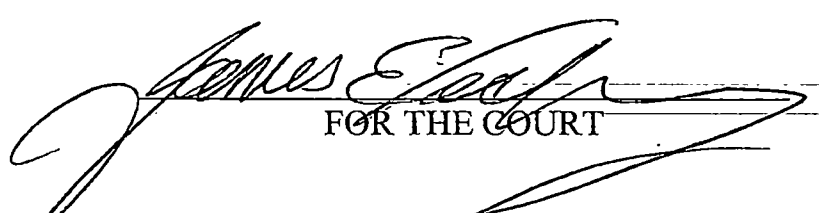
Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete, Third-Party Defendants,

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

Appellate Case No. 2019-000238

ORDER

Appellants' motions requesting that this court stay the trial scheduled to begin May 6, 2019 are denied. The trial may proceed as scheduled. The motion to dismiss this appeal is denied.


FOR THE COURT

Columbia, South Carolina

cc:

FILED

May 15, 2019 S.S.

John Lucius McCants, Esquire
Justin O'Toole Lucey, Esquire
Stephanie D. Drawdy, Esquire
Joshua Fletcher Evans, Esquire
Edward D. Buckley, Jr., Esquire
Steven L. Smith, Esquire
Zachary James Closser, Esquire
Samuel Melvil Wheeler, Esquire
Janice Holmes, Esquire
Shelley Sunderman Montague, Esquire
John Robert Murphy, Esquire
Timothy J. Newton, Esquire
George Troy Thames, Esquire
James A. Atkins, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS
ISLAND CONDOMINIUM PROPERTY
OWNERS ASSOCIATION, INC. AND
JACK LOVE, INDIVIDUALLY, AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

PLAINTIFFS,

vs.

COMPLETE BUIDLING CORP., ET AL,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2015-CP-10-0955

VERDICT FORM

- 1) We, the jury, find for the Plaintiffs against the following Defendants on the cause of
action for Breach of Implied Warranty (select all that apply):

a)	☒ Yes / No (Circle one)	Complete Building Corporation;
b)	☒ Yes / No (Circle one)	TriCounty Roofing;
c)	Yes / ☒ No (Circle one)	WC Services;
d)	☒ Yes / No (Circle one)	Wilson Lucas Sales d/b/a Miracle Siding;
e)	☒ Yes / No (Circle one)	Eloy Vasquez.

- 2) We, the jury, find for the Plaintiffs against the following Defendants on the cause
of action for Negligence (select all that apply):

a)	☒ Yes / No (Circle one)	Complete Building Corporation;
b)	☒ Yes / No (Circle one)	TriCounty Roofing;

- c) Yes / ☒ No (Circle one) WC Services;
- d) ☒ Yes / No (Circle one) Wilson Lucas Sales d/b/a Miracle Siding;
- e) ☒ Yes / No (Circle one) Eloy Vasquez.

(Answer next questions only if one or more subparts in the first two (2) questions were found in favor of the Plaintiffs)

- 3) If the answer to any of the subparts to the foregoing two (2) questions is in favor of the Plaintiffs, set forth below your award of damages to the Plaintiffs:

(\$ 6,500,000.00)

- 4) If you find through clear and convincing evidence that any of the Defendants acted with gross negligence, or with conscious or reckless disregard for Plaintiffs' rights, so indicate by circling Yes below. Otherwise, circle No below:

- a) ☒ Yes / No (Circle one) Complete Building Corporation;
- b) ☒ Yes / No (Circle one) TriCounty Roofing;
- c) Yes / ☒ No (Circle one) WC Services;
- d) Yes / ☒ No (Circle one) Wilson Lucas Sales d/b/a Miracle Siding;
- e) Yes / ☒ No (Circle one) Eloy Vasquez.

- 5) If your answer to the foregoing question (4) was yes, how much do you award against the specified Defendants in punitive damages?

- a) Complete Building Corporation:

(\$ 500,000.00)

b) TriCounty Roofing:

(\$ 500,000.00)

c) WC Services:

N/A
(\$ _____)

d) Wilson Lucas Sales d/b/a Miracle Siding:

N/A
(\$ _____)

e) Eloy Vasquez:

N/A
(\$ _____)

6) Do you find that Complete Building Corp. is entitled to indemnity from TriCounty Roofing ? Yes / No (circle one).

If yes, how much do you award Complete Building Corp. on its cross-claim against TriCounty Roofing ?

(\$ 1,000,000)

7) Do you find that Complete Building Corp. is entitled to indemnity from WC Services ?

Yes / No (circle one).

If yes, how much do you award Complete Building Corp. on its cross-claim against WC Services ?

(\$ N/A)

Date: 16 May 19

 Walter J. Dean
Presiding Juror

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS
ISLAND CONDOMINIUM PROPERTY
OWNERS ASSOCIATION, INC. AND
JACK LOVE, INDIVIDUALLY, AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

PLAINTIFFS,

vs.

COMPLETE BUIDLING CORP., ET AL,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2015-CP-10-0955

SPECIAL VERDICT FORM

- 1) Please indicate what percentage of the \$6,500,000.00 actual damages awarded to the Plaintiff is attributable to the following Defendants:

Wilson Lucas Sales d/b/a Miracle Siding

5 %

Eloy Vasquez

5 %

Date: 16
19 May 19

Walt S. D.
Presiding Juror

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Michael Ingram and Diane Ingram,)
Bobby Horn and Donita Horn, and)
Bob Shropshire and Kathy Shropshire,)
on behalf of themselves and)
all others similarly situated,)
Plaintiffs,)

Civil Action No. 2017-CP-26-2854

v.)
Lauderdale Bay Developers, LLC,)
Bill Clark Homes of Myrtle Beach, LLC,)
L&R Plumbing, Inc., Elite Exteriors, LLC,)
G&F Siding and Framing, Inc. a/k/a G&F)
Framing & Siding, Inc., Lauderdale Bay)
Homeowners Association, Inc., Jeff Farrell)
and John Doe Defendants 1 through 5,)
Defendants,)

ORDER DENYING PLAINTIFFS'
MOTION TO RECONSIDER

Bill Clark Homes of Myrtle Beach, LLC,)
Third-Party Plaintiff,)
v.)
Exterior Concepts 2, Inc. and)
Elizabeth Saldivar d/b/a A.S. Construction,)
Third-Party Defendants.)

This matter is before this Court on the Plaintiffs' Motion to Reconsider the Order Granting Motion to Intervene as filed on October 18, 2018. After careful consideration of the Plaintiffs' motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded. Accordingly, this Court hereby denies Plaintiffs' motion as discussed more fully below. In addition, pursuant to Rule 59(f),

SCRCP, the Court is of the opinion that oral argument is not necessary and thereby decides this motion on the written submissions filed by the parties alone.

On October 18, 2018, this Court issued an Order Granting Motion to Intervene which allows Selective Insurance Company of South Carolina (“Selective”) to intervene in this action for a limited purpose, specifically to have the requisite standing to request that the trial judge submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury’s verdict against G&F Framing & Siding Inc., if a verdict is returned in favor of the Plaintiffs and/or Lauderdale Bay Homeowners Association. In its Order, this Court relied heavily on the South Carolina Supreme Court’s decisions in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017) and *Auto-Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), which address the responsibility for a liability insurer to attempt to obtain a special verdict showing an allocation between covered and non-covered damages. This Court wrote: “As the Supreme Court’s decisions in *Harleysville* and *Newman* make evident, Selective is entitled to intervene in this action as a matter of right to ensure that its interests are fully protected and that it satisfied its duty to obtain an allocated verdict for itself and its insured.” *See*, Order Granting Motion to Intervene, p. 5.

In their Motion to Reconsider the October 18, 2018 Order, the Plaintiffs argue that only a party may intervene and that Selective is not a “party” because it does not have a “personal stake” in the litigation. The Court disagrees. As this Court has already ruled, Selective does not specific interests at stake in this litigation separate and apart from its insured G&F Framing, and more importantly, has an obligation to its insured to attempt to provide for an allocated verdict consistent with the *Harleysville* and *Newman* decisions. In addition, numerous courts have held that intervention under Rule 24 is an appropriate means for an insurer to fulfill those obligations. *See, Plough v. International Flavors & Fragrances, Inc.*, 96 F.R.D. 136, 137 (W.D. Tenn. 1982)

(district court allowed an insurance company to intervene "for the very limited purpose of submitting special interrogatories, at pre-trial and trial, to the Court"); *Armor Screen Corp. v Storm Catcher, Inc.*, 2009 WL 10667863, *3 (S.D. Fla. 2009) (insurer "is permitted to intervene for the sole purpose of submitting a verdict form and/or special trial interrogatories"). *See also*, *Fidelity Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41 (D. Nev. 1984); *Thomas v. Henderson*, 297 F.Supp.2d 1311 (S.D. Ala. 2003); *Pandolfo v. Labach*, 2009 WL 5851102 (D.N.M. 2009).

The Plaintiffs also argue that the portions of the *Harleysville* and *Newman* cases on which this Court relied in granting the Motion to Intervene are dicta. That is incorrect. In *Newman*, the Supreme Court wrote:

[I]t 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.

Newman, 684 S.E.2d at 547. (Emphasis added). That is not dictum. That was the Supreme Court's explanation as to why Auto-Owners was held responsible to pay the non-covered portion of the damages. Similarly, in *Harleysville*, the Supreme Court was addressing the importance of an insurer formally reserving its rights in writing and explained that "courts have found that where an insurer defends under a reservation of rights, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus noncovered damages." *Harleysville*, 803 S.E.2d at 297-298. That likewise is not dictum. Nonetheless, the Plaintiffs' position is flawed because there is no reason for the Court to simply ignore or disregard dictum from a higher court. As former Chief Judge Alex Sanders has warned,

“[b]ut those who disregard dictum, either in law or in life, do so at their peril.” *See, Yeager v. Murphy*, 291 S.C. 485, 354 S.E.2d 393, 386, n.2 (Ct. App. 1987).

The Plaintiffs also complain that a prior motion to intervene filed by a different insurer was denied in this case. The Plaintiffs cite only to a form order which contains no legal analysis and states only in a summary fashion that the motion was denied. The form order states: “Defendant's Motion to Intervene is DENIED.” *See*, Form Order filed April 4, 2018. Selective was not a party to that motion and is not bound by that ruling, even if it was made on substantive grounds, which is not clear from the form order. In addition, the prior order was interlocutory and thus is subject to reconsideration until final judgment. In *Blyth v. Marcus*, 335 S.C. 363, 517 S.E.2d 433 (1999), the Supreme Court held that an interlocutory motion may reconsidered even after an initial motion is denied. The Supreme Court explained that “[t]he rationale behind these cases is that denial of a motion for summary judgment is an interlocutory decision which the trial judge can reconsider until the end of trial.” 517 S.E.2d at 434. A motion to intervene is no different, particularly when filed by a different movant. It is an interlocutory ruling that may be modified or reconsidered until final judgment is entered. *See, PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331, 335 (Ct. App. 1988) (“[t]he trial judge, under our procedure, is afforded many opportunities to change his mind”).

Lastly, the Plaintiffs complain that the Court has usurped the authority of the trial judge and altered the manner in which the case will be tried. These complaints demonstrate a misreading or misunderstanding of this Court’s October 18, 2018 Order. This Court was careful in its Order to not usurp any authority of the trial judge and instead was granting Selective the standing to *request* a special verdict or special interrogatories from the trial court. This Court explicitly wrote:

In granting the Motion to Intervene, the Court is not deciding whether a special verdict and/or special interrogatories must be submitted to the jury. That decision will depend on the posture of the case at the time the case is submitted to the jury and specifically the nature of the elements of damages being presented to the jury. The Court's decision today recognizes the issues discussed by the Supreme Court in the *Harleysville* and *Newman* cases and grants Selective the standing of an intervenor to make a motion for a special verdict and/or special interrogatories to the trial judge. In sum, the decision whether to submit a special verdict and/or special interrogatories and the language to be used in any special verdict form and/or special interrogatories that are submitted to the jury are reserved to the discretion of the trial judge.

See, Order Granting Motion to Intervene, pp. 5-6. In addition, to the extent that the Plaintiffs need any proposed special interrogatories or special verdict form prior to trial, that is something that the trial judge can address in pre-trial proceedings. In addition, there are many ways that a trial court can obtain an allocated verdict which will be within the trial judge's discretion to determine. This Court has not pre-judged those matters. This Court has simply granted Selective the standing to make the motion for a special verdict or special interrogatories so that it may meet its obligations under *Harleysville* and *Newman* to seek an allocated verdict.

IT IS, THEREFORE, ORDERED that the Plaintiffs' Motion to Reconsider is hereby denied.

AND IT IS SO ORDERED.

WILLIAM H. SEALS, JR.
Presiding Circuit Court Judge,
Fifteenth Judicial Circuit

January __, 2019



Horry Common Pleas

Case Caption: Michael Ingram , plaintiff, et al VS Lauderdale Bay Developers LLC
, defendant, et al
Case Number: 2017CP2602854
Type: Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. and KATHY MILNER,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

ISLAND POINTE, LLC; LEONARD T.
BROWNE; COMPLETE BUILDING
CORPORATION; TRI-COUNTY ROOFING,
INC.; CREEKSIDE, INC.; AMERICAN
RESIDENTIAL SERVICES, LLC d/b/a
ARS/RESCUE ROOTER CHARLESTON;
AND JOHN DOE 1-60,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2015-CP-10- 0955

SUMMONS

(Defective Construction)

(Jury Trial Demanded)

TO: THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
a copy of which is herewith served upon you, and to serve a copy of your Answer to the said
Complaint on the subscribers at their offices, 25 Calhoun Street, Suite 400, Charleston, South
Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service. If
you fail to do so, judgment by default will be taken against you for the relief demanded in the
Complaint.

BY

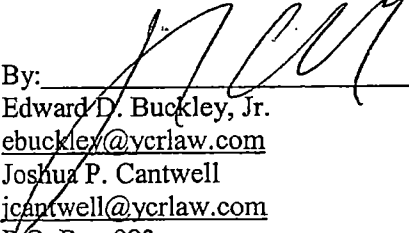
JULIE J. ARS
CLERK OF COURT

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FILED

Respectfully submitted,

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Dated: 2/13/2015

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2015-CP-10- 0955
)

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. and KATHY MILNER,
individually, and on behalf of all others
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Plaintiffs,

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ISLAND POINTE, LLC; LEONARD T.
BROWNE; COMPLETE BUILDING
CORPORATION; TRI-COUNTY ROOFING,
INC.; CREEKSIDE, INC.; AMERICAN
RESIDENTIAL SERVICES, LLC d/b/a
ARS/RESCUE ROOTER CHARLESTON;
AND JOHN DOE 1-60,

Defendants.

COMPLAINT
(Defective Construction)

(Jury Trial Demanded)

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Plaintiffs, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Kathy Milner, individually and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The POA is the property owners association for the Palmetto Pointe at Peas Island Horizontal Property Regime.

3. The Palmetto Pointe at Peas Island Horizontal Property Regime is a Horizontal Property Regime ("Palmetto Pointe") which exists by virtue of a Master Deed dated January 6,

2006 and recorded on January 10, 2006 in the RMC Office of Charleston County in Book W568, Page 532 and the Amended and Restated Master Deed dated January 19, 2007 and recorded January 22, 2007 in the RMC Office of Charleston County in Book R612, Page 823.

4. Palmetto Pointe originally consisted of forty (40) townhome style condominiums located in twenty (20) buildings and related common elements and a clubhouse, which are located in Charleston County, South Carolina. There are four (4) recently built units in two (2) buildings, which are not subject to this matter.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with Palmetto Pointe.

6. The POA is charged with, *inter alia*, the management and administration of Palmetto Pointe, the investigation, maintenance and repair of Palmetto Pointe's Common Elements and other areas of responsibility, including exteriors and roofs, and has the right and obligation to bring this action on behalf of Palmetto Pointe, the POA, and the respective owners and members.

7. Plaintiff Kathy Milner (hereinafter "Plaintiff Milner") is an owner of a condominium within Palmetto Pointe more particularly described as 1610 Folly Creek Way, Charleston, South Carolina, 29412, and she owns an undivided interest in all other property within the Palmetto Pointe regime, except such property comprising the remaining thirty-nine (39) units.

8. By virtue of property ownership in Palmetto Pointe, Plaintiff Milner is a member of the POA, has been a member of the POA at all times relevant hereto, and has ownership and membership rights relating thereto.

9. Defendant Island Pointe, LLC ("Island Pointe") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Island Pointe was engaged in the business of designing, developing, marketing, constructing, and/or selling condominiums in Charleston County, South Carolina.

10. Defendant Leonard T. Browne ("Browne") is an individual residing in Charleston, South Carolina. At all times, Browne was engaged in the business of designing, developing, marketing, constructing, and/or selling condominiums in Charleston, South Carolina.

11. At all times relevant hereto, Browne controlled Island Pointe and acted as its agent and the Island Pointe, LLC which form the basis of the complaint herein. Additionally, he and /or Island Pointe, LLC controlled the POA until that control was turned over to the owners themselves.

12. Defendant Complete Building Corporation (hereinafter "Complete Building") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Complete Building was engaged in the business of designing, constructing condominiums in Charleston County, South Carolina.

13. At all times relevant hereto, Browne, Island Pointe, and Complete Building were acting in concert with each other, and as agents for each other, and each are jointly responsible for each other's failures.

14. Defendant Tri-County Roofing, Inc. (hereinafter "Tri-County Roofing") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Tri-County Roofing supplied materials, installed roofing and related materials, among other work, at Palmetto Pointe.

15. Defendant Creekside, Inc. (hereinafter "Creekside") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action,

Creekside supplied materials, applied painting and caulking, among other work, at Palmetto Pointe.

16. Defendant American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston (hereinafter "ARS") is a limited liability company organized and existing under the laws of the State of Delaware. At all times relevant to this action, ARS supplied materials, installed the HVAC systems, among other work, at Palmetto Pointe.

17. The address and identity of all John Doe Defendants are unknown at this time.

18. Defendants John Doe #1-60 (hereinafter "John Doe Defendants") are subcontractors and/or other entities involved in the design, development, marketing, construction, material manufacturing and/or supplying, and/or sale of Palmetto Pointe.

19. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto and venue is proper in this forum.

FACTUAL ALLEGATIONS

20. This matter arises out of the design, development, construction, and sale of Palmetto Pointe.

21. At the time the Certificates of Occupancy were issued, Palmetto Pointe contained latent building defects.

22. 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.

23. A preliminary inspection of Palmetto Pointe evidences failure of one or more components 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 other various and sundry building components, with consequential damages resulting there from.

24. Defendants had a duty to design, develop, construct, and repair Palmetto Pointe in a workmanlike manner with suitable materials and free from all defects.

25. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

26. The Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

27. Remedying the above-wrongs will result in additional consequential damages and loss of use.

28. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur a reasonable attorney's fees and costs for the retention of experts to determine the damage and the scope of work for repair.

29. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical general liability policies.

CLASS ACTION ALLEGATIONS

30. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Milner brings this action both individually and as a proposed class action against Defendants on behalf of herself and all other similarly situated persons and entities, who own, per the class definition, a condominium within Palmetto Pointe (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a townhome style condominium within Palmetto Pointe located in Charleston, South Carolina.

Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants; (c) Defendants' legal representatives, assigns and successors of Defendants; (d) Defendants' current or former employees, investors, members, or officers; and (e) all persons who properly execute and file a timely request for exclusion from the Class.

31. *Numerosity*: The Class is composed of in excess of forty (40) persons or entities geographically dispersed throughout the State of South Carolina and the United States, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of sixty (60) members.

32. *Commonality*: Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- (a) Whether the construction of Palmetto Pointe was defective;
- (b) Whether Defendants knew or should have known of the defects;
- (c) Whether Defendants failed to disclose to purchasers and/or homeowners the defects;
- (d) Whether Defendants have acted or refused to act on grounds generally applicable to the Class;
- (e) Whether Defendants are financially responsible to pay the full costs and expenses of repair of said defective conditions;
- (f) Whether Defendants' expertise, superiority, and financial interest in sales transactions gave rise to a duty to disclose the material facts which were concealed; thereby, giving rise to a claim for fraudulent concealment;
- (g) Whether Plaintiffs and the Class are entitled to compensatory damages, including,

among other things: (i) compensation for all out-of-pocket monies expended by other members of the Class for repair of their condominiums as well as repair/replacement of other property damage; (ii) temporary repairs and (iii) compensation for loss of use.

(h) Whether Defendants negligently designed, developed, and/or constructed Palmetto Pointe;

(i) Whether the Plaintiffs are entitled to prejudgment interest, attorneys' fees and costs from Defendants.

33. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, developing, constructing, and selling Palmetto Pointe, Defendants' conduct in concealing the defective condition of Palmetto Pointe, and Plaintiffs' and Class Members' purchasing homes containing building defects.

34. *Adequate Representation*: Plaintiff Milner will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiff Milner has retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

35. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the

court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

36. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective conditions existing within Palmetto Pointe.

37. Plaintiff Milner and the Class envision no unusual difficulty in the management of this action as a class action.

38. Each Class Member has an interest of more than \$100.00.

39. The amount of money at stake for each Class Member is not sufficient for each member to hire his own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

40. Defendants are estopped from relying on any statutes of limitation or repose by virtue of its acts. Upon information and belief, Defendants should have known Palmetto Pointe was defectively constructed and failed to alert the Plaintiffs of Palmetto Pointe's defective condition.

41. Defendants had a duty to inform Plaintiffs of the defects described herein, which it should have known. Notwithstanding its duty, Defendants never disclosed the defects to Plaintiffs.

42. Despite exercising reasonable diligence, Plaintiffs could not have discovered the

defective condition of Palmetto Pointe.

43. Given Defendants' failure to disclose this non-public information about the defective nature of Palmetto Pointe -- information over which it had exclusive control -- and because Plaintiffs could not reasonably have known of Palmetto Pointe's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

44. Defendants are further estopped from relying upon any statute of limitations as they have represented to Plaintiffs that they are only responsible for correcting work for a period of one year after sale.

**ESTOPPEL FROM PLEADING ANY ANTI-SUIT PROVISIONS
CONTAINED IN PALMETTO POINTE'S MASTER DEED AND BY-LAWS**

45. The Island Pointe and Browne Defendants are estopped from relying on any anti-suit provisions contained in Palmetto Pointe's Master Deed and By-Laws because said provisions are void pursuant to public policy and the Horizontal Property Regime Act and/or voidable as such constitutes a breach of the Island Pointe/Browne's fiduciary duty to Plaintiffs.

**FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)**

46. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

47. At all times relevant hereto, the Defendants, its agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design and construction of Palmetto Pointe in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

48. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, willful, and wanton in the following particulars:

- (a) In designing, developing, constructing, and selling Palmetto Pointe with construction deficiencies including those previously identified;
- (b) In failing to construct Palmetto Pointe in accordance with due care and in accordance with standard building practices;
- (c) In failing to construct Palmetto Pointe in accordance with building code;
- (d) In failing to properly supervise the work and construction of Palmetto Pointe;
- (e) In failing to properly coordinate the subcontractors;
- (f) In failing to construct with an adequate exterior building envelope;
- (g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (h) In covering up their own defective work and the defective work of others;
- (i) In failing to make proper repairs; and
- (j) Such other failures to be proven at trial.

49. Any violations of applicable building codes constitutes negligence *per se*.

50. Plaintiffs and the Class have been damaged as a direct and proximate result if the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

51. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence *per se*, Plaintiffs and Class are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to all Defendants)

52. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

53. The design, construction, and/or sale of Palmetto Pointe came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that Palmetto Pointe would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

54. The design, construction, and/or sale of Palmetto Pointe, and the components used therein, came with implied warranties of fitness, merchantability, and workmanship.

55. Additionally, Defendant Developers owed Plaintiffs a warranty of habitability.

56. Defendants have breached their warranties by constructing Palmetto Pointe in a defective manner as set forth above.

57. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiff's have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Strict Liability in Tort: *S.C. Code Ann. § 15-73-10 et seq.* as to John Doe Defendants who manufactured and/or supplied components used in the construction of Palmetto Pointe)

58. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

59. In manufacturing and supplying products for the construction of Palmetto Pointe, the manufacturer and supplier John Doe Defendants placed products into the stream of commerce.

60. By introducing their products into the stream of commerce, the manufacturer and supplier John Doe Defendants represented said products were safe and suitable for their foreseeable use.

61. In the manufacture and supply of products to Palmetto Pointe, the manufacturer and supplier John Doe Defendants anticipated and expected that their products would reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

62. The manufacture and supplier John Doe Defendants have supplied and manufactured their products in a defective manner unreasonably dangerous to persons or property other than the products themselves, which has resulted in repeated water intrusion into and damage to Palmetto Pointe and other building deficiencies.

63. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

64. The cost of altering the design, construction, and/or repair of the products supplied to Palmetto Pointe was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

65. The design and manufacture of the products supplied to Palmetto Pointe was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

66. The manufacturer and supplier John Doe Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact. _____

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to Defendants Island Pointe and Browne)

67. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

68. The Island Pointe and Browne Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of Palmetto Pointe and their former capacity controlling the POA.

69. The Island Pointe and Browne Defendants promoted, created and maintained control of the POA and Palmetto Pointe for a period of time, and thus, had fiduciary duties they owed to the POA, its members and individual homeowners.

70. The Island Pointe and Browne Defendants breached the fiduciary duties they owed to the Plaintiffs by:

- (a) failing to investigate defective conditions prior to handing over the property to the POA and the homeowners;
- (b) failing to disclose said defective conditions;
- (c) failing to properly repair said defective conditions prior to handing over the property to the POA and the homeowners;
- (d) turning over the property to the POA in said defective condition without depositing sufficient funds to the account of the POA to bring the elements up to a reasonable standard;
- (e) failing to timely hold the other Defendants accountable for the construction defects; and
- (f) inserting provisions in the Master Deed which benefited Defendants at the expense of Plaintiffs.

71. As a direct and proximate result of the Island Pointe and Browne Defendants' breach of fiduciary duty, Plaintiffs have been damaged as hereinabove set forth and as to be further proven at trial.

FOR A FIFTH CAUSE OF ACTION
(Unfair Trade Practices as to Island Pointe, Browne, and Complete Building)

72. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

73. At all times relevant herein, the Island Pointe, Browne, and Complete Building Defendants engaged in the business of developing, designing, constructing, and selling Palmetto Pointe into the stream of commerce.

74. The Island Pointe, Browne, and Complete Building Defendants were engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

75. The Island Pointe, Browne, and Complete Building Defendants above-described activities, including placing Palmetto Pointe with defective design and construction into the stream of commerce, failing to comply with the building code, failing to disclose those defects to potential and actual purchasers and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of the Island Pointe, Browne, and Complete Building Defendants' trade.

76. The Island Pointe, Browne, and Complete Building Defendants' above-described acts are capable of repetition and adversely affect the public interest.

77. The Island Pointe, Browne, and Complete Building Defendants knew or should have known that their conduct was in violation of the S.C. Code Ann. § 39-5-20.

78. As a direct, foreseeable, and proximate result of the Island Pointe, Browne, and Complete Building Defendants' unfair trade practices in South Carolina, Plaintiffs have suffered

significant damage and have and will incur attorney's fees and the costs and expenses of this action.

FOR A SIXTH CAUSE OF ACTION
(Declaratory Action/Reformation as to Island Pointe and Browne Defendants)

82. Plaintiffs re-allege the allegations, which are not inconsistent with this cause of action and are, contained in the above paragraphs as if fully set forth herein.

83. The anti-suit provisions of the Palmetto Pointe Master Deed are in violation of public policy, statutory law and/or provisions of the Constitution, and the Island Pointe and Browne Defendants' fiduciary duties.

84. Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions included within the Master Deed by the Island Pointe and Browne Defendants are in violation of statutory law and/or provisions in the Constitution and are therefore void and/or require reformation to eliminate the subject provisions.

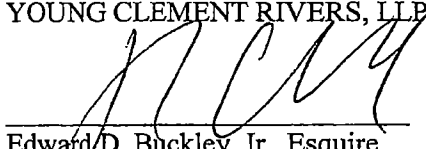
85. As the provisions in the Master Deed are severable, the Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions are severable from the other terms of the Master Deed.

86. Plaintiffs are also entitled to have ambiguous and contradictory provisions in the Master Deed construed against the Island Pointe and Browne Defendants and/or reformed by the Court to more accurately reflect the reasonable expectations of the POA and Homeowners.

WHEREFORE, Plaintiffs demand a trial by jury and pray actual and consequential damages; statutory or punitive damages expected to be millions of dollars; reasonable attorneys' fees; costs of suit; and prejudgment interest; declaration/reformation of the Master Deed; and granting such further relief as the Court deems just and proper.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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Attorneys for the Plaintiffs

February 13, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Palmetto Pointe at Peas Island
Condominium Property Owners
Association, Inc., and Kathy Milner,
individually, and one behalf of all others
similarly situated,

Plaintiffs,

vs.

Island Pointe, LLC; Leonard T. Browne;
Complete Building Corporation; Tri-County
Roofing, Inc.; Creekside, Inc.; American
Residential Services, LLC d/b/a
ARS/Rescue Rooter Charleston; and John
Doe 1-60,

Defendants.

Tri-County Roofing, Inc.,

Third-Party Plaintiff,

vs.

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
Gutters; Miracle Siding, LLC and Wilson
Lucas Sales d/b/a Miracle Siding, LLC;
Mark Palpoint a/k/a Micah Palpoint; Eloy
Alonzo Vasquez; and Chris a/k/a John Doe
61,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-10-955

ANSWER TO PLAINTIFFS' COMPLAINT
AND THIRD-PARTY COMPLAINT

(JURY TRIAL DEMANDED)

FILED
2015 APR 22 PM 2:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Defendant, Tri-County Roofing, Inc. ("Tri-County"), answers Plaintiffs' Complaint by denying each and every allegation not hereinafter admitted, demanding strict proof thereof, and further responds as follows:

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 1 through 3 and, therefore, denies the same.
2. Upon information and belief, Tri-County admits the allegations contained in Paragraph 4.
3. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 5 and 6 and, therefore, denies the same.
4. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 7 and 8 and, therefore, denies the same.
5. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 9 through 11 and, therefore, denies the same.
6. Upon information and belief, Tri-County admits the allegations contained in Paragraph 12.
7. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 13 and, therefore, denies the same.
8. Tri-County admits the allegations contained in Paragraph 14.
9. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 15 and 16 and, therefore, denies the same.
10. Paragraphs 17 and 18 are placeholders for currently unknown potential defendants and require no response from Tri-County; however, to the extent a response is required or to the

extent these paragraphs could be construed to impart liability on behalf of Tri-County, these allegations are denied.

11. In response to Paragraph 19, Tri-County admits only that, upon information and belief, the Palmetto Point at Peas Island project is located in Charleston County, South Carolina.

12. Paragraph 20 requires no response; however, to the extent a response is required or to the extent this paragraph could be construed to impart liability on behalf of Tri-County, these allegations are denied.

13. Tri-County denies the allegations contained in Paragraphs 21 through 23 and demands strict proof thereof.

14. In response to Paragraph 24, Tri-County admits only that the work it performed on the Palmetto Point at Peas Island project was done in a workmanlike manner with suitable materials, free from defects, and in accordance with the applicable building codes, manufacturers' instructions, and general industry requirements and denies all allegations inconsistent with this response.

15. Tri-County denies the allegations contained in Paragraphs 25 through 28 and demands strict proof thereof.

16. Paragraph 29 calls for a legal conclusion and requires no response; however, to the extent a response is required or to the extent this paragraph could be construed to impart liability on behalf of Tri-County, these allegations are denied.

17. In response to Paragraph 30, Tri-County denies that this claim is proper for class certification. Tri-County further objects to the purported definition of the class as the class definition conflicts with the suggested limiting language from Paragraph 4 set forth earlier in Plaintiffs' Complaint.

18. In response to Paragraphs 31 through 35, Tri-County renews its objection and denies that this case is proper or ripe for class certification as the questions of numerosity, commonality, typicality, adequate representation, and predominance do not apply consistently to all of the purported class members or Defendants and may also be shown to be inadequate on their face.

19. Tri-County denies the allegations contained in Paragraph 36 and demands strict proof thereof.

20. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 37 and 38 and, therefore, denies the same.

21. Tri-County denies the allegations contained in Paragraph 39 and demands strict proof thereof.

22. Tri-County denies the allegations contained in Paragraphs 40 through 44 and demands strict proof thereof. Furthermore, Tri-County states that Plaintiffs' appear to attempt to change the statutory and common law regarding the statute of limitations and/or statute of repose in these Paragraphs and, Tri-County denies that Plaintiffs can circumvent the laws of the state of South Carolina regarding these issues.

23. Upon information and belief, the allegations contained in Paragraph 45 are not directed to Tri-County and require no response. However, to the extent a response is required or to the extent these allegations can be construed to impart liability on behalf of Tri-County, these allegations are denied.

24. In response to Paragraph 46, Tri-County repeats its responses in Paragraphs 1 through 22 above as if restated herein verbatim.

25. In response to Paragraph 47, Tri-County admits only that the work it performed on the Palmetto Point at Peas Island project was done with due care and in a good and workmanlike manner with suitable materials in accordance with the applicable buildings codes, applicable laws, and in conformance with industry standards and product installation guidelines. All allegations inconsistent with this response are denied and Tri-County demands strict proof thereof.

26. Tri-County denies the allegations contained in Paragraph 48, including all subparts, and demands strict proof thereof.

27. Paragraph 49 is an incorrect statement of the law in South Carolina and, therefore, is denied.

28. Tri-County denies the allegations contained in Paragraphs 50 and 51 and demands strict proof thereof.

29. In response to Paragraph 52, Tri-County realleges its answers in Paragraphs 1 through 28 above as if restated herein verbatim.

30. In response to Paragraph 53, Tri-County admits only that its work performed on the Palmetto Point at Peas Island project was done in a careful, diligent, and workmanlike manner, free from defects and in accordance with the applicable building codes and product installation requirements. All allegations inconsistent with this response are denied and Tri-County demands strict proof thereof.

31. In response to Paragraph 54, Tri-County admits only that there are certain implied warranties applied at law but denies that, to the extent that any implied warranties are attributed to the work by Tri-County, it violated any of these warranties.

32. In response to Paragraph 55, Tri-County admits that the warranty of habitability applies to the developer only.

33. Tri-County denies the allegations contained in Paragraphs 56 and 57 and demands strict proof thereof.

34. In response to Paragraph 58, Tri-County realleges its answers in Paragraphs 1 through 33 above as if restated herein verbatim.

35. Upon information and belief, the allegations contained in Paragraphs 59 through 66 are not directed to Tri-County and, therefore, require no response. However, to the extent these paragraphs require a response from Tri-County or can be construed to impart liability on this Defendant, these allegations are denied.

36. In response to Paragraph 67, Tri-County realleges its answers in Paragraphs 1 through 35 as if restated herein verbatim.

37. Upon information and belief, the allegations contained in Paragraphs 68 through 71, including all subparts, are not directed to Tri-County and, therefore, require no response. However, to the extent a response is required or to the extent these paragraphs could be construed to impart liability on behalf of Tri-County, these allegations are denied.

38. In response to Paragraph 72, Tri-County realleges its answers in Paragraphs 1 through 37 above as if restated herein verbatim.

39. Upon information and belief, the allegations contained in Paragraphs 73 through 78 are not directed to Tri-County and, therefore, require no response. However, to the extent a response is required or to the extent these paragraphs could be construed to impart liability, these allegations are denied.

40. There are no paragraphs numbered 79 through 81 in Plaintiffs' Complaint.

41. In response to Paragraph 82, Tri-County realleges its answers in Paragraphs 1 through 40 above as if restated herein verbatim.

42. Upon information and belief, the allegations contained in Paragraphs 83 through 86 are not directed to Tri-County and, therefore, require no response. However, to the extent a response is required or to the extent these paragraphs could be construed to impart liability on Tri-County, these allegations are denied.

43. In response to the unnumbered "Wherefore" paragraph, Tri-County denies that Plaintiffs are entitled to the relief requested in their Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE

44. The Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

45. Even if Tri-County was negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiffs' injuries, if any, which is expressly denied, Tri-County alleges Plaintiffs' negligent, grossly negligent, reckless, willful, and wanton conduct contributed more than fifty percent (50%) to the cause of the accident, and therefore, Plaintiffs' claims are barred.

FOR A FOURTH DEFENSE

46. Even if Tri-County was negligent in any respect, which is expressly denied, and even if such conduct on the part of Tri-County operated as a greater than fifty percent (50%) cause of Plaintiffs' injuries, if any, which is also denied, Tri-County is entitled to a determination as to the percentage which Plaintiffs' negligent, grossly negligent, reckless, willful, and wanton

conduct contributed to Plaintiffs' accident and resulting injuries, if any, and to a reduction of any amount awarded to Plaintiffs by an amount equal to the percentage of Plaintiffs' own negligence.

FOR A FIFTH DEFENSE

47. Such injuries or losses as Plaintiffs' sustained, if any, were caused by the contributory negligence, carelessness, recklessness, willfulness, and wantonness of Plaintiffs, and Tri-County pleads Plaintiffs' contributory negligence as a complete defense to this action.

FOR A SIXTH DEFENSE

48. Any injuries or damages sustained by Plaintiffs were due to and caused and occasioned by Plaintiffs' own negligence, gross negligence, recklessness, willfulness, and wantonness which was the direct and proximate cause of Plaintiffs' alleged injuries or damages, if any, and without which the same would not have occurred, and therefore, due to Seamar's sole negligence, gross negligence, recklessness, willfulness, and wantonness, Seamar's claims are barred.

FOR A SEVENTH DEFENSE

49. Any injuries sustained by Plaintiffs were due to and caused by the sole negligence of third persons over whom Tri-County had no control, and therefore, Tri-County should not be liable to Plaintiffs in any sum whatsoever.

FOR AN EIGHTH DEFENSE

50. Any injuries sustained by Plaintiffs were due to and caused by the intervening and superseding acts of negligence, carelessness, recklessness, and gross negligence on the part of third persons as a proximate cause of injuries as alleged, if any, and therefore, Tri-County should not be liable to Plaintiffs in any sum whatsoever.

FOR A NINTH DEFENSE

51. Plaintiffs' claims may be barred by the doctrine of estoppel.

FOR A TENTH DEFENSE

52. Plaintiffs' claims may be barred or otherwise reduced due to Plaintiffs' failure to mitigate damages as required by law.

FOR AN ELEVENTH DEFENSE

53. Plaintiffs' claims may be barred by the doctrine of laches.

FOR A TWELFTH DEFENSE

54. Tri-County asserts that some or all of the claims against it are barred by applicable statutes of limitation or statutes of repose.

FOR A THIRTEENTH DEFENSE

55. Plaintiffs failed to comply with the terms and conditions of The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §40-59-810; therefore, all claims are subject to being stayed.

FOR A FOURTEENTH DEFENSE

56. Any recovery by Plaintiffs must be reduced or offset by amounts Plaintiffs received or will receive from others or that Plaintiffs receive directly for the same injuries claimed in this lawsuit.

FOR A FIFTEENTH DEFENSE

57. Plaintiffs' claims may be barred by the doctrine of waiver.

FOR A SIXTEENTH DEFENSE

58. Punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of *State Farm*

Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

FOR A SEVENTEENTH DEFENSE

59. Pursuant to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424, 121 S.Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of punitive damages “[are] not really a fact tried by the jury;” therefore Plaintiffs’ request for punitive damages “to be determined by the jury” violates the United States Constitution.

FOR AN EIGHTEENTH DEFENSE

60. The U.S. Constitution’s Due Process Clause “forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly [do not] represent,” *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (U.S. 2007), and, therefore, to the extent that Plaintiffs’ seek an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial.

FOR A NINETEENTH DEFENSE

61. Notwithstanding Plaintiffs’ prior defenses incorporating *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424 (2001) and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), and the cases upon which they are based, in the event the trial court permits the jury to return a punitive damages award in the instant case, such damages are to be limited to an amount that is no greater than the jury’s award of actual damages, as explicated within *Exxon Shipping Company v. Baker*, 128 S. Ct. 2605 (2008).

FOR A TWENTIETH DEFENSE

62. The work and services that may have been provided by Tri-County were in conformity with the standard of care for that time.

FOR A TWENTY-FIRST DEFENSE

63. No act or omission by Tri-County in the performance of its professional services proximately caused the alleged damages for which Plaintiffs now seek to recover and, as a result, Plaintiffs are not entitled to any recovery from Tri-County.

FOR A TWENTY-SECOND DEFENSE

64. Tri-County incorporates by reference any affirmative defenses raised by any other Defendant in this action.

FOR AT TWENTY-THIRD DEFENSE

65. Tri-County specifically reserves any additional and/or affirmative defenses as may be available to it or revealed to it during the course of the investigation and/or discovery in this case.

**FOR A TWENTY-FOURTH DEFENSE AND BY WAY OF THIRD-PARTY
COMPLAINT TRI-COUNTY ALLEGES THE FOLLOWING**

66. Tri-County hired certain subcontractors to perform construction work on the Palmetto Point at Peas Island project. Tri-County did not self-perform any of the work but, instead, supervised the specific work by its subcontractors.

67. Cornerstone Construction Corporation and Mark Malloy d/b/a Cornerstone Construction is a South Carolina company located in Charleston County, South Carolina, and at all times relevant herein, performed siding installation, flashing, and other component work on one or more buildings at the Palmetto Point at Peas Island project.

68. Gutter Works, Inc. and Michael L. Segars d/b/a Gutter Works is a South Carolina company located in Charleston County, South Carolina, and at all times relevant herein, performed gutter installation on one or more of the buildings at the Palmetto Point at Peas Island project.

69. Mr. Gutter is a South Carolina company located in Dorchester County, South Carolina, and at all times relevant herein, performed gutter installation on one or more of the buildings at the Palmetto Point at Peas Island project.

70. Litchfield Seamless Gutters & Windows, LLC and Thomas Litchfield d/b/a Litchfield Seamless Gutters is a South Carolina company located in Berkeley County, South Carolina, and at all times relevant herein, performed gutter installation on one or more of the buildings at the Palmetto Point at Peas Island project.

71. Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding is a South Carolina company located in Berkeley County, South Carolina, and at all times relevant herein, performed siding installation, related flashings, and other component work on one or more buildings at the Palmetto Point at Peas Island project.

72. Mark Palpoint a/k/a Micah Palpoint is a South Carolina resident who, at all times relevant herein, installed Sealoflex waterproofing on one or more buildings at the Palmetto Point at Peas Island project.

73. Eloy Alonzo Vasquez was a South Carolina resident who, at all times relevant herein, installed roofing, flashing, other roofing components, and waterproofing on one or more buildings at the Palmetto Point at Peas Island project.

74. Chris a/k/a John Doe No. 61 is a resident of South Carolina and at all times relevant herein installed waterproofing on one or more of the buildings at the Palmetto Point at Peas Island project.

75. All of the Subcontractors listed above performed the described work on the buildings located at the Palmetto Point at Peas Island project.

76. All of the referenced Third-Party Defendants, collectively referenced as "Subcontractors," that were retained by Tri-County were required to obtain proper commercial general liability insurance coverage of sufficient limits and further to list Tri-County as an additional insured in these policies.

FOR A FIRST THIRD-PARTY CAUSE OF ACTION
(Negligence)

77. Tri-County realleges its assertions set forth in Paragraphs 66 through 76 as if restated herein verbatim.

78. The various Subcontractors were required to perform their work in accordance with applicable building codes, installation guidelines, industry standards, and in a good and workmanlike manner.

79. However, it is alleged the work these Subcontractors performed did not comply with the applicable standards.

80. Tri-County has denied the substantive allegations alleged against it; however, if the Subcontractors' work is found to be deficient, then the Subcontractors have breached their duty to perform this work correctly.

81. The Subcontractors' breaches of their duties are the proximate cause of the damages suffered by Tri-County.

82. Tri-County is damaged by these breaches by having to extent time, effort, and attorneys' fees defending these claims. Tri-County is entitled to full reimbursement for any costs, expenses, payments of any kind, and attorneys' fees incurred as a result of the alleged defective work by the Subcontractors.

FOR A SECOND THIRD-PARTY CAUSE OF ACTION
(Breach of Express and Implied Warranties)

83. Tri-County realleges its assertions set forth in Paragraphs 66 through 82 as if restated herein verbatim.

84. The Subcontractors warranted and expressly stated that the work they performed at the Palmetto Point at Peas Island project was performed in a workmanlike manner, free of defects, and commensurate with all applicable building codes and installation details.

85. Although Tri-County has denied the substantive allegations asserted against it, to the extent there are deviations with the actual installation of the work by the Subcontractors, the Subcontractors have breached their implied and express warranties owed Tri-County.

86. Tri-County is damaged by these breaches by having to extent time, effort, and attorneys' fees defending these claims. Tri-County is entitled to full reimbursement for any costs, expenses, payments of any kind, and attorneys' fees incurred as a result of the alleged defective work by the Subcontractors.

FOR A THIRD THIRD-PARTY CAUSE OF ACTION
(Breach of Contract)

87. Tri-County realleges its assertions set forth in Paragraphs 66 through 86 as if restated herein verbatim.

88. Through either formal contract, purchase order, and/or otherwise, the various Subcontractors contracted with Tri-County to supply labor and/or materials for roofing, siding, waterproofing, gutters, and/or related work on the Palmetto Point at Peas Island project.

89. In addition to the construction scope of work, each of the Subcontractors promised and in fact was required to include Tri-County as an additional insured on their commercial general liability policies. This term was a significant requirement for the Subcontractors to be hired by Tri-County to work on this project.

90. Although Tri-County has denied all substantive allegations, to the extent the work performed by the Subcontractors does not meet their contractual obligations, they are in breach of their subcontracts with Tri-County. Furthermore, to the extent the subcontractors did not list Tri-County as an additional insured and/or do not defend Tri-County as an additional insured, they are in breach of their subcontract agreements.

91. Tri-County is damaged by these breaches by having to extent time, effort, and attorneys' fees defending these claims. Tri-County is entitled to full reimbursement for any costs, expenses, payments of any kind, and attorneys' fees incurred as a result of the alleged defective work by the Subcontractors.

FOR A FOURTH THIRD-PARTY CAUSE OF ACTION
(Indemnity)

92. Tri-County realleges its assertions set forth in Paragraphs 66 through 91 as if restated herein verbatim.

93. By their relationship as principal and subcontractor, there is a special relationship between Tri-County and the Subcontractors.

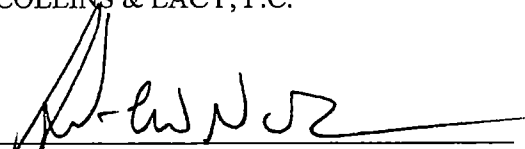
94. Tri-County has been named in a lawsuit claiming damages for work that was performed by and alleged defects that are the sole responsibility of the Subcontractors.

95. Although Tri-County denies the Plaintiffs' allegations, to the extent the Subcontractors' work is found to be defective, these defects are caused by and born by the Subcontractors alone for liability that Tri-County does not share.

96. Therefore, Tri-County should be indemnified and held harmless by the Subcontractors to the full extent of the law.

WHEREFORE, having answered the Plaintiffs' Complaint, Tri-County prays the allegations be dismissed. Furthermore, Tri-County prays for judgment against the Subcontractors with its Third-Party Claims. Tri-County prays for costs, expenses, attorney's fees, punitive damages, and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,
COLLINS & LACY, P.C.

By: 

Andrew N. Cole, Esquire
Christopher M. Adams, Esquire
Post Office Box 12487
Columbia, SC 29211
803.256.2660

ATTORNEYS FOR TRI-COUNTY ROOFING

April 20, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
PALMETTO POINTE AT PEAS ISLAND	)	CASE NO. 2015-CP-10-0955
CONDOMINIUM PROPERTY OWNERS	)	
ASSOCIATION, INC. AND JACK	)	
LOVE, INDIVIDUALLY, AND ON	)	
BEHALF OF ALL OTHERS SIMILARLY	)	
SITUATED,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
ISLAND POINTE, LLC; COMPLETE	)	
BUILDING CORPORATION; TRI-	)	
COUNTY ROOFING, INC.; CREEKSIDE,	)	
INC.; AMERICAN RESIDENTIAL	)	
SERVICES, LLC D/B/A ARS/RESCUE	)	
ROOTER CHARLESTON; ANDERSEN	)	
WINDOWS, INC.; ATLANTIC BUILDING	)	
CONSTRUCTION SERVICES, INC. N/K/A	)	
ATLANTIC CONSTRUCTION SERVICES,	)	
INC.; 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; CORNERSTONE	)	
CONSTRUCTION AND MARK MALLOY	)	
D/B/A CORNERSTONE CONSTRUCTION;	)	
MIRACLE SIDING, LLC AND WILSON	)	
LUCAS SALES D/B/A MIRACLE SIDING,	)	
LLC; MARK PALPOINT A/K/A MICAH	)	
PALPOINT; ELROY ALONZO VASQUEZ;	)	
CHRIS A/K/A JOHN DOE 61;	)	
ALDERMAN CONSTRUCTION;	)	
STANLEY'S VINYL FENCE DESIGNS;	)	
COHEN'S DRYWALL COMPANY, INC.;	)	
MOSELY CONCRETE;	)	
HAND A FRAMING CONSTRUCTION,	)	
LLC A/K/A H&A FRAMING	)	

SECOND AMENDED SUMMONS

FILED
2017 NOV -2 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY *js*

CONSTRUCTION, LLC AND D/B/A	)
H AND A FRAMING, LLC, H&A	)
CONSTRUCTION, AND HAND A	)
CONSTRUCTION; JMC	)
CONSTRUCTION, INC.; JMC	)
CONSTRUCTION, LLC; JOHN DOE 1-	)
15,	)
	)
DEFENDANTS.	)
COMPLETE BUILDING CORPORATION,	)
INC.,	)
	)
THIRD-PARTY PLAINTIFF,	)
	)
VS.	)
	)
LEONARD T. BROWNE AND	)
CHRISTOPHER N. UNION,	)
	)
THIRD-PARTY DEFENDANTS.	)
CREEKSIDE, INC.,	)
	)
THIRD-PARTY PLAINTIFF,	)
	)
VS.	)
	)
CHRISTOPHER N. UNION,	)
	)
THIRD-PARTY DEFENDANT.	)

YOU ARE HEREBY SUMMONED and required to answer the Second Amended Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said Amended Complaint upon the subscriber at his office at 415 Mill Street, Post Office Box 806, Mount Pleasant, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer within the prescribed time, a judgment by default will be rendered against you for the amount or other remedy requested in the attached Second Amended Complaint plus interest and costs.

JUSTIN O'TOOLE LUCEY, P.A.

BY: 

Justin Lucey, Esquire

Stephanie Drawdy, Esquire

415 Mill Street

Post Office Box 806

Mount Pleasant, S.C. 29465-0806

-and-

Edward D. Buckley, Jr.

YOUNG CLEMENT RIVERS, LLP

P.O. Box 993

Charleston, SC 29402

(843) 724-5446

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 11/2/2017

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

PALMETTO POINTE AT PEAS ISLAND) CASE NO. 2015-CP-10-0955
CONDOMINIUM PROPERTY OWNERS)
ASSOCIATION, INC. AND JACK)
LOVE, INDIVIDUALLY, AND ON)
BEHALF OF ALL OTHERS SIMILARLY)
SITUATED,)

PLAINTIFFS,)

vs.)

ISLAND POINTE, LLC; COMPLETE)
BUILDING CORPORATION; TRI-)
COUNTY ROOFING, INC.; CREEKSIDE,)
INC.; AMERICAN RESIDENTIAL)
SERVICES, LLC D/B/A ARS/RESCUE)
ROOTER CHARLESTON; ANDERSEN)
WINDOWS, INC.; ATLANTIC BUILDING)
CONSTRUCTION SERVICES, INC. N/K/A)
ATLANTIC CONSTRUCTION SERVICES,)
INC.; 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.; CERTAINTED)
CORPORATION; KELLY FLOORING)
PRODUCTS, INC., D/B/A CARPET)
BAGGERS; CORNERSTONE)
CONSTRUCTION AND MARK MALLOY)
D/B/A CORNERSTONE CONSTRUCTION;))
MIRACLE SIDING, LLC AND WILSON)
LUCAS SALES D/B/A MIRACLE SIDING,)
LLC; MARK PALPOINT A/K/A MICAH)
PALPOINT; ELROY ALONZO VASQUEZ;))
CHRIS A/K/A JOHN DOE 61;)
ALDERMAN CONSTRUCTION;)
STANLEY'S VINYL FENCE DESIGNS;)
COHEN'S DRYWALL COMPANY, INC.;)
MOSELY CONCRETE;)
HAND A FRAMING CONSTRUCTION,)
LLC A/K/A H&A FRAMING)

**PLAINTIFFS' SECOND
AMENDED COMPLAINT**

FILED
2017 NOV -2 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

CONSTRUCTION, LLC AND D/B/A)
H AND A FRAMING, LLC, H&A)
CONSTRUCTION, AND HAND A)
CONSTRUCTION; JMC)
CONSTRUCTION, INC.; JMC)
CONSTRUCTION, LLC; JOHN DOE 1-)
15,)

DEFENDANTS.)

COMPLETE BUILDING CORPORATION,)
INC.,)

THIRD-PARTY PLAINTIFF,)

VS.)

LEONARD T. BROWNE AND)
CHRISTOPHER N. UNION,)

THIRD-PARTY DEFENDANTS.)

CREEKSIDE, INC.,)

THIRD-PARTY PLAINTIFF,)

VS.)

CHRISTOPHER N. UNION,)

THIRD-PARTY DEFENDANT.)

The Plaintiffs, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The POA is the property owners association for the Palmetto Pointe at Peas Island Horizontal Property Regime.

3. The Palmetto Pointe at Peas Island Horizontal Property Regime is a Horizontal Property Regime ("Palmetto Pointe") which exists by virtue of a Master Deed dated January 6, 2006 and recorded on January 10, 2006 in the RMC Office of Charleston County in Book W568, Page 532 and the Amended and Restated Master Deed dated January 19, 2007 and recorded January 22, 2007 in the RMC Office of Charleston County in Book R612, Page 823.

4. Palmetto Pointe originally consisted of forty (40) townhome style condominiums located in twenty (20) buildings and related common elements and a clubhouse, which are located in Charleston County, South Carolina. There are four (4) recently built units in two (2) buildings, which are not subject to this matter.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with Palmetto Pointe.

6. The POA is charged with, *inter alia*, the management and administration of Palmetto Pointe, the investigation, maintenance and repair of Palmetto Pointe's Common Elements and other areas of responsibility, including exteriors and roofs, and has the right and obligation to bring this action on behalf of Palmetto Pointe, the POA, and the respective owners

and members. Additionally, the POA is the assignee of homeowner interests relating to these claims and repairs.

7. Plaintiff Jack Love (hereinafter "Plaintiff Love") is an owner of a condominium within Palmetto Pointe more particularly described as 1651 Folly Creek Way, Charleston, South Carolina, 29412, and he owns an undivided interest in all other property within the Palmetto Pointe regime, except such property comprising the remaining thirty-nine (39) units.

8. By virtue of property ownership in Palmetto Pointe, Plaintiff Love is a member of the POA, has been a member of the POA at all times relevant hereto, and has ownership and membership rights relating thereto.

9. Defendant Island Pointe, LLC ("Island Pointe") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Island Pointe was engaged in the business of designing, developing, marketing, constructing, and/or selling condominiums in Charleston County, South Carolina.

10. Defendant Complete Building Corporation (hereinafter "Complete Building") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Complete Building was engaged in the business of designing and constructing condominiums in Charleston County, South Carolina.

11. At all times relevant hereto, Island Pointe and Complete Building were acting in concert with each other, and as agents for each other, and each are jointly responsible for each other's failures.

12. Defendant Tri-County Roofing, Inc. (hereinafter "Tri-County Roofing") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Tri-County Roofing supplied materials and installed roofing and related

materials, among other work, at Palmetto Pointe. Tri-County also supplied siding, flashing, deck waterproofing, gutters and other materials at Palmetto Pointe.

13. Defendant Creekside, Inc. (hereinafter "Creekside") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Creekside supplied materials and applied painting and caulking, among other work, at Palmetto Pointe.

14. Defendant American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston (hereinafter "ARS") is a limited liability company organized and existing under the laws of the State of Delaware. At all times relevant to this action, ARS supplied materials and installed the HVAC systems, among other work, at Palmetto Pointe.

15. Defendant Andersen Windows, Inc. (hereinafter "Andersen") is a corporation organized and existing under the laws of the State of Minnesota. At all times relevant to this action, Andersen supplied windows and related products at Palmetto Pointe.

16. Defendant Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc. (hereinafter "Atlantic") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Atlantic supplied materials and installed framing, metal fabrications, rough carpentry, metal plate connected wood trusses, weather resistant barriers, sheet metal flashing and trim, joint sealants, and wood windows and doors, among other work and products, at Palmetto Pointe.

17. Defendant Builder Services Group, Inc. d/b/a Gale Contractor Services (hereinafter "BSG") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, BSG supplied materials and installed fireplaces, among other work, at Palmetto Pointe.

18. Defendant Novus Architects, Inc., f/k/a SGM Architects, Inc. (hereinafter "Novus") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Novus performed design work, among other work, at Palmetto Pointe.

19. Defendant Tallent and Sons, Inc. (hereinafter "Tallent") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Tallent performed grading and paving work, among other work, at Palmetto Pointe.

20. Defendant W C Services, Inc. (hereinafter "W C") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, WC supplied and installed fire sprinkler systems and related components, among other work, at Palmetto Pointe.

21. Defendant CRG Engineering, Inc. (hereinafter "CRG") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, CRG provided civil engineering services, among other work, at Palmetto Pointe.

22. Defendant CertainTeed Corporation (hereinafter "CertainTeed") is a corporation organized and existing under the laws of the State of Delaware. At all times relevant to this action, CertainTeed manufactured and supplied aluminum trim coil stock and siding, among other products, at Palmetto Pointe.

23. Defendant Kelly Flooring Products, Inc. d/b/a Carpet Baggers (hereinafter "Carpet Baggers") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Carpet Baggers supplied materials and installed carpet, wood flooring and related materials, among other work, at Palmetto Pointe.

24. Defendants Cornerstone Construction Corporation and Mark Malloy d/b/a Cornerstone Construction ("Cornerstone") are South Carolina companies located in Charleston County, South Carolina. At all times relevant to this action, Cornerstone supplied materials and installed siding, flashing, and related components, among other work, at Palmetto Pointe.

25. Defendant Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding ("Miracle Siding") is a Limited Liability Company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Miracle Siding supplied materials and installed siding, flashing, and related components, among other work, at Palmetto Pointe.

26. Defendant Mark Palpoint a/k/a Micah Palpoint ("Palpoint") is a South Carolina resident who, at all times relevant to this action, installed Sealoflex waterproofing, among other work, at Palmetto Pointe.

27. Defendant Eloy Alonzo Vasquez ("Vasquez") was a South Carolina resident who, at all times relevant to this action, installed roofing, flashing, other roofing components, and waterproofing, among other work, at Palmetto Pointe.

28. Defendant Chris a/k/a John Doe No. 61 ("Doe No. 61") is a resident of South Carolina and, at all times relevant to this action, installed waterproofing, among other work at Palmetto Pointe.

29. Defendant Alderman Construction, Inc. ("Alderman") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Alderman supplied and installed interior trim, among other work, at Palmetto Pointe.

30. Defendant Stanley's Vinyl Fence Designs ("Stanley's"), is a North Carolina company located in Kinston, North Carolina. At all times relevant to this action, Stanley's supplied and installed residential railings, among other work, at Palmetto Pointe.

31. Defendant Cohen's Drywall Company, Inc. ("Cohen's") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Cohen's supplied and installed insulation and drywall, among other work, at Palmetto Pointe.

32. Defendant Mosley Concrete ("Mosley") is a South Carolina company located in Richland County, South Carolina. At all times relevant to this action, Mosley supplied and installed concrete, among other work, at Palmetto Pointe.

33. Defendant H and A Framing Construction, LLC a/k/a H&A Framing Construction, LLC and d/b/a Hand A Framing, LLC, H&A Construction, and Hand A Construction ("H&A") is a South Carolina limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, H&A supplied materials and installed framing, among other work and products, at Palmetto Pointe.

34. Defendant JMC Construction, Inc. and JMC Construction, LLC (collectively "JMC") is a South Carolina corporation and a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, JMC supplied materials and installed framing, among other work and products, at Palmetto Pointe

35. The address and identity of all John Doe Defendants are unknown at this time.

36. Defendants John Doe #1-15 (hereinafter "John Doe Defendants") are subcontractors and/or other entities involved in the design, development, marketing, construction, material manufacturing and/or supplying, and/or sale of Palmetto Pointe.

37. Defendant Andersen, CertainTeed, and John Doe #1 are hereinafter referred to collectively as the "Manufacturing and Supplier Defendants."

38. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto and venue is proper in this forum.

FACTUAL ALLEGATIONS

39. This matter arises out of the design, development, construction, and sale of Palmetto Pointe.

40. At the time the Certificates of Occupancy were issued, Palmetto Pointe contained latent building defects.

41. 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.

42. A preliminary inspection of Palmetto Pointe evidences failure of one or more components 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 other various and sundry building components, with consequential damages resulting therefrom.

43. Defendants had a duty to design, develop, construct, and repair Palmetto Pointe in a workmanlike manner with suitable materials and free from all defects.

44. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

45. The Defendants' acts and omissions, individually and collectively, have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

46. Remedying the above-wrongs will result in additional consequential damages and loss of use.

47. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur reasonable attorney's fees and costs for the retention of experts to determine the damage and the scope of work for repair.

48. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical commercial general liability policies.

CLASS ACTION ALLEGATIONS

49. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Love brings this action both individually and as a proposed class action against Defendants on behalf of himself and all other similarly situated persons and entities, who own, per the class definition, a condominium within Palmetto Pointe (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a townhome style condominium within Palmetto Pointe located in Charleston, South Carolina.

Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants; (c) Defendants' legal representatives, assigns and successors of Defendants; (d) Defendants' current or former employees, investors, members, or officers; (e) all persons who properly execute and file a timely request for exclusion from the Class; and (f) the owners of the four excluded units referenced in Paragraph 4.

50. *Numerosity*: The Class is composed of in excess of forty (40) persons or entities geographically dispersed throughout the State of South Carolina and the United States, the

joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of sixty (60) members.

51. *Commonality*: Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- a) Whether the construction of Palmetto Pointe was defective;
- b) Whether Defendants knew or should have known of the defects;
- c) Whether Defendants failed to disclose to purchasers and/or homeowners the defects;
- d) Whether Defendants have acted or refused to act on grounds generally applicable to the Class;
- e) Whether Defendants are financially responsible to pay the full costs and expenses of repair of said defective conditions;
- f) Whether Defendants' expertise, superiority, and financial interest in sales transactions gave rise to a duty to disclose the material facts which were concealed; thereby, giving rise to a claim for fraudulent concealment;
- g) Whether Plaintiffs and the Class are entitled to compensatory damages, including, among other things: (i) compensation for repair of their condominiums; (ii) temporary repairs; and (iii) compensation for loss of use; and
- h) Whether Defendants negligently designed, developed, and/or constructed Palmetto Pointe.

52. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, developing, constructing, and selling Palmetto Pointe, Defendants' conduct in concealing the defective condition of Palmetto Pointe, and Plaintiffs' and Class Members' purchasing homes containing building defects.

53. *Adequate Representation*: Plaintiff Love will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class.

Plaintiff Love has retained counsel experienced in the prosecution of construction defect claims

and complex litigation, including consumer class actions involving product liability and product design defects.

54. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

55. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective conditions existing within Palmetto Pointe.

56. Plaintiff Love and the Class envision no unusual difficulty in the management of this action as a class action.

57. Each Class Member has an interest of more than \$100.00.

58. The amount of money at stake for each Class Member is not sufficient for each member to hire his own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

59. Defendants are estopped from relying on any statutes of limitation or repose by virtue of their acts. Upon information and belief, Defendants should have known Palmetto Pointe was defectively constructed and failed to alert the Plaintiffs of Palmetto Pointe's defective condition.

60. Defendants had a duty to inform Plaintiffs of the defects described herein, which they should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiffs.

61. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of Palmetto Pointe.

62. Given Defendants' failure to disclose this non-public information about the defective nature of Palmetto Pointe - information over which they had exclusive control and because Plaintiffs could not reasonably have known of Palmetto Pointe's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

63. Defendants are further estopped from relying upon any statute of limitations as they have represented to Plaintiffs that they are only responsible for correcting work for a period of one year after sale.

**ESTOPPEL FROM PLEADING ANY ANTI-SUIT PROVISIONS
CONTAINED IN PALMETTO POINTE'S MASTER DEED AND BY-LAWS**

64. Island Pointe is estopped from relying on any antisuit provisions contained in _____ Palmetto Pointe's Master Deed and By-Laws because said provisions are void pursuant to public policy and the Horizontal Property Regime Act and/or are voidable as such constitutes a breach of Island Pointe's fiduciary duties to Plaintiffs.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)

65. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

66. At all times relevant hereto, the Defendants, their agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design and construction of Palmetto Pointe in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

67. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, willful, and wanton in the following particulars:

- a) In designing, developing, constructing, and selling Palmetto Pointe with construction deficiencies including those previously identified;
- b) In failing to design and construct Palmetto Pointe in accordance with due care, good workmanship, and in accordance with standard building practices and the plans;
- c) In failing to design and construct Palmetto Pointe in accordance with the building code;
- d) In failing to properly supervise the work and construction of Palmetto Pointe;
- e) In failing to properly coordinate the subcontractors;
- f) In failing to design and construct an adequate exterior building envelope;
- g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- h) In covering up their own defective work and the defective work of others;
- i) In failing to make proper repairs; and
- j) Such other failures to be proven at trial.

68. Any violations of applicable building codes constitute negligence *per se*.

69. Plaintiffs and the Class have been damaged as a direct and proximate result of the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

70. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence per se, Plaintiffs and Class are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to all Defendants)

71. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

72. The design, construction, and/or sale of Palmetto Pointe came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that Palmetto Pointe would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

73. The design, construction, and/or sale of Palmetto Pointe, and the components used therein, came with implied warranties of fitness, merchantability, and workmanship.

74. Additionally, Island Pointe owed Plaintiffs a warranty of habitability.

75. Defendants have breached their warranties by constructing Palmetto Pointe in a defective manner as set forth above.

76. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiffs have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Strict Liability in Tort: *S.C. Code Ann. § 15-73-10 et seq.* as to
Manufacturing and Supplier Defendants)

77. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

78. In manufacturing and supplying products for the construction of Palmetto Pointe, the Manufacturing and Supplier Defendants (including Andersen, CertainTeed, and John Doe. No. 1) placed products into the stream of commerce.

79. By introducing their products into the stream of commerce, the Manufacturing and Supplier Defendants represented said products were safe and suitable for their foreseeable use.

80. In the manufacture and supply of products to Palmetto Pointe, Manufacturing and Supplier Defendants anticipated and expected that their products would reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

81. The Manufacturing and Supplier Defendants have supplied and manufactured their products in a defective manner unreasonably dangerous to persons and/or property other than the products themselves, which has resulted in repeated water intrusion into and damage to Palmetto Pointe and other building deficiencies.

82. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

83. The cost of altering the design, construction, and/or repair of the products supplied to Palmetto Pointe was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

84. The design and manufacture of the products supplied to Palmetto Pointe was inherently defective as sold and was a direct and proximate cause of the damages suffered by Plaintiffs.

85. The Manufacturing and Supplier Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices as to Island Pointe)

86. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

87. At all times relevant herein, Island Pointe was engaged in the business of developing, designing, constructing, and selling Palmetto Pointe, and thereby placing Palmetto Pointe into the stream of commerce.

88. Island Pointe was engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

89. Island Pointe's above-described activities, including placing Palmetto Pointe with defective design and construction into the stream of commerce, failing to comply with the building code, failing to disclose those defects to potential and actual purchasers, and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of Island Pointe's trade.

90. Island Pointe's above-described acts are capable of repetition and adversely affect the public interest.

91. Island Pointe knew or should have known that its conduct was in violation of the S.C. Code Ann. § 39-5-20.

92. As a direct, foreseeable, and proximate result of Island Pointe's unfair trade practices in South Carolina, Plaintiffs have suffered significant damage and have and will incur attorney's fees and the costs and expenses of this action.

FOR A FIFTH CAUSE OF ACTION
(Declaratory Action/Reformation as to Island Pointe)

93. Plaintiffs re-allege the allegations, which are not inconsistent with this cause of action and are contained in the above paragraphs as if fully set forth herein.

94. The anti-suit provisions of the Palmetto Pointe Master Deed are in violation of public policy, statutory law and/or provisions of the Constitution, and the Island Pointe's fiduciary duties.

95. Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions included within the Master Deed by Island Pointe are in violation of statutory law and/or provisions in the Constitution and are therefore void and/or require reformation to eliminate the subject provisions.

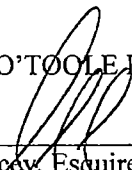
96. As the provisions in the Master Deed are severable, the Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions are severable from the other terms of the Master Deed.

97. Plaintiffs are also entitled to have ambiguous and contradictory provisions in the Master Deed construed against Island Pointe and/or reformed by the Court to more accurately reflect the reasonable expectations of the POA and Homeowners.

WHEREFORE, Plaintiffs demand a trial by jury and pray actual and consequential damages in excess of \$17.5 Million; statutory and/or punitive damages; reasonable attorneys' fees; costs of suit; prejudgment interest; engineering and diagnostic fees; declaration/reformation of the Master Deed; and granting such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

BY: 
Justin Lucey, Esquire
Stephanie Drawdy, Esquire
415 Mill Street
Post Office Box 806
Mount Pleasant, S.C. 29465-0806

-and-

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Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 11/2/2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. AND JACK LOVE,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS,

VS.

ISLAND POINTE, LLC; COMPLETE
BUILDING CORPORATION; TRI-
COUNTY ROOFING, INC.; CREEKSIDE,
INC.; AMERICAN RESIDENTIAL
SERVICES, LLC D/B/A ARS/RESCUE
ROOTER CHARLESTON; ANDERSON
WINDOWS, INC.; ATLANTIC BUILDING
CONSTRUCTION SERVICES, INC. N/K/A
ATLANTIC CONSTRUCTION SERVICES,
INC.; 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.; CERTAINTED
CORPORATION; KELLY FLOORING
PRODUCTS, INC., D/B/A CARPET
BAGGERS; CORNERSTONE
CONSTRUCTION AND MARK MALLOY
D/B/A CORNERSTONE
CONSTRUCTION; MIRACLE SIDING,
LLC AND WILSON LUCAS SALES D/B/A
MIRACLE SIDING, LLC; MARK
PALPOINT A/K/A MICAH PALPOINT;
ELROY ALONZO VASQUEZ; CHRIS
A/K/A JOHN DOE 61; ALDERMAN
CONSTRUCTION; STANLEY'S VINYL
FENCE DESIGNS; COHEN'S DRYWALL
COMPANY, INC.; MOSELY CONCRETE;
HAND A FRAMING CONSTRUCTION,
LLC A/K/A H&A FRAMING
CONSTRUCTION, LLC AND D/B/A

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2015-CP-10-00955

**TRI-COUNTY ROOFING, INC.'S
ANSWER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT AND CROSS-
CLAIMS AGAINST CORNERSTONE
CONSTRUCTION AND MARK
MALLOY D/B/A CORNERSTONE
CONSTRUCTION, MIRACLE SIDING,
LLC AND WILSON LUCAS SALES
D/B/A MIRACLE SIDING, LLC, MARK
PALPOINT A/K/A MICAH PALPOINT,
ELOY ALONZO VASQUEZ,
AND CHRIS A/K/A JOHN DOE 61**

(Jury Trial Demanded)

FILED
2016 NOV 17 AM 11:33
JULIE J. ARMSTRONG
CLERK OF COURT

H AND A FRAMING, LLC, H&A	)
CONSTRUCTION, AND HAND A	)
CONSTRUCTION; JMC	)
CONSTRUCTION, INC.; JMC	)
CONSTRUCTION, LLC; JOHN DOE 1-15,	)
	)
DEFENDANTS.	)
COMPLETE BUILDING CORPORATION,	)
INC.	)
	)
THIRD-PARTY PLAINTIFF,	)
	)
VS.	)
	)
LEONARD T. BROWNE AND	)
CHRISTOPHER N. UNION,	)
	)
THIRD-PARTY DEFENDANTS.	)
	)
CREEKSIDE, INC.,	)
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THIRD-PARTY PLAINTIFF,	)
	)
VS.	)
	)
CHRISTOPHER N. UNION,	)
	)
THIRD-PARTY DEFENDANT.	)

The Defendant, Tri-County Roofing, Inc. ("Tri-County"), answers Plaintiffs' Second Amended Complaint that was filed on November 2, 2017, by denying each and every allegation not hereinafter admitted, demanding strict proof thereof, restates its still pending third-party claims against certain sub-subcontractors as cross-claims, and further responds as follows:

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 1 through 3 and, therefore, denies the same.
2. Upon information and belief, Tri-County admits the allegations contained in Paragraph 4. Further Responding, Tri-County understands, upon information and belief, that the

duplex townhomes at the street numbers on Folly Creek Way of 1601-1603, 1605-1607, 1609-1611, 1613-1615, 1617-1619, 1621-1623, 1625-1627, 1629-1631, 1633-1635, 1637-1639, 1641-1643, 1645-1647, 1649-1651, 1653-1655, 1628-1626, 1624-1622, 1620-1618, 1616-1614, 1612-1610, and 1608-1606 are the forty (40) townhomes Plaintiffs allege are included in the lawsuit and the duplex townhomes at the street numbers on Folly Creek Way of 1657-1659 and 1632-1630 are the four (4) townhomes not included in the lawsuit.

3. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 5 and 6 and, therefore, denies the same.

4. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 7 and 8 and, therefore, denies the same.

5. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 9, and therefore, denies same.

6. Upon information and belief, Tri-County admits the allegations contained in Paragraph 10.

7. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 11, and therefore, denies same.

8. Tri-County admits the allegations contained in Paragraph 12.

9. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 13 through 23 and, therefore, denies the same.

10. Tri-County admits the allegation contained in Paragraphs 24 through 28.

11. Tri-County lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 29 through 37 and, therefore, denies the same.

12. In response to Paragraph 38, Tri-County admits only that, upon information and belief, the Palmetto Point at Peas Island project is located in Charleston County, South Carolina.

13. Paragraph 39 is a descriptive paragraphs and requires no response; however, to the extent a response is required or to the extent this paragraph could be construed to impart liability on behalf of Tri-County, these allegations are denied.

14. Tri-County denies the allegations contained in Paragraphs 40 through 42 and demands strict proof thereof.

15. In response to Paragraph 43, Tri-County admits only that the work it performed on the Palmetto Point at Peas Island project was done in a workmanlike manner with suitable materials, free from defects, and in accordance with the applicable building codes, manufacturers' instructions, and general industry requirements, and Tri-County denies all allegations inconsistent with this response.

16. Tri-County denies the allegations contained in Paragraphs 44 through 47 and demands strict proof thereof.

17. Paragraph 48 calls for a legal conclusion and requires no response; however, to the extent a response is required or to the extent this paragraph could be construed to impart liability on behalf of Tri-County, these allegations are denied.

18. In response to Paragraph 49, Tri-County denies that this claim is proper for class certification. Tri-County further objects to the purported definition of the class as the class definition conflicts with the suggested limiting language from Paragraph 4 set forth earlier in Plaintiffs' Second Amended Complaint.

19. In response to Paragraphs 50 through 54, including all subparts, Tri-County renews its objection to class certification and denies that this case is proper or ripe for class

certification as the questions of numerosity, commonality, typicality, adequate representation, and predominance do not apply consistently to all of the purported class members and/or Defendants and may also be shown to be inadequate on their face.

20. Tri-County denies the allegations contained in Paragraph 55 and demands strict proof thereof.

21. Tri-County denies the allegations contained in Paragraphs 56 through 58 and demands strict proof thereof.

22. Tri-County denies the allegations contained in Paragraphs 59 through 63 and demands strict proof thereof. Furthermore, Tri-County states that Plaintiffs' appear to attempt to change the statutory and common law regarding the statute of limitations and/or statute of repose in these Paragraphs and Tri-County denies that Plaintiffs can circumvent the laws of the state of South Carolina regarding these issues.

23. Upon information and belief, the allegations contained in Paragraph 64 are not directed to Tri-County and require no response. However, to the extent a response is required or to the extent these allegations can be construed to impart liability on behalf of Tri-County, these allegations are denied.

First Cause of Action
(Negligence/Gross Negligence)

24. In response to Paragraph 65, Tri-County repeats its responses in Paragraphs 1 through 23 above as if restated herein verbatim.

25. In response to Paragraph 66, Tri-County admits only that the work it performed on the Palmetto Point at Peas Island project was done with due care and in a good and workmanlike manner with suitable materials in accordance with the applicable buildings codes, applicable laws, and in conformance with industry standards and product installation guidelines

and all allegations inconsistent with this response are denied and Tri-County demands strict proof thereof.

26. Tri-County denies the allegations contained in Paragraph 67, including all subparts, and demands strict proof thereof.

27. Paragraph 68 is an incorrect statement of the law in South Carolina and, therefore, it is denied.

28. Tri-County denies the allegations contained in Paragraphs 69 and 70 and demands strict proof thereof.

Second Cause of Action
(Breach of Warranty)

29. In response to Paragraph 71, Tri-County realleges its answers in Paragraphs 1 through 28 above as if restated herein verbatim.

30. In response to Paragraph 72, Tri-County admits only that its work performed on the Palmetto Point at Peas Island project was done in a careful, diligent, and workmanlike manner, free from defects and in accordance with the applicable building codes and product installation requirements and all allegations inconsistent with this response are denied and Tri-County demands strict proof thereof.

31. In response to Paragraph 73, Tri-County admits only that there are certain implied warranties applied at law but denies that, to the extent that any implied warranties are attributed to the work by Tri-County, it violated any of these warranties.

32. In response to Paragraph 74, Tri-County admits only that the warranty of habitability applies to the developer only.

33. Tri-County denies the allegations contained in Paragraphs 75 and 76 and demands strict proof thereof.

Third Cause of Action
(Strict Liability in Tort)

34. In response to Paragraph 77, Tri-County realleges its answers in Paragraphs 1 through 33 above as if restated herein verbatim.

35. Upon information and belief, the allegations contained in Paragraphs 78 through 85 are not directed to Tri-County and, therefore, require no response from this defendant. However, to the extent these paragraphs require a response from Tri-County or to the extent they can be construed to impart liability on Tri-County, these allegations are denied.

Fourth Cause of Action
(UTPA)

36. In response to Paragraph 86, Tri-County realleges its answers in Paragraphs 1 through 35 above as if restated herein verbatim.

37. Upon information and belief, the allegations contained in Paragraphs 87 through 92 are not directed to Tri-County and, therefore, require no response from this defendant. However, to the extent a response is required or to the extent these paragraphs could be construed to impart liability on Tri-County, these allegations are denied.

Fifth Cause of Action
(Declaratory Action)

38. In response to Paragraph 93, Tri-County realleges its answers in Paragraphs 1 through 37 above as if restated herein verbatim.

39. Upon information and belief, the allegations contained in Paragraphs 94 through 97 are not directed to Tri-County and, therefore, require no response from this defendant. However, to the extent a response is required or to the extent these paragraphs could be construed to impart liability on Tri-County, these allegations are denied.

40. In response to the unnumbered "Wherefore" paragraph, Tri-County denies that Plaintiffs are entitled to the relief requested in their Second Amended Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE

41. The Second Amended Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

42. Even if Tri-County was negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiffs' injuries, if any, which is expressly denied, Tri-County alleges Plaintiffs' negligent, grossly negligent, reckless, willful, and wanton conduct contributed more than fifty percent (50%) to the cause of the accident, and therefore, Plaintiffs' claims are barred.

FOR A FOURTH DEFENSE

43. Even if Tri-County was negligent in any respect, which is expressly denied, and even if such conduct on the part of Tri-County operated as a greater than fifty percent (50%) cause of Plaintiffs' injuries, if any, which is also denied, Tri-County is entitled to a determination as to the percentage which Plaintiffs' negligent, grossly negligent, reckless, willful, and wanton conduct contributed to Plaintiffs' accident and resulting injuries, if any, and to a reduction of any amount awarded to Plaintiffs by an amount equal to the percentage of Plaintiffs' own negligence.

FOR A FIFTH DEFENSE

44. Such injuries or losses as Plaintiffs' sustained, if any, were caused by the contributory negligence, carelessness, recklessness, willfulness, and wantonness of Plaintiffs, and Tri-County pleads Plaintiffs' contributory negligence as a complete defense to this action.

FOR A SIXTH DEFENSE

45. Any injuries or damages sustained by Plaintiffs were due to and caused and occasioned by Plaintiffs' own negligence, gross negligence, recklessness, willfulness, and wantonness which was the direct and proximate cause of Plaintiffs' alleged injuries or damages, if any, and without which the same would not have occurred, and therefore, due to Plaintiffs' sole negligence, gross negligence, recklessness, willfulness, and wantonness, Plaintiffs' claims are barred.

FOR A SEVENTH DEFENSE

46. Any injuries sustained by Plaintiffs were due to and caused by the sole negligence of third persons over whom Tri-County had no control, and therefore, Tri-County should not be liable to Plaintiffs in any sum whatsoever.

FOR AN EIGHTH DEFENSE

47. Any injuries sustained by Plaintiffs were due to and caused by the intervening and superseding acts of negligence, carelessness, recklessness, and gross negligence on the part of third persons as a proximate cause of injuries as alleged, if any, and therefore, Tri-County should not be liable to Plaintiffs in any sum whatsoever.

FOR A NINTH DEFENSE

48. Plaintiffs' claims may be barred by the doctrine of estoppel.

FOR A TENTH DEFENSE

49. Plaintiffs' claims may be barred or otherwise reduced due to Plaintiffs' failure to _____ mitigate damages as required by law.

FOR AN ELEVENTH DEFENSE

50. Plaintiffs' claims may be barred by the doctrine of laches.

FOR A TWELFTH DEFENSE

51. Tri-County asserts that some or all of the claims against it are barred by applicable statutes of limitation or statutes of repose.

FOR A THIRTEENTH DEFENSE

52. Plaintiffs failed to comply with the terms and conditions of The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §40-59-810; therefore, all claims are subject to being stayed.

FOR A FOURTEENTH DEFENSE

53. Any recovery by Plaintiffs must be reduced or offset by amounts Plaintiffs received or will receive from others or that Plaintiffs receive directly for the same injuries claimed in this lawsuit.

FOR A FIFTEENTH DEFENSE

54. Plaintiffs' claims may be barred by the doctrine of waiver.

FOR A SIXTEENTH DEFENSE

55. Punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

FOR A SEVENTEENTH DEFENSE

56. Pursuant to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424, 121 S.Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of punitive damages "[are] not really a fact tried by the jury;" therefore Plaintiffs' request for punitive damages "to be determined by the jury" violates the United States Constitution.

FOR AN EIGHTEENTH DEFENSE

57. The U.S. Constitution's Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly [do not] represent," *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (U.S. 2007), and, therefore, to the extent that Plaintiffs' seek an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial.

FOR A NINETEENTH DEFENSE

58. Notwithstanding Plaintiffs' prior defenses incorporating *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424 (2001) and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), and the cases upon which they are based, in the event the trial court permits the jury to return a punitive damages award in the instant case, such damages are to be limited to an amount that is no greater than the jury's award of actual damages, as explicated within *Exxon Shipping Company v. Baker*, 128 S. Ct. 2605 (2008).

FOR A TWENTIETH DEFENSE

59. The work and services that may have been provided by Tri-County were in conformity with the standard of care for that time.

FOR A TWENTY-FIRST DEFENSE

60. No act or omission by Tri-County in the performance of its professional services proximately caused the alleged damages for which Plaintiffs now seek to recover and, as a result, Plaintiffs are not entitled to any recovery from Tri-County.

FOR A TWENTY-SECOND DEFENSE

61. Tri-County asserts and specifically pleads that Plaintiffs have failed to prove and/or cannot prove that this claim is entitled to class certification as (1) the numerosity requirement is not met, (2) there are questions of law and fact that are different between the purported class members, (3) the claims and/or defenses are not typical across the purported class, and (4) the purported class representative(s) will not adequately advance the position of the purported class members. Therefore, this matter is not proper for class certification.

FOR AT TWENTY-THIRD DEFENSE

62. Tri-County incorporates by reference any affirmative defenses raised by any other Defendant in this action.

FOR AT TWENTY-FOURTH DEFENSE

63. Tri-County specifically reserves any additional and/or affirmative defenses as may be available to it or revealed to it during the course of the investigation and/or discovery in this case.

FOR A TWENTY-FIFTH DEFENSE AND BY WAY OF CROSS-CLAIMS (WHICH WERE PREVIOUSLY ASSERTED AS THIRD-PARTY CLAIMS) AGAINST CORNERSTONE CONSTRUCTION CORPORATION AND MARK MALLOY D/B/A CORNERSTONE CONSTRUCTION, MIRACLE SIDING, LLC AND WILSON LUCAS SALES D/B/A MIRACLE SIDING, MARK PALPOINT A/K/A MICAH PALPOINT, ELOY ALONZO VASQUEZ, AND CHRIS A/K/A JOHN DOE 61

64. Tri-County hired certain subcontractors to perform construction work on the Palmetto Point at Peas Island project. Tri-County did not self-perform any of the work but, instead, supervised the specific work by its subcontractors.

65. Cornerstone Construction Corporation and Mark Malloy d/b/a Cornerstone Construction is a South Carolina company located in Charleston County, South Carolina, and at

all times relevant herein, performed siding installation, flashing, and other component work on one or more buildings at the Palmetto Point at Peas Island project.

66. Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding is a South Carolina company located in Berkeley County, South Carolina, and at all times relevant herein, performed siding installation, related flashings, and other component work on one or more buildings at the Palmetto Point at Peas Island project.

67. Mark Palpoint a/k/a Micah Palpoint is a South Carolina resident who, at all times relevant herein, installed Sealoflex waterproofing on one or more buildings at the Palmetto Point at Peas Island project.

68. Eloy Alonzo Vasquez was a South Carolina resident who, at all times relevant herein, installed roofing, flashing, other roofing components, and waterproofing on one or more buildings at the Palmetto Point at Peas Island project.

69. Chris a/k/a John Doe No. 61 is a resident of South Carolina and at all times relevant herein installed waterproofing on one or more of the buildings at the Palmetto Point at Peas Island project.

70. All of the Subcontractors listed above performed the described work on the buildings located at the Palmetto Point at Peas Island project.

71. All of the referenced Third-Party Defendants, collectively referenced as "Subcontractors," that were retained by Tri-County were required to obtain proper commercial general liability insurance coverage of sufficient limits and further to list Tri-County as an additional insured in these policies.

FOR A FIRST CROSS-CLAIM
(Negligence)

72. Tri-County realleges its assertions set forth in Paragraphs 64 through 71 above as if restated herein verbatim.

73. The various Subcontractors were required to perform their work in accordance with applicable building codes, installation guidelines, industry standards, and in a good and workmanlike manner.

74. However, it is alleged the work these Subcontractors performed did not comply with the applicable construction and industry standards.

75. Tri-County has denied the substantive allegations alleged against it by the Plaintiffs arising from the construction of the Palmetto Pointe at Peas Island project; however, if the Subcontractors' work is found to be deficient, then the Subcontractors have breached their duty to perform this work correctly.

76. The Subcontractors' breaches of their duties are the proximate cause of the damages suffered by Tri-County.

77. As a result, Tri-County is damaged by these breaches by having to expend time, effort, and attorneys' fees defending these claims. Tri-County is entitled to full reimbursement for any costs, expenses, payments of any kind, and attorneys' fees incurred as a result of the alleged defective work by the Subcontractors.

FOR A SECOND CROSS-CLAIM
(Breach of Express and Implied Warranties)

78. Tri-County realleges its assertions set forth in Paragraphs 64 through 77 as if restated herein verbatim.

79. The Subcontractors warranted and expressly stated that the work they performed at the Palmetto Point at Peas Island project was performed in a workmanlike manner, free of defects, and commensurate with all applicable building codes and installation details.

80. Although Tri-County has denied the substantive allegations asserted against it, to the extent there are deviations with the actual installation of the work by the Subcontractors, the Subcontractors have breached their implied and express warranties owed Tri-County.

81. As a result, Tri-County is damaged by these breaches by having to expend time, effort, and attorneys' fees defending these claims. Tri-County is entitled to full reimbursement for any costs, expenses, payments of any kind, and attorneys' fees incurred as a result of the alleged defective work by the Subcontractors.

FOR A THIRD CROSS-CLAIM
(Breach of Contract)

82. Tri-County realleges its assertions set forth in Paragraphs 64 through 81 as if restated herein verbatim.

83. Through either formal contracts, purchase orders, and/or otherwise, the various Subcontractors contracted with Tri-County to supply labor and/or materials for roofing, siding, waterproofing, and/or related work on the Palmetto Pointe at Peas Island project.

84. In addition to the construction scope of work, each of the Subcontractors promised and in fact was required to include Tri-County as an additional insured on their commercial general liability policies. This term was a significant requirement for the Subcontractors to be hired by Tri-County to work on this project.

85. Although Tri-County has denied all substantive allegations, to the extent the work performed by the Subcontractors does not meet their contractual obligations, they are in breach of their subcontracts with Tri-County. Furthermore, to the extent the subcontractors did not list

Tri-County as an additional insured on their respective insurance policies, they are in breach of their subcontract agreements.

86. As a result, Tri-County is damaged by these breaches by having to expend time, effort, and attorneys' fees defending these claims. Tri-County is entitled to full reimbursement for any costs, expenses, payments of any kind, and attorneys' fees incurred as a result of the alleged defective work by the Subcontractors.

FOR A FOURTH CROSS-CLAIM
(Indemnity)

87. Tri-County realleges its assertions set forth in Paragraphs 64 through 86 as if restated herein verbatim.

88. By their relationship as principal and subcontractor, there is a special relationship between Tri-County and the Subcontractors.

89. Tri-County has been named in a lawsuit claiming damages for work that was performed by and alleged defects that are the sole responsibility of the Subcontractors.

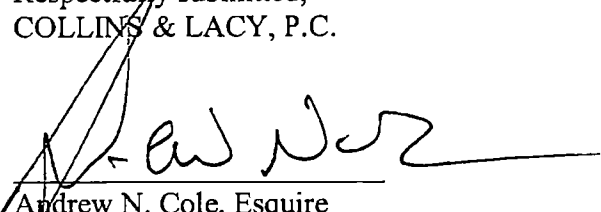
90. Although Tri-County denies the Plaintiffs' allegations, to the extent the Subcontractors' work is found to be defective, these defects are caused by and born by the Subcontractors alone for liability that Tri-County does not share.

91. Therefore, Tri-County should be indemnified and held harmless by the Subcontractors to the full extent of the law.

WHEREFORE, having answered the Plaintiffs' Second Amended Complaint, Tri-County prays the allegations be dismissed. Furthermore, Tri-County prays for judgment against the Subcontractors with its cross-claims that renewed the previously filed and still pending Third-Party Claims. Tri-County prays for costs, expenses, attorney's fees, punitive damages, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,
COLLINS & LACY, P.C.

By:


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Christopher M. Adams, Esquire
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803.256.2660

ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

November ¹⁵~~14~~, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc., et al.,

Plaintiff,

vs.

Island Pointe, LLC, et al.,

Defendant.

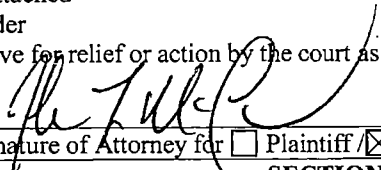
IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-00955

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney: Edward D. Buckley, Jr., Esq. Address: P.O. Box 993, Charleston, SC 29402-0993 Phone: 843-720-5446 Fax: 843-579-2942 E-mail: Other: jcantwell@ycrlaw.com		Intervenant Attorney: John McCants., Bar No. 10423 Address: PO Box 11803, Columbia SC 29211 Phone: 803-256-1268 Fax: 803-252-3653 E-mail: jmccants@rogerslewis.com Other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Motion for Intervention</u> Estimated Time Needed: <u>30 minutes</u> Court Reporter Needed: ☐ YES / ☒ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☒ Intervenant		<u>3/22/18</u> Date submitted	
SECTION III: Motion Fee			
☒ PAID – AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED – AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF CHARELSTON

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; COMPLETE
BUILDING CORPORATION; TRI-
COUNTY ROOFING, INC.; CREEKSIDE,
INC; AMERICAN RESIDENTIAL
SERVICES, LLC D/B/A ARS/RESCUE
ROOTER CHARLESTON; ANDERSEN
WINDOWS, INC.; ATLANTIC
BUILDING CONSTRUCTION
SERVICES, INC. N/K/A ATLANTIC
CONSTRUCTION SERVICES, INC.;
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;
CORNERSTONE CONSTRUCTION AND
MARK MALLOY D/B/A
CORNERSTONE CONSTRUCTION;
MIRACLE SIDING, LLC AND WILSON
LUCAS SALES D/B/A MIRACLE
SIDING, LLC; MARK PALPOINT A/K/A
MICAH PALPOINT; ELROY ALONZO
VASQUEZ; CHRIS A/K/A JOHN DOE 61;
ALDERMAN CONSTRUCTION;
STANEY'S VINYL FENCE DESIGNS;

IN THE COURT OF COMMON PLEAS
THE NINTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-10-00955

FILED
2018 MAR 27 AM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

COHEN'S DRYWALL COMPANY, INC.;
MOSELY CONCRETE; HAND A
FRAMING CONSTRUCTION, LLC
A/K/A H&A FRAMING
CONSTRUCTION, LLC AND D/B/A
H AND A FRAMING, LLC, H&A
CONSTRUCTION, AND HAND A
CONSTRUCTION; JMC
CONSTRUCTION, INC.; JMC
CONSTRUCTION, LLC; JOHN DOE 1-
15,

DEFENDANTS.

COMPLETE BUILDING
CORPORATION, INC.,

THIRD-PARTY PLAINTIFF,

V.

LEONARD T. BROWNE AND
CHRISTOPHER N. UNION,

THIRD-PARTY DEFENDANTS.

CREEKSIDE, INC.,

THIRD-PARTY PLAINTIFF,

V.

CHRISTOPHER N. UNION,

THIRD-PARTY DEFENDANT.

**NOTICE OF MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR
INTERVENTION PURSUANT TO RULE 24, SCRCP, TO HAVE THE COURT SUBMIT
A SPECIAL VERDICT FORM AND/OR GENERAL VERDICT FORM
ACCOMPANIED BY ANSWER TO INTERROGATORIES
PURSUANT TO RULE 49, SCRCP**

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for Builders Mutual Insurance Company (“Builders Mutual”), will move before the Court, for the Ninth Judicial Circuit, ten (10) days from the date of this motion, or as soon thereafter as counsel may be heard, for an Order permitting Builders Mutual to intervene in the civil action pursuant to Rule 24, SCRPC, for the limited purpose of participating in the drafting and the submission by the Court of a special verdict form and/or a general verdict form accompanied by answer to interrogatories pursuant to Rule 49, SCRPC, to the jury at the trial of the civil action.

Plaintiffs commenced Civil Action No. 2015-CP-10-00955, against numerous parties, including Defendant Tri-County Roofing, Inc. (“Tri-County”), involved in the construction of the buildings comprising the Palmetto Pointe at Peas Island condominium development in Charleston County, South Carolina (“Palmetto Pointe”). Plaintiffs allege that Tri-County was a subcontractor for the construction of Palmetto Pointe and supplied materials and installed roofing and related materials, among other work; and also supplied siding, flashing, deck waterproofing, gutters and other materials. (Second Amended Complaint ¶ 12). Palmetto Pointe consists of forty townhome style condominiums located in twenty buildings and a clubhouse. (Second Amended Complaint ¶ 4). Builders Mutual is informed and believes the buildings at Palmetto Pointe were completed between January 19, 2007 and November 2, 2007.

Plaintiffs allege various construction defects with the building envelopes of the buildings and contend that the defects have allowed the weather to physically damage parts of the buildings. (See Second Complaint ¶¶ 40, 41, 42 and 48). Plaintiffs allege the following causes of action in their Second Amended Complaint against Tri-County: 1) negligence/gross negligence; and 2) breach of warranty.

Builders Mutual issued insurance policies with commercial general liability (“CGL”)

coverage to Tri County Roofing, Inc. for the following periods: 1) CPP 0035981 00 ~ 07/24/2009 to 07/24/2010; 2) CPP 0035981 01 ~ 07/24/2010 to 07/24/2011; 3) CPP 0035981 02 ~ 07/24/2011 to 07/24/2012; 4) CPP 0035981 03 ~ 07/24/2012 to 07/24/2013; 5) CPP 0035981 04 ~ 07/24/2013 to 07/24/2014*; 6) UMB 0023391 00 ~ 10/15/2012 to 07/24/2013; 7) UMB 0023391 01 ~ 07/24/2013 to 07/24/2014*.¹ Policy CPP 0035981 04* and Policy UMB 0023391 01* were replaced by a CGL insurance policy with another insurer; and were otherwise cancelled effective August 23, 2013. Builders Mutual is providing a defense to Tri-County for the Civil Action by Andrew N. Cole, Esq. of Collins & Lacy, P.C., pursuant to a reservation of rights to contest whether the damages being sought against Tri-County are insured by the Builders Mutual insurance policies.

A third-party liability insurance contract or a CGL policy is an indemnity contract whereby an insurer agrees to pay an insured the amount for covered damages the insured may become legally obligated to pay a third party. Trancik v. USAA Ins. Co., 354 S.C. 549, 581 S.E.2d 858 (S.C. Ct. App. 2003). A CGL policy contains two insuring provisions that are notable for the subject matter: 1) there is a duty to defend an insured to the extent a party seeks damages that may be insured by the CGL policy; and 2) and there is a duty to indemnify an insured for damages covered by the policy to which an insured becomes legally obligated to pay a third party. Sloan Const. Co., Inc. v. Central Nat. Ins. Co. of Omaha, 269 S.C. 183, 236 S.E.2d 818 (1977). The duty to defend is triggered in part if the allegations in a complaint raise the possibility that there are damages insured by a CGL policy. Isle of Palms Pest Control Company v. Monticello Insurance Company, 319 S.C.12, 459 S.E.2d 319 (Ct. App. 2012). In contrast, the duty to indemnify is based

¹ The policies can be made available for inspection and review or have otherwise been produced in the civil action.

on the evidence found by a jury at trial and it is reversible error to find there is a duty before a jury renders a decision. Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 604, 748 S.E.2d 781, 791 (2013) (“We hold the declaratory judgment action was procedurally proper save for a ruling on the issues regarding property damages as there are related questions of fact that must be decided by a jury on retrial.”); see also, Ellett Bros., v. U.S. Fidelity & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001) (citing Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 314, 476 S.E.2d 708, 711 (1996) (“Clearly the right to recover, while it exists, does not ripen until decided by the finder of fact”)).

Under established South Carolina law, a standard CGL insurance policy does not insure all of the damages that Palmetto Pointe seeks to recover against Tri-County. A CGL insurance policy does not insure Tri-County’s defective construction itself. Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 8, 747 S.E.2d 426, 430 (2013); Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011); Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546 (2009). A CGL insurance policy does not insure the costs to repair Tri-County’s defective work even if the cost of removing the defective work is incidental to repairing water damaged other property that may possibly be insured under a CGL insurance policy. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546. A CGL insurance policy does not insure the costs to replace Tri-County’s defective work. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546-47.

A CGL insurance policy does not insure an insured’s work itself but rather consequential risks that stem from an insured’s work. Bennett & Bennett Constr., 405 S.C. at 8, 747 S.E.2d at 430. “CGL coverage ‘is for tort liability for injury to persons and damage to *other* property and not for contractual liability of [the] insured for economic loss because [the] completed work is not

that for which the damaged person bargained [.]” Bennett & Bennett Constr., 405 S.C. at 8, 747 S.E.2d at 430 (emphasis in original). For example, the Supreme Court found that continuous water intrusion resulting from the defective installation of the stucco cladding on a home that caused water damage to wood sheathing and framing behind the stucco triggered an insured loss under the CGL insurance policy. Newman, 385 S.C. at 194, 684 S.E.2d at 545. The results in Newman and Crossmann Communities have subsequently been codified in S.C. Code § 38-61-70(B)(2). The insurance coverage principles discussed above were reiterated by the Supreme Court in the recent decision Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017).

Again, the duty to indemnify an insured is based on the evidence found by a jury and that is the basis for a verdict against an insured. CGL insurance coverage for a construction defect claim (where South Carolina law unmistakably holds there are non-insured damages) is made complicated when a jury renders a general verdict against an insured. When a general verdict is rendered, the question arises how does one determine whether and how much of a jury’s verdict contains damages that are insured by a CGL policy. The question becomes even more complicated when a jury compromises and awards an amount of damages that is somewhere between what a Plaintiff submits is the estimated cost of repair and what a Defendant submits is the estimated cost of repair.

In two published decisions, the South Carolina Supreme Court has required the insurer in each appeal to pay a general verdict arising in a construction defect civil action where the Supreme 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; Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017).

In Newman, a construction defect claim was brought by the owner against the builder of a house. Newman, 385 S.C. at 190, 684 S.E.2d at 542.² The builder and the owner submitted the owner's claims to binding arbitration. Newman, 385 S.C. at 190, 684 S.E.2d at 542. A hearing was held, and the arbitrator awarded the owner damages based on the cost to remove and replace the (defectively installed) stucco cladding and cost to repair the water damaged sheathing and framing behind the stucco. Newman, 385 S.C. at 190, 684 S.E.2d at 542. The Supreme Court held that the cost to remove and replace the stucco was not covered by a CGL insurance policy, but the cost to repair the water damaged framing and sheathing behind the stucco was covered by the CGL insurance policy. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546.

Notwithstanding, the Supreme Court held that Auto-Owners Insurance Company was obligated to pay the *entire* arbitration award because the Supreme Court was unable to discern what part of the award was for the cost to remove and replace the stucco (not insured) versus the cost to repair water damaged sheathing and framing (insured). Newman, 385 S.C. at 198, 684 S.E.2d at 547. 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.

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. 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.").

² In Newman, Auto-Owners Insurance Company retained defense counsel for the builder to defend the arbitration. Counsel retained to defend the builder was different than the counsel retained by Auto-Owners Insurance Company to bring a declaratory judgment action to determine insurance coverage for the arbitration award.

Newman, 385 S.C. at 198, 684 S.E.2d at 547.

In Heritage Communities, the Supreme Court again addressed this same issue. Heritage Communities, 420 S.C. at 331, 803 S.E.2d at 293-94. In Heritage Communities, the facts in the underlying construction defect claim were similar to the facts in Newman. The plaintiff homeowners association sought damages for the cost to remove and replace the siding and cost to repair water damaged sheathing and framing behind the siding. Heritage Communities, Inc., 420 S.C. at 332, 803 S.E.2d at 294. The jury rendered a general verdict in favor of the plaintiff homeowners association for costs to repair damages that included both insured and non-insured damages. Heritage Communities, Inc., 420 S.C. at 331, 803 S.E.2d at 294.

In the declaratory judgment action to determine insurance coverage for the verdict, the Supreme Court affirmed the Special Referee who held that Harleysville Insurance Group was obligated to pay its time-on-risk share of the general verdict. Heritage Communities, Inc., 420 S.C. at 332, 803 S.E.2d at 294. The Supreme Court also affirmed the Special Referee who held that Harleysville Insurance Group could not allocate the damages between insured and uninsured damages in the declaratory judgment action. Heritage Communities, Inc., 420 S.C. at 332, 803 S.E.2d at 294 (“Although the Special Referee found that the costs to remove and replace the faulty workmanship were not covered under the policies, the Special Referee concluded that it would be improper and purely speculative to attempt to allocate the juries’ general verdicts between covered and non-covered damages. Accordingly, the Special Referee ordered the full amount of the actual damages in the construction-defect suits would be subject to Harleysville’s duty to indemnify in proportion with its time on the risk.”). In light of Newman and Heritage Communities, CGL insurers, including Builders Mutual, are left with no alternative but to ask a circuit court to allow them to intervene on a case by case basis every time this issue arises. The fact is Heritage

Communities (and Newman) leaves no alternative for an insurer but to request intervention or suffer the consequences of a general verdict; and thereby being required to pay both insured and uninsured damages, contrary to South Carolina law and contrary to CGL insurance policies.

The Supreme Court in Newman and Heritage Communities did not provide definitive instructions on what actions must be taken to avoid the consequences of a general verdict. In Newman and Heritage Communities, the majority decision did not mention intervention or Rule 49, SCRPC. Heritage Communities, 420 S.C. at 363, 803 S.E.2d at 310 (Pleicones, J. dissenting) (“Moreover, 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.”). The Supreme Court also did not hold that a general verdict is the only option; and that insurers must bear the consequences under any circumstance. The Supreme Court did not hold that it would be improper for an insurer to intervene and participate in the drafting of a special verdict form or a general verdict form that is accompanied by interrogatories to allocate damages for the ultimate purpose of determining insurance coverage.

In Heritage Communities, the Supreme Court relied on Duke v. Hoch, 468 F.2d 973 (5th Cir. 1972), which discusses burdens of proof, general verdicts, and the allocation of damages. Heritage Communities, 420 S.C. at 341, 803 S.E.2d at 299. The facts in Duke involved a judgment creditor seeking insurance from the CGL insurer for the insured judgment debtor. Duke, 468 F.2d at 974. In Duke, the verdict on the merits was a general verdict for a single sum and included covered and non-covered damages. Duke, 468 F.2d at 974. The Fifth Circuit Court of Appeals affirmed the lower court’s finding that the insurer discharged the initial burden which was to show that the verdict included noncovered damages. Duke, 468 F.2d at 976. Once the insurer established that part of the verdict was for noncovered damages, the burden was then on the judgment creditor

to prove the precise portion of the unallocated verdict that was insured. Duke, 468 F.2d at 977 (citing Universal Underwriters Ins. Corp. v. Reynolds, 129 So.2d 689, 691 (Fla. Dist. Ct. App. 1961)). The Fifth Circuit expressed the need for allocating damages: “[t]he consequence to the insureds of a non-allocated verdict is the catastrophic total loss of coverage. The risks to the insurer in requesting an allocated verdict are of no such magnitude, if of any consequence at all.” Duke, 468 F.2d at 979.

There is one way to solve the conundrum created by a general verdict and that is to have the jury allocate damages in a special verdict form and/or general verdict form accompanied by answer to interrogatories. The South Carolina Rules of Civil Procedure do not require a general verdict. There is a civil procedure rule that absolutely allows a trial court to require the jury to explain the basis for a jury’s verdict and thus avoid a general verdict. The procedure is not intrusive or prejudicial to any party to the civil action; and Builders Mutual submits that not doing so prejudices Builders Mutual – particularly if the legal consequences are that which the insurers faced in Newman and Heritage Communities. Rule 49, SCRPC states in parts as follows:

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written

interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

For the purposes of this civil action, the verdict form and/or answer to interrogatories would be tailored for the jury to allocate damages between those which are the cost to repair or remove and replace the work installed by Tri-County; and that which is "property damage" to property other than Tri-County's work.

Intervention

Rule 24, SCRCP states in part as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In

exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990). Intervention may be of right or permissive; intervention of right is governed by Rule 24(a), SCRCP. In analyzing intervention for a particular case, the South Carolina Supreme Court has recognized that intervention controversies arise in a myriad of contexts. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714. The Supreme Court has stated the following about intervention:

[W]e interpret the rules to permit liberal intervention particularly where as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected. Accordingly, [the Supreme Court] must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2).

Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714.

“Each case will be examined in the context of its unique facts and circumstances.” Berkely Elec., 302 S.C. at 189, 394 S.E.2d at 714.

Rule 24(a)(2), SCRCP, permits intervention as of right based on the following criteria: (1) there is a timely application; (2) movant asserts an interest relating to the property or transaction which is the subject of the action; (3) movant demonstrates that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) movant demonstrates that its interest is inadequately represented by other parties. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714 (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)).

Builders Mutual's application is timely. Builders Mutual is merely seeking to intervene for the limited purpose of participating in the preparation of a special verdict form or a general verdict form accompanied by answer to interrogatories for the submission to the jury during trial. Such involvement necessarily depends on the evidence introduced at trial so what is actually submitted to a jury is not imminent. Further, the trial in the civil action will not in be delayed by allowing Builders Mutual to intervene. Builders Mutual's involvement necessarily depends on the evidence introduced at a trial so the task of preparing interrogatories is one that is done late in the trial, much like jury charges and preparing the verdict form.

Builders Mutual will be represented by counsel different than the counsel Builders Mutual retained to defend Tri-County. Builders Mutual's counsel will not be involved in any other aspects of the trial or the Civil Action. Builders Mutual's counsel will not participate in the selection of a jury; nor will it present witnesses or introduce evidence. Builders Mutual's counsel will not appear before the jury during the trial. Builders Mutual's counsel should not be involved until it is time to prepare a verdict form and/or written interrogatories. Builders Mutual's counsel's involvement will be limited to its counsel's communications with the court and other counsel and will occur outside the presence of the jury as a trial judge does in conducting a jury charge conference with counsel. Subject to any objections, and based on the submissions of all counsel and evidence that is in the record, the trial judge will determine what interrogatories, if any, may go to the jury.

Builders Mutual should not be named as party to the civil action. Builders Mutual submits that naming an insurer as a party or disclosing that Tri-County is insured is not permissible under South Carolina law and is thus not a viable solution. See Major v. Nat'l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976); see also Trancik v. USAA Ins. Co., 354 S.C. 549, 554, 581

S.E.2d 858, 861 (Ct. App. 2003).³ The submission of interrogatories can be easily accomplished by the court without reference to insurance. As stated by the Fifth Circuit, “[a] request for identification of the two types of damages reveals neither the presence of insurance nor the amount of coverage. Duke v. Hoch, 468 F.2d at 979.

The next requirement is whether Builders Mutual claims an interest relating to the property or transaction that is the subject of the civil action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest. Based on the law discussed above, Builders Mutual submits that it satisfies the requirement. Based on Newman and Heritage Communities, Builders Mutual submits that the prejudice to Builders Mutual is obvious if the legal consequence is that Builders Mutual will be bound by a general verdict.

The next requirement is whether the interest of the party moving for intervention is adequately represented by the existing parties in the civil action. The burden of demonstrating inadequacy of representation is on Builders Mutual.. Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716. This burden is minimal and Builders Mutual need only show that the representation of its interests “may be” inadequate. Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716. The following factors are used in determining the requirement:

[W]hether the existing representation is adequate: (1) whether the existing parties will undoubtedly make all of the intervenor’s arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Berkeley Elec., 302 S.C at 191, 394 S.E.2d at 716.

³ For instance, a jury may render a verdict under the assumption that Tri-County’s work is fully insured. This assumption would be wrong under South Carolina law.

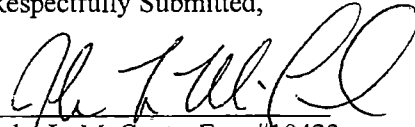
It is doubtful that the existing parties in the case at bar will “undoubtedly” seek, or be willing to seek, an allocated verdict for the purposes of allocating damages on behalf of Builders Mutual. Notwithstanding, Builders Mutual submits that the Plaintiffs and Tri County are proponents of insurance and must themselves have the jury allocate damages if any of these parties seeks insurance coverage for a verdict or judgment. In fact, to the extent these parties do not so and oppose Builders Mutual doing so, such party should be estopped from later contending that Builders Mutual should be bound by a general verdict. The utilization of a special verdict form or answer to interrogatories will enable the jury to allocate damages with respect to damages that may be covered and damages that are not covered under the Builders Mutual policies – without having to know the ultimate purpose of the trial discovery.

The parties to the civil action will not be prejudiced by Builders Mutual’s intervention. Intervention will not cause any undue delay in the Civil Action. If this Court finds that Builders Mutual is not entitled to intervention as of right under Rule 24(a)(2), SCRCP, Builders Mutual respectfully requests that it be granted permissive intervention under Rule 24(b), SCRCP for the above reasons.

WHEREFORE, Builders Mutual requests that the court permit Builders Mutual to intervene pursuant to Rule 24, SCRCP for the limited purpose of participating in the drafting and the court’s submission of a special verdict form and/or general verdict form accompanied by answer to interrogatories to the jury pursuant to Rule 49, SCRCP so that the jury can allocate damages as discussed herein that are being sought against Tri-County.

Civil Action No.: 2015-CP-10-00955
Motion to Intervene- Builders Mutual Insurance Company

Respectfully Submitted,



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**ATTORNEY FOR BUILDERS MUTUAL
INSURANCE COMPANY**

March 22, 2018

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Nationwide Mutual Insurance Company, et al.

☐ Plaintiffs

v.

Kelly Flooring Products, Inc., et al

☐ Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-10-0955

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
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☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Nationwide Mutual Insurance Company's Motion to Intervene

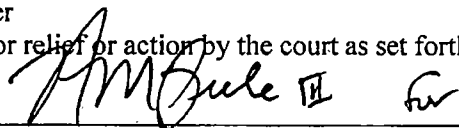
Estimated Time Needed: 20 minutes Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / X Defendant

May 3, 2018

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: 25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2015-CP-10-00955

Nationwide Mutual Fire Insurance Company,
Petitioner,

IN RE:

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Jack
Love, individually, and on behalf of all others
similarly situated,

Plaintiff,

vs.

Island Pointe, LLC, *et al.*,

Defendants.

**NOTICE OF MOTION AND
MOTION TO INTERVENE BY
NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY**

FILED
2019 MAY -7 PM 2:17
CLERK OF COURT

TO: ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to Rule 24(a)(1), SCRPC, or, in the alternative, pursuant to Rule 24(b)(2), SCRPC, Applicant, Nationwide Mutual Fire Insurance Company (hereinafter Nationwide) hereby moves to intervene in this action. The following Memorandum provides the grounds therefor. Because this Motion pertains only to allocation of damages that may be awarded for purposes of liability insurance, no claim or defense is pled for purposes of pleading requirement in Rule 24(c), SCRPC.

Nationwide is entitled to intervention as a commercial general liability ("CGL") carrier for Defendant STANLEY'S VINYL FENCE DESIGNS hereinafter ("STANLEY"), as its rights may be affected by a disposition of this case on the merits. This motion is made on the following grounds:

1. Nationwide issued Contractors policy number 61 AC 934-995-3001 to “Floyd W. Stanley d/b/a Stanley’s Vinyl Fence Designs.” This policy, including annual renewals, was in effect from October 11, 2004 until cancellation effective February 10, 2007 (hereinafter “the Policies”). The limits of coverage were \$500,000 per occurrence and in the aggregate for products-completed operations. A certified copy of this 2006-07 policy is attached as Exhibit A.

2. The Policies only cover “sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ . . . to which this insurance applies.” (Exh. A, Form ACP-0007, ¶ A.1.a.)

3. The Policies only apply to “property damage” if it is caused by an “occurrence.” (Id. at ¶ A.1.b.(1)(a).)

4. The Policies define “property damage” as physical injury to tangible property, including all resulting loss of use of that property. (Id. at ¶ F.16.) “Occurrence” is defined as “an accident, including continuous and repeated exposure to substantially the same general harmful conditions.” (Id. at ¶ F.12.)

5. Under the contractual terms of the Policies, as interpreted by South Carolina law, defective construction is not covered. Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011). However, resulting damage to otherwise non-defective components may constitute covered “property damage” caused by an “occurrence,” satisfying the requirements of the insuring agreement. Id.

6. Additionally, the contractual terms of the Policies exclude coverage for business risks such as defective construction. (Exh. A, Form ACP-0007, ¶¶ B.k. 1., m., n., and o.)

7. The Policies contain various other exclusions which may require an allocation between covered and non-covered damages. (See Exh.A.)

8. Upon information and belief, the Plaintiff in this matter intends to present evidence of defective development and/or construction by STANLEY at the trial of this action.

9. To the extent damages are awarded against STANLEY for defective work or damage to STANLEY's work, the damages awarded are not damages to which the Policies apply, and they are therefore not covered.

10. To the extent damages are awarded against STANLEY that are subject to exclusions, the damages awarded are not covered.

11. The contractual terms of the Policies and South Carolina law require an allocation between covered and non-covered damages.

12. Nationwide contends that this allocation does not involve relitigating the issue of damages; it is rather a determination of the amount of covered damages under the contractual terms of the Policies and South Carolina law based upon a review of the evidence submitted at trial in this action. Nevertheless, the Supreme Court of South Carolina has recently held in *dicta* that this contractual allocation of covered damages may not be made in a separate coverage action. Harleysville Group Ins. v. Heritage Cmties, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 36 n.11).

13. The court did not clarify this holding in its final opinion. Harleysville Group Ins. v. Heritage Cmties, Inc., et al., 420 S.C. 321, 803 S.E.2d 288 (2017). Instead, the court cited a prior case in which allocation was not allowed due to failure to raise the issue in an underlying arbitration proceeding. See Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). In Newman, the court indicated that "it is not the purpose of this declaratory judgment action to relitigate the issue of damages." Id. Thus, it appears that South Carolina law may not allow insurers to obtain facts necessary for determinations involving liability coverage for construction defect claims in separate declaratory judgment actions.

14. Generally, insurers lack standing to intervene in underlying actions to determine liability. Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03 (2007); Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (1994) (citing Blue Cross and Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35 (1980)). These holdings were based upon the understanding that factual determinations for coverage purposes could be litigated in separate coverage actions. See Ex Parte GEICO, 373 S.C. at 137, 644 S.E.2d at 702; Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). Harleysville and Newman appear to contradict this prior understanding.

15. Notice and opportunity to be heard are fundamental requirements of due process. If Nationwide is denied any forum for obtaining facts necessary for its allocation for coverage purposes, then its due process rights are violated in violation of both state and federal law.

16. Furthermore, in Harleysville, the court referenced a burden-shifting procedure for allocating between covered and non-covered damages. 420 S.C. at 341, 803 S.E.2d at 299 (citing Duke v. Hoch, 468 F.2d 973, 976-77 (5th Cir. 1972)). Under Harleysville and Duke, the insurer has the burden of demonstrating that the plaintiff's claim against its insured includes damages for non-covered acts. Duke, 468 F.2d at 976. Once this is established by the insurer, the insured has the burden of proving the precise portion of the damages that are covered. Id. at 977 ("The burden of apportioning these damages is on the party seeking to recover from the insurer."). If the insured fails to provide sufficient evidence to support an allocation, none of the damages are covered. Id. Thus, failure to allow intervention by Nationwide may prejudice the rights of STANLEY and the Plaintiff, as third-party claimant.

17. If intervention is not permitted, Nationwide lacks any means of conducting discovery to ascertain the facts necessary to make a determination as to the amount of covered damages. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365,

373 (4th Cir. 2005) (holding that “an attorney in South Carolina who represents an insured owes the insured a duty of loyalty and cannot, for example, communicate information detrimental to the insured to the insurance company.”) (citing Rules 1.8(b) and 1.6 of the South Carolina Rules of Professional Conduct).

18. Accordingly, Nationwide hereby moves to intervene in this action for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages and participating in the drafting of a special verdict form or submitting special interrogatories to the jury to support an allocation of any damages award for purposes of a determination of covered and non-covered damages.

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

20. Nationwide’s motion to intervene is timely. This motion is being filed well in advance of trial. This motion is not expected to significantly impact discovery. The amount of damages is determined by the factfinder in this action. Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001). Nationwide seeks only to obtain evidence for and to obtain findings to support an allocation, as a matter of contract, as to how much of the damages that may be awarded against STANLEY in this action are covered. See Rock Hill Tel. Co., Inc. v. Globe Communic’ns, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (holding that when indemnity is by contract, “the contract itself establishes the relationship between the parties”); Newman, 385

S.C. at 198, 684 S.E.2d at 546 (requiring a record supporting an allocation between covered and non-covered damages).

21. Nationwide has an interest relating to the property or transaction which is the subject of this action. As discussed above, this action represents the only forum in which Nationwide can obtain an allocation as to the amount of covered damages under the Policies.

22. Nationwide is in a position such that, without intervention, disposition of this action will impair or impede its ability to protect that interest. The Supreme Court appears to have held that if intervention is not sought, an insurer waives its right to seek an allocation as to the amount of covered damages. Harleysville, 420 S.C. at 343 n.11, 803 S.E.2d at 300 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547.

23. Nationwide is not adequately represented by other parties to this action. None of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the Plaintiffs and STANLEY are aligned against the interest of Nationwide. Indeed, federal courts often realign parties to coverage litigation to reflect the fact that the interests of the liability carrier are adverse to the interests of both the plaintiffs and the defendants in the underlying tort litigation. See Bi-Lo, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, C.A. No. 0:14-cv-00335-CMC, 2014 WL 12605522 at *7-8 (D.S.C. Apr. 30, 2014). When the interests of the party seeking intervention are adverse to the interests of the party litigants, "there is an obvious lack of adequate representation." In re Horry Bounty State Bank, 361 S.C. at 509, 604 S.E.2d at 726.

24. Accordingly, Nationwide has satisfied all of the elements for intervention as of right under Rule 24(a)(2). The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to this Court's discretion.

25. In the alternative, Nationwide also moves to intervene under Rule 24(b). Permissive intervention is allowed at the court's discretion based upon the existence of a common question of fact or law between the underlying litigation and the intervenor's claims or defenses. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988). Sound administrative procedure favors the disposition of all claims or defenses in a single action. Id. As discussed above, this action represents the only forum in which an allocation of covered versus non-covered damages can be made.

26. Nationwide's motion to intervene is made for the limited purpose of obtaining facts for and presenting the jury with a special verdict or special interrogatories for a finding as to allocation between covered and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (holding that intervention is appropriate for third-party challenges to protective orders).

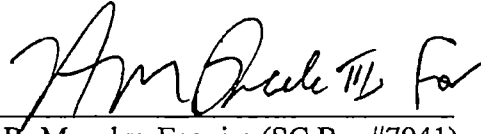
27. Upon information and belief, the granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original parties to the instant action, in that intervention is for the limited purpose of allocation will not impact the ability of the original parties to present their claims and/or defenses at trial.

Nationwide respectfully moves to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages under the Policy and participating in the submitting of a special verdict form or submitting special interrogatories to the jury in order to obtain findings of fact necessary for that allocation. The grounds for this Motion are set forth above.

[Signature page follows]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read "Timothy J. Newton" with a stylized flourish at the end.

J.R. Murphy, Esquire (SC Bar #7941)

Timothy J. Newton, Esquire (SC Bar #71640)

Post Office Box 6648

Columbia, South Carolina 29260

(803) 782-4100; ext. 1242

(803) 782-4140 (facsimile)

Email: tnewton@murphygrantland.com

Attorneys for Nationwide Mutual Fire Insurance
Company

Columbia, South Carolina
May 3, 2018

BANNER PAGE

POLICY PERIOD
FROM: OCTOBER 11, 2006
TO: OCTOBER 11, 2007

RENEWAL

POLICY #: 61 AC 934-995-3001
OUTPUT DATE: 09-27-06
CHANGE EFF. DATE:

ENDORSEMENTS PRINTED IN THIS PACKAGE

AC.D.ACP0001A
AL.E.CAS2627B.0794
AC.E.CAS6351.0504
COVER.LETTER
AL.STF.CD.2086E.EL
AC.STF.CAS6324.EL

AC.S.ACP0003
AC.E.ACP0007.0605
AC.E.ACP0123.0504
AC.STF.CAS8051.EL
AL.STF.CAS4350.D.EL

GROUPS IN THIS PACKAGE

INSURED

AGENT

FILE

WORD SERVER FORMS/MESSAGES



POLICY #: 61 AC 934-995-3001

Cas. 4364-2

BANNER PAGE



Issued by:
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

Home Office: Columbus, Ohio

Prepared for:

FLOYD W STANLEY
DBA STANLEY'S VINYL FENCE
DESIGNS
215 BURNCOAT RD
KINSTON NC 28504



Thank you for choosing our agency and Nationwide as your business insurance professionals.

Your policy is an important document that helps to protect your business. Keep it and other valuable papers in a safe place.

We have an outstanding reputation for fast, fair claims service. In the event of a loss, you can reach our Claims Office 24 hours a day at 1-800-421-3535.

It is important that you review any enclosed "POLICYHOLDER INFORMATION" documents for notices, additional coverage options, and any request for a response. If you see, RESPONSE REQUIRED, please handle as instructed.

If you have any questions about this policy or the services we offer, please contact our agency at 252-527-4515. We can assist you with all your business as well as personal insurance needs.

We look forward to continuing to provide your insurance protection.

OWEN QUINN
1695 HWY 258 N
KINSTON NC 28504



POLICYHOLDER INFORMATION

FLOOD INSURANCE NOTICE

The North Carolina Department of Insurance has requested the North Carolina Insurance Underwriting Association, the North Carolina Joint Underwriting Association, and all property and casualty companies to advise their policyholders that the Contractors policy does not provide coverage for floods. You will **not** have coverage for property damage from floods unless you take steps to purchase a separate policy of flood insurance.

This Notice does not expand or increase coverage in any Contractors policy or endorsement. That policy or accompanying endorsements remain subject to all exclusions, limitations and conditions.

If you would like more information about obtaining flood insurance, please contact your Nationwide agent.

NATIONWIDE INSURANCE COMPANIES • One Nationwide Plaza • Columbus, Ohio 43215-2220
Serving the Personal and Business Community Since 1926

Hearing or voice impaired: 1-800-622-2421 (TTY Only)

Cas. 6051-EL (7-00)



POLICYHOLDER INFORMATION

"SUBSIDENCE OF LAND EXCLUSION" & "CHANGES – INSURING AGREEMENT" ENDORSEMENT NOTICE

Certain coverage in this policy has been eliminated or reduced. The description of the change in coverage is as follows:

Cas. 6351 (5-04), Subsidence of Land Exclusion has been added to your policy. This endorsement restricts coverage for losses arising out of earth movement. Please review this endorsement carefully.

ACP-0123 (5-04) or Cas. 6349 (5-04), Changes - Insuring Agreement endorsement has been added to your policy. This endorsement amends the Insuring agreement to include the term "manifests" in place of "occurs" and also includes a definition of that term. Please review this endorsement carefully.

If you have any questions about this endorsement, please contact your Nationwide agent.

This disclosure notice does not provide coverage, nor does this notice replace any provisions of your policy. You should read your policy for complete information on the coverages you are provided. If there is any conflict between the policy and this notice, the provisions of the policy shall prevail.

NATIONWIDE INSURANCE COMPANIES • One Nationwide Plaza • Columbus, Ohio 43215-2220
Serving the Personal and Business Community Since 1926

Hearing or voice impaired: 1-800-622-2421 (TTY Only)

Cas. 6324-EL (5-04)



CONTRACTORS POLICY DECLARATIONS

Issued By: NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

Named Insured FLOYD W STANLEY
Mailing Address DBA STANLEY'S VINYL FENCE
DESIGNS
215 BURNCOAT RD
KINSTON NC 28504

Policy Number: RENEWAL
61 AC 934-995-3001

Form of Business: ☒ Sole Proprietorship
☐ Partnership ☐ Corporation
☐ Other:

Policy Period: From OCTOBER 11, 2006 to OCTOBER 11, 2007 at 12:01 A.M. * Standard Time
at your mailing address. *Exceptions: 12:00 Noon in Michigan, New Hampshire and Puerto Rico.

Description of Business FENCE ERECTION

Described Premises:

Premises No. Bldg. No. Location Address

Mortgage Holder Name and Address:
Premises No. Bldg. No.

Mortgage Holder

Mortgage Holder

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE TO PROVIDE YOU WITH THE INSURANCE AS STATED IN THIS POLICY.

PROPERTY COVERAGES

Buildings - Replacement Cost
Actual Cash Value Option
Automatic Increase

Business Personal Property
Deductible

LIMITS OF INSURANCE	
Premises No.	Building No.
\$	
\$	
	%
\$	
\$	

OPTIONAL PROPERTY COVERAGES — Applicable only if an "X" is shown in the boxes below:

- ☐ Outdoor Signs
☐ Exterior Grade Floor Glass
☐ Employee Dishonesty
☐ Accounts Receivable - Increased Limits
☐ Valuable Papers - Increased Limits
☐
☐
☐

LIMITS OF INSURANCE	
\$	Per Occurrence
\$	Per Occurrence
\$	Per Occurrence
\$	Per Occurrence
\$	
\$	
\$	

PROPERTY PREMIUM

\$ 0.00



CONTRACTORS POLICY DECLARATIONS

LIABILITY AND MEDICAL EXPENSE COVERAGES		LIMITS OF INSURANCE	
Liability and Medical Expense		\$ 500,000	Any One Occurrence
Personal and Advertising Injury		\$	Any One Person or Organization
Medical Expenses		\$ 5,000	Any One Person
Fire Legal Liability		\$ 100,000	Any One Fire or Explosion
General Aggregate Limit (other than Products-Completed Operations and Fire Legal Liability)		\$ 1,000,000	
Products-Completed Operations Aggregate Limit		\$ 500,000	
OPTIONAL LIABILITY COVERAGES — Applicable only if an 'X' is shown in the boxes below:		LIMITS OF INSURANCE	
☐		\$	
☐		\$	
☐		\$	
LIABILITY AND MEDICAL EXPENSE ADVANCE PREMIUM		\$ 812.00	
INLAND MARINE COVERAGES — Applicable only if an 'X' is shown in the boxes below:		LIMITS OF INSURANCE	
☐ CONTRACTORS EQUIPMENT AND PORTABLE TOOLS			
☐ Unscheduled Covered Property (Coverage not to exceed \$500 on any one item)		\$	
☐ Scheduled Covered Property		See Schedule	
DEDUCTIBLE \$			
☐ CONTRACTORS INSTALLATION		\$	
DEDUCTIBLE \$			
INLAND MARINE PREMIUM		\$ 0.00	
FORMS APPLICABLE:			
CAS 3228	CAS 2527 B-0794	ACP 0007-0805	
IL 09 85-0103	ACP 0083-0802	ACP 0005 A-0700	
ACP 0112-1102	ACP 0085-0198	CAS 3880-0897	
CAS 6361-0504	CAS 6217-1102	CAS 6283-0403	
CAS 6356-1004	CAS 6351-0504	ACP 0123-0504	
	CAS 3687 A-0194	ACP 0024 A-1094	
TOTAL PREMIUM			
Total Advance Premium		\$	812.00
Includes the following miscellaneous charges			
.....		\$	
.....		\$	
.....		\$	
.....		\$	
.....		\$	

In the event of cancellation by you, we will receive and retain not less than \$ 100 as the minimum premium.

4401 CREEDMOOR ROAD

Date of Issue: 09-27-06

Issuing Office: BALEIGH, NC 27622

Countersignature Date:

Agency At: KINSTON NC 28504

Agent: OWEN QUINN

0003004-32

252-527-4515

**LIABILITY AND MEDICAL EXPENSES
CLASSIFICATION SCHEDULE**

Policy Number:

61 AC 934-995-3001

<u>Classification</u>	<u>Code No.</u>	<u>Premium Basis</u>	<u>Advance Premium</u>
FENCE ERECTION	94276	25,000	\$ 812



MANDATORY ENDORSEMENT

POLICYHOLDER MEMBERSHIP IN THE COMPANY

(Applicable Only In the Nationwide Mutual Insurance Company or the Nationwide Mutual Fire Insurance Company In All States Except Those Specifically Provided For)

Because this policy is issued by a mutual insurance company, you are a member of the company while this or any other policy is in force. While a member you are entitled to one vote only — either in person or by proxy — at meetings of the company. You are entitled to any dividends which are declared by the Board of Directors and are applicable to coverages in your policy.

The annual meeting of members of the company issuing your policy (the company is indicated on the Declarations Page) will be held at the Nationwide Plaza in Columbus, Ohio, on the first Thursday of April. The time of the meeting for the Nationwide Mutual Fire Insurance Company is 9:30 A.M. and the time of the meeting for the Nationwide Mutual Insurance Company is 10:00 A.M. We will mail notice of any change in meeting dates, time or place to you at your address last known to us at least ten days prior to the rescheduled meeting date.

This policy is non-assessable, meaning that you are not subject to any assessment beyond the premiums we require for each policy term.

IN WITNESS WHEREOF: Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company or Nationwide Property and Casualty Insurance Company, whichever is the issuing company as designated on the Declarations, has caused this policy to be signed by its President and Secretary at Columbus, Ohio, and countersigned by a duly authorized representative of the company.

ATTEST:

ABCD

abcd

JKLM

NATIONWIDE MUTUAL INSURANCE COMPANY
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

efgh

EFGH

NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY

efgh

Cas. 3228

POLICY NUMBER:

THIS ENDORSEMENT IS ATTACHED TO AND MADE PART OF YOUR POLICY IN RESPONSE TO THE DISCLOSURE REQUIREMENTS OF THE TERRORISM RISK INSURANCE ACT OF 2002. THIS ENDORSEMENT DOES NOT GRANT ANY COVERAGE OR CHANGE THE TERMS AND CONDITIONS OF ANY COVERAGE UNDER THE POLICY.

**DISCLOSURE PURSUANT TO TERRORISM RISK
INSURANCE ACT OF 2002**

SCHEDULE*

Terrorism Premium (Certified Acts) \$ 0.

Additional Information, if any, concerning the terrorism premium: NOT APPLICABLE

* Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.

A. Disclosure Of Premium

In accordance with the federal Terrorism Risk Insurance Act of 2002, we are required to provide you with a notice disclosing the portion of your premium, if any, attributable to coverage for terrorist acts certified under that Act. The portion of your premium attributable to such coverage is shown in the Schedule of this endorsement or in the policy Declarations.

B. Disclosure Of Federal Participation In Payment Of Terrorism Losses

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 90% of that portion of the amount of such insured losses that exceeds the applicable insurer retention.

CAP ON LOSSES FROM CERTIFIED ACTS OF TERRORISM

This endorsement modifies insurance provided under the following:

CONTRACTORS LIABILITY COVERAGE FORM

- A. The following provisions are added to the Contractors Policy and apply to the Contractors Liability Coverage Form:

Cap On Certified Terrorism Losses

"Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act of 2002. The criteria contained in that Act for a "certified act of terrorism" include the following:

1. The act resulted in aggregate losses in excess of \$5 million; and
2. The act is a violent act or an act that is

dangerous to human life, property or infrastructure and is committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

With respect to any one or more "certified acts of terrorism" under the federal Terrorism Risk Insurance Act of 2002, we will not pay any amounts for which we are not responsible under the terms of that Act (including subsequent action of Congress pursuant to the Act) due to the application of any clause which results in a cap on our liability for payments for terrorism losses.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
**CONDITIONAL EXCLUSION OF TERRORISM (RELATING
TO DISPOSITION OF FEDERAL TERRORISM RISK
INSURANCE ACT OF 2002)**

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS STANDARD PROPERTY COVERAGE FORM
BUSINESSOWNERS SPECIAL PROPERTY COVERAGE FORM
BUSINESS PROVIDER STANDARD PROPERTY COVERAGE FORM
BUSINESS PROVIDER SPECIAL PROPERTY COVERAGE FORM
CONTRACTORS SPECIAL PROPERTY COVERAGE FORM
BUSINESSOWNERS LIABILITY COVERAGE
BUSINESS PROVIDER LIABILITY COVERAGE FORM
CONTRACTORS LIABILITY COVERAGE FORM

SCHEDULE

The Exception Covering Certain Fire Losses (Paragraph B.2.) applies to property located in the following state(s)		
State(s)		
Georgia New York Rhode Island	Illinois North Carolina Virginia	Maine Pennsylvania West Virginia
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

A. The following provisions are added to the Businessowners Policy, Business Provider Policy and Contractors Policy and apply to Property and Liability Coverages:

1. Applicability Of The Provisions Of This Endorsement

a. The provisions of this endorsement will become applicable commencing on the date when any one or more of the following first occurs:

(1) The federal Terrorism Risk Insurance Program ("Program"), established by the Terrorism Risk Insurance Act of 2002, has terminated with respect to the type of insurance provided under this Coverage Form; or

(2) A renewal, extension or continuation of the Program has become effective without a requirement to make terrorism coverage available to you and with revisions that:

(a) Increase our statutory percentage deductible under the Program for terrorism losses. (That deductible determines the amount of all certified terrorism losses we must pay in a calendar year, before the

federal government shares in subsequent payment of certified terrorism losses.); or

(b) Decrease the federal government's statutory percentage share in potential terrorism losses above such deductible; or

(c) Redefine terrorism or make insurance coverage for terrorism subject to provisions or requirements that differ from those that apply to other types of events or occurrences under this policy.

The Program is scheduled to terminate at the end of December 31, 2005 unless renewed, extended or otherwise continued by the federal government.

b. If the provisions of this endorsement become applicable, such provisions:

(1) Supersede any terrorism endorsement already endorsed to this policy that addresses "certified acts of terrorism" and/or "other acts of terrorism", but only with respect to loss or injury or damage from an incident(s) of terrorism (however defined) that occurs on or after the date when the

provisions of this endorsement become applicable; and

- (2) Remain applicable unless we notify you of changes in these provisions, in response to federal law.
 - c. If the provisions of this endorsement do NOT become applicable, any terrorism endorsement already endorsed to this policy, that addresses "certified acts of terrorism" and/or "other acts of terrorism", will continue in effect unless we notify you of changes to that endorsement in response to federal law.
2. The following definition is added and applies under this endorsement wherever the term terrorism is enclosed in quotation marks.

"Terrorism" means activities against persons, organizations or property of any nature:

- a. That involve the following or preparation for the following:
 - (1) Use or threat of force or violence; or
 - (2) Commission or threat of a dangerous act; or
 - (3) Commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and
- b. When one or both of the following applies:
 - (1) The effect is to intimidate or coerce a government or the civilian population or any segment thereof, or to disrupt any segment of the economy; or
 - (2) It appears that the intent is to intimidate or coerce a government, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology.

B. The following provisions are added to Businessowners Standard Property Coverage Form BP-00 01, Businessowners Special Property Coverage Form Cas 6033, Business Provider Standard Property Coverage Form BPP-0005, Business Provider Special Property Coverage Form BPP-0006 or Contractors Special Property Coverage Form ACP-0006:

1. EXCLUSION OF TERRORISM

We will not pay for loss or damage caused directly or indirectly by "terrorism", including action in hindering or defending against an actual or expected incident of "terrorism". Such loss or damage is excluded regardless of any other

cause or event that contributes concurrently or in any sequence to the loss. But this exclusion applies only when one or more of the following are attributed to an incident of "terrorism":

- a. The "terrorism" is carried out by means of the dispersal or application of radioactive material, or through the use of a nuclear weapon or device that involves or produces a nuclear reaction, nuclear radiation or radioactive contamination; or
- b. Radioactive material is released, and it appears that one purpose of the "terrorism" was to release such material; or
- c. The "terrorism" is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or
- d. Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the "terrorism" was to release such materials; or
- e. The total of insured damage to all types of property in the United States, its territories and possessions, Puerto Rico and Canada exceeds \$25,000,000. In determining whether the \$25,000,000 threshold is exceeded, we will include all insured damage sustained by property of all persons and entities affected by the "terrorism" and business interruption losses sustained by owners or occupants of the damaged property. For the purpose of this provision, insured damage means damage that is covered by any insurance plus damage that would be covered by any insurance but for the application of any terrorism exclusions. Multiple incidents of "terrorism" which occur within a 72-hour period and appear to be carried out in concert or to have a related purpose or common leadership will be deemed to be one incident, for the purpose of determining whether the threshold is exceeded.

With respect to this item 1.e., the immediately preceding paragraph describes the threshold used to measure the magnitude of an incident of "terrorism" and the circumstances in which the threshold will apply, for the purpose of determining whether this Exclusion will apply to that incident. When the Exclusion applies to an incident of "terrorism", there is no coverage under this Coverage Form.

2. Exception Covering Certain Fire Losses

The following exception to the Exclusion Of Terrorism applies only if indicated and as indicated in the Schedule of this endorsement.

If "terrorism" results in fire, we will pay for the loss or damage caused by that fire, subject to all applicable policy provisions including the Limit of Insurance on the affected property. Such coverage for fire applies only to direct loss or damage by fire to Covered Property. Therefore, for example, the coverage does not apply to insurance provided under Business Income and/or Extra Expense coverages or endorsements that apply to those coverages.

3. Application Of Other Exclusions

- a. When the Exclusion Of Terrorism applies in accordance with the terms of 1.a. or 1.b., such exclusion applies without regard to the Nuclear Hazard Exclusion in this Coverage Form.
- b. The terms and limitations of any terrorism exclusion, or the inapplicability or omission of a terrorism exclusion, do not serve to create coverage for any loss or damage which would otherwise be excluded under this Coverage Form as losses excluded by the Nuclear Hazard Exclusion or the War And Military Action Exclusion.

C. The following provisions are added to Businessowners Liability Coverage Form BP 00 06, Business Provider Liability Coverage Form BPP-0007 or Contractors Liability Coverage Form ACP-0007:

1. The following definition is added and applies under this endorsement wherever the phrase any injury or damage, is enclosed in quotation marks:

"Any injury or damage" means any injury or damage covered under this Coverage Form or any applicable endorsement, and includes but is not limited to "bodily injury", "property damage" or "personal and advertising injury", as may be defined under this Coverage Form or any applicable endorsement.

2. The following exclusion is added:

EXCLUSION OF TERRORISM

We will not pay for "any injury or damage" caused directly or indirectly by "terrorism", including action in hindering or defending against an actual or expected incident of "terrorism". "Any injury or damage" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to such injury or damage. But this exclusion applies only when

one or more of the following are attributed to an incident of "terrorism":

- a. The "terrorism" is carried out by means of the dispersal or application of radioactive material, or through the use of a nuclear weapon or device that involves or produces a nuclear reaction, nuclear radiation or radioactive contamination; or
- b. Radioactive material is released, and it appears that one purpose of the "terrorism" was to release such material; or
- c. The "terrorism" is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or
- d. Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the "terrorism" was to release such materials; or
- e. The total of insured damage to all types of property exceeds \$25,000,000. In determining whether the \$25,000,000 threshold is exceeded, we will include all insured damage sustained by property of all persons and entities affected by the "terrorism" and business interruption losses sustained by owners or occupants of the damaged property. For the purpose of this provision, insured damage means damage that is covered by any insurance plus damage that would be covered by any insurance but for the application of any terrorism exclusions; or
- f. Fifty or more persons sustain death or serious physical injury. For the purposes of this provision, serious physical injury means:
 - (1) Physical injury that involves a substantial risk of death; or
 - (2) Protracted and obvious physical disfigurement; or
 - (3) Protracted loss of or impairment of the function of a bodily member or organ.

Multiple incidents of "terrorism" which occur within a 72-hour period and appear to be carried out in concert or to have a related purpose or common leadership will be deemed to be one incident, for the purpose of determining whether the thresholds in Paragraphs 2.e. or 2.f. are exceeded.

With respect to this Exclusion, Paragraphs 2.e. and 2.f. describe the threshold used to measure the magnitude of an incident of "terrorism" and the circumstances in which the threshold will

apply, for the purpose of determining whether this Exclusion will apply to that Incident. When the Exclusion applies to an Incident of "terrorism", there is no coverage under this Coverage Form.

In the event of any Incident of "terrorism" that is not subject to this Exclusion, coverage does not apply to "any Injury or damage" that is otherwise excluded under this Coverage Form.

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
EXCLUSION – VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX,
PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR
INFORMATION**

This endorsement modifies Insurance provided under the following:

CONTRACTORS LIABILITY COVERAGE FORM
BUSINESSOWNERS LIABILITY COVERAGE FORM
BUSINESS PROVIDER LIABILITY COVERAGE FORM

- A. The following exclusion is added to Section B.1 – Exclusions, applicable to Business Liability;

This Insurance does not apply to:

DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES

"Bodily Injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- c. Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

- B. The following exclusion is added to paragraphs p.

Personal Injury or Advertising Injury and q. Advertising Injury of Section B.1. – Exclusions, applicable to Business Liability;

This Insurance does not apply to:

DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES

"Personal Injury" or "advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- c. Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

AMENDATORY ENDORSEMENT – ADDITIONAL POLICY CONDITION

It is agreed that the following condition is made a part of this policy:

If this policy and any other policy issued to you by us or any affiliated Company apply to the same occurrence, the total maximum amount payable under all policies, including limits of liability, general aggregate limit and products-completed operations aggregate limit, shall not exceed the highest applicable limits of liability, general aggregate limit or products-completed operations aggregate limit under any one policy. This condition does not apply to any policy issued by us or an affiliated Company specifically to apply as excess insurance over this policy.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT - LIABILITY AND MEDICAL EXPENSES LIMITS OF INSURANCE

This endorsement modifies Insurance provided under the following:

CONTRACTORS LIABILITY COVERAGE FORM

Section D. LIABILITY AND MEDICAL EXPENSES
LIMITS OF INSURANCE is replaced by the following:

D. LIABILITY AND MEDICAL EXPENSES LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or "suits" brought; or
 - c. Persons or organizations making claims or bringing "suits";
 - d. Premises, operations or projects insured.
2. The most we will pay for the sum of all damages because of all "bodily injury," "property damage" and medical expenses arising out of any one "occurrence" is the Liability and Medical Expenses limit shown in the Declarations. But the most we will pay for all medical expenses because of "bodily injury" sustained by any one person is the Medical Expenses limit shown in the Declarations.
3. The most we will pay for the sum of all damages because of all "personal injury" and "advertising injury" sustained by any one person or organization is the Personal and Advertising Injury limit shown in the Declarations.
4. The most we will pay under Business Liability Coverage for damages because of "property

damage" to premises rented to you arising out of any one fire or explosion is the Fire Legal Liability limit shown in the Declarations.

5. Aggregate Limits

The most we will pay for:

- a. Injury or damage under the "products-completed operations hazard" arising from all "occurrences" during the policy period is the Products-Completed Operations Aggregate Limit shown in the Declarations; and
- b. All other injury or damage, including medical expenses, arising from all "occurrences" or offenses during the policy period is the General Aggregate Limit (Other Than Products-Completed Operations and Fire Legal Liability) shown in the Declarations. This limitation does not apply to "property damage" to premises rented to you arising out of fire or explosion.

The limits of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

CONTRACTORS POLICY

The following exclusion is added to Section B. EXCLUSIONS of the Contractors Liability Coverage Form:

This insurance does not apply to:

1. "Bodily Injury" or "personal injury" to:
 - a. A person arising out of any:
 - (1) Refusal to employ that person;
 - (2) Termination of that person's employment; or
 - (3) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment,

humiliation or discrimination directed at that person; or

- b. The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" or "personal injury" to that person at whom any of the employment-related practices described in paragraphs (1), (2) or (3) above is directed.

This exclusion applies:

- a. Whether the Insured may be liable as an employer or in any other capacity; and
- b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGI OR BACTERIA EXCLUSION (LIABILITY)

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS LIABILITY COVERAGE FORM
BUSINESS PROVIDER LIABILITY COVERAGE FORM
CONTRACTORS LIABILITY COVERAGE FORM

- A. The following exclusion is added to Paragraph 1.,
Applicable to Business Liability Coverage of Section B. Exclusions:

B. Exclusions

Fungi or Bacteria

- (1) "Bodily Injury", "property damage" or "personal and advertising injury" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

- (2) Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for consumption.

- B. The following definition is added:

1. "Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or by-products produced or released by fungi.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SUBSIDENCE OF LAND - EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
CONTRACTORS POLICY

This policy does not apply to any claims arising out of:

"property damage" included within the "products completed operations hazard" when caused by, resulting from, contributed to or aggravated by the subsidence of land.

Subsidence shall mean earth movement, including but not limited to landslide, mud flow, earth sinking and earth rising or shifting.

AMENDATORY ENDORSEMENT — PREMIUM PAYMENT

The named insured has elected to pay the premium for this policy or bond in payments in accordance with the premium payment plans approved for use by us and set forth in our approved portfolios or manuals. For each separate payment, including the initial payment, there is a payment plan service charge of five dollars (\$5.00).

CONTRACTORS LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the named Insured shown in the Declarations, and any other person or organization qualifying as a named Insured under this policy. The words "we," "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under SECTION C. - WHO IS AN INSURED.

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION F. - LIABILITY AND MEDICAL EXPENSES DEFINITIONS.

A. COVERAGES

1. Business Liability

- a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. However, we will have no duty to defend the Insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in SECTION D - LIABILITY AND MEDICAL EXPENSES LIMITS OF INSURANCE; and

- (2) Our right and duty to defend end when we have used up the applicable Limit of Insurance in the payment of judgments or settlements or medical expenses.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under COVERAGE EXTENSION - SUPPLEMENTARY PAYMENTS.

b. This insurance applies:

- (1) To "bodily injury" and "property damage" only if:

- (a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

- (b) The "bodily injury" or "property damage" occurs during the policy period.

- (2) To "personal and advertising injury" only if:

- (a) The "personal and advertising injury" caused by an offense was committed in the "coverage territory"; and

- (b) The "personal and advertising injury" occurs during the policy period.

- c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury."

- d. "Property damage" that is loss of use of tangible property that is not physically injured will be deemed to occur at the time of the "occurrence" that caused it.

e. Coverage Extension - Supplementary Payments

In addition to the Limit of Insurance, we will pay, with respect to any claim or "suit" we defend:

- (1) All expenses we incur.

- (2) Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which Business Liability Coverage for "bodily injury" applies. We do not have to furnish these bonds.

- (3) The cost of bonds to release attachments, but only for bond amounts

within our Limit of Insurance. We do not have to furnish these bonds.

- (4) All reasonable expenses incurred by the Insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to \$100 a day because of time off from work.
- (5) All costs taxed against the Insured in the "suit."
- (6) Prejudgment Interest awarded against the Insured on that part of the judgment we pay. If we make an offer to pay the Limit of Insurance, we will not pay any prejudgment interest based on that period of time after the offer.
- (7) All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within our Limit of Insurance.

2. Medical Expenses

- a. We will pay medical expenses as described below for "bodily injury" caused by an accident:
 - (1) On premises you own or rent;
 - (2) On ways next to premises you own or rent; or
 - (3) Because of your operations;provided that:
 - (1) The accident takes place in the "coverage territory" and during the policy period;
 - (2) The expenses are incurred and reported to us within one year of the date of the accident; and
 - (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.
- b. We will make these payments regardless of fault. These payments will not exceed the Limit of Insurance. We will pay reasonable expenses for:
 - (1) First aid at the time of an accident;
 - (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

- (3) Necessary ambulance, hospital, professional nursing and funeral services.

B. EXCLUSIONS

1. Applicable to Business Liability Coverage

This Insurance does not apply to:

- a. "Bodily Injury" or "property damage" expected or intended from the standpoint of the Insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
- b. "Bodily Injury" or "property damage" for which the Insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
 - (1) Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement;
 - (2) That the Insured would have in the absence of the contract or agreement.
- c. "Bodily Injury" or "property damage" for which any Insured may be held liable by reason of:
 - (1) Causing or contributing to the intoxication of any person;
 - (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
 - (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.
- d. Any obligation of the Insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.
- e. "Bodily Injury" to:
 - (1) An "employee" of the Insured arising out of and in the course of employment by the Insured; or
 - (2) The spouse, child, parent, brother or

sister of that "employee" as a consequence of (1) above.

This exclusion applies:

- (a) Whether the Insured may be liable as an employer or in any other capacity; and
- (b) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the Insured under an "insured contract."

f. Pollution

(1) "Bodily Injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Insured. However, this subparagraph does not apply to:

- (i) "Bodily Injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

- (ii) "Bodily Injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional Insured with respect to your ongoing operations performed for that additional Insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any Insured, other than that additional Insured; or

- (iii) "Bodily Injury" or "property damage" arising out of heat,

smoke or fumes from a "hostile fire";

- (b) At or from any premises, site or location which is or was at any time used by or for any Insured or others for the handling, storage, disposal, processing or treatment of waste;

- (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any Insured or any person or organization for whom you may be legally responsible; or

- (d) At or from any premises, site or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such Insured, contractor or subcontractor. However, this subparagraph does not apply to:

- (i) "Bodily Injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such Insured, contractor or subcontractor;

- (ii) "Bodily Injury" or "property damage" sustained within a building and caused by the

release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily Injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any Insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the Insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. "Bodily Injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any Insured. Use includes operation and "loading or unloading."

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the Insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily Injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or

(b) the operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment".

h. "Bodily Injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any Insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. "Bodily Injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. "Bodily Injury," "property damage," or "personal and advertising injury" due to rendering or failure to render any professional service. This includes but is not limited to:

- (1) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; and
- (2) Supervisory, inspection or engineering services.

k. "Property damage" to:

- (1) Property you own, rent or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section D - Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not

apply to "property damage" included in the "products-completed operations hazard."

l. "Property damage" to "your product" arising out of it or any part of it.

m. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

n. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

o. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "impaired property";

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

p. "Personal and Advertising Injury":

- (1) Arising out of oral or written publication of material; if done by or at the direction of the insured with knowledge of its falsity;
- (2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
- (3) Arising out of the willful violation of a

penal statute or ordinance committed by or with the consent of the Insured; or

- (4) For which the Insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the Insured would have in the absence of the contract or agreement.
- (5) Breach of contract, other than misappropriation of advertising ideas under an implied contract;
- (6) The failure of goods, products or services to conform with advertised quality or performance; or
- (7) The wrong description of the price of goods, products or services.

q. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

Exclusions c., d., e., f., g., h., i., k., l., m., n. and o. do not apply to damage by fire or explosion to premises rented to you. A separate Limit of Insurance applies to this coverage as described in Section D., Limits of Insurance.

2. Applicable to Medical Expenses Coverage -
We will not pay expenses for "bodily injury":

- a. To any Insured, except for "volunteer workers".
- b. To a person hired to do work for or on behalf of any Insured or a tenant of any Insured.
- c. To a person injured on that part of premises you own or rent that the person normally occupies.
- d. To a person, whether or not an "employee" of any Insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.
- e. To a person injured while practicing,

instructing or participating in any physical exercises or games, sports, or athletic contests.

- f. Included within the "products-completed operations hazard."
 - g. Excluded under Business Liability Coverage.
 - h. Due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.
- 3. Applicable to both Business Liability Coverage and Medical Expenses Coverage - Nuclear Energy Liability Exclusion.**

This insurance does not apply:

a. Under Business Liability Coverage, to "bodily injury" or "property damage":

(1) With respect to which an Insured under the policy is also an Insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an Insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(2) Resulting from the "hazardous properties" of "nuclear material" and with respect to which:

(a) Any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof; or

(b) The Insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

b. Under Medical Expenses Coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.

c. Under Business Liability Coverage, to "bodily injury" or "property damage" resulting

from the "hazardous properties" of the "nuclear material"; If:

(1) The "nuclear material":

- (a) Is at any "nuclear facility" owned by, or operated by or on behalf of, an Insured; or
- (b) Has been discharged or dispersed therefrom;

(2) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an Insured; or

(3) The "bodily injury" or "property damage" arises out of the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility"; but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to "property damage" to such "nuclear facility" and any property thereat.

As used in this exclusion:

"by-product material" has the meaning given it in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"hazardous properties" include radioactive, toxic or explosive properties;

"nuclear facility" means:

- (1) Any "nuclear reactor";
- (2) Any equipment or device designed or used for:
 - (a) Separating the isotopes of uranium or plutonium;
 - (b) Processing or utilizing "spent fuel"; or
 - (c) Handling, processing or packaging "waste";
- (3) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the Insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

(4) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear material" means "source material," "special nuclear material" or "by-product material";

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property;

"source material" has the meaning given it in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"special nuclear material" has the meaning given it in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor";

"waste" means any waste material;

- (1) Containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content; and
- (2) Resulting from the operation by any person or organization of any "nuclear facility" included under paragraphs (a) and (b) of the definition of "nuclear facility."

C. WHO IS AN INSURED

1. If you are designated in the Declarations as:

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an

Insured. Your members are also Insureds, but only with respect to the conduct of your business. Your managers are Insureds, but only with respect to their duties as your managers.

- d. An organization other than a partnership or joint venture or limited liability company, you are an Insured. Your "executive officers" and directors are Insureds, but only with respect to their duties as your officers or directors. Your stockholders are also Insureds, but only with respect to their liability as stockholders.
2. Each of the following is also an Insured:
 - a. Your "employees", other than your "executive officers", but only for acts within the scope of their employment by you. However, no "employee" is an Insured for:
 - (1) "Bodily Injury" or "personal and advertising Injury" to you or to a co-"employee" while in the course of his or her employment, or to the spouse, child, parent, brother or sister of that co-"employee" as a consequence of such "bodily Injury" or "personal and advertising Injury", or for any obligation to share damages with or repay someone else who must pay damages because of the Injury;
 - (2) "Bodily Injury" or "personal and advertising Injury" arising out of his or her providing or failing to provide professional health care services; or
 - (3) "Property damage" to property owned or occupied by or rented or loaned to that "employee", any of your other "employees", or any of your partners or members (if you are a partnership or joint venture).
 - b. Any person (other than your "employee"), or any organization while acting as your real estate manager.
 - c. Any person or organization having proper temporary custody of your property if you die, but only:
 - (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
 - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.

3. Any organization you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will qualify as an Insured if there is no other similar insurance available to that organization. However:

- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
- b. Coverage does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
- c. Coverage does not apply to "personal and advertising Injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an Insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a named Insured in the Declarations.

D. LIABILITY AND MEDICAL EXPENSES LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

- a. Insureds;
- b. Claims made or "suits" brought; or
- c. Persons or organizations making claims or bringing "suits";
- d. Premises, operations or projects Insured.

2. The most we will pay for the sum of all damages because of all:

- a. "Bodily Injury," "property damage" and medical expenses arising out of any one "occurrence"; and
- b. "Personal and advertising Injury" sustained by any one person or organization;

is the Liability and Medical Expenses limit shown in the Declarations. But the most we will pay for all medical expenses because of "bodily injury" sustained by any one person is the Medical Expenses limit shown in the Declarations.

3. The most we will pay under Business Liability Coverage for damages because of "property damage" to premises rented to you arising out of any one fire or explosion is the Fire Legal Liability limit shown in the Declarations.

4. Aggregate Limits

The most we will pay for:

- a. Injury or damage under the "products-completed operations hazard" arising from all "occurrences" during the policy period is the Products-completed Operations Aggregate Limit shown in the Declarations; and
- b. All other injury or damage, including medical expenses, arising from all "occurrences" during the policy period is the General Aggregate Limit (Other Than Products-Completed Operations and Fire Legal Liability) shown in the Declarations. This limitation does not apply to "property damage" to premises rented to you arising out of fire or explosion.

The limits of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

E. LIABILITY AND MEDICAL EXPENSES GENERAL CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this policy.

2. Duties in The Event Of Occurrence, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation, settlement or defense of the claim or "suit"; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this policy:

- a. To join us as party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable Limit of Insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this policy to the first named insured, this insurance applies:

- a. As if each named insured were the only named insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

5. Premium Audit

- a. We will compute all premiums for this Coverage Form in accordance with our rules and rates.
- b. Premium shown for this Coverage Form as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first named insured. If the sum of the advance and audit premiums paid for the policy term is greater than the earned premium, we will return the excess to the first named insured.
- c. The first named insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

F. LIABILITY AND MEDICAL EXPENSES DEFINITIONS

1. "Auto" means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However "auto" does not include "mobile equipment."

2. "Bodily Injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

3. "Coverage Territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, provided the injury or damage does not occur in the

course of travel or transportation to or from any place not included in a. above; or

c. All parts of the world if:

(1) The injury or damage arises out of:

- (a) Goods or products made or sold by you in the territory described in a. above; or
- (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and

(2) The insured's responsibility to pay damages is determined in a "suit" on the merits in the territory described in a. above or in a settlement we agree to.

4. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

5. "Executive Officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing documents.

6. "Hostile Fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

7. "Impaired Property" means tangible property, other than "your product" or "your work," that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

If such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
- b. Your fulfilling the terms of the contract or agreement.

8. "Insured Contract" means:

- a. A lease of premises;
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

An "insured contract" does not include that part of any contract or agreement:

- a. That indemnifies any person or organization for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing;
 - b. That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (1) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or
 - (2) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage;
 - c. Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (b) above and supervisory, inspection or engineering services; or
 - d. That indemnifies any person or organization for damage by fire or explosion to premises rented or loaned to you.
9. "Leased Worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
10. "Loading or Unloading", means the handling of property:
- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
 - b. While it is in or on an aircraft, watercraft or "auto"; or

- c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto."

11. "Mobile Equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - (1) Power cranes, shovels, loaders, diggers or drills; or
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
- e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - (2) Cherry pickers and similar devices used to raise or lower workers;
- f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

- (1) Equipment designed primarily for:
 - (a) Snow removal;
 - (b) Road maintenance, but not construction or resurfacing;
 - (c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

13. "Personal and Advertising Injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication of material that violates a person's right of privacy;
- f. Misappropriation of advertising ideas or style of doing business; or
- g. Infringement of copyright title or slogans.

14. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

15. a. "Products-Completed Operations Hazard" includes all "bodily injury" and "property damage" arising out of "your product" or "your work" except:

- (1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned.

The "bodily injury" or "property damage" must occur away from premises you own or rent.

b. "Your work" will be deemed completed at the earliest of the following times:

- (1) When all of the work called for in your contract has been completed.
- (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
- (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

c. This hazard does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle created by the "loading or unloading" of it; or
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials.

16. "Property Damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

17. "Suit" means a civil proceeding in which

damages because of "bodily injury," "property damage," "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit with our consent.

18. "Temporary Worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

19. "Volunteer Worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

20. "Your Product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (1) You;
 - (2) Others trading under your name; or

(3) A person or organization whose business or assets you have acquired; and

- b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your Products" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

21. "Your Work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

"Your Work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
- b. The providing of or failure to provide warnings or instructions.

CONTRACTORS COMMON POLICY CONDITIONS

All coverages of this policy are subject to the following conditions.

A. CANCELLATION

1. The first named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. CHANGES

This policy contains all the agreements between you and us concerning the insurance afforded. The first named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. CONCEALMENT, MISREPRESENTATION OR FRAUD

This policy is void in any case of fraud by you as it relates to this policy at any time. It is also void if you

or any other Insured, at any time, intentionally conceal or misrepresent a material fact concerning:

1. This policy;
2. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this policy.

D. EXAMINATION OF YOUR BOOKS AND RECORDS

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

E. INSPECTIONS AND SURVEYS

We have the right but are not obligated to:

1. Make inspections and surveys at any time;
2. Give you reports on the conditions we find; and
3. Recommend changes.

Any inspections, surveys, reports or recommendations relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

1. Are safe or healthful; or
2. Comply with laws, regulations, codes or standards.

This condition applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

F. INSURANCE UNDER TWO OR MORE COVERAGES

If two or more of this policy's coverages apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

G. LIBERALIZATION

If we adopt any revision that would broaden the coverage under this policy without additional premium within 45 days prior to or during the policy period, the broadened coverage will immediately apply to this policy.

H. OTHER INSURANCE

1. Applicable to Contractors Special Property coverage and Inland Marine coverages:

If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

2. Applicable to Contractors Liability coverage:

If other valid and collectible insurance is available to the Insured for a loss we cover under Coverage A.1. Business Liability of the Contractors Liability Coverage Form, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
 - (b) That is Fire Insurance for premises rented to you or temporarily occupied by you with permission of the owner;
 - (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

- (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion B.1.g. of the Contractors Liability Coverage Form.

- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverage A.1. to defend the Insured against any "suit" if any other insurer has a duty to defend the Insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the Insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Policy.

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

I. PREMIUMS

1. The first named Insured shown in the Declarations:
 - a. Is responsible for the payment of all premiums; and
 - b. Will be the payee for any return premiums we pay.

2. The premium shown in the Declarations was computed based on rates in effect at the time the policy was issued. On each renewal, continuation or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.

3. With our consent, you may continue this policy in force by paying a continuation premium for each successive one-year period. The premium must be:

- a. Paid to us prior to the anniversary date; and
- b. Determined in accordance with paragraph 2. above.

Our forms then in effect will apply. If you do not pay the continuation premium, this policy will expire on the first anniversary date that we have not received the premium.

4. Undeclared exposures or change in your business operation, acquisition or use of locations may occur during the policy period that are not shown in the Declarations. If so, we may require an additional premium. That premium will be determined in accordance with our rates and rules then in effect.

J. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

1. Applicable to Contractors Special Property coverage and Inland Marine coverages:

If any person or organization to or for whom we make payment under this policy has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

- a. Prior to a loss to your Covered Property.

b. After a loss to your Covered Property only if, at time of loss, that party is one of the following:

(1) Someone insured by this insurance;

(2) A business firm:

(a) Owned or controlled by you; or

(b) That owns or controls you; or

(3) Your tenant.

You may also accept the usual bills of lading or shipping receipts limiting the liability of carriers.

This will not restrict your insurance.

2. Applicable to Contractors Liability coverage:

If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them. This condition does not apply to Medical Expenses Coverage.

K. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

ASBESTOS LIABILITY EXCLUSION

The following exclusion is added:

"This Insurance does not apply to bodily injury, property damage, personal injury or advertising injury arising out of asbestos or goods containing asbestos or real property containing asbestos. This exclusion applies whether the bodily injury, property damage, personal injury or advertising injury is caused solely by asbestos or goods containing asbestos or real property containing asbestos, or is caused by other means in conjunction or separately with asbestos or goods containing asbestos or real property containing asbestos."

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WAR LIABILITY EXCLUSION

This endorsement modifies Insurance provided under the following:

**BUSINESSOWNERS LIABILITY COVERAGE FORM
BUSINESS PROVIDER LIABILITY COVERAGE FORM
CONTRACTORS LIABILITY COVERAGE FORM**

The following provisions are added to the Businessowners Liability Coverage Form BP 00 06, Business Provider Liability Coverage Form BPP-0007 and Contractors Liability Coverage Form ACP-0007:

A. Exclusion i. under Paragraph B.1., Exclusions – Applicable To Business Liability Coverage is replaced by the following:

1. Applicable To Business Liability Coverage

This Insurance does not apply to:

i. War

"Bodily Injury", "property damage", "personal injury", "advertising injury" or "personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war; or
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

B. Exclusion h. under Paragraph B.2. Exclusions – Applicable To Medical Expenses Coverage does not apply. Medical Expenses due to war are now subject to Exclusion g. of Paragraph B.2. since "bodily injury" arising out of war is now excluded under Paragraph B.1., Exclusions – Applicable To Business Liability Coverage.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CHANGES – INSURING AGREEMENT

This endorsement modifies insurance provided under the following:

CONTRACTORS POLICY

A. Paragraph 1.b. under A. COVERAGES, BUSINESS LIABILITY is replaced by the following:

b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
- (2) The "bodily injury" or "property damage" first "manifests" during the policy period.
- (3) Prior to the policy period, no insured listed under Paragraph 1. of C. – Who is an insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage"

during or after the policy period will be deemed to have been known prior to the policy period.

B. The following definition is added to LIABILITY AND MEDICAL EXPENSES DEFINITIONS:

"Manifests" means that the damage or injury is either:

- a. Discovered by the insured or some other person; or
- b. Reasonably should be discovered by the insured or some other person.

C. The following exclusion is added to B. EXCLUSIONS 1., APPLICABLE TO BUSINESS LIABILITY COVERAGE:

This insurance does not apply to:

"Bodily injury" and "property damage" which "manifests" prior to the inception of this policy or after termination of this policy.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
**NORTH CAROLINA CHANGES – CANCELLATION AND
 NONRENEWAL**

This endorsement modifies insurance provided under the following:

CONTRACTORS POLICY

A. Paragraph 2. of the CANCELLATION Common Policy Condition is replaced by the following:

2. a. **CANCELLATION OF POLICIES IN EFFECT LESS THAN 60 DAYS**

If this policy has been in effect for less than 60 days, we may cancel this policy by mailing or delivering to the first named insured written notice of cancellation at least:

- (1) 15 days before the effective date of cancellation if we cancel for nonpayment of premium; or
- (2) 30 days before the effective date of cancellation if we cancel for any other reason.

b. **CANCELLATION OF POLICIES IN EFFECT FOR 60 DAYS OR MORE**

If this policy has been in effect for 60 days or more, or is a renewal of a policy we issued, we may cancel this policy prior to the:

- (1) Expiration of the policy term; or
- (2) Anniversary date,

stated in the policy only for one or more of the following reasons:

- (1) Nonpayment of premium;
- (2) An act or omission by the insured or his or her representative that constitutes material misrepresentation or nondisclosure of a material fact in obtaining this policy, continuing this policy or presenting a claim under this policy;
- (3) Increased hazard or material change in the risk assumed that could not have been reasonably contemplated by the parties at the time of assumption of the risk;
- (4) Substantial breach of contractual duties, conditions or warranties that

materially affects the insurability of the risk;

- (5) A fraudulent act against us by the insured or his or her representative that materially affects the insurability of the risk;
- (6) Willful failure by the insured or his or her representative to institute reasonable loss control measures that materially affect the insurability of the risk after written notice by us;
- (7) Loss of facultative reinsurance, or loss of or substantial changes in applicable reinsurance as provided in G.S.58-41-30;
- (8) Conviction of the insured of a crime arising out of acts that materially affect the insurability of the risk;
- (9) A determination by the Commissioner of Insurance that the continuation of the policy would place us in violation of the laws of North Carolina; or
- (10) You fail to meet the requirements contained in our corporate charter, articles of incorporation or by-laws when we are a company organized for the sole purpose of providing members of an organization with insurance coverage in North Carolina.

We will mail or deliver written notice of cancellation to the first named insured at least:

- (1) 15 days before the effective date of cancellation if we cancel for nonpayment of premium; or
- (2) 30 days before the effective date of cancellation if we cancel for any other reason.

c. Cancellation for nonpayment of premium will not become effective if you pay the premium amount due before the effective date of cancellation.

- d. We may also cancel this policy for any reason not stated above provided we obtain your prior written consent.
- B. The following provisions are added and supersede any other provisions to the contrary:
1. **NONRENEWAL**
- a. If we elect not to renew this policy, we will mail or deliver to the first named insured shown in the Declarations written notice of nonrenewal at least 45 days prior to the:
 - (1) Expiration of the policy if this policy has been written for one year or less; or
 - (2) Anniversary date of the policy if this policy has been written for more than one year or for an indefinite term.
 - b. We need not mail or deliver the notice of nonrenewal if you have:
 - (1) Insured property covered under this policy, under any other insurance policy;
 - (2) Accepted replacement coverage; or
 - (3) Requested or agreed to non-renewal of this policy.
- c. If notice is mailed, proof of mailing will be sufficient proof of notice.
2. The written notice of cancellation or non-renewal will:
- a. Be mailed or delivered to the first named insured and any designated mortgagee or loss payee at their addresses shown in the policy, or if not indicated in the policy, at their last known addresses; and
 - b. State the reason or reasons for cancellation or nonrenewal.

NATIONWIDE'S PREMIUM AUDIT FACTS

What is a Premium Audit?

It is the actual findings from the examination of your business accounting records to determine the correct insurance charges for the covered period.

When is a Premium Audit necessary?

At the beginning of each policy period, your premium is based on an estimate using an exposure base such as Gross Sales, Payroll or other similar factor. So at the end of each policy period, generally each year, we must ask you for the actual amount so we can adjust your insurance coverage.

Does this mean my insurance will cost me more money?

Yes, sometimes, but it can also mean you may be entitled to a refund. For example, you estimate your Gross Sales at \$5,000,000 but unfortunately only have Gross Sales of \$4,000,000; your insurance cost could be 20% less after we conduct the Premium Audit. Isn't that a fair way for both of us?

Does a Premium Audit require me to keep extra records?

No, your normal business accounting records are generally all that is needed.

You need to let us look at your:

- Journals
- Ledgers
- Tax Reports
- Individual Payroll Records
- Vehicle Titles
- Certificates of Insurance

How do you conduct a Premium Audit?

We use one of three methods:

- We will call you on the telephone during normal business hours, after you return a post card giving a convenient time. We will ask you several questions. Normally this takes less than 10 minutes; or;
- We send you a questionnaire to complete and return to us; or

We will arrange for our company auditor or an independent auditor, who is employed by a nationally known auditing service, to come to your place of business at a time which is convenient to you.

What kind of accounting information do you need?

This may vary, but usually we need to know:

- Your Gross Sales; this is your total sales, less sales taxes paid, credits given for return merchandise and any amounts you may make as finance charges.
- Your total payroll, which includes wages, commissions, bonuses, holiday pay, vacation pay, sick pay, piece work payments, profit sharing, tool allowances and value of board and lodging. Please keep any overtime pay separate as the extra pay for overtime is not included in payroll for insurance computation.* If you do not keep separate records on overtime pay, you may be paying too much for your insurance.
- Amounts paid to subcontractors. You should require that your subcontractors furnish you Certificates of Insurance for Workers' Compensation and General Liability and Automobile Liability.

It is to your advantage to have Certificates of Insurance from your subcontractors available to the auditor showing adequate general liability insurance. If a subcontractor cannot furnish a Certificate of Insurance documenting general liability insurance limits of at least \$300,000, they may be classified as your employees and your premium may be increased.

If you have any questions about your Premium Audit, please contact your Nationwide Agent and he or she will help in answering your questions.

The contents of this publication follow general insurance principles, and it is not intended to supersede any definitions or conditions contained in your policy.

- * **EXCEPTION:** The states of Pennsylvania and Delaware include extra pay for overtime in the workers compensation payroll.

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DATOS SOBRE LA AUDITORÍA DE LAS PRIMAS DE NATIONWIDE

¿Qué es una auditoría de las primas?

Es el resultado real de un examen de los documentos de contabilidad de su negocio para determinar los costos correctos de seguros para el periodo de cobertura.

¿Cuándo es necesaria una auditoría de las primas?

Al comienzo de cada periodo de póliza, su prima se basa en un cálculo que utiliza una base de exposición, tal como las ventas brutas, la nómina u otro factor similar. Por eso, al final de cada periodo de póliza, generalmente cada año, tenemos que pedirle la cantidad real para poder ajustar la cobertura de su seguro.

¿Quiere decir esto que mi seguro me costará más dinero?

Sí, a veces, pero también puede significar que tendrá derecho a un reembolso. Por ejemplo, usted calcula que sus ventas brutas a \$5,000,000 pero desafortunadamente sólo tiene ventas brutas por valor de \$4,000,000; el costo de su seguro podría ser de un 20% menos después de nuestra auditoría de las primas. ¿Verdad que es justo para ambos?

¿Es necesario que mantenga documentos adicionales para la auditoría de las primas?

No, por regla general lo único que se necesita son sus documentos normales de contabilidad para su negocio.

Debe permitirnos ver sus:

- Diarios
- Libros mayores
- Declaraciones de impuestos
- Registros individuales de nómina
- Títulos de propiedad de sus vehículos
- Certificados de seguros

¿Cómo llevan a cabo la auditoría de las primas?

Utilizamos uno de estos tres métodos:

- Le llamaremos por teléfono durante el horario comercial normal, una vez que usted haya enviado de regreso una postal indicando la mejor hora para llamarle. Le haremos varias preguntas. Normalmente, esto toma menos de 10 minutos; o
- Le enviaremos un cuestionario para que usted lo rellene y envíe de regreso; o
- Haremos los arreglos necesarios para que un auditor de la compañía o un auditor independiente, empleado de un servicio de auditoría reconocido

a nivel nacional, acuda a su negocio a una hora conveniente para usted.

¿Qué tipo de información sobre contabilidad necesitan?

Esto puede variar, pero por regla general necesitamos saber:

- Sus ventas brutas; es decir el total de sus ventas, menos los impuestos de ventas pagados, créditos por devoluciones de mercancía y cualquier cantidad que pueda ganar como cargos de financiación.
- El total de su nómina, que incluye salarios, comisiones, bonificaciones, paga de días feriados, paga de vacaciones, paga en días de enfermedad, pagos por unidades trabajadas, participación en los beneficios, compensación para herramientas y valor de alojamiento y comidas. Por favor, mantenga cualquier paga por horas extraordinarias separada, ya que la paga adicional por horas extraordinarias no se incluye en la nómina para las cuentas de seguros.* Si no mantiene registros separados para la paga por horas extraordinarias, es posible que esté pagando demasiado por su seguro.
- Cantidades pagadas a subcontratistas. Usted deberá requerir que sus subcontratistas le entreguen certificados de seguros para el seguro para accidentes de trabajo (Worker's Compensation) y seguro de responsabilidad civil en general y responsabilidad civil para automóviles.

El hecho de tener certificados de seguros de sus subcontratistas a disposición del auditor para demostrar que tiene seguro adecuado de responsabilidad civil es ventajoso para usted. Si un subcontratista no puede darle un certificado de seguro para documentar límites de seguro de responsabilidad civil de por lo menos \$300,000, se le podría clasificar como empleado de usted y su prima podría aumentar.

Si tiene cualquier pregunta acerca de la auditoría de las primas, póngase en contacto con su agente de Nationwide para que responda a sus preguntas.

Los contenidos de esta publicación están de acuerdo con los principios generales de seguros y no tienen por objetivo reemplazar las definiciones o condiciones contenidas en su póliza.

* **EXCEPCIÓN:** Los estados de Pennsylvania y Delaware incluyen la paga adicional por horas extraordinarias en la nómina del seguro para accidentes de trabajo.

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Para personas con problemas auditivos o del habla: 1-800-622-2421 (TTY solamente)

Audit Information – North Carolina

Workers' Compensation

- **The sole proprietor or partners** in a Partnership are excluded from coverage under the Workers' Compensation policy unless they elect to be covered and notify the Company of this intent.
- **Executive Officers** of a Corporation are automatically covered under Workers' Compensation policy unless they elect to be excluded. The Company must be notified of this intent.
- **Premium for Workers' Compensation** is based on an estimated payroll for the term of the policy; thus, the premium at inception is considered estimated. After the policy period expires, we will request actual payroll figures from you. The premium will be adjusted according to the actual payroll for that period. You will receive either an audit billing or refund after premiums have been computed.
- **Total overtime wages** are included in payroll unless you keep specific records. The extra pay for overtime in excess of the amount the employee would have earned for the overtime work at his regular rate of pay must be shown separately, by employee.
- Your records should identify the type of work performed by each employee and the home state of each employee.
- Use of subcontractors can affect your premium.

A subcontractor **without** employees is no longer required to carry Workers' Compensation. If he later hires employees and does not secure Workers' Compensation, you will be charged for the payroll for his employees.

If a subcontractor **with** employees carries his own insurance, you must secure a Certificate of Insurance from him for your records. This will prevent you from being charged for his employees.

Certificates of Insurance must be obtained before the job is performed.

- **The costs your subcontractors** charge for labor must be shown separate from material costs.

General Liability

- **Premium for General Liability** coverage is based on various types of exposures: payroll, sales, units, etc. At the beginning of a policy term, an **estimated** amount of exposure is used to develop an **estimated** premium to charge for the coverage. After the policy term expires, we will request that you provide your actual exposures (sales, payroll, units, etc.) for the term of the policy. We will use this information to develop an **actual** premium, and make the necessary adjustments to the premium for the same policy term. You will be billed, or refunded accordingly.
- Several factors are considered in developing actual exposures...

If the premium basis is payroll, a flat amount of payroll is used for a sole proprietor, each partner or each executive officer. This flat payroll is added to the actual payroll for your employees.

Use of subcontractors can affect premiums. If a subcontractor cannot furnish a Certificate of Insurance documenting general liability limits of at least \$300,000, they may be classified as your employees and your premium may be increased.

If the subcontractor has adequate coverage, obtain a Certificate of Insurance and a charge will be made under the lower-rated Contractors/Subcontractors classification for the coverage. This charge is based on the total cost of the job – material and labor.

Certificates of Insurance should be obtained from the subcontractor before a job is performed.

Audit balances represent earned premium and are due when billed. To avoid substantial premium adjustments as a result of an audit, you should contact your agent to adjust estimated exposures if you experience, or anticipate changes in your exposures and/or operations during the term of your policy. Your agent will welcome your call.

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REPORT #1908 - A CANCELLATION STRIP

0095

O. QUINN

32-0003004

61-51-01

G1 AC 934-995-3001 02-10-07 CURRENT DATE 02-20-07

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DBA STANLEY'S VINYL FENCE

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Columbia, SC 29201
Phone (803) 978-2834
jmccants@rogerslewis.com
www.rogerslewis.com

December 17, 2018

2018 DEC 21 PM 2:52
CLERK COURT
J

Via US Mail

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.,
et al., v. Island Pointe, LLC, et al.
Case No.: 2015-CP-10-00955

Dear Madame Clerk:

Enclosed please find for filing the original and one copy of Builders Mutual Insurance Company's submissions/exhibits regarding the Motion to Intervene heard by The Honorable Jennifer B. McCoy, in the above-referenced matter.

By copy of this letter, I am serving counsel of record.

Should you have any questions or comments, please do not hesitate to contact me.

Sincerely,


John L. McCants

Enclosure

cc: All Counsel of Record

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

Beresford Commons Homeowners
Association, Inc.,)

Plaintiff,)

v.)

Civil Action No. 2013-CP-08-0179

Portrait Homes-South Carolina, LLC,)
Portrait Homes-Beresford Commons, LLC,)
Pasquinelli Homebuilding, LLC,)
JJA Construction, Inc., d/b/a JJA Framing,)
Jose Castillo d/b/a JJA Framing,)
Samuel Glover, Glover's Brickworks, Inc.,)
Z & Z, Incorporated, United Siding)
Specialists, Inc., Superior Solution, LLC,)
All American Roofing, Inc., Juan Luis)
Sanchez, Alfonso Villa Vicenio d/b/a)
Alfonso's Painting, Heritage Construction)
Consultants, Inc., Robert H. Yarnall)
d/b/a Heritage Construction Consultants,)
Inc., Victor Manuel Fernandez Jimenez)
d/b/a MJF Roofing Specialist, Arturo)
Torres Solache, Trinidad Olivia Garcia,)
Luis Hernandez d/b/a CNN Roofing,)
Norlan Cerrato, American Residential)
Services of SC, Inc., American Residential)
Services, LLC, Smith's Heating & Air)
Conditioning Co., Inc., Maurilio G.)
Demendonca, Gildo Rodrigues de Melo)
d/b/a Brazil Vinyl Siding, Vinicius)
Araujo a/k/a Vinicius Araujo Freitas,)
Lucas Rodriguez Barcelos, Guilherme)
Dos Santos, Renato Secomandi d/b/a)
New Canaan Carpentry, Donald Lee d/b/a)
Vinyl Siding Specialists, Ronedues)
Ventura d/b/a Providencia Siding,)
Nicholas Owens, Welinton Rezende,)
Levi Arruda, Argentino Jose Campos,)
Wellen Resende Bueno, Charles Bowser)
d/b/a CBW Services, Marcio Nunes da)
Silva, Jose Geraldo Dos Reis, Milton Dias)

**ORDER GRANTING
MOTION TO INTERVENE**

FILED
CLERK OF COURT
BERKELEY COUNTY, S.C.

17 JAN 23 PM 2:16

111
JL
JP

d/b/a Milton Dias Siding, and Leandro de)
Paulo Araujo, Tom's Vinyl Siding,)
Universal Forest Products, Inc.,)
Universal Forest Products Eastern Division,)
Inc. n/k/a UFP Eastern Division, Inc.,)
Universal Forest Products Shoffner, LLC,)
Guy C. Lee Building Materials, LLC,)
Benjamin Mora d/b/a Mora Construction,)
Benjamin Mora Construction, LLC,)
Builders' Firstsource-Southeast Group, LLC,)
James W. Wentling, AIA, R.B.A., Inc.)
d/b/a Lifestyle U.S.A. Design, Lifestyle)
Design USA, Ltd., CTS of Summerville,)
Inc. f/k/a Carolina Truss Systems, Inc.,)
Grade A Land Services, LLC, Saluda Hill,)
Inc., Marciniak Construction Co., Inc.,)
Carolina Landscape Group, Inc., Plantation)
Scapes, Inc. and M and J Siding and)
Construction, LLC,)

Defendants.)

gn
This matter is before the Court upon the motion of Selective Insurance Company of the Southeast ("Selective") to intervene in this action. A hearing was held on October 18, 2016, in Moncks Corner, South Carolina. After hearing the arguments of counsel present for the hearing and reviewing the written submissions, the Court hereby grants Selective's motion to intervene.

Based upon the filings, the Court understands that Selective provides insurance coverage to the Defendant United Siding Specialists, Inc. ("USSI") under Commercial General Liability (CGL) Policies and Commercial Umbrella Liability Policies. Those policies insure USSI for certain risks under the insuring agreement and exclude certain risks through policy exclusions. USSI, which was a siding subcontractor on the Beresford Commons project, sought coverage for this litigation, and Selective has been defending this lawsuit and a companion lawsuit under a reservation of rights. Selective disputes that USSI is entitled to coverage under the CGL Policies for each of the causes of

action or for all of the claims for damages as asserted by the Plaintiff in this action, based upon certain terms, conditions, and exclusions contained within the CGL and Commercial Umbrella Policies. Selective has identified a number of potential coverage issues that may be implicated by the facts of this litigation.

In order to protect its interests, Selective seeks to intervene in this action for a limited purpose. Selective seeks the ability to request that the trial judge submit a special verdict and/or special interrogatories to the jury to determine the basis of the jury's verdict against the Defendant USSI, if a verdict is returned in favor of the Plaintiff.

Selective is seeking to intervene pursuant to Rule 24(a)(2), SCRCP, which provides:



Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a)(2), SCRCP. Therefore, in order to intervene as a matter of right, Selective must demonstrate that it has an interest in the underlying lawsuit and that the disposition of the action may impede its ability to protect its interests. This Court finds that Selective has made that showing.

Selective has demonstrated that it has an interest in the subject matter of this litigation and that the disposition of the action may impede its ability to protect its interests. Moreover, Selective has shown that its interests and the interests of its insured, USSI, are not identical, and as a result, the interests of Selective are not fully protected in this litigation. Specifically, Selective argues that in the event both covered and non-covered elements of damages are submitted to the jury and if the jury returns only a general verdict, Selective would likely be compelled to indemnify USSI for what would be, in whole or in part, a non-covered loss unless Selective takes action, as it is attempting to do with

this motion to intervene, to make certain that the jury's verdict, if any, is allocated between covered and non-covered claims or elements of damages. This Court agrees with Selective's position.

Selective relies heavily on the 2009 decision of the South Carolina Supreme Court in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), to demonstrate the necessity of the intervention it seeks. In *Newman*, Auto-Owners Insurance Company was the general liability insurer for a homebuilder. A homeowner brought a claim for defective construction which was arbitrated. The arbitrator issued an award in favor of the homeowner. Auto-Owners then pursued a declaratory judgment action to determine which damages awarded by the arbitrator were covered under its CGL policy. The Supreme Court reversed the trial court's ruling and found that the portion of the arbitrator's award for removal and replacement of defective stucco was not covered under the CGL policy. Yet, the Supreme Court still held Auto-Owners responsible to pay that non-covered portion of the damages because:



[I]t 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.

684 S.E.2d at 547. (Emphasis added). Auto Owners was not a party in that underlying litigation. Yet, the Supreme Court nonetheless explained that "Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award." 684 S.E.2d at 547, n.5.

gn

In short, the Supreme Court in *Newman* has held that a liability insurer – even though not a party to the underlying action – has a responsibility to seek an allocation of damages from the factfinder in that underlying action or waive the ability to "relitigate the issue of damages" in a subsequent declaratory judgment action. In other words, the *Newman* decision makes it mandatory for an insurer to seek an allocation of damages for coverage purposes in the underlying action, which is what Selective is attempting to accomplish with its intervention in this litigation. This Court concludes, based on *Newman*, that the failure of an insurer (although not a party) to raise the damages allocation in the underlying case will bar the insurer from litigating the issue in a later declaratory judgment action, which may (as was the case in *Newman*) result in the insurer being compelled to pay non-covered claims or damages. Thus, this Court agrees with Selective that *Newman* demonstrates the propriety of and necessity for Selective moving to intervene in this litigation so as to avoid later having to pay non-covered claims or damages.

Moreover, Selective has demonstrated that its interests are not adequately represented by other parties to the action. As discussed above, Selective has interests in this litigation separate from the actual defense of its insured, USSI. Selective also has interests with regard to its obligation to indemnify the insured, if a verdict is returned on any cause of action or any element of damages that is covered. That interest is not being protected by counsel retained to represent USSI who must follow the instructions of his client with respect to the proffer of a verdict form.

As indicated, 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 USSI, if a verdict is returned in favor of Plaintiff. 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 trial judge will determine whether or not the jury will be informed that Selective has intervened or is represented in the courtroom. Likewise, the trial judge will determine whether Selective's motion for the submission of special interrogatories or a special verdict will occur outside the presence of the jury.

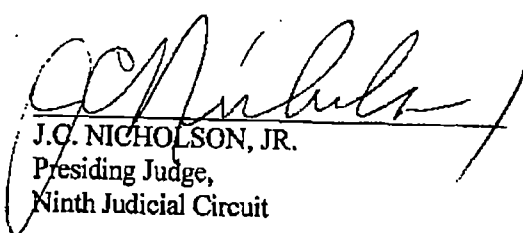
 The parties have not demonstrated any legal prejudice to the proposed intervention. There will be no delays in the litigation as a result of the intervention, and the Court has not been shown that any changes in trial strategy would result from Selective's intervention. In contrast, this Court finds that Selective has shown prejudice that it will suffer if the intervention is denied. A denial would result in the impairment of its interests in that the Selective may ultimately be compelled to pay the entire judgment despite the fact that a portion of that judgment may not be a covered risk for which a premium was paid. That very result occurred in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), and given the admonitions by the Supreme Court, this Court believes that Selective in fairness should be permitted to intervene in this action to prevent the same detrimental result from occurring here.

In granting the motion to intervene, the Court is not deciding whether a special verdict and/or special interrogatories must be submitted to the jury. That decision will depend on the posture of the case at the time the case is submitted to the jury and specifically the nature of the elements of damages being presented to the jury. The Court's decision today recognizes the issues raised by the Supreme Court in *Newman* and gives Selective the standing to make a motion for a special verdict and/or special interrogatories to the trial judge. In sum, the decision whether to submit a special verdict

and/or special interrogatories or the language to be used in any special verdict form and/or special interrogatories that are submitted to the jury is reserved to the discretion of the trial judge.

IT IS, THEREFORE, ORDERED that the motion to intervene filed by Selective Insurance Company of the Southeast is hereby granted as set forth herein.

AND IT IS SO ORDERED.



J.C. NICHOLSON, JR.
Presiding Judge,
Ninth Judicial Circuit

Charleston, South Carolina

January 17, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)

IN THE COURT OF COMMON PLEAS

Andrew and Diane Corvey,)
Plaintiffs,)

Civil Action No. 2009-CP-26-6392

v.)

Hall Custom Homes of South Carolina,)
LLC d/b/a Sterling Homes of)
South Carolina, LLC;)
Waterford Partners, LLC;)
Waterford Plantation, LLC;)
Waterford Plantation Homeowners)
Association, Inc.; City of Conway,)
South Carolina; Salvatore Cataldo;)
and John Nye,)

Defendants.)

ORDER GRANTING
MOTION TO INTERVENE

MAR 28 AM 10:58
CLERK OF COURT

This matter is before the Court upon the motion of Selective Insurance Company of South Carolina ("Selective") to intervene in this action. A hearing was held on March 7, 2011, in Conway, South Carolina, with all parties represented by counsel. After hearing the arguments of counsel and reviewing the parties' written submissions, the Court hereby grants the motion to intervene.

Based upon the parties' filings, the Court is informed that Selective provides insurance coverage to the Defendants Hall Custom Homes of South Carolina, LLC d/b/a Sterling Homes of South Carolina, LLC, Waterford Partners, LLC, and John Nye under a Commercial General Liability (CGL) Policy and a Commercial Umbrella Liability Policy. Selective also provides insurance coverage to the Defendant Waterford Plantation Homeowners Association, Inc. under a CGL Policy. These Defendants have sought coverage as insureds under the terms of those policies.

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Selective disputes that these Defendants (hereafter referred to as "insureds") are entitled to coverage under those policies for each of the causes of action asserted by the Plaintiffs in this action, based upon certain terms, conditions, and exclusions contained within the policies.

Specifically, Selective maintains that there may not be coverage for the claims alleged by the Plaintiffs because:

- (a) The alleged damages do not qualify as "bodily injury" or "property damage" caused by an "occurrence." The Plaintiffs' damages, in whole or in part, constitute faulty workmanship for which there is no coverage. In addition, economic losses do not qualify as "property damage."
- (b) Coverage, in whole or in part, may be excluded by the work product exclusions, namely Exclusions (j), (k), (l), and (m).
- (c) Coverage, in whole or in part, may be excluded by the Intentional Acts Exclusion, which is Exclusion (a).
- (d) Coverage, in whole or in part, may be excluded by the Contractual Liability Exclusion, which is Exclusion (b).
- (e) Coverage, in whole or in part, may be excluded by the Pollution Exclusion.
- (f) Coverage, in whole or in part, may be excluded by the Fungi or Bacteria Exclusion.

In order to protect its interests, Selective seeks to intervene in this action for a limited purpose. Selective seeks 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 is seeking to intervene pursuant to Rule 24(a)(2), SCRCP, which provides:

Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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Rule 24(a)(2), SCRCP. Therefore, in order to intervene as a matter of right, Selective must demonstrate that it has an interest in the underlying lawsuit and that the disposition of the action may impede its ability to protect its interests. This Court finds that Selective has made that showing.

Selective has demonstrated that it has an interest in the subject matter of this litigation and that the disposition of the action may impede its ability to protect its interests. Moreover, Selective has shown that its interests and the interests of the insureds are not identical, and as a result, the interests of Selective are not fully protected in this litigation. Specifically, Selective argues that in the event both covered and uncovered causes of action are submitted to the jury and if the jury returns only a general verdict, Selective will likely be compelled to indemnify the insureds for what would be, in whole or in part, an uncovered loss.

Selective relies heavily on the recent decision of the South Carolina Supreme Court in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), to demonstrate the necessity of the intervention it seeks. In *Newman*, Auto-Owners Insurance Company was the general liability insurer for a homebuilder. A homeowner brought a claim for defective construction which was arbitrated. The arbitrator issued an award in favor of the homeowner. Auto-Owners then pursued a declaratory judgment action to determine which damages awarded by the arbitrator were covered under its CGL policy. The Supreme Court reversed the trial court's ruling and found that the portion of the arbitrator's award for removal and replacement of defective stucco was not covered under the CGL policy. Yet, the Supreme Court still held Auto-Owners responsible to pay that uncovered portion of the damages because:

[I]t 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*

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raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits.

684 S.E.2d at 547. (Emphasis added). Importantly, Auto Owners was not a party in that underlying litigation. Yet, the Supreme Court nonetheless explained that "Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award." 684 S.E.2d at 547, n.5.

In short, the Supreme Court in *Newman* has held that a liability insurer – even though not a party to the underlying action – has a responsibility to seek an allocation of damages from the factfinder in *that underlying action* or waive the ability to "relitigate the issue of damages" in a subsequent declaratory judgment action.¹ In other words, the *Newman* decision makes it mandatory for an insurer to seek an allocation of damages for coverage purposes in the underlying action, which is what Selective is attempting to accomplish with its proposed intervention. This Court concludes that, based on *Newman*, the failure of an insurer (although not a party) to raise the damages allocation in the underlying case will bar the insurer from litigating the issue in a later declaratory judgment action, which may (as was the case in *Newman*) result in the insurer being compelled to pay an uncovered claim. Thus, this Court

¹ In its recent decision in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, Op. No. 26909 (S.C. S.Ct. filed January 7, 2011), the Supreme Court has overruled *Newman* in part. However, the parts of *Newman* on which Selective is relying have been affirmed by footnote 9 from the *Crossmann* decision, which states:

Notwithstanding this ruling, however, the insurance company failed to request the arbitrator to delineate the portion of the award attributable to the removal of the defective stucco. We were therefore constrained to affirm the arbitrator's award, as "it is not the purpose of this declaratory judgment action to relitigate the issue of damages."

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agrees with Selective that *Newman* demonstrates the propriety of and necessity for Selective moving to intervene in this litigation so as to avoid later having to pay an uncovered claim.

Moreover, Selective has demonstrated that its interests are not adequately represented by other parties to the action. As discussed above, Selective has interests in this litigation separate from the actual defense of the insureds. Selective also has interests with regard to its obligation to indemnify the insureds, if a verdict is returned on any cause of action that is covered. That interest is not being represented by counsel representing the insureds. Furthermore, the opposition of the insureds to the motion to intervene demonstrates that their counsel are unlikely to seek at trial a special verdict or special interrogatories as needed to allocate damages between covered claims and uncovered claims as is necessary under the holding in *Newman*.

In opposing the proposed intervention, the Defendants which are insureds under the Selective policies maintain that Selective's motion to intervene was not timely filed. The Court recognizes that pursuant to Rule 24, SCRPC, a party may intervene only upon timely application. In addition, the Supreme Court has adopted a four-part test for determining timeliness: "(1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial." *Ex parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661, 664 (1993).

In weighing these factors, the Court does not find Selective's motion to intervene to be untimely. The timeliness of the motion must be judged in relation to its purpose. As indicated, 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,

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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 has 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 insureds 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.

In contrast, this Court finds that Selective has shown prejudice that it will suffer if the intervention is denied. A denial would result in the impairment of its interests in that the Selective may ultimately be compelled to pay the entire judgment despite the fact that a portion of that judgment may not be a covered risk for which a premium was paid. That very result occurred in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), and given the admonitions by the Supreme Court, this Court believes that Selective should be permitted to intervene in this action to prevent the same detrimental result from occurring here.

In granting the motion to intervene, the Court is not deciding whether a special verdict and/or special interrogatories must be submitted to the jury. That decision will depend on the posture of the case at the time the case is submitted to the jury. The Court's decision today only gives Selective the standing to make a motion for a special verdict and/or special interrogatories to the trial judge. In sum, the decision whether to even submit a special verdict and/or special interrogatories or the language to be used in any special verdict form and/or special interrogatories that are submitted to the jury is reserved to the discretion of the trial judge.

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IT IS, THEREFORE, ORDERED that the motion to intervene filed by Selective Insurance Company of South Carolina is hereby granted as set forth herein.

AND IT IS SO ORDERED.


WILLIAM H. SEALS, JR.
Presiding Judge,
Thirteenth Judicial Circuit

Marion, South Carolina

March 24, 2011

STATE OF SOUTH CAROLINA
COUNTY OF Lancaster
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP2900330

Isaac Mitchell et al
PLAINTIFF(S)

True Homes USA, Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Motion for Summary Judgment - Denied
Motion to Compel - Denied
Motion/Intervention Pursuant to Rule 24 -Granted
Motion for Continuance - Denied

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/17/2018 .

Corporation Service Co

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Lancaster Common Pleas

Case Caption: Isaac Mitchell , plaintiff, et al VS True Homes USA, Inc , defendant,
et al
Case Number: 2016CP2900330
Type: Order/Electronic Form 4

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2018-09-17 10:57:17 page 3 of 3

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Michael Ingram and Diane Ingram,)
Bobby Horn and Donita Horn, and)
Bob Shropshire and Kathy Shropshire,)
on behalf of themselves and)
all others similarly situated,)

Civil Action No. 2017-CP-26-2854

Plaintiffs,)

v.)

ORDER GRANTING
MOTION TO INTERVENE

Lauderdale Bay Developers, LLC,)
Bill Clark Homes of Myrtle Beach, LLC,)
L&R Plumbing, Inc., Elite Exteriors, LLC,)
G&F Siding and Framing, Inc. a/k/a G&F)
Framing & Siding, Inc., Lauderdale Bay)
Homeowners Association, Inc., Jeff Farrell)
and John Doe Defendants 1 through 5,)

Defendants,)

Bill Clark Homes of Myrtle Beach, LLC,)

Third-Party Plaintiff,)

v.)

Exterior Concepts 2, Inc. and)
Elizabeth Saldivar d/b/a A.S. Construction,)

Third-Party Defendants.)
_____)

This matter is before the Court upon the motion of Selective Insurance Company of South Carolina ("Selective") to intervene in this action. A hearing was held on October 9, 2018. Andrew F. Lindemann appeared on behalf of Selective, and Robert Wylie appeared for the

Plaintiffs to oppose the motion. No other party contested the motion in any written opposition or in open court. After careful consideration of Selective's motion, the written submissions by the parties, other Circuit Court orders submitted by counsel, and the arguments of counsel at the hearing, the Court grants Selective's Motion to Intervene as set forth herein.

Based upon the parties' filings, the Court is informed that the Plaintiffs filed this action against various Defendants including G&F Framing & Siding, Inc. ("G&F Framing") alleging construction defects with respect to the Lauderdale Bay condominium complex. In their current Second Amended Complaint, the Plaintiffs have alleged causes of action against G&F Framing for negligence and breach of implied warranty. In addition, the Defendant Lauderdale Bay Homeowners Association ("HOA") has filed a cross-claim for equitable indemnity against G&F Framing.

The Court further understands that Selective provides insurance coverage to G&F Framing under a Commercial General Liability (CGL) Policy with policy periods of June 15, 2007 through June 15, 2008 and June 15, 2008 through June 15, 2009. Those policies insure G&F Framing for certain risks under the insuring agreement and exclude certain risks through policy exclusions. Selective has been defending G&F Framing in this litigation under a strict reservation of rights. Selective disputes that G&F Framing is entitled to coverage for each of the causes of action or for all the claims for damages as asserted by the Plaintiffs and/or the HOA in this litigation, based upon the terms, conditions, and exclusions contained within the CGL Policy. Selective has identified a number of potential coverage issues that may be implicated by the facts of this litigation.

In order to protect its interests, Selective seeks to intervene in this action for a limited purpose. Selective seeks the ability to request that the trial judge submit a special verdict and/or

special interrogatories to the jury to determine the basis of the jury's verdict against the Defendant G&F Framing, if a verdict is returned in favor of the Plaintiffs and/or the HOA.

The Court finds that Selective's position is supported by the Supreme Court's recent decision in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017). In that case, the Supreme Court explained that "an insurer typically has the right to control the litigation and is in the best position to see to it that the damages are allocated," and as a result of that, "courts have found that where an insurer defends under a reservation of rights, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus noncovered damages." 803 S.E.2d at 297-298. The Supreme Court in *Harleysville* further ruled as follows regarding the necessity of special interrogatories or a special verdict to obtain an allocated verdict:

"The right to control the litigation carries with it certain duties" including "the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages." *Magnum Foods, Inc v. Cont'l. Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994). (citations omitted) (explaining "[i]f the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories" (citing *Duke v. Hoch*, 468 F.2d 973, 979 (5th Cir. 1972))).

803 S.E.2d at 299.

The case of *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), is also instructive. In *Newman*, Auto-Owners Insurance Company was the general liability insurer for a homebuilder. A homeowner brought a claim for defective construction which was arbitrated. The arbitrator issued an award in favor of the homeowner. Auto-Owners then pursued a declaratory judgment action to determine which damages awarded by the arbitrator

were covered under its CGL policy. The Supreme Court reversed the trial court's ruling and found that the portion of the arbitrator's award for removal and replacement of defective stucco was not covered under the CGL policy. Yet, the Supreme Court still held Auto-Owners responsible to pay that non-covered portion of the damages because:

[I]t 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.

684 S.E.2d at 547. Auto Owners was not a party in that underlying litigation. Yet, the Supreme Court nonetheless explained that "Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award." 684 S.E.2d at 547, n.5.

The Supreme Court in *Newman* thus explained that a liability insurer -- even though not a party to the underlying action -- has a responsibility to seek an allocation of damages from the factfinder in that underlying action or waive the ability to "relitigate the issue of damages" in a subsequent declaratory judgment action. That was reiterated by the Court in *Harleysville*. Those decisions, therefore, require an insurer to seek an allocation of damages for coverage purposes in the underlying action, which is what Selective is attempting to accomplish with its intervention in this litigation.

Moreover, Selective has demonstrated that its interests are not adequately represented by other parties to the action. Selective has interests in this litigation separate from the actual

defense of its insured, G&F Framing. Selective also has interests with regard to its obligation to indemnify the insured, if a verdict is returned on any cause of action or any element of damages that is covered. That interest is not being protected by counsel retained to represent G&F Framing who must follow the instructions of his client with respect to the proffer of a verdict form. The Court thus finds that Selective has satisfied the elements for intervention as a matter of right under Rule 24(a)(2), SCRCP. As the Supreme Court's decisions in *Harleysville* and *Newman* make evident, Selective is entitled to intervene in this action as a matter of right to ensure that its interests are fully protected and that it satisfies its duty to obtain an allocated verdict for itself and its insured.

As outlined in its motion, Selective seeks to intervene for only 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 G&F Framing, if a verdict is returned in favor of the Plaintiffs and/or the HOA. 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 should not even be informed that Selective has intervened or is represented in the courtroom. Selective's motion for the submission of special interrogatories or a special verdict will occur outside the presence of the jury. Hence, there will be no legal prejudice to other parties.

In granting the Motion to Intervene, the Court is not deciding whether a special verdict and/or special interrogatories must be submitted to the jury. That decision will depend on the

posture of the case at the time the case is submitted to the jury and specifically the nature of the elements of damages being presented to the jury. The Court's decision today recognizes the issues discussed by the Supreme Court in the *Harleysville* and *Newman* cases and grants Selective the standing of an intervenor to make a motion for a special verdict and/or special interrogatories to the trial judge. In sum, the decision whether to submit a special verdict and/or special interrogatories and the language to be used in any special verdict form and/or special interrogatories that are submitted to the jury are reserved to the discretion of the trial judge.

IT IS, THEREFORE, ORDERED that the Motion to Intervene filed by Selective Insurance Company of South Carolina is hereby granted as set forth herein.

AND IT IS SO ORDERED.

WILLIAM H. SEALS, JR.
Presiding Circuit Court Judge,
Fifteenth Judicial Circuit

October __, 2018

Case Caption:	Michael Ingram , plaintiff, et al VS Lauderdale Bay Developers LLC , defendant, et al
Case Number:	2017CP2602854
Type:	Order/Intervene

s/ The Honorable William H. Seals Jr. #2157

ROA 194

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
PALMETTO POINTE AT PEAS	)	CASE NO. 2015-CP-10-0955
ISLAND CONDOMINIUM PROPERTY	)	
OWNERS ASSOCIATION, INC. AND	)	
KATHY MILNER, INDIVIDUALLY,	)	
AND ON BEHALF OF ALL OTHERS	)	
SIMILARLY SITUATED,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
ISLAND POINTE, LLC; LEONARD T.	)	PLAINTIFFS' FIRST SET OF INTERROGATORIES TO ALL DEFENDANTS
BROWNE; COMPLETE BUILDING	)	
CORPORATION; TRI-COUNTY	)	
ROOFING, INC.; CREEKSIDE, INC.;	)	
AMERICAN RESIDENTIAL	)	
SERVICES, LLC D/B/A ARS/RESCUE	)	
ROOTER CHARLESTON; AND JOHN	)	
DOE 1-60,	)	
	)	
DEFENDANTS.	)	

TO: THE ABOVE-NAMED DEFENDANTS AND THEIR RESPECTIVE COUNSEL:

YOU WILL PLEASE TAKE NOTICE Plaintiffs, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Kathy Milner, individually, and on behalf of all others similarly situated, (hereinafter collectively referred to as "Plaintiffs"), hereby request, pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, each Defendant answer in writing and under oath, within thirty (30) days after the service hereof, the following Interrogatories. Documents and things responsive to the Interrogatories should be produced for inspection and copying at the law offices of Young Clement Rivers, LLP located at 25 Calhoun Street Charleston, SC 29402.

DEFINITIONS AND INSTRUCTIONS

A. "You", "Your", or "Defendant", shall mean each of the above-named Defendants and/or the Defendant's agents, employees, consultants, attorneys, or other representatives.

B. The word "person" means any natural person, firm, corporation, partnership, joint venture, or any other entity.

C. The term "documents" or "things" means all writings of any kind, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and interoffice communications, offers, notations of any sort of conversations, telephone calls, meetings, or other communications, bulletins, printed matter, computer printouts, teletypes, telefaxes, invoices, work sheets; and all drafts, alterations, modifications, changes, and amendments to any of the foregoing; graphic or aural records; or representations of any kind, including without limitation, photographs, charts, microfilm, videotape, recordings, and motion pictures, and electronics, mechanical, or electrical records or representations of any kind, including, without limitation, tapes, cassettes, discs, or other records.

D. The term "all documents" means every document as above defined known to you, your agents or counsel, and each document or thing which can be located or discovered by reasonably diligent efforts.

E. The terms "refer to" or "relate to" shall mean mentioning, comprising, constituting, indicating, describing, reflecting, evidencing, regarding, pertaining to, showing, discussing, connected with, memorializing or involving in any way whatsoever the subject matter of the

request, including having a legal, factual, or logical connection, relationship, correlation, or association with the subject matter of the request. A document or communication may "refer to" or "relate to" an individual or entity without specially mentioning or discussing said individual or entity by name.

F. The term "identify" means in the case of a business entity, to state the business name and present address of each said entity.

G. The terms "and" and "or" as used herein are both conjunctive and disjunctive.

H. Any verb used in any tense shall be read to mean that verb in all its tenses.

I. The singular includes the plural and vice versa.

J. The term "including" shall mean "including, but not limited to."

K. In answering these Interrogatories, furnish such documents and things as are available to You, not merely such documents and things as are in Your possession or control. This means You are to provide documents and things which are available to or in the possession or control of Your employees, representatives, experts, witnesses, servants, or agents, including Your attorney (unless privileged) or any agent or investigator for You or Your attorney (unless privileged).

L. All of the Interrogatories are deemed continuing requests, and You are obliged to supplement Your responses to produce all answers responsive to these Interrogatories, including such answers as will become available to You or of which You become aware of after the responses hereto are served.

M. If any of these Interrogatories or portions thereof cannot be responded to fully, such shall be answered or responded to the extent possible, with the reasons for not responding more fully.

N. Unless otherwise indicated, these Interrogatories refer to the time, place, and circumstances of the occurrences mentioned or referred to in the pleadings.

O. If an Interrogatory or definition or instruction is objected to in whole or in part, specify all grounds on which the objection rests. Respond to all portions of each such Interrogatory to which no objection is asserted. Additionally, state whether any responsive information has been omitted from a response or whether and in what way the search for responsive information has been delimited or circumscribed on the basis of such objection.

P. *Destroyed Documents.* If any documents requested or relevant to the Interrogatories herein have been lost, discarded, or destroyed, please identify the documents so lost, discarded, or destroyed as completely as possible, including without limitation the following information: the date of, manner of, reason for, person authorizing, and the person disposing of the document.

Q. *Privileged Documents.* To the extent any other responsive documents shall be withheld from production based upon the attorney-client privilege, the work product doctrine, or any other claim of privilege asserted with respect to any requested document, then as to each such document the party claiming privilege shall (a) submit a list identifying each such document; (b) identify the nature of the privilege claimed in writing with sufficient specificity to permit the Court to reach a determination, in the event of a Motion to Compel, as to the applicability of the asserted privilege, and (c) identify each person having knowledge of the factual basis on which the claim of privilege or immunity is based. For these purposes, "identify" means in the case of a document, to state the document's date, its author, its recipient or the person for whom it was prepared, the type of document, its present location or custodian, a summary of its contents, and any other information necessary to render the document distinguishable from all others and subject to ready location.

INTERROGATORIES

1. Identify each person known to you or your counsel to be a witness concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witness and indicate who has possession of such statements.

2. For each person known to you or your counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

3. Set forth a list of photographs, plats, sketches, or other documents in your possession or available to you which relate to the claims or defenses in the case. This includes any and all materials associated with the design, construction, repair and/or sale of the Palmetto Pointe at Peas Island Condominiums such as correspondence, notes, invoices, contracts, agreements, telephone messages, memoranda, work-progress records, e-mails, reports, estimates, and any other document, whether recorded, written or oral, complaints pertaining to faulty construction, cracks, water intrusion, mildew or fungal contamination, remediation and/or cleaning at Palmetto Pointe at Peas Island; and any and all know inspection, investigation, testing and/or sampling reports for any work performed, product installed and/or alleged defect at the Palmetto Pointe at Peas Island Condominiums from time of construction to the present. For each such document identified, please specify: (a) the name, address, and telephone number of each person who made the document; and (b) the name, address, and telephone number of each person who presently has custody of these records.

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and list all policies with the policy number, term, and the amount or amounts of liability coverage in each policy.

5. List the names and addresses of any expert witnesses, engineers, consultants, or testing laboratory engaged by you and/or your agents to inspect, investigated, examine, test, or analyze Palmetto Pointe at Peas Island Condominiums and in connection with each expert witness, give the following information:

- a. the witness' full name and address;
- b. the witness' qualifications as an expert and field of expertise;
- c. the subject matter on which the expert is expected to testify;
- d. the substance of the facts and opinions to which the expert is expected to testify;
- e. a complete summary of the grounds for each opinion;
- f. a complete list of all articles, treatises, texts, technical bulletins, professional guidelines, periodicals or papers which support the experts' opinion (for every text or periodical cited, please denote the chapter and page where the information is located that supports the experts' opinion);
- g. whether the witness has testified in any trials before, and if so, identify each time the witness has testified, including the name of the court, whether the witness testified for the plaintiff or the defendant and a description of the subject matter of the testimony given;

- h. whether the witness, in any prior testimony, was paid compensation for his testimony, and, if so, for each act of testimony, the amount of compensation so paid and by whom;
- i. whether the witness has ever testified for you in any prior case; and
- j. whether the witness served as an expert witness and testified in any prior case for your attorney or any other member of the firm of the attorneys for the Defendant, and, if so, state the name and the action in which the testimony was given, the time, place, and amount of compensation, if any, paid to the witness indicating the source of the compensation paid to the witness.

6. State whether any investigation, inspection or inquiry of the condition of the Palmetto Pointe at Peas Island Condominiums was made by you or your subcontractors, agents, and/or employees (former or current), and if so:

- a. State the nature of the investigation;
- b. Identify the agent or expert making the investigation;
- c. State the date of the investigation;
- d. Describe the reports, findings, conclusions, and recommendations of the investigation; and
- e. Identify all relevant documents including documents used in the preparation of any report.

7. Identify which of the Palmetto Pointe at Peas Island buildings you and/or your subcontractors, agents and/or employees supplied labor and/or materials.

8. Please identify all your employees, laborers, consultants and/or agents (former or current) involved in the construction, development, sale, field supervision, site inspection, renovation, maintenance, repair, consultation and/or sale of the Palmetto Pointe at Peas Island Condominiums. For each person or entity identified:

- a. Describe the specific tasks or scope of work undertaken by such person or entity;
- b. Provide the title or position of each such person or entity;
- c. Provide the scope of responsibility of each such person or entity;
- d. Provide the date each such person or entity performed these tasks; and
- e. Identify any and all associated documents including, but not limited to, time cards, time sheets, work orders, invoices, or other evidence of the dates and tasks undertaken.

9. Please identify all designers, builders, suppliers, consulting engineers, contractors, subcontractors, and/or independent contractors-who you are aware were involved in the construction, renovation, maintenance, repair, consultation and/or sale of the Palmetto Pointe at Peas Island Condominiums. For each person or entity identified state whether a written or oral agreement was entered into concerning the construction of the Palmetto Pointe at Peas Island Condominiums:

- a. The specific tasks or scope of work assigned under each agreement;
- b. The names and addresses of all persons responsible for supervising the work performed under the agreement;

- c. The substance of any provision, condition, or stipulation contained in any contract which you contends creates a right of indemnity or contribution; and
- d. Identify any and all associated documents including, but not limited to, bid proposals, subcontract agreements whether written or oral, the amount of compensation received, application for payments, time cards, time sheets, change orders, work orders, invoices, or other evidence of the dates and type of work undertaken.

10. Set forth in detail the scope of work you and your employees, subcontractors and/or agents performed at the Palmetto Pointe at Peas Island Condominiums including, but not limited to, approximate dates of service; a description of the work; and the identity of any documents related to your work such as time cards, work orders, draw requests, invoices, or other evidence of dates and tasks undertaken.

11. Identify all products and/or materials supplied by you and/or used by you and your employees, subcontractors and/or agents for the work performed at the Palmetto Pointe at Peas Island Condominiums. For each such product and/or material identified, provide (a) a description of the product and/or material; (b) the entity or individual from whom you received, purchased and/or ordered said product or material; (c) whether you inspected said product and/or material for defects prior to supplying to or using on the construction project; (d) to whom the product and/or material was supplied and/or used by if anyone other than you; and (e) the identity of any documents related to said product and/or material including, but not limited to, supplier information, invoices, order forms, product specifications, product brochures,

manufacturer recommendations, application and/or installation instructions, test reports, warranties and technical literature.

12. Describe in detail any on-site changes, alterations, and/or modifications to the buildings from the building plans, framing plans, and/or any other architectural or engineered plan. Include in your response the specific change, alteration and/or modification; the units at which said change, alteration, and/or modification was made; the reasons for making any such change, alteration, and/or modification, and the identity of any documents which relate to and/or support your Answer.

13. Set forth in detail any change(s) to the scope of work or products being supplied and/or used by your company and your employees, subcontractors and/or agents during the design, construction and/or repair of the Palmetto Pointe at Peas Island Condominiums. Include in your response the approximate date of the change(s); the substance of the change(s); the reasons for the change(s); the identity of the individual, entity or agent who instituted and/or approved the change(s); and the identity of any documents which relate to and/or support your Answer.

14. Set forth the total gross proceeds you earned on the Palmetto Pointe at Peas Island Condominium project and your net profit.

15. Please state whether you have ever attempted to repair or mitigate any of the damages or defects identified in the Complaint? If so, describe in detail all such actions taken by you, your employees, subcontractors and/or agents, including a summary of all materials and labor that were required to complete such repairs or mitigation, the date when any such work was performed, the substance of the work and the person(s) who performed the work, and identify all documents relating to such work.

16. Set forth in detail any and all on-site installation and/or application instructions or guidance given or received (whether orally or in writing) by you regarding the construction and/or repair of the Palmetto Pointe at Peas Island Condominiums. Include in your response the approximate dates on which the instruction(s) or guidance were given or received; the substance of any verbal instructions or guidance provided or received; the identity of any written instructions provided or received; and the name(s) and position(s) of the individual and/or agent providing and receiving said instruction(s) or guidance.

17. Please identify and describe all communications you and/or your employees, subcontractors and/or agents had with any other Defendant and/or that Defendant's employees, subcontractors and/or agents regarding the Palmetto Pointe at Peas Island Condominiums from the time of the initial construction to the present.

18. State with specificity any warranty provided relating to your work and the procedures and policies for providing warranty work to the Palmetto Pointe at Peas Island homeowners.

19. State whether you contend the Plaintiffs' injuries were caused by, or contributed to, by the actions or omissions of some person other than the Plaintiffs, and if so, state:

- a. The name, address and telephone number of each person; and
- b. The nature of how these individuals have caused the injuries.

20. Identify and describe in detail all quality control procedures conducted by you during the construction of the Palmetto Pointe at Peas Island Condominiums.

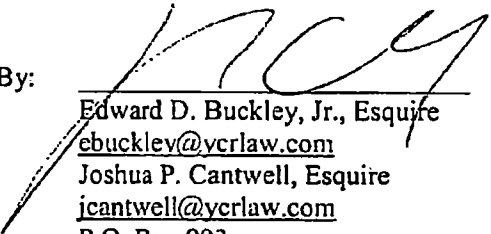
21. Identify all claims for repairs and/or damages regarding any construction project within South Carolina in which you performed work, supervised work, provided materials or otherwise participated. For each such claim, provide a summary of the relevant facts surrounding

the claim, the date when the original and any remedial work was performed, the substance of the original and remedial work performed, the person(s) who performed the original and remedial work, and identify all documents relating to the original and remedial work.

22. Please identify all South Carolina legal actions, mediations, and arbitrations, and all complaints filed with South Carolina municipal or governmental agencies such as the Department of Labor, Licensing and Regulations, against your firm in the past ten years including the date and place such action and/or complaint was filed; the civil action, docket or complaint file number; a description of the facts and parties involved in the proceeding; and the final disposition of each proceeding.

YOUNG CLEMENT RIVERS, LLP

By:


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Joshua P. Cantwell, Esquire
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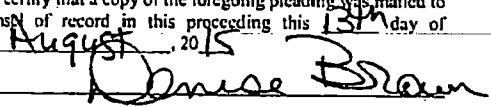
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 8/12/2015

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 13th day of August, 2015.


Denise Brown

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
PALMETTO POINTE AT PEAS	)	CASE NO. 2015-CP-10-0955
ISLAND CONDOMINIUM PROPERTY	)	
OWNERS ASSOCIATION, INC. AND	)	
KATHY MILNER, INDIVIDUALLY,	)	
AND ON BEHALF OF ALL OTHERS	)	
SIMILARLY SITUATED,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
ISLAND POINTE, LLC; LEONARD T.	)	PLAINTIFFS' FIRST SET OF REQUEST
BROWNE; COMPLETE BUILDING	)	FOR PRODUCTION TO ALL
CORPORATION; TRI-COUNTY	)	DEFENDANTS
ROOFING, INC.; CREEKSIDE, INC.;	)	
AMERICAN RESIDENTIAL	)	
SERVICES, LLC D/B/A ARS/RESCUE	)	
ROOTER CHARLESTON; AND JOHN	)	
DOE 1-60,	)	
	)	
DEFENDANTS.	)	

TO: THE ABOVE-NAMED DEFENDANTS AND THEIR RESPECTIVE COUNSEL:

YOU WILL PLEASE TAKE NOTICE Plaintiffs, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Kathy Milner, individually, and on behalf of all others similarly situated, (hereinafter collectively referred to as "Plaintiffs"), hereby request, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, each of the above-named Defendants respond, within thirty (30) days after the service hereof, to produce and permit the Plaintiffs to inspect, copy, or photograph, each of the following documents or things which may be in the possession, custody, or control of the Defendants or Defendants' attorney which constitutes or contains evidence relating to the claim or defense of this case.

DEFINITIONS AND INSTRUCTIONS

Pursuant to the provisions of the South Carolina Rules of Civil Procedure, Plaintiffs request each Defendant produce and make available for inspection and copying all documents in its possession, custody, or control which are responsive to the Requests For Production set forth below. The documents produced pursuant to these requests are to be made available for inspection and copying within the time provided by law at the office of Plaintiffs' counsel, or at such other place as may be agreed upon by counsel, continuing from day to day until inspection and copying are completed. The instructions and definitions set forth in Plaintiffs' First Interrogatories to the Defendants apply to these requests.

REQUESTS FOR PRODUCTION

1. Produce copies of any and all photographs, slides, videotapes, data compilations, brochures, plats, sketches, diagrams, installation instruction(s), product descriptions, sales literature, specifications, electronic transmissions including e-mails and e-documents, and/or reports pertaining to this action, the Palmetto Pointe at Peas Island Condominiums, or any products utilized or installed in the subject property.

2. Produce a complete copy of any and all management agreements, contracts, documents, job files, construction files, drawings, plans, marketing materials, installation instructions, manufacturer recommendations, warranties, manuals, work orders, correspondence, company policies, handbooks, manuals, memoranda or any other written material in your possession or available to you which in any way relates to the construction, design, renovations, maintenance, operation, repair and/or sale, or any other aspect of the Palmetto Pointe at Peas Island Condominiums. Such documents should include, but are not limited to, any original management agreements, construction agreements, subcontractor agreements, blue prints, plats,

diagrams, drawings, detailed specifications, outline specifications, or any other construction, design, management, inspection or repair related documents any way relating to the Palmetto Pointe at Peas Island Condominiums.

3. Produce all architectural, engineering, structural or any other mechanical drawings relating to the Palmetto Pointe at Peas Island Condominiums but not limited to:

- a. Preliminary tracings and prints;
- b. Original plans and revisions;
- c. Job site plans and revisions;
- d. Copies of plans and revisions submitted to any state, county, or municipal agencies;
- e. Specifications and revisions;
- f. As built plans and specifications;
- g. All other preliminary tracings, prints, plans, specifications, lay outs, revisions of any kind relating in any way to this project; and
- h. All correspondence, field orders, field reports, directives, notices, and any other documents of any kind or nature relating to the inspection or supervision of the project by an architect, or any other individual having administrative or supervisory authority with respect to the Palmetto Pointe at Peas Island Condominiums.

4. Produce all contracts and change orders (including proposals) related to or in any way related to the design, construction, repair, inspection and/or investigation of the Palmetto Pointe at Peas Island Condominiums between you and any:

- a. General Contractors;
- b. Subcontractors;
- c. Architects;
- d. Engineers;
- e. Surveyors;
- f. Supervisors;
- g. Inspectors;
- h. Persons who performed tests, and testing laboratories;
- i. Material suppliers and manufacturers;
- j. Persons who made offers to perform services on the Palmetto Pointe at Peas Island Condominiums; and
- k. All others persons in any way involved in the planning, designing, testing, improving, constructing, supervising, inspecting, repairing, renovating, and maintaining of the subject residences.

5. Produce any and all documents relating to the nature, extent, costs and scope of any and all repairs, renovations, additions, improvements, modifications or additional work performed to any part of the Palmetto Pointe at Peas Island Condominiums by you or anyone associated with you.

6. Produce all applications for building permits and the building permits themselves, job or daily minutes, daily logs, notes, change orders, change directives and memoranda relating to the Palmetto Pointe at Peas Island Condominiums including, but not limited to the following: site work, foundations, framing, windows, roof, siding, decks, floors, wiring, plumbing, HVAC and any and all other work associated with the construction of Palmetto Pointe at Peas Island in your possession or available to you.

7. Produce any insurance policy documents, including complete copies of all policies and declaration pages, owned by you from 2005 to present.

8. Produce any notice of claim related to the Palmetto Pointe at Peas Island Condominiums provided by you and/or your agents to each of the insurance carriers identified in answering Plaintiffs' Interrogatory 4 and all related documentation. Such documentation should include, but is not limited to, all correspondence, notes, and other material relating to the notification of each of your insurance carriers of potential claims or problems with the Palmetto Pointe at Peas Island Condominiums and any inquiry or investigation relating thereto, and any reservation of rights and/or denial letters.

9. For each expert witness identified in answering Plaintiffs' Interrogatories, produce the following:

a. the most up-to-date *curriculum vitae* on his or her background, training, and education;

b. all materials and documents of any kind which he or she has received concerning the case in question, including but not limited to all statements, transcripts, reports, photographs, videos, e-mails, and correspondence;

c. any documents including, but not limited to, notes, reports, report drafts, or any other materials written, dictated, or otherwise recorded by him or her or at his or her discretion during or after the examination of any records, documents, and/or communications relating to the Palmetto Pointe at Peas Island Condominiums;

d. any documents including, but not limited to, notes, records, correspondence, and other materials relating in any way to the Palmetto Pointe at Peas Island Condominiums;

e. all books, records, articles, writings, publications, correspondence, notes, documents, or any other written materials upon which he or she may specifically rely on for his/ her testimony or to which he/she referred in reviewing the issues of this case;

f. all written reports prepared by him or her in connection with this case;

g. any notes, outlines, transcriptions, slides, photographs, videos or other written, audio and/or visual materials of lectures, classes, or presentations given by the expert or expert's company, or which the expert attended, related to any issues in this case (whether these materials are stored in hard copy or electronic form);

h. any written correspondence which he or she has sent to or received from any party in this litigation; and

i. a complete list of all cases where he or she has provided expert consultant services and whether or not a deposition or trial testimony was given. Include the names of the parties, the jurisdiction where the case was filed, the case number, and the names of the attorneys representing the parties.

10. Produce any and all reports and documents prepared by any and all witnesses relating to this litigation.

11. Produce any and all product information related to any products used at the Palmetto Pointe at Peas Island Condominiums which is in your possession or available to you.

Such documentation should include, but is not limited to, product brochures, product application, installation instructions, manufacturer recommendations, product specifications, test reports, and technical literature related to products used at the Palmetto Pointe at Peas Island Condominiums.

12. Produce any and all documents relating to any inspection or investigation performed by you, your agents, other Defendants, or any third-party regarding the Palmetto Pointe at Peas Island Condominiums including, but not limited to, photographs, correspondence (whether written or electronic), field notes, reports, findings, and/or recommendations.

13. Produce any and all documents relating to the testing (destructive or nondestructive) of the Palmetto Pointe at Peas Island Condominiums, your work, and/or your product.

14. Produce any and all documents, records, photographs, objects, or other materials of any nature whatsoever which you and/or your agents have obtained in response to subpoenas or otherwise procured from any person, third-party, entity or organization relating to Palmetto Pointe at Peas Island Condominiums.

15. Produce copies of any, pleadings, discovery, depositions or sworn statements given in the past ten years by you and any witnesses for you relating to any negligent, deficient or defective construction claims or lawsuits within South Carolina.

16. Produce any and all documents in your possession or available to you which reflect the responsibilities of the various groups, individuals, entities or corporations involved in the design, development, construction, sale, repair and/or inspection of the Palmetto Pointe at Peas Island Condominiums.

17. Produce all correspondence between you and any person, whether or not a party to this lawsuit, related to the subject matter of this case.

18. Produce any and all documents and photographs in your possession or available to you regarding alleged defective work performed at the Palmetto Pointe at Peas Island

Condominiums and/or defective materials supplied for the Palmetto Pointe at Peas Island Condominiums.

19. Produce copies of any and all documents in your possession or available to you relating to complaints from South Carolina homeowners, homeowners' associations or businesses regarding your work and/or any construction project you performed work upon. Such documentation should include, but is not limited to, complaints made to the South Carolina Department of Labor, Licensing and Regulations, the South Carolina Better Business Bureau and/or any other municipal or governmental agency.

20. Produce copies of any and all documents discussing potential health hazards associated with excessive water damage, fungal growth, and any other indoor air contaminants in your possession or otherwise made available to you.

21. Produce any and all documents in your possession or available to you regarding the presence of construction defects, water intrusion, and/or fungal growth at the Palmetto Pointe at Peas Island Condominiums, and the precautions taken to avoid the hazards associated with the same.

22. Produce any and all documents in your possession or available to you relating to any and all warranty work performed or warranty services/products supplied to the Palmetto Pointe at Peas Island Condominiums including punch lists, warranty forms, service requests, correspondence (whether written or electronic) with any homeowner, rental agent, renter, property manager, and/or other agent or representative of any homeowner, reports, findings, work performed, and any other document relating to warranty work performed.

23. Produce copies of your federal and state tax returns for the past three years.

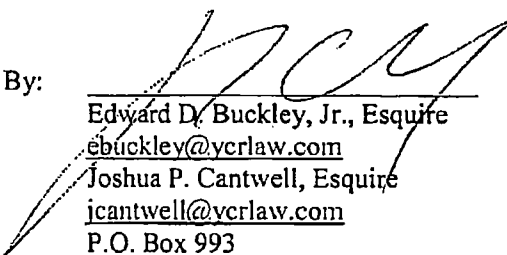
24. Produce all documents and materials (whether electronic or hard copy) in your possession or available to you which pertains to the Palmetto Pointe at Peas Island Condominiums and/or any claim or defense in this case. Such documentation includes, but is not limited to, any sworn or unsworn statements, written or recorded, of any persons who are or may become witnesses or have knowledge to any matters alleged in the Plaintiffs' Complaint

25. Produce any and all documents upon which you intend to use as exhibits or otherwise rely to establish proof of claims, damages, or repudiation of claims at the trial of this case.

26. Produce any and all non-privileged documents you and/or your agents referred to or consulted for the purpose of answering any Interrogatory asked in this case.

YOUNG CLEMENT RIVERS, LLP

By:


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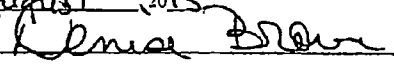
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 8/12/2015

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 13th day of

August, 2015


STATE OF SOUTH CAROLINA

COUNTY OF HORRY

HARLEYSVILLE GROUP INSURANCE,
A PENNSYLVANIA CORPORATION

Plaintiff,

VS.

HERITAGE COMMUNITIES, INC, A
SOUTH CAROLINA CORPORATION;
HERITAGE MAGNOLIA NORTH, INC.
A SOUTH CAROLINA CORPORATION;
BUILDSTAR CORPORATION, A
SOUTH CAROLINA CORPORATION,
MAGNOLIA NORTH HORIZONTAL
PROPERTY REGIME, MAGNOLIA
NORTH PROPERTY OWNERS
ASSOCIATION, INC. A SOUTH
CAROLINA CORPORATION and
NATIONAL SURETY CORP.

Defendants

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-26-11862

HORRY COUNTY
13 MAR -5 AM 8:58
HELAINE HIGGINS-WARD
CLERK OF COURT

ORDER

This is a declaratory judgment action to determine coverage under Commercial General Liability ("CGL") policies issued by the Plaintiff, Harleysville Group Insurance, a Pennsylvania Corporation ("Harleysville"). This case arises out of a construction defect action ("underlying action") which was tried to a jury verdict. Because of the common parties, issues and policies, this case was consolidated with the *Riverwalk at Arrowhead Country Club Property Owners' Assoc., Inc. vs. Heritage Communities, Inc. et al* and the *Tony L. Pope, et al vs. Heritage Communities, Inc., et al* cases for which a separate order will be issued. This case was referred to me as Special Referee by the Honorable Larry B. Hyman, Jr., Presiding Judge, Fifteenth



Circuit by Order dated October 21, 2010. The Order directs that I take testimony and evidence and issue an Order disposing of this action, with finality, with all rights to appeal reserved.

Although the judgment in the underlying case is under appeal and has not finally concluded, there is a justifiable controversy and this case is ripe. Owners v. Rhodes, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009); Owners Ins. Co. v. Clayton, 364 S.C. 555, 557, 614 S.E.2d 611, 612-13 (2005). The Court would note that the "judgment holder" in this action stands in the shoes of the Harleysville insureds. Lee v. Gulf Ins. Co., 248 S.C. 296, 149 S.E.2d 639 (1966) ("an injured party who brings suit against a liability carrier in order to collect on a judgment previously acquired against an insured is possessed of all rights of the insured and subject to all defenses that exist as between the insured and the insurance carrier").

Harleysville is represented by Robert C. Calamari, Esquire, formerly of the firm of McAngus, Goudelock & Courie, LLC, now of Nelson Mullins Riley and Scarborough; the "judgment holder", Magnolia North Property Owners Association, Inc. is represented by John P. Henry, Esquire, and Philip C. Thompson, Esquire, of the firm of Thompson & Henry, P.A. National Surety Corporation is represented by Laura Johnson Evans of the firm of Smith, Moore, Leatherwood, LLP and Karin McCarthy of the firm of Rivkin Redler, Attorneys at Law of New York. Issues relating to this party are being addressed in a separate Order. "Harleysville's insureds", Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation did not answer or otherwise appear in this declaratory judgment action, although properly served. The Plaintiff in the underlying cases have stepped into the shoes of the insureds and while the default of the insureds prohibits them, individually, from relitigating any issues involved in these cases, the same does not affect the rights of the Plaintiff's judgment holders.

THE "UNDERLYING ACTION"

The underlying action is styled Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Magnolia North, Inc. and Buildstar Corporation (C/A No. 2003-CP-26-3203) ("Magnolia North POA action") and was originally filed on May 28, 2003. After trial by jury on May 20, 2009, the jury returned a general verdict against Heritage Communities, Inc., Heritage Magnolia North and Buildstar Corporation on negligence, breach of warranty and breach of fiduciary duty and awarded \$6,500,000.00 in actual damages and \$2,000,000.00 in punitive damages. (Rec. Ex. 27).¹

The Plaintiff in the underlying action alleged and sought damages for faulty construction and consequential damages from water intrusion arising out of the construction and development of the condominiums. (Rec. Ex. 9).

Prior to the jury trial the underlying Plaintiff settled with numerous subcontractors. It is not contested that all of the work on the project was done by subcontractors. Buildstar, the general contractor, oversaw the construction by the subcontractors on the project.

THE PROJECT

The Magnolia North condominium project is located near Myrtle Beach, South Carolina and is composed of 21 three-story buildings containing 12, 13 or 15 units per building. The Magnolia North buildings were constructed beginning in 1997 and completed in late 2000. Heritage Communities, Inc. was the overall developer; Heritage Magnolia North, Inc. was the site specific developer that owned the land and conveyed the condominium units; and Buildstar Corporation was the general contractor.

¹ A set-off of \$1,531,063.15 from the total verdict of \$8,500,000.00 was granted by the trial judge in his post trial motion order making the total verdict \$6,968,936.85 as of November 16, 2009.

THE HARLEYSVILLE POLICIES

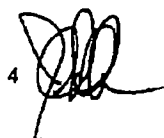
Harleysville issued numerous CGL primary policies and excess policies to the Harleysville insureds and a list of those policies with policy periods, policy amounts and the remaining amounts left on the policies has been marked as Rec. Ex. 17. Although there were numerous policies, all of the policies were standard "ISO" Insurance Service Organization and Commercial General Liability ("CGL") policies with the same pertinent language in each policy. (Rec. Ex. 12).

The primary policies issued by Harleysville to its insureds contain the standard ISO insuring agreement as follows:

1. "Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may at our discretion, investigate any 'occurrence' and settle any claim or "suit" that may result.
But:
 - (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
 - (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES AND B.

4 

b. This insurance applies to 'bodily injury' and 'property damage' only if:

- (1) The 'bodily injury' or 'property damage' is caused by an "occurrence" that takes place in the "coverage territory"; and
- (2) The 'bodily injury' or 'property damage' occurs during the policy period."

All of the policies define "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Both the primary and excess policies provided completed operations coverage.

Harleysville also issued Commercial Umbrella Liability policies with substantially the same insuring agreement as the primary policy:

1. "INSURING AGREEMENT

We will pay on behalf of the insured the 'ultimate net loss' in excess of the 'applicable underlying limit' which the insured becomes legally obligated to pay as damages because of:

- "a. 'Bodily injury' or 'property damage' covered by this policy and caused by an 'occurrence' which occurs during the policy period: or
- b. 'personal injury' or 'advertising injury' covered by this policy and caused by an 'offense' committed during the policy period.

This insurance applies anywhere in the world."

All of the excess policies also define "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The Exclusions in each of the Harleysville policies are the same.

FINDINGS OF FACTS²

Based on the record before the Court, the Court makes the following findings of facts applicable to the underlying action:

² References to the Record are not intended to be all inclusive.

5 

1. Magnolia North Property Owners Association, Inc. is a South Carolina Corporation which governs the Magnolia North condominiums in accordance with the South Carolina Horizontal Property Act.
2. The Harleysville insureds who were defendants in the Magnolia North POA action were Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation. Heritage Communities, Inc. was the overall developer. Heritage Magnolia North, Inc. was the site specific developer and owned the land upon which the Magnolia North condominiums were constructed and conveyed the condominium units to the individual owners. Buildstar Corporation was the general contractor which oversaw the subcontractors. (Rec. Hardister, pp. 13644-45). The trial court amalgamated the Harleysville insureds.
3. The Plaintiffs in the underlying action sought compensation for faulty workmanship and for negligent construction resulting from damage to other property (building components) from continuous and repeated water intrusion. (Rec. Ex. 9).
4. Buildstar Corporation did not provide any construction. The construction was all performed by subcontractors. (Rec. Hardister, pp. 13585-86).
5. The buildings at Magnolia North were composed of 21 multi-story buildings containing 12, 13, or 15 units per building.
6. Complete copies of all the policies issued by Harleysville to the Harleysville insureds are included in Rec. Ex. 12. A listing of the policies with the

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policy periods, face amount of the policies and amounts of available coverage remaining on each of the policies is set forth on Rec. Ex. 17.

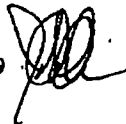
7. The Harleysville CGL policies were basically the same policies for both primary and excess coverage and prototype forms are included in Lee Wright's deposition. (Rec. Ex.19)
8. The Harleysville policies listed on Rec. Ex. 17 provide sufficient coverage to indemnify the Harleysville insureds for the judgments rendered in the underlying action should the Court find coverage and, thus, the National Surety Corp. policies would not be triggered.
9. There are no endorsements in any of the Harleysville policies that would adversely affect coverage issues in this action. (Rec. Ex. 11, p. 12243).
10. In the Magnolia North project the first building permit was issued April 16, 1997 and the last Certificate of Occupancy was issued in late 2000. (Rec. Ex. 10, Buric Report).
11. For each building at Magnolia North, the construction began shortly after the building permit was issued and the buildings were completed at or about the time the Certificates of Occupancy were issued.
12. Harleysville insureds expected their subcontractors to be reliable and skilled in their trade and did not expect their subcontractors to perform negligently. (Rec. Hardister, pp. 13639-13640).
13. Harleysville Insureds relied on the skill of their subcontractors and expected and intended them to perform their work in a competent manner. (Rec. Hardister, p. 13638).

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14. Heritage intended their buildings to be quality condominiums. (Rec. Hardister, 13640-41).
15. There were numerous deficiencies in the subcontractor's work including but not limited to: 1) inappropriate installation of flashing or omission of flashing; 2) inappropriate application of sealants or omission of sealants; 3) installation of defective windows some of which leaked; 4) installation of a trim product that turned out to be defective allowing water intrusion; 5) inappropriate attachment of handrails in that the screws attaching the handrails accidentally penetrated the waterproofing on the decks at some locations allowing water intrusion and damage. All of these deficiencies allowed for continuous moisture intrusion resulting in substantial water damage to the condominiums exterior framing and sheathing which was previously undamaged. (Rec. Ex. 10).
16. The continuous moisture intrusion from the faulty workmanship also damaged the interior of the units including sheetrock, drapes and carpeting. (Rec. Hearing 12/9/11, pp. 13966-67).
17. The county inspected the buildings' components including the sheathing and issued a Certificate of Occupancy which required all the building components to meet code.
18. There is no evidence that sheathing, framing, insulation and interior finishes were defective when they were damaged by water seeping into the buildings and units.
19. The repair of the damage from water intrusion will require the removal and replacement of defective and non-defective building components.

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20. Progressive damages from water intrusion began to occur at each building thirty (30) days from the time the Certificate of Occupancy was issued and continued thereafter.
21. Some of the deficiencies were latent defects. (Rec. Buric Report, Ex. 10).
22. Not all buildings had the same defects or quantities of defects.
23. There is no evidence in the record to indicate the Harleysville insureds realized that the Louisiana Pacific trim was a defective product. (Rec. Hardister, p. 13641). The defective and improperly installed trim allowed water intrusion which caused damage to other building components. (Rec. Buric Report, pp. 13640-41).
24. The Harleysville insureds neither expected nor intended that the work of the subcontractors be performed negligently nor did they expect or intend water intrusion or damage would result from the negligent construction.
25. The Harleysville insureds did not expect or intend that a defective product be installed on the buildings such as the Louisiana Pacific trim and did not expect or intend there to be water intrusion and damage from the defective product. (Rec. Hardister, pp. 13640-41).
26. The Harleysville insureds did not expect or intend the subcontractors to install defective windows in the buildings. Harleysville insureds intended its subcontractors to install non-defective windows and changed window manufacturers in an attempt to accomplish this. (Rec. Buric Report, Ex. 10; Rec. Ex. 24; Rec. Hearing 12/13/10, Lee Wright, p. 12841-42).

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27. The Harleysville insureds did not expect or intend that the walkway railings would be installed by its subcontractors so as to cause a breach of the waterproofing membrane exposing the framing, sheathing and units to continuous and repeated exposure to water intrusion and rot. (Rec. Ex. 6, pp. 6036-37).
28. The Harleysville insureds did not expect or intend the continuous and repeated water intrusion and deterioration of the buildings due to the negligent construction or the application of defective windows and Louisiana Pacific Trim installed by the subcontractors.
29. Some of the construction defects were latent defects and the record does not provide any evidence that the Harleysville insureds were even aware of some of the defects or that some of the defects were exposing the buildings to continuous and repeated water intrusion causing rot and deterioration of the buildings. (Rec. Buric Report, Ex. 10).
30. The Harleysville insureds did not expect or intend the negligent installation of or omission of building components by its subcontractors or expect or intend the buildings would be exposed to repeated and continuous moisture intrusion causing property damage.
31. Viewing the evidence from the standpoint of the insureds, the continuous moisture intrusion into the condominium buildings and resulting damage was an unexpected happening or event not intended by the Harleysville insureds, in other words an "accident" involving continuous or repeated exposure to the same general harmful conditions.

32. Harleysville issued reservation of rights letters to some of its insureds. (Rec. Ex. 15).
33. Harleysville evidently inadvertently omitted issuing a reservation of rights letter to Buildstar Corporation in the underlying action and, thus, such letter was not a part of Ex. 15. (Rec. Hearing 12/13/10, p. 13828).
34. Harleysville employed defense counsel for the Harleysville insureds and controlled the defense of the insureds in the underlying action. (Rec. Hearing 12/13/10, pp. 13833-34).
35. Harleysville's Reservation of Rights letters were general in nature and set out the provisions of the policies Harleysville thought may affect coverage. Coverage was questioned but not denied. (Rec. Ex. 15).
36. The Reservation of Rights letters did not advise Harleysville's insureds of the conflict of interest or the need for an allocated verdict. (Rec. Ex. 15).
37. Harleysville orally advised the insureds that there was no coverage because the claims did not meet the definition of "occurrence" as opposed to coverage being excluded by one of the policy exclusions. (Rec. Hearing 12/13/10, p. 13829-30).
38. After the reservation of rights letters were sent, Harleysville never modified them but continued advising their insureds there appeared to be no coverage because there was no "occurrence" (Rec. Hearing 12/13/10, pp. 13828-29).
39. 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. (Rec. Hearing 12/13/10, p. 13829).

40. Harleysville did not detail to its insureds which exclusion if any would preclude coverage because Harleysville did not believe there was an "occurrence" so there was no need to discuss exclusions. (Rec. Hearing 12/13/10, pp. 13830-31).
41. Harleysville advised the insureds personal counsel that there was not likely going to be coverage for a "grand majority" of these damages. (Rec. Hearing 12/13/10, p. 13758).
42. Harleysville advised its insureds that the decision on coverage would be made after the verdict. (Rec. Hearing 12/13/10, p. 13832).
43. Harleysville's representatives including Harleysville's personal counsel attended the trial of the underlying action and discussed the progress of the case with defense counsel. (Rec. Hearing 12/13/10, p. 13836).
44. Harleysville was aware of the coverage issues but based on its understanding of the law and the fact, chose not to discuss the need for an allocated verdict with its insureds and the consequences that an unallocated verdict may cause. (Rec. Hearing 12/13/10, p. 13835).
45. Harleysville made a conscious decision not to intervene in the underlying action and took no action to seek an allocated verdict by informing the trial Court of the need for an allocated verdict or by submitting special interrogatories for the Court's consideration for submission to the jury. (Rec. Hearing 12/13/10, pp. 13835, 13856).

LEGAL ISSUES TO BE RESOLVED

In this declaratory judgment action the court has before it for resolution the following issues:

1. The threshold question to be resolved is: was there an "occurrence(s)" with resulting "property damage" that occurred during the policy period and triggered coverage under the Harleysville policies?
2. If there was an "occurrence(s)" causing "property damage" that triggered coverage, do any of the exclusions advanced by Harleysville preclude indemnification of the Harleysville insureds?
3. In the underlying action the jury reached general verdicts after submission to them of more than one cause of action and numerous claims. If the Court determines that covered claims and non-covered claims were submitted to the jury, can the Court look behind the general verdicts and allocate the damages between covered and non-covered claims?
4. Is the award of punitive damages in the underlying action covered and not excluded by the Harleysville policies?
5. Did Harleysville reserve its rights to contest coverage?
6. Is it possible for the Court to perform a "time on the risk" analysis or do the general verdicts preclude such an analysis?

DISCUSSIONS AND FINDINGS OF LAW

OCCURRENCE

Harleysville argues that the judgment in the underlying action is not covered by the CGL policy. Specifically, Harleysville argues that the subcontractor's negligent application of

building components did not cause an "accident" constituting an "occurrence" subject to coverage under their policies. As in Newman, infra, and Crossmann, infra, the Harleysville policies are standard CGL Insurance Services Office (ISO) policies used since 1996. (Rec. Ex. 6). These policies provide that Harleysville will "pay those sums which the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies". The policy also requires that the "bodily injury" or "property damage" be caused by an "occurrence". It defines "occurrence" as an "accident" "including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" is defined as "physical injury to tangible property including all resulting loss of use of that property." The policy does not define "accident".

The pleadings below alleged both negligent construction and use of defective products and alleged damage to parts of the buildings caused by water seeping into the buildings as the result of the negligent construction. (Rec. Ex. 4). The complaint was not simply a claim for faulty workmanship seeking damages for the repair and replacement of defective construction itself, but rather was also a claim for "property damage" resulting from the negligent construction. The Court finds that the underlying Complaint properly alleged negligent construction that resulted in an "occurrence" rather than an occurrence of alleged negligent construction. Here, the record reveals there was "property damage" beyond that of the work product itself caused by a subcontractor and therefore I find that the homeowners' claims are not merely for faulty workmanship typically excluded under a CGL policy.³

The two recent cases of Auto Owners v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), "Newman", and Crossmann Communities of North Carolina, Inc., v. Beazer Homes Investment

³ According to the testimony of the experts hired by the POA and Harleysville insureds, the subcontractors' application of flashing, sealants, windows and decks did not meet code or industry standards and resulted in water seeping into the buildings causing rot and deterioration of building components.

Corp., et al., 395 S.C. 40, 717 S.E.2d 589 (2011), "Crossmann", resolved the long standing and much litigated issue of what constitutes an "occurrence" that would trigger coverage in the context of construction defect litigation under the 1996 ISO CGL policy. The Court in Crossmann held that the expanded definition of "occurrence" to include "continuous or repeated exposure to substantially the same general harmful conditions" leaves the Court with an ambiguity which must be construed against the insurer and in favor of the insured. As in Crossmann, this Court finds that there were allegations of negligent construction causing continuous and repeated exposure to moisture intrusion resulting in "property damage" as defined by the Harleysville policy. Although the subcontractors' negligence in installing the various components of the building does not on its own constitute an "occurrence", the Court finds that the continuous moisture intrusion resulting from the subcontractors' negligence is an "occurrence" and is "property damage" as those terms are defined by the Harleysville policies.⁴ As the Court will discuss below, I find that the continuous moisture intrusion into the condominium buildings was an "unexpected happening or event" not intended by the Harleysville insureds, in other words "an accident" - involving "continuous or repeated exposure to substantially the same general harmful conditions." Accordingly, I find that the subcontractors' negligence resulted in an "occurrence" falling within the Harleysville policies' initial grant of coverage for the resulting "property damage" to the non-defective sheathing, insulation, framing, interior finishes and other non-defective building components of the condominiums, unless excluded as discussed below. Newman, Crossmann.

The Court in Crossmann analyzed the coverage issue not only from the "occurrence" standpoint as it did in Newman, but also from the standpoint of "property damage" as that term is

⁴ High Country Associates v. Hampshire Ins. Co., 139 N. H. 39, 648 A.2d (474 (1994)) ("Occurrence" has a broader meaning than "accident" because occurrence includes an injurious exposure to continuing conditions as well as a discreet event." Citation Omitted). Id. at p. 44

defined in the policy. The Court said that the term "property damage" required "physical injury" which suggests that the property was not defective at the outset. Therefore, the Crossmann Court held that a claim for the costs of repairing or removing defective work, which is not a claim for "property damage" is not covered by the CGL policy while a claim for the costs of repairing damage caused by the defective work is a claim for "property damage" which may be covered by the CGL policy, unless excluded.⁵

Harleysville contends that because of the numerous and repeated defects in this project, there was no "accident" and coverage is precluded. Harleysville does not define "accident" in its policy. Our Court has, however, defined "accident" as "[a]n unexpected happening or event which occurs by chance, and usually suddenly with harmful results, not intended or designed by the person suffering the harm or hurt." Newman, *Id.* at p. 192. [*Emphasis supplied*]. Our Courts have made it clear that an accident does not require a sudden happening. Boggs v. Aetna Cas. & Surety Co., 272 S.C. 460, 252 S.E.2d 565 (1979) ("The phrase "injurious exposure to conditions" incorporated in the policy definition of "occurrence" indicates that an occurrence need not be sudden but may be produced over a period of time").

From the evidence presented, the Court finds that the continuous moisture intrusion into the Magnolia North buildings was an unexpected happening or event causing "property damage", in other words an "accident"- involving "continuous or repeated exposure to substantially the same harmful conditions" which triggered coverage under the Harleysville policies.

Based on the record, I find that the non-defective building components damaged by the continuous and repeated water intrusion constitutes "property damage" which was caused by an

⁵ The Court in Crossmann did not discuss exclusions since the parties stipulated that policy exclusions would not be raised.

"occurrence" and falls within the initial grant of coverage under the Harleysville policies. I further find that the negligently installed building components themselves would fall outside the grant of coverage by the Harleysville policies. Also, I find that the costs to remove defective building components to access the water damage would not be covered under the Harleysville policies. However, as discussed below, since there were covered claims and non-covered claims submitted to the jury and a general verdict was rendered, Harleysville must indemnify its insureds for the full amount of the final judgment, (reduced by "time -on-the-risk" analysis as discussed, *infra*.) unless the court finds that the covered claims are excluded.

EXCLUSIONS

Insurance policy exclusions are construed most strongly against the insurance company, which also has the burden of establishing the exclusion's applicability. Owners Insurance Co., v. Clayton, 364 SC 555, 614 S.E.2d 611 (2005). Since the jury in the underlying action returned a general verdict, a finding that a claim submitted to the jury is covered and not excluded answers the coverage question, *ie.*, the entire verdict is covered. Owners, supra. (Discussed *infra*).

Harleysville through its answers to interrogatories (Rec. Ex. 14), its pre-trial brief, and through the testimony of Lee Wright, Harleysville's construction litigation specialist, advances a number of policy exclusions it contends apply to exclude coverage. The following are exclusions advanced by Harleysville which will be discussed below: ⁶

Exclusion "a" Expected or Intended Injury;

Exclusion "J-1" Property Damage to Property You Own Rent or Occupy;

Exclusion "J-5" Performing Operations;

Exclusion "J-6" Your Work Incorrectly Performed;

Exclusion "k" Damage to Your Product;

⁶ The numbering or lettering of the exclusions may vary among the various policies.

Exclusion "m" Impaired Property.

A. Exclusion "a"- Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured.⁷ This exclusion does not apply to the "bodily injury" resulting from the use of reasonable force to protect persons or property.

As noted above, the Harleysville insureds did not perform any of the construction. Their function was to oversee the subcontractors that were performing the construction. In Newman, the homeowner sued the contractor ("Trinity") alleging that the application of stucco to their home violated the building code and industry standards and these anomalies caused water to seep into the home and damage the home's exterior sheathing and framing. The stucco work was done by a subcontractor and the alleged defects were similar or identical to the defective work alleged in the underlying case here. Auto Owners claimed that the "expected or intended" exclusion precluded coverage because "a construction professional would expect substantial moisture intrusion from defective stucco to result in these type damages." *Id.* at p. 197. In rejecting this contention, the court stated:

"In our opinion, and in the absence of any evidence otherwise, it is unreasonable to believe that Trinity expected or intended its subcontractor to perform negligently. Therefore Trinity could not have expected or intended the resulting property damage. CF. Lamar Homes v. Mid-Continent Cas. Co., 242 SW 3d 1, 8 (Tx. 2007)('But a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly') *Id.* at p. 197.

⁷ Note that the exclusion expressly provides that it is the injury or damage which must not be intended.

The Court then must examine the record to determine if the Harleysville insureds "expected or intended" its subcontractors to act negligently and expected or intended the resulting property damage.

South Carolina applies a two pronged subjective test in determining the applicability of this exclusion. First, the act causing the damage must be expected or intended by the insured and second, the resulting damage must be expected or intended from the standpoint of the insured. Vermont Mutual Insurance Co. v. Singleton By and Through Singleton, 316 S.C. 5, 446 S.E.2d 417 (1994); Manufacturers and Merchants Mutual Inc. Co. v. Harvey, 330 S.C., 152 498 S.E.2d 222 (S.C. 1998). In South Carolina Farm Bureau Mut. Ins. Co. v. Dawsey, 371 S.C. 353 638 S.E.2d 103 (S.C. App. 2006)(Certiorari Denied), the Court pointed out that the terms "intend" and "expect" are often defined synonymously.

The question then before the Court is did Harleysville's insureds not only expect or intend their subcontractor to perform negligently which caused the damage complained of, but did they also expect or intend the resulting damages to the condominiums? Harleysville's construction litigation manager, Lee Wright explained the proof he believed necessary for exclusion "a" to be applicable:

"On the, on, on the exclusion, you have to prove that -- well, intent is, is, difficult to prove in any, in any sense. It's a more subjective argument, that you'd have to climb inside somebody's head and prove that, you know, that there is a reason to believe that they either expected or intended or intended this."⁸
(Rec. p. 1372, 11 6-19).

Mr. Wright also testified that he had no evidence that the insureds "consciously intended to create a situation that water damage would occur, I don't have that." (Rec. p. 13839). The record is replete with numerous deficiencies that were repeated but this is tempered by the fact

⁸ This is clearly in accord with South Carolina law.

that there were 21 buildings containing 12, 13 or 15 units per building. However, for exclusion "a" to apply there must be evidence viewed from the standpoint of the insured that the insured subjectively intended its subcontractors to perform negligently and subjectively intended the resulting damages. The evidence in this record does not support such a finding. In neither the underlying action nor this action was Roger Van Wie called as a witness. Mr. Van Wie, a principal in all the insureds, was intimately involved in the construction. However, officers of the Harleysville insureds were called to testify in the underlying action.

Gwyn Hardister, Chief Operating Officer of Heritage Communities, Inc., the overall developer, testified. He testified that Heritage hired subcontractors thought to be skilled in their trade. (Rec. Video, Tr. pp.13640-41). He also testified that they were not knowingly using products that were defective. (Rec. Video, pp. 13640-41). Mr. Hardister testified that Heritage had no intent to harm the homeowners; that Heritage rectified the construction deficiencies. (Rec. video p. 13643); and that Heritage attempted to lean to the side of the homeowners. (Rec. Video, p. 13643).

Harleysville emphasizes the leaking window issues as negating the existence of an accident. During construction the Harleysville insureds claimed the Betterbilt windows were defective and leaked. Betterbilt claimed the method of installation caused the leaks. James Graham, a Betterbilt representative, testified by deposition (Rec. Ex. 24) that he warned Heritage the windows were being installed in a defective manner. The subcontractor continued installing the windows the same way because the Harleysville insureds were convinced that the windows were defective and the source of the leaks and changed to another manufacturer. This was clearly a dispute between the builder and the manufacturer as to the source of the problem. Post construction tests revealed that leaks occurred both from defective windows and the

method of installation. City of Johnstown N.Y. v. Bankers Standard Ins. Co., 877 Fd.2d. 1146, 1150, 1151 (2nd Cir. N.Y. 1989)(It is not enough that an insured was warned that damages might ensue from its actions or insured decided to take a calculated risk. It is only when the insured knew that damages would flow from his acts that coverage is precluded because the damages are not accidental). It is clear from the record that Heritage was attempting to find the source of the leaks and stop them.

The record reveals defects and installation of a defective product with no proof showing that the Heritage insureds were even aware of, such as the defective Louisiana Pacific trim which caused extensive damages to the buildings.⁹ The fact that there were numerous defects is not determinative. It is the intent, not the foreseeability that determines the application of exclusion "a". Continental Western Ins. Co. v. Toal, 309 Minn. 169, 244 N.W.2d 121 (Minn. 1976)(defining expected injury as a foreseeable injury would have the effect of unduly limiting coverage because foreseeability is an essential element of negligence and therefore would exclude injuries even from simple negligence). This "foreseeability" test was rejected in Newman and the Court will not apply it here.

Harleysville contends that the award of punitive damages is strong evidence that their insureds intended to cause damages. This same position was advanced by the insurance company in Pennsylvania Thresherman & Farmer's Mutual Casualty Ins. Co. v. Thornton, 244 F.2d 823 (C.A. 4 1957).¹⁰ Applying South Carolina law, the court rejected the carrier's position holding that:

"Negligent conduct may be so gross so as to merit characterization as willful and wanton in the sense of the rule for punitive damages, yet fall far short of an assault and battery which would distinguish it from an

⁹ Acceptance Ins. Co. v. American Safety Risk Retention Group, Inc., 2011 WL 3475305 (S.D. Cal. 2011)(In determining what knowledge of insured was, construction defects must be analyzed separately).

¹⁰ This case is cited in Carroway v. Johnson, *supra*.

accidental event and withdraw it from the coverage of the policy...to allow the appellant's argument would lead to the illogical and indefensible result that...the more extreme the recklessness the more likely the insurer would be to escape liability." *Id.* at p. 827.

The Court went on to hold that no matter how reckless the respondent's conduct, there was nothing in the record to establish the insured intended to injure the plaintiff. Likewise in the case at bar there is nothing in the record that indicates the insureds intended to injure the plaintiffs or intended its subcontractors to perform negligently.

In addition, two causes of action were submitted to the jury, negligence and breach of fiduciary duty, both of which would support punitive damages. Unfortunately, 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. The Court would also note that a finding of intent to harm is not required for an award of punitive damages. Anderson v. Atlantic Coast Line R. Co., 179 S.C. 367, 184 S.E. 164 (1936)(to authorize recovery of punitive damages, an intentional act with a purpose to do wrong to a person is not necessary; reckless disregard of the rights of others is sufficient to authorize such damages. It is not necessary for punitive damages that the Defendant had a specific intent to injure Plaintiff); Hicks v. McCandlish, 221 S.C. 410, 70 S.E.2d 629 (1952)(punitive damages allowed when wrongdoer does not actually realize that he is invading the rights of another). The Court finds this argument unpersuasive.¹¹

This Court finds as a matter of law that there is insufficient evidence to conclude that the Harleysville insureds expected or intended their subcontractors to perform negligently and

¹¹ American Family Mutual Inc. Co. v. Pacchetti, 808 SW2d. 369 (Mo. 1991)(Finding that insured acted recklessly does not compel a finding that injury was intentional. If coverage were to turn on jury's finding whether insured acted negligently or recklessly, insurance would be of scant value); Koch Engineering Co. Inc. Gilbralter Cas. Co. Inc., 78 F. 3rd 1291 (C.A. 8 Mo. 1996)(Finding recklessness is not the equivalent of a finding that insured intended the conduct. This case involved a failure to properly design a filtration system).

expected or intended the property damage that resulted from the negligent construction. The Court finds as a matter of law Harleysville did not meet its burden of proof that exclusion "a" precludes coverage.

B. Exclusion "J-1" – Property You Own Rent or Occupy

This exclusion is intended to carve out coverage that would normally be afforded under a property policy. Bruner & O'Connor Construction Law 11:96 (2010); C.O. Falter, Inc. v. Crum and Forster Ins. Companies, 79 Misc. 2d 981, 361 N.Y.S. 2d 968 (N.Y. Sup. 1974)(this exclusion did not preclude coverage where insured contractor relinquished key to building upon completion of work); Mid-Continent Cas. Co. v. JPH Development, Inc., 557 F.3d. 207 (5th Cir. Tex. 2009). (Exclusion "J" does not apply to damage that occurs after construction is completed).

In a 1979 publication by the Insurance Services Office (ISO), the drafter of exclusion "j", the ISO explained its intent for this exclusion as follows:

"It is intended that property manufactured or purchased by the insureds and constructed or installed at premises not owned by the insured shall be considered property owned by the insured until the construction or installation is accepted by the owner. (Insurance Services Office, Inc., Circular No. General Liability GL 79-12, (Broad form property damage coverage explained). January 29, 1979).
[Emphasis Supplied].

Although it is apparent that some damage from water intrusion (although unspecified) may have begun while construction was being performed, it is also clear damages were occurring after the units were completed and sold. There is no quantification of these damages in the record, nor can there be since there was a general verdict and Harleysville did not seek an allocation of damages. The Court finds as a matter of law that the evidence does not support

the application of this exclusion "J(1)" and even if it did, the exclusion would be a partial exclusion and thus would not aid Harleysville because of the general verdict. Owners, supra.

C. Exclusion "J(5)"

That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations if the "property damage" arises out of those operations;

This exclusion, known as the "Performing Operations Exclusion" only applies to the work that is being actively worked on at the instant the property damage occurs. Assurance Co. of America v. Admiral Ins. Co., 2011 WL 1897589, (S.D. Ala. 2011)(Exclusion "J(5)" applies only to the property damage that occurs while the contractor and/or subcontractor is performing work); Thomas v. Nautilus Ins. Co., 2011 WL 4369519 (D. Mon. 2011)(This "J(5)" exclusion only applies to bar coverage to property on which the insured or any subcontractors "are performing operations").

Again, there is no quantification of damages occurring during the time Buildstar's subcontractors were performing work ("Operations") at the projects. Even if there were such proof it would exclude only a portion, if any, of the damages which would not aid Harleysville because of the general verdict. I find as a matter of law, that Harleysville has not discharged its burden of proof that exclusion "J(5)" applies to exclude coverage of the judgment in the underlying action.

D. Exclusion "J(6)"

That particular part of any property that must be restored, repaired or replaced because of "your work" was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to the "property damage" included in the products completed operations hazard.

This exclusion is one of the "business risk" exclusions and may apply to exclude Plaintiff's claims except for the last paragraph providing that "J(6)" does not apply to property included in the products completed operations hazard.¹²

The Harleysville policies provide completed operations hazard coverage. Since the Harleysville Insureds had completed operations hazard coverage, exclusion "(J)(6)" cannot apply to damage occurring after the insureds work is completed. Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002); Exclusion "J6" applies to damages that occur during construction due to faulty workmanship. Mid-Continent Cas. Co. v. JPH Development, Inc., *supra*.

Harleysville has failed to discharge its burden of proof as to this exclusion's applicability and I find as a matter of law Exclusion "J(6)" does not apply.

E. Exclusion "k" - Damage to Your Product

"Property damage to "your product" arising out of it or any part of it".

This exclusion cannot apply because the policy defines "your product" as "a. any goods or products other than real property manufactured, sold and/or distributed or disposed of by you..." Since "your product" does not include real property, the exclusion cannot apply to the condominiums at Magnolia North. In addition, "goods or products" do not include services, such as the work of contractors and developers. Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 654 (9th Cir. Or. 1988); Scottsdale Ins. Co., v. Tri-State Ins. Co. of MN., 302 F. Supp 2d. 1100 (D.N.D 2004)("Real Property" was deleted from the definition of

¹² The policies define "Products-Completed Operations Hazard" "a. Includes all...property damage occurring away from the premises you own or rent and arising out of...'your work' except;...(2) work that has not been completed or abandoned.

"Product" in the 1996 CGL policy "clarifying that work on homes, buildings, or other structures is not considered to be the insureds "product") [citation omitted]. The Court concludes as a matter of law that exclusion "k" does not apply.

F. Exclusion "m" - Damage to Impaired Property or Property not Physically Injured

"Property Damage" to "impaired property" or property that has not been physically injured arising out of:

- (1) a defect, deficiency, inadequacy or dangerous condition in "your product" or "your work; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of a sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

"Impaired property" means tangible property, other than "your product" or your work", that cannot be used or is less useful because:

- a. It incorporates "your product" or your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;
if such property can be restored to use by:
 - a. The repair, replacement, adjustment or removal of "your product" or your work; or
 - b. Your fulfilling the terms of the contract or agreement.

[Emphasis Supplied.]

This exclusion is commonly called the "impaired property" exclusion. Our courts have not addressed the impaired property exclusion under the facts and circumstances present in this action. The exclusion contains numerous terms that are defined in the CGL policies and the policy definitions must be applied when determining the applicability of exclusion "m". The

exclusion is complex and difficult to understand. It has been found to be ambiguous. Serigne v. Wildey, 612 So.2d 155 (La. App. 5th Cir. 1992).

If the loss involves damage by work performed by the insured or its subcontractors (and thus falls outside of the definition of "impaired property") or involves physical injury to tangible property, the exclusion will often be found not to apply..." Bruner & O'Connor Construction Law, Sec. 11:106, p. 4. The definition of "impaired property" requires that the tangible property whose use has been lost cannot be "your product" or "your work". Thus damage to "your product" or "your work" cannot qualify. Insurance Coverage of Construction Disputes, 2nd Edition, Sec. 26:7.

In these cases, the condominiums are not "impaired property" because they are the work of the Harleysville insureds and are therefore "your work" which falls outside of the policy definition of "impaired property". Therefore, exclusion "m" cannot apply. C.J.S.U.B., Inc. v. U.S. Fire Ins. Co., 906 So.2d 303, 311 (Fla. App. 2 Dist. 2005)("impaired property" exclusion does not apply because defective homes are undeniably the builder's work as "your work" is defined in the C.G.L. policy.") (Decision approved 979 So.2d 871 (Fla. 2007); Auto Owners Ins. Co. v. NewMech Companies, Inc., 678 N.W.2d 477 (Minn. App. 2004)(work was performed on behalf of the developer and is thus "your work" which does not come within the definition of "impaired property"). Durbrow v. Mike Check Builders, Inc., 442 F. Supp. 2d. 676, 684 (E.D. Wis. 2006)(the only damage at issue is damage caused by the insured's builder's work, which does not come within the definition of "impaired property" since it is the builder's work). Accordingly, "m(1)" of the impaired property exclusion does not apply.

The second part of exclusion "m" includes failure to perform a contract in accordance with its terms. This exclusion by its terms excludes contract claims. In this case, the allegations

and proof were in tort in that the insureds violated applicable building codes and industry standards. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989)(violation of a building code violates a legal duty for which a builder can be held liable in tort).

The Court finds as a matter of law that exclusion "m" does not exclude coverage for the final underlying judgment.

As a result of the Court's findings that there was an "occurrence(s)" causing "property damage", and none of the exclusions advanced by Harleysville excluded all coverage, the Court finds as a matter of law that there were covered claims submitted to the jury and since there was a general verdict, that answers the coverage question, *ie*, Harleysville must indemnify the Harleysville Insureds for the entire final judgments rendered in the underlying action. Owners, supra.

GENERAL VERDICT

The Court has determined as discussed above that both covered claims and non-covered claims and various causes of action were submitted to the jury in the underlying action which reached a general verdict. Harleysville offered evidence in an attempt to allocate the general verdict between covered and non-covered claims. The judgment holders objected on two grounds:

1. Since there was a general verdict any attempt at allocation would be speculative and;
2. The testimony would be irrelevant under Rules 401 & 402, *SCRE*.

Although I sustained the objection, I allowed Harleysville to proffer the testimony. Harleysville offered F.E. Baiden, a general contractor, to proffer evidence of an estimate that he performed

to completely repair the Magnolia North buildings. He then segregated that portion of his estimate which constituted cost to repair damage from water intrusion which under Newman and Crossmann would constitute "covered damages". He then took the percentage of the covered damages contained in his estimate and multiplied it times the jury's verdict to arrive at an amount representing damages from water intrusion. Mr. Baiden admitted that his estimate does not correlate or correspond with the underlying jury award (Rec. Tr. p. 13909). His estimate was based on labor rates and material costs current in 2010. (Rec. Tr. p. 13901). Plaintiff's estimate submitted at trial was based upon an investigation and scope of work prepared much earlier. Mr. Baiden's testimony would be irrelevant and speculative under Rule 401 & 402 SCRE, and therefore inadmissible even if the Court allowed Harleysville to attempt an allocation of the general verdict. This attempt at a re-litigation of damages was addressed in Newman.

Newman was a declaratory judgment action to determine if an arbitration award was covered under a CGL policy. Both covered claims and non-covered claims had been submitted to the arbitrator. The arbitrator issued a general award and did not allocate damages between covered and non-covered claims. The Court held that because the arbitrator did not allocate damages, Auto Owners would be liable for the entire award. Strikingly, the Court had this to say:

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 [allocation of damages between covered and non-covered damages] when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. FN5 (citation omitted).
Id. at p. 198.

FN5. Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.
Id. at p. 198.

The Court refused to allow Auto Owners to re-litigate damages as have other courts.¹³ 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. Lorick S. Lowrance, Inc. v. Julius H. Walsh, Co., 153 S.C. 309, 319, 150 S.E. 789 792(1929)("The law rather forbids this Court assuming to take upon itself the powers, duties, rights and privileges of a jury"). Anderson v. Aetna Cas. Sur. Co., 175 S.C. 254, 282, 178 S.E.819, 829 (1934)("Obviously, the absolute power to change or modify the findings of the jury upon an issue of fact properly submitted to them would when exercised, amount to the substitution of the trial judge's findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury". Id. at p. 283). As the Court said in S.C. State Hwy. Dept. v. Miller, 237 S.C. 386, 117 S.E.2d 561 (1960). "A verdict is the product of the minds of twelve men, and to a certain extent...frequently represents a result which no individual member of the panel would have reached in the first instance if free to follow his own judgment." Id. at p. 395.

In the underlying action, Harleysville undertook the defense of its insureds and hired attorneys to defend its insureds as it was required to do under the terms of its policies. Harleysville represented some of the insureds under a reservation of rights with an

¹³ Herrera v. American Standard Ins. Co., 203 Neb. 477, 279 N.W.2d 140 (1979)(Where numerous types of damages were submitted and defendant did not request an allocated verdict, the defendant at this late date will not be allowed to relitigate damages).

understanding that coverage issues would be reserved for judicial consideration in a separate proceeding. (Rec. Tr. pp. 13832, 13835-36). Harleysville's representatives and its legal counsel attended the trial (Rec. Tr. p. 13836) and were in contact both pre-trial and at trial with the trial counsel Harleysville employed to represent its insureds. (Rec. Tr. pp. 13833-34). Harleysville made the decision not file a motion to intervene or otherwise seek an allocated verdict as it could have done under Rules 24 and 49, *SCRCP*. (Rec. Tr. p. 13835). Harleysville never explained to its insureds the need for an allocated verdict and the potentially devastating consequences of an unallocated verdict. (Rec. Tr. 13835-36). Nor did Harleysville explain to its insureds the divergence of interest (conflict) between it and its insureds. (Rec. Tr. 13839). Harleysville's representative conceded at trial that it is now impossible to determine how the jury allocated damages. (Rec. Ex. 11, p. 12245, Wright Depo); The Court will not engage in speculation.¹⁴

Harleysville contends, in part, that it made the decision not to intervene because at the time of the trial the law on CGL coverage was in a state of flux and an intervention would have

¹⁴ Jenkins v. Few, 391 S.C. 209, 705 S.E.2d 457 (S.C. App. 2010)(Defendant contributed to drafting general verdict form and general verdict makes it impossible to determine how the jury allocated damages. The Court will not speculate on how the jury allocated damages.);

Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (S.C. App. 2004)(“since the jury returned a general verdict and appellant did not request the trial court to submit a special verdict form to determine the type of damages rendered by the jury, the Court cannot speculate as to what portion of the award the jury attributed to lost profits as opposed to other tort damages”);

Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (S.C. App. 2005)(the jury's verdict was declared a general verdict by the trial Court and because the verdict was a general verdict we cannot now speculate as to how the jury allocated damages”);

Pearson v. Bridges, 344 S.C. 366, 544 S.E.2d 617 (2001)(since the jury returned a general verdict and the Defendant never requested a special verdict form separating the elements of damage, there is no way of knowing now how the jury allocated damages);

Harry L. Hussmann Refrigerator & Supply Co. v. Cash & Carry Grocer, 134 S.C. 191, 132 S.E.173 (1926)(since the Defendant's counsel made no attempt to find out what the jury intended, the Court cannot now clarify the jury's verdict).

Owners Ins. Co., v. Clayton, 364 SC 555, 614 S.E.2d 611 (2005)(Where covered claims were submitted to the jury which reached a general verdict, a finding that any of the three claims submitted to the jury is not excluded answers the coverage question, i.e., the carrier must pay the entire general verdict).

put Harleysville in a direct conflict with its insureds. Harleysville had advised its insureds that the claims in the underlying action may not be covered because the cases said there was no "occurrence". (Rec. Tr. pp. 13829-30). Harleysville relied on its assessment and sat silent when the forms of the verdict were being drafted and submitted to the jury. Harleysville cannot now use its own miscalculation to prejudice the rights of the insureds. Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 498, 473 S.E.2d 52 (1996) ("There is an implied covenant of good faith and fair dealing that neither party, insurer or insured, will do anything to impair the other's rights to receive benefits under the contract"). Our Courts have long recognized that when the insurer undertakes to represent its insured, it must subordinate its interests to those of its insureds. Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933) is apposite. In Tyger River, *supra*, the Court rejected the Kentucky rule that an insurance company in processing a claim may look to its own interest as well as interests of the insured stating that:

We especially dissent from the language of the [Kentucky] opinion which we have italicized. The very thing which the appellant in the case which we have before us for determination undertook to do was to hold the respondent harmless in the disposition of Chesser's claim. If, in the effort to do this, its own interest conflicted with those of respondent, it was bound, under its contract of indemnity, and in good faith, *to sacrifice its interest in favor of those of the respondent*. If the Kentucky rule is the law, then a policy of indemnity such as is before us becomes a delusion and a snare. In the nature of things when there is a conflict of interests - as is inevitably the case in all such matters - the company will give the preference to its own. *[Emphasis by the Court]*.

For the protection of its interests the casualty company especially reserved the right to control and direct the matter of negotiations for settlement and compromise, and of the defense of the action if litigation ensued. The plaintiff was directly deprived of a voice or part in such negotiations and defense. If the rule of the Kentucky case shall prevail, the indemnity companies may well felicitate themselves, for they are in a position to say to the insured, 'Heads I win, tails you lose.'"

Id. at p. 348.

As the Court said in Newman, it is the insurer's responsibility, who is in control of the litigation, to make sure there is an allocated verdict. Harleysville must sacrifice its interests in favor of the insureds. Courts throughout the country have determined likewise.

The following, taken from the case of Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491 (10th Cir. Oak. 1994), is worth quoting:

As an initial matter, we note that an insurer who undertakes the defense of a suit against its insured must meet a high standard of conduct. Duke v. Hoch, 468 F.2d 973, 978, (5th Cir. 1972); Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co., 550 F. Supp. 710, 714-16 (W.D.Okla.1981). The right to control the litigation carries with it certain duties. Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 627 (10th Cir.1942). One of these is the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages. See Gay & Taylor, 550 F.Supp. at 716. The reason for this is that when grounds of liability are asserted, some of which are covered by insurance and some of which are not, a conflict of interest arises between the insurer and the insured. If the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories. Duke, 468 F.2d at 979. The insurer is in the best position to see to it that the damages are allocated; therefore, it should be given the incentive to do so. Id. at. pp. 1498-1499.

Harleysville's failure to attempt to intervene or otherwise seek an allocated verdict cannot now be used to prejudice the rights of its insureds or the rights of the claimants who step into the shoes of the insureds. As the court said in Buckley v. Orem, 112 Idaho 117, 123, 730 P.2d 1037 (Idaho App. 1986):

"...when the insurer sought to limit its liability to the coverage provided by the contract, the insurer was required to show that it had faithfully and fully performed its responsibilities to its insured by disclosing the need for an allocated verdict. The application of this principle has consequences in the secondary action where the

injured party was directly pursuing insurance proceeds through garnishment or other post-trial litigation involving the insurer. This carry over effect occurred because at this secondary stage of the litigation the injured party stands in the shoes of the insured party. Accordingly, the injured party would be able to assert rights the insured would have had against the insurer and the insurer would be able to rely on any defenses which it could have asserted against its insured." *Id.* at p. 124 [Emphasis Supplied].

Harleysville relies on Duke v. Hoch, 468 F.2d 973 (C.A.5 1973) for the proposition that the Court should allow it to estimate what part of the unallocated verdicts constitute non-covered claims. In Duke, because the Court directed a verdict on one issue, the insurance carrier was able to carry its burden of showing that the jury allocated damages to a non-covered claim. Duke clearly holds that a post verdict allocation of damages in the coverage context should not even be considered unless and until the insurer meets its burden of showing that the general verdict includes damages for non-covered acts. In the case at bar, that is simply not possible. Here, the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict, and the Court will not engage in unguided speculation with respect to this issue, particularly when the dilemma now confronting Harleysville is of its own making.¹⁵

The Court concludes as a matter of law that because there were covered claims submitted to the jury which were not excluded and the jury rendered a general verdict, Harleysville is precluded from now re-litigating damages. Harleysville must indemnify its insureds for the entire amount of the final judgment in the underlying case.

¹⁵ McCloud v. Roy Riegels Chemicals, 20 Cal. App. 3d 928, 97 Cal. Repr. 910 (Cal. App. 3d Dist. 1971) (parties should have one chance (by request for special verdict forms) to have the jury's verdict pinpointed. They should not be permitted to drag out litigation by turning their backs on the safeguards provided by the legislature. Where a general verdict was rendered where a special verdict could have been used, it puts the courts in a guessing game as to how the jury traveled to reach its verdict).

PUNITIVE DAMAGES

Harleysville denies that its CGL policies provide coverage for punitive damages "because they are uninsurable as damages under the policies". (Ex. 3 Complaint, p. 7 paragraph "P"). The Court disagrees. Our Courts have long held that a builder who is grossly negligent in the construction of a building is subject to punitive damages. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989).

Some Courts have found that the "all sums" and "damages" language in the CGL policy is ambiguous which requires the ambiguity to be construed against the insurer and in favor of coverage. United Services Auto Ass'n. v. Webb, 235 Va. 655, 369 S.E.2d 196 (1988). Other Courts such as South Carolina have found punitive damages recoverable under the plain language of the CGL policy. Carroway v. Johnson, 245 S.C. 200, 205, 139 S.E.2d 908, 910 (1965)(stated by the Court to be the majority rule); S.C. State Budget & Control Board Division of General Services v. Prince, 304 S.C. 241, 403 S.E.2d 643 (1991)(the term "all sums" requires the construction of the policy to include coverage for punitive damages).

In Carroway v. Johnson, *supra*, the Court was faced with the coverage of punitive damages under the identical language contained in the Harleysville policies. The insuring agreement in the Carroway policy provided the carrier agreed:

"to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of...."
Id. at p. 202.

The Court held that the average insured would contemplate punitive damages would be covered under the CGL policy, stating: "with this view the majority of Courts have agreed, and have imposed liability upon the insurer even though the recovery was based upon willful or wanton

conduct..." *Id.* at p. 205. The Court concluded the language in the policy was broad enough to include liability for punitive damages.¹⁶

The Supreme Court examined this same issue in South Carolina State Budget and Control Board v. Prince, *supra*, wherein the court was once again faced with the identical language contained in the Harleysville policies:

"The fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages."
[Emphasis supplied]. *Id.* at p. 648. (citing Carroway, *supra*.)

The Court pointed out that the policy does not define "damages" and does not limit recovery to "actual damages". The Court held that this broad language must be interpreted to include punitive damages.¹⁷

Harleysville agreed to indemnify its insureds for "all sums" its insureds become legally obligated to pay. Punitive damages are not excluded by the language of the policy. If insurers intend to preclude coverage of an item, it is incumbent upon them to include clear language accomplishing that result. Crossmann, *supra*. Harleysville could have simply added the word "compensatory" before the word "damages" if it had intended to exclude punitive damages. United Services Automobile Assn. v. Webb, *Id.* at p. 204. ("The insurance carrier could have inserted the word 'compensatory' before the word 'damages', or specifically excluded liability for punitive damages elsewhere in the policy, and resolved the ambiguity but it did not. Therefore we construe the ambiguity, against the insurance company and in favor of coverage").

¹⁶ Harleysville's representative, Lee Wright testified that if the claim met the requirements of the insuring agreement there is nothing in the policy that says Harleysville will not pay punitive damages. "There is not a punitive damages exclusion in the policy" (Rec. Ex. 11, Lee Wright depo. p. 12245).

¹⁷ Fluke Corp. v. Hartford Acc. & Indemnity Co., 102 Wash. App. 237, 7 P.3d. 825 (2000) (Trial Court was in error in interpreting the policy to include only "compensatory damages". We elect to follow the majority rule that the terms of the policy "all sums that the insured becomes legally obligated to pay as damages" will be interpreted to provide coverage for punitive damages). [Citing among other cases South Carolina State Budget and Control Board v. Prince, *supra*.]

Harleysville advances the position that the jury's award of punitive damages is tantamount to a finding of intentional conduct which would exclude coverage for punitive damages. This same position was advanced by the insurance company in Pennsylvania Thresherman & Farmer's Mutual Casualty Ins. Co. v. Thornton, 244 F.2d 823 (C.A. 4 1957).¹⁸

Applying South Carolina law, the court rejected the carrier's position holding that:

"Negligent conduct may be so gross so as to merit characterization as willful and wanton in the sense of the rule for punitive damages, yet fall far short of an assault and battery which would distinguish it from an accidental event and withdraw it from the coverage of the policy...to allow the appellant's argument would lead to the illogical and indefensible result that....the more extreme the recklessness the more likely the insurer would be to escape liability." *Id.* at p. 827.

The Court went on to hold that no matter how reckless the respondent's conduct, there was nothing in the record that the insured intended to injure the plaintiff.

Likewise in the case at bar there is nothing in the record that the insureds intended to injure the plaintiff.

Despite the contrary arguments by Harleysville, the Court concludes that punitive damages are covered under the Harleysville policies and Harleysville must indemnify its insureds for any punitive damages in the final judgment.

RESERVATION OF RIGHTS

Magnolia North POA contends that Harleysville did not issue a reservation of rights letter ("R/R/L") to Buildstar, the general contractor. Magnolia North POA also contends that the R/R/Ls issued to Heritage Communities, Inc. and Heritage Magnolia North, Inc. were insufficient to reserve its rights to contest coverage. This issue was raised by the parties in both the pleadings and discovery and was thoroughly explored in the testimony at trial.

¹⁸ This case is cited in Carroway v. Johnson, *supra*.

A. FAILURE TO ISSUE R/R/L TO BUILDSTAR.

Lee Wright, construction Litigation Specialist for Harleysville, testified that he believed a R/R/L was sent to Buildstar but could not find one. (Rec. Tr. p. 13745). Harleysville produced no copy of the letter or other proof that one had been sent. While it may have been an inadvertent oversight, the Court concludes that Harleysville never sent a letter reserving its rights as to Buildstar.

Harleysville, however contends that its discussions with principals of its insureds were sufficient to reserve its rights because the same principals were in all three of its insureds and Harleysville's representatives had conversations with the principals and their attorney about coverage issues, ergo., their insureds including Buildstar understood and agreed that coverage issues would be reserved post litigation. The Court disagrees.

As noted in the findings of facts, Harleysville issued general reservation of rights letters to Heritage Communities and Heritage Magnolia North and never supplemented them to advise their insureds of their specific policy defenses even though Harleysville recognized that facts arise during litigation that may or may not affect coverage. (Rec. Tr. p. 12234). In fact, although Harleysville set forth practically all of its policy exclusions, Harleysville advised its insureds that it was relying on Harleysville's interpretation of the law that there was no "occurrence" as that term is defined under the policy and therefore there was no need to even consider exclusions. (Rec. Tr. pp. 13829-31). Now that there is a judgment against its insureds, Harleysville has decided that there are four exclusions that may be applicable. (See Harleysville's Amended Answers to Interrogatories dated Oct. 15, 2010, interrogatory No. 37.). There is no South Carolina law that details what a properly written R/R/L must contain.

However, several commentators have discussed the purpose of a R/R/L and the minimum such a letter should contain.

PURPOSE

1. "[t]he purpose of reservation of rights letters is to enable insureds to make informed decisions as to whether they should because of the existence of conflicts of interest between themselves and their insurers, take some action in order to protect their interests." Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies & Insureds* § 2.14 (5th ed.2007).

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2. "The insurer must avoid ambiguity, since any ambiguity in the reservation of rights will be resolved against the insurer." Goodman & Jacobs § 8.9. To avoid ambiguity, certain elements should be included in a reservation of rights letter, including (i) specific identification of the policy at issue; (ii) a description of the claims or allegations in the complaint, including details of the facts known at that time (iii) citation and quotation of each policy provision forming the basis of the insurer's coverage defenses, including an explanation of why each provision could cause denial of coverage; (iv) a specific reservation of the insurer's right to change its coverage position and to assert defenses based on any of the policy provisions, even if not specifically set forth in the letter; (v) a detailed explanation of the claim investigation that will be undertaken to determine the insurer's ultimate coverage decision and when that decision should be expected; and (vi) an advisement of any issues that actually or potentially give rise to a conflict of interest between the insurer and insured. See Peter Kalis, et al., *Policyholder's Guide to the Law of Insurance Coverage* § 24.04 (1998 & Supp.2007); Jerold Oshinsky & Theodore A. Howard, *Practitioner's Guide to the Law of Insurance Coverage* § 205 (2nd ed.1998 & Supp.2007); Goodman & Jacobs § 8.9.

As to the timing of a reservation of rights letter, once the insurer determines that it has a duty to defend, it should send the letter "prior to assuming the insured's defense, or within a reasonable time thereafter." Windt § 2.14; see Oshinsky &

Howard § 205 ("there are two basic requirements for reservations of rights and disclaimers of coverage: (1) they must be given in a timely fashion; and (2) they must be made with specificity"). Sometimes an insurer may need additional time to analyze the existence of coverage and thus it may send a general reservation of rights letter; however, the insurer must then supplement the reservation of rights letter as soon as it learns of its specific defenses, Windt § 2.14.

The Harleysville R/R/Ls fall far short of these requirements. The R/R/L does not explain why each provision or exclusion would cause a denial of coverage; does not contain a detailed explanation of the claim investigation that will be undertaken to determine the insurer's ultimate coverage decision and when that decision could be expected; and does not set forth issues that actually or potentially could give rise to a conflict of interest. Harleysville's R/R/Ls fail in specificity and Harleysville never supplemented its letters to detail their specific defenses and importantly, Harleysville never advised its insureds of the need for an allocated verdict and the devastating consequences a general verdict may cause.

Although the Court could find no legal precedent in South Carolina for an oral reservation of rights, it is generally frowned upon because it can lend itself to ambiguity and is at odds with the very purpose behind a R/R/L – that is, to inform the insured in a timely manner specifically what the policy defenses are so that the insureds can take appropriate action to protect their own interest due to a conflict of interest with the insurer. Oshinsky & Howard § 205; Windt § 2.14; Goodman & Jacobs § 8.9. An oral reservation is likely to generate a dispute as to what was said and lead to exactly the kind of expensive and protracted litigation Magnolia North is now experiencing. Even if an oral reservation is allowed under South Carolina jurisprudence, when viewing the facts in the light most favorable to Harleysville, the oral communications by Lee Wright fall short of the specificity and are ambiguous at best. On the one hand he was advising the insureds Harleysville did not believe anything was covered

(Rec. Tr. p. 13827), and on the other hand he was advising them that the "grand majority" of the claims were not covered. This exemplifies the need for a written and specific reservation of rights.

Providing timely and specific policy defenses and disclosing actual or potential conflicts are important fiduciary duties of the insurer especially when, as here, Harleysville is controlling the defense of its insured.

The Court concludes as a matter of law that Harleysville failed to properly reserve its rights to dispute coverage not only as to Buildstar, but also as to Heritage Communities, Inc and Heritage Magnolia North, Inc. The Court further finds that this action clearly prejudiced the Harleysville insureds and can be raised by Magnolia North. Lee, supra. The Court further finds that Harleysville's actions constitute an implied waiver of Harleysville's right to contest coverage in this action. Lyles v. MBI, Inc., 292 S.C 153, 355 S.E.2d 282 (S.C. App. 1987) (Implied waiver results from acts and conduct of party against whom doctrine is invoked from which an intentional relinquishment of right is reasonably inferable).

Although the Court has already concluded that Harleysville has a duty to indemnify the insureds, this issue was fully litigated and the Court felt it appropriate to address the issue.

TIME ON THE RISK

Harleysville has asked this Court to apply a time-on-the risk analysis to the damages if the Court finds that there are damages covered by the Harleysville policies. As noted above, I have determined that the judgment rendered in the underlying action is covered by the Harleysville policies. However, I find as a matter of law that the "time-on-the-risk" analysis recently adopted by the Supreme Court in Crossmann, supra, should be applied to the actual damages awarded of \$4,968,937.02 (verdict with set-off and less the \$2,000,000 punitive

damages). I find that the "time-on-the-risk" analysis should not be applied to the punitive damages.

In the recent Crossmann, supra, case the court had before it the question of how to equitably allocate damages among successive insurance policies when the damages were "progressive" damages that occurred over several policy periods or uninsured periods. The parties stipulated that the damages resulted from water intrusion (and were all progressive damages) and the time the damages began and progressed. The parties in Crossmann, supra, also stipulated that either "time-on-the-risk" analysis or "joint-and-several" analysis would apply to those progressive damages. The Supreme Court adopted a time-on-the-risk analysis. The Court instructed that in cases where progressive damages have occurred over a number of successive policy periods so that it is impossible both scientifically and administratively to determine the amount of damages occurring in each policy period, a default method is to be employed. The default method would require the total amount of progressive damage to be divided by the number of policy periods to determine the approximate amount of damages in each policy period. If there were periods in which the insured did not provide insurance the insured would absorb the amount of damages occurring during the uninsured periods. I find that it is appropriate for the Court to apply a time-on-the-risk analysis to the general verdict pursuant to Crossmann, supra. In order to accomplish this I must determine when damages began to occur and an ending date of those damages for the purpose of this analysis.

Drew Brown, expert for the underlying Plaintiffs testified that damages began 30 days following the Certificate of Occupancy. The first Certificate of Occupancy was issued December 10, 1998 so the damages began on January 10, 1999. The last time that anyone went out to look at that property in connection with the Buric Report was May 5, 2004. I find that the



damages were advanced enough that they needed repair and/or replacement and that the passage of additional time, while it may have made something even less sound, it did not change the point in time that they needed repair and/or replacement. Accordingly, I find that there were 1,943 days in which these damages occurred and had reached a point where all of the repairs and/or replacements would have needed to be made. The Court is not going to attempt to compute damages using a per building Certificate of Occupancy date. The verdict rendered in this case was a general verdict and, thus, made no award based on damages for a particular building, but awarded damages as to the whole project. Using a per building Certificate of Occupancy would, in essence, require the Court to allocate damages and would be speculative, at best. The Court concludes that in applying "Time-on-the-Risk" to these facts, the most equitable way to proceed is by comparing the total number of days in which damage occurred to the entire project to the total number of days of coverage under the Harleysville policies.

Harleysville had coverage on January 10, 1999 when the damage began and I find that this coverage for Magnolia North continued until November 30, 2000 which are the dates of coverage put into evidence in the 2010 hearing and in the 2011 hearing. I find that Harleysville, therefore, had coverage for Magnolia North for a period of 691 days. In using the numerator and denominator in the Crossmann case, this creates a multiplier of .3556 which is used to multiply the general verdict. Using this multiplier, Harleysville will be responsible for only a part of the general verdict as follows:

MAGNOLIA NORTH PROPERTY OWNERS ASSOCIATION

\$4,968,937.02 actual damages after set-off and less punitive damages

x .3556 multiplier as determined above

\$ 1,766,954 actual damages after applying "time-on-the-risk"

\$ 2,000,000 punitive damages added back
\$ 2,766,954 amount covered by Harleysville policies

CONCLUSION

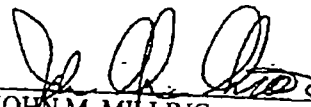
IT IS HEREBY ORDERED AS FOLLOWS:

- A. I find and conclude that there were "occurrences" with resulting "property damage" which occurred during the policy period and which triggered coverage for the Association's claim for actual and punitive damages;
- B. I find and conclude that the exclusions advanced by Harleysville do not exclude coverage for the claims made in the underlying action by the Association;
- C. I find and conclude that the general verdict rendered in the underlying action preclude the Court from looking behind the general verdict in an attempt to allocate damages between covered and non-covered damages. I further find and conclude that covered claims and non-covered claims were submitted to the jury and since there was a general verdict, the entire amounts awarded by the jury in the underlying actions are covered by the Harleysville policies;
- D. I find and conclude that it is appropriate to perform a time-on-the-risk analysis to the actual damages in the underlying action but that it would not be appropriate to apply the time-on-the-risk analysis to the punitive damages awarded to the association. Applying the time-on-the-risk analysis to the actual damages awarded to the Association, Harleysville would have coverage for actual damages awarded the Association in the amount of One Million Seven Hundred Sixty-Six Thousand Nine Hundred Fifty-Four and 00/100

- (\$ 1,766,954.00) Dollars as calculated on page forty-three (43) above.
- Harleysville would also have coverage for punitive damages awarded the Association in the amount of Two Million and 00/100 (\$ 2,000,000.00) Dollars.
- E. I find and conclude that punitive damages are not excluded from the Harleysville policies and are covered under the terms of the Harleysville policies;
- F. I find and conclude that Harleysville did not properly reserve its right to contest coverage for the claims made by the Association;
- G. I find and conclude that the Association is entitled to judgment against Harleysville for actual damages in the amount of One Million Seven Hundred Sixty-Six Thousand Nine Hundred Fifty-Four and 00/100 (\$ 1,766,954.00) Dollars and punitive damages in the amount of Two Million and 00/100 (\$ 2,000,000.00) Dollars;
- H. I find and conclude that Harleysville's policies here under consideration specifically provide coverage for post-judgment interest and the Association is entitled to judgment for statutory post-judgment interest on the amounts found covered from the date of the order for judgment in the underlying actions;
- I. The Motion by Harleysville to amend or reopen the record is denied;
- J. As noted above, the underlying actions are under appeal. The provisions of this Order are subject to modification if warranted by the final judgment in the underlying actions and this order is without prejudice to the parties to move

pursuant to Rule 60, SCRCP, for the correction of the amount to be indemnified.

AND IT IS SO ORDERED.


JOHN M. MILLING
Special Referee

Darlington, South Carolina.
February 28, 2013.

Estimate Company

Standard Estimate Report

Palmetto Pointe

Page 1

4/22/2017 2:56 PM

Project name:	Palmetto Pointe
Estimator:	Jay
Labor rate table:	Standard Labor
Equipment rate table:	Standard Equipment
Bid date:	2/01/14
Report format:	Entered by "Group General/Plasma" "Detail" summary

ROA 261

Palmetto Pointe 185,
Handeg



not adjusted needs
to be \$96,000

Estimate Company

Standard Estimate Report
Palmetto Points

Page 2
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Item	Description	Takeoff City	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Rate	Amount	Amount	Amount
1000.000 GENERAL REQUIREMENTS												
1002.100	Blank/Check Insurance Blank/Check Insurance Blank/Check Insurance	1.00	fs				80,300.00	fs.		80,300		80,300
1300.010	Personnel Supervision 10 Superintendent 10 Asst Superintendent (Quality Control) Personnel Supervision 8,000.00 Labor Hours 8,000.00 Equipment Hours	110.00	hr	1,800.00	hr	209,000						209,000
		110.00	hr			121,000						121,000
						330,000						330,000
1510.010	Utilities-Temporary 10 Temp Electricity (Tentative) 40 Mobile Phone (Super & Asst) 20 Temp Toilet Utilities-Temporary	24.00	hr						3,120			3,120
		52.00	hr						4,420			4,420
		24.00	hr			210.00	hr	1,020				1,020
									7,840			7,840
1520.010	Temp: Facilities 10 Temp Toilet 10 Office Toilet Temp: Facilities 24,726.50 Equipment Hours	24.00	hr						5,714			5,714
		24.00	hr						9,125			9,125
									14,637			14,637
1520.020	Temp: Supplies 10 Copy & fax Temp: Supplies 320.00 Labor Hours	24.00	hr	1,100		0	120.00	hr	3,120			3,120
									3,120			3,120
1620.030	Office Supplies 5 Stamp - Laptop (estimated @ \$400/yr) 10 Ink Supp Office Supplies 3,000 Labor Hours	1.00	fs						600			600
		1.00	fs	20,000	fs	20	600.00	fs	600			600
									800			800
1540.010	Tools & Equipment 10 Super Truck Expense 10 Asst. Super. Truck Expense 50 Super. Gas Expense 50 Asst. Super. Gas Expense 50 Equip. Gas Expense 50 Fuel Oil Expense 50 Maint. Repair Tools & Equipment 3,500.00 Labor Hours	20.00	hr	0.00		0.00		0		16,900		16,900
		20.00	hr	0.00		0.00		0		16,900		16,900
		20.00	hr			450.00	hr	11,700				11,700
		20.00	hr			450.00	hr	11,700				11,700
		20.00	hr			300.00	hr	7,000				7,000
		20.00	hr			0.00		0		85,020		85,020
		22.00	hr			0.00		0		40,040		40,040
										149,460		149,460
1540.020	Temp: Construction Allow 20 Scaffold - Material 20 Scaffold Labor (incl. - Tent Down) Temp: Construction Allow 0.700 Labor Hours	1.00	fs	0.00		0.00		0		630,000		630,000
		1.00	fs	0.00		0.00		0		113,024		113,024
								312,834.00	hr	313,024		313,024
									630,000			630,000
1550.100	Temporary Controls 10 Temp Weather Protection - Exterior (500 sq ft per unit) 40 Interior Zip Walls & Duct Protection - Interior (more 2 hr 4 units per unit)	40.00	hr	1,000.00	hr	40,000	450.00	hr	18,000			58,000
		40.00	hr	1,000.00	hr	24,000	500.00	hr	12,000			36,000

ROA 262

ROA 263

ROA 264

.262U.010.

Palmietto Pointe 185

ROA 265

Palmetto Pointe 1857
Handegg

ROA 266

Standard Estimate Report
Palmetto Pointe

Item	Description	Quantity	Unit	Cost	Amount	Unit	Cost	Amount	Unit	Cost	Amount	Unit	Cost	Amount
	Arch Wd Wk: Door/Window				35,037			21,212						56,249
	10,702 H31 Labor hours													
6471.010	Arch Wd Wk: Porch Screening													
	10- Porches with Screening	39.00	sq	672.00	26,208	450.00	sq	17,550						43,758
	Arch Wd Wk: Porch Screening				36,208			17,550						
	99.00 Labor hours													
6481.010	Hard - Sliding													
	10- 6-1/4" Hard - Sliding	212.41	sq	0.01	193,294	0.48	sq	101,557						294,851
	10- Sliding Hardware	176.00	sq	0.00	0	0.04	sq	7,000						7,000
	10- Water Table (curved slope & flashing)	0.433	sq	1.63	0.656	2.50	sq	1,083						22,433
	10- 6-1/4" Hard - Sliding sq Chd House	3,270.00	sq	0.01	2,664	0.08	sq	1,416						4,080
	10- Water Table (curved slope & flashing) sq Chd House	172.00	sq	1.63	280	2.50	sq	430						710
	Hard - Sliding				205,005			124,375						329,380
	WOOD & PLASTICS				877,617			881,335			61,023		0	1,609,976
	100.00 Labor hours													
7000.000	THERMAL & MOISTURE PROT													
7119.010	Waterproofing Under													
	20- Type 3 Mem	89,625.00	sq	0.10	10,133	0.30	sq	26,888						43,020
	20- Type 3 Mem sq Chd House	3,762.00	sq	0.10	264	0.30	sq	430						704
	30- Window & Door Frame & Flashings	13,041.00	sq	1.00	13,041	0.65	sq	8,477						21,518
	30- Window & Door Frame & Flashings sq Chd House	5,750.00	sq	1.00	248	0.65	sq	161						409
	Waterproofing Under				20,605			35,465						56,070
	1,491.25 Labor hours													
7169.000	Form & Deck Coatings													
	10- Seal-Off Deck	24,167.00	sq					16.00	sq		386,672			386,672
	20- Flashings & Mem													
	Form & Deck Coatings										386,672			386,672
7310.010	Shingles: Several Types													
	10- Fiberglass Mat Shingles	976.00	sq	0.00	0	0.00	sq	0.7,840			97,600			195,440
	10- Fiberglass Mat Shingles sq Chd House	27.00	sq					2,431			2,700			5,131
	70- Asphalt Shingles	1,533.00	sq					13,584			13,584			27,168
	80- Heavy Vent	2,301.00	sq	0.00	0	0.00	sq	0.00			11,506			18,400
	60- Cedar Shake - Stock Mat	20.00	sq					0.00			0			11,000
	50- Oak Edge	11,560.00	sq					0.00			23,120			23,120
	60- Oak Edge (House)	150.00	sq					2.00	sq		300			300
	Shingles: Several Types							110,372			150,806		11,000	280,300
	7,757.00 Labor hours													
7311.010	Shingles: Full													
	30- Roofing Full 30 to	976.00	sq	0.00	0	15.00	sq	14,640			20,000			34,640
	30- Roofing Full 30 to sq Chd House	27.00	sq					405			405			810
	Shingles: Full							15,045			20,405			35,105
	250.75 Labor hours													
7312.010	Shingles: Nail													
	70- Roofing Nails	976.00	sq					0.00	sq		0.7,840			9,760
	Shingles: Nail										0.7,840			9,760
7600.010	Roof Counter Flashings													
	10- Cut Flashings by Router	976.00	sq	0.00	0	0.00	sq	0			20,200			20,200
	10- Cut Flashings by Router sq Chd House	27.00	sq					0.00			810			810

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Estimate Company

Standard Estimate Report

Palmetto Pointe

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Item	Description	Takeoff Qty	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Name	Amount	Amount	Amount
	Roof Counter Flashings							30,000				30,000
	100 30 Labor hours											
7710.010	Roof Accessories											
10	Gutters	2,615.00	lf	0.00	0	0.00	0	12.00	lf	31,380		31,380
110	Downspouts	3,838.00	lf	0.00	0	0.00	0	12.00	lf	47,256		47,256
110	Dividers (4ea per Bldg)	80.00	ea					30.00	ea	2,400		2,400
	Roof Accessories									41,048		41,048
	633.13 Labor hours											
7710.030	Aluminum/Vinyl Patch Ceiling											
10	Remove - patch ceilings	21,015.00	sf	0.80	10,508	0.00	0					10,508
20	Install New Patch Ceilings	21,187.00	sf	2.00	48,334	1.00	33,834					82,168
	Aluminum/Vinyl Patch Ceiling											
	2,942.00 Labor hours											
7840.000	Applied Fireproofing											
60	Firespray Penetrator @ Fire Walls	2,243.00	lf	0.00	0			25.00	lf	56,075		56,075
60	Fluorocarbon Penetrations @ Fire Walls (40 Units)	40.00	ea	0.00	0			150.00	ea	6,000		6,000
	Applied Fireproofing									62,075		62,075
	81.32 Labor hours											
	THERMAL & MOISTURE PROT			88,527		285,375		738,531		11,000	0	1,043,433
	13 239 421 Labor hours											
8000.000	DOORS & WINDOWS											
8550.010	Double Hung Windows											
10	Type 1 - Window	127.00	ea	287.00	33,909	875.00	123,826	10.00	ea	1,270		159,004
20	Type 4 - Window	248.00	ea	257.00	65,682	1,081.00	268,828	10.00	ea	2,480		334,088
30	Type 4a - Window	21.00	ea	257.00	5,607	1,185.00	24,885	10.00	ea	210		30,723
40	Type 8 - Window	6.00	ea	400.00	2,400	2,278.00	13,668	10.00	ea	60		16,128
	Double Hung Windows				107,998		428,325			4,060		539,923
	DOORS & WINDOWS			107,998		428,325		4,060		0	0	539,923
9000.000	FINISHES											
9133.010	GWB: Patch Existing											
10	Replace Existing Sheetrock Ceilings (for ductwork)	39,349.00	sf	0.00	0	0.00	0	3.00	sf	118,047		118,047
10	Patch Interior Sheetrock around window replacements	400.00	ea	0.00	0	0.00	0	50.00	ea	20,000		20,000
10	Patch Walls - 1st floor dome repair - allowance	40.00	ea	0.00	0	0.00	0	300.00	ea	12,000		12,000
10	Items 1611 & 1651 Repair Sheetrock Ceilings	2.00	ea					2,000.00	ea	4,000	Allowance	4,000
	GWB: Patch Existing									154,047		154,047
	39,791.00 Labor hours											
9134.010	GWB: Fire Walls											
30	Paint & Repair - Fire Walls	8,630.00	sf	0.00	0	0.50	4,315	2.00	sf	17,260		21,575
30	Remove - Roof Sheeting - load sheetrock into space	40.00	ea	40.00	1,600	0.00	0					1,600
30	Install Roof Sheeting	40.00	ea	50.00	2,000	75.00	3,000					5,000
40	Add fastening @ 2 layers of Type X - ceiling outside package	8,254.00	sf	0.00	0	7.00	57,778					57,778
40	Paint ceiling outside garage	8,254.00	sf	0.00	0	0.00	0	2.00	sf	16,508		16,508

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Estimate Company

Standard Estimate Report

Palmetto Pointe

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Item	Description	Takwin City	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount
	GWB, Fire Grills, 1,400 231 Labor hours			4,000		65,093		33,709				102,801
0310.010	Tile: Floor & Wall 200 Ceramic Floor Tile Tile: Floor & Wall 317.55 Labor hours	7,431.00	sf	0.00	0	0.00	0	14.50	sf	107,750		107,750
								107,750				107,750
9640.010	Flooring Wood 10 Vinyl Flooring Flooring Wood, 3,729.75 Labor hours	24,065.00	sf	0.00	0	0.00	0	8.00	sf	150,920		150,920
								150,920				150,920
0600.010	Flooring Carpet 6 Carpet Complete with Pad Flooring Carpet 352.00 Labor hours	3,078.00	sq	0.00	0	0.00	0	25.00	sq	88,200		88,200
								88,200				88,200
9910.020	Painting: Exterior & Interior 5 Painting 10 E.C. Hand Siding & Trim 10 - Est. Siding, Paint, Wap, Clings 10 - Interior Siding & Trim Painting, Exterior & Interior 4,111.42 Labor hours	4.00	ls	0.00	0	0.00	0	741,760.00	ls	141,760		141,760
								141,760				141,760
	FINISHES 45,851.42 Labor hours			4,000		65,093		1,324,445		0	0	1,393,538

15000.000

MECHANICAL

14300.010

Sprinkler
10 Fire Protection - Rattle Space
10 4" Water Service to each building
10 Additional work to create a chase to attic space
Sprinkler

1.00 ls
700.00 cu
20.00 sq

378,320.00 ls
18,000.00 ls
3,160.00 sq

770,920
160,000
330,000

378,920
160,000
330,000

378,920
160,000
330,000

378,920
160,000
330,000

15400.000

Painting
430 Remove & Replace Tubs for Floor Replacement
Painting

120.00 sq

150.00 sq

150,000

150,000

150,000

150,000

15700.000

HVAC Systems
1,000 HVAC Systems per Typical Report
500 Unit, Total Report (Hoodwork System)
500 Kitchen Exhaust per Typical Report
HVAC Systems

20.00 sq
20.00 sq
20.00 sq

151,000.00 sq
280,000.00 sq
280,000.00 sq

7,620,120
280,000
280,000

7,620,120
280,000
280,000

7,620,120
280,000
280,000

7,620,120
280,000
280,000

MECHANICAL

0

0

2,887,280

0

0

2,887,280

16000.000

ELECTRICAL

16500.010

Lighting
500 Lighting (Canopy & Function for Exterior Repairs)
500 Power to each Sprinkler Head per Wdy
500 Additional wiring per Typical Report

20.00 sq
20.00 sq
20.00 sq

400.00 sq
400.00 sq
271,400.00 sq

16,000
16,000
271,400

16,000
16,000
271,400

16,000
16,000
271,400

16,000
16,000
271,400

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Estimate Company

Standard Estimate Report
Palmetto Pointe

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Item	Description	Takeoff Qty	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount
	Liquiditej							305,440				305,440
	ELECTRICAL			0		0		305,440		0		0

ROA 270

Standard Estimate Report
Palmetto Pointe

Estimate Totals

Description	Amount	Totals	Rate
Labor	2,093,052		
Material	1,487,408		
Subcontract	6,890,307		
Equipment	820,437		
Other	1,390,829		
	13,340,154	13,340,154	
Sales Tax	305,819		0.500 %
Tools & Ins On Labor	780,082		37.400 %
Permits & Non Expendables	1,110,919		2.000 %
	1,000,500	15,346,094	
Engineering Fee	1,201,203		0.000 %
	1,201,203	16,547,297	
Overhead	1,016,353		7.350 %
Profit	1,950,075		10.000 %
	2,966,428	17,513,725	
General Fund - Fair Blotch	77,053		0.439 %
Plan Review Fee	42,807		0.244 %
Reserve Fund	23,367		0.133 %
	143,227	17,656,952	
General Fund	201,479		
Total		17,858,431	

+ 16,000 - Builders Risk

+ 12,187 - Plywood Roof Sheathing Allow

17,588,792

ROA 271

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

PALMETTO POINTE AT PEAS ISLAND) CASE NO. 2015-CP-10-0955
CONDOMINIUM PROPERTY OWNERS)
ASSOCIATION, INC. AND JACK LOVE,)
INDIVIDUALLY, AND ON BEHALF OF)
ALL OTHERS SIMILARLY SITUATED,)

Plaintiffs,)

VS.)

ISLAND POINTE, LLC; COMPLETE)
BUILDING CORPORATION; TRICOUNTY)
ROOFING, INC.; CREEKSIDE, INC.;)
AMERICAN RESIDENTIAL SERVICES, LLC)
D/B/A ARS/RESCUE ROOTER)
CHARLESTON; ANDERSEN WINDOWS,)
INC.; ATLANTIC BUILDING)
CONSTRUCTION SERVICES, INC. N/K/A)
ATLANTIC CONSTRUCTION SERVICES,)
INC.; 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.; CERTAINTED)
CORPORATION; KELLY FLOORING)
PRODUCTS, INC., D/B/A CARPET)
BAGGERS; CORNERSTONE)
CONSTRUCTION AND MARK MALLOY)
D/B/A CORNERSTONE CONSTRUCTION;)
MIRACLE SIDING, LLC AND WILSON)
LUCAS SALES D/B/A MIRACLE SIDING,)
LLC; MARK PALPOINT A/K/A MICAH)
PALPOINT; ELROY ALONZO VASQUEZ;)
CHRIS A/K/A JOHN DOE 61; ALDERMAN)
CONSTRUCTION; STANLEY'S VINYL)
FENCE DESIGNS; COHEN'S DRYWALL)
COMPANY, INC.; MOSELY CONCRETE;)
HAND A FRAMING CONSTRUCTION, LLC)
A/K/A H&A FRAMING CONSTRUCTION,)

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO MOTIONS TO
INTERVENE**

LLC AND D/B/AH AND A FRAMING, LLC,)
H&A CONSTRUCTION, AND HAND A)
CONSTRUCTION; JMC CONSTRUCTION,)
INC.; JMC CONSTRUCTION, LLC; JOHN)
DOE 1-15,)

Defendants.)

COMPLETE BUILDING CORPORATION,)
INC.,)

Third-Party Plaintiff,)

VS.)

LEONARD T. BROWNE AND)
CHRISTOPHER N. UNION,)

Third-Party Defendants.)

CREEKSIDE, INC.,)

Third-Party Plaintiff,)

VS.)

CHRISTOPHER N. UNION,)

Third-Party Defendant.)

AMERICAN RESIDENTIAL SERVICES, LLC,)

Third-Party Plaintiff,)

VS.)

VICTOR HUGO HERNANDEZ; HERNANDEZ)
ELECTRIC, LLC; LILIANA ROJAS FLORES;)
MARTIN BARR D/B/A PORT CITY)
STRUCTURED WIRING; KELLER)
ELECTRIC, LLC; JOHN TOOLIN D/B/A)
JOHN F. TOOLIN HEAT AND AIR; RUSSELL)
"RUSTY" HILL D/B/A RUSTY'S HEATING &)
AIR; and WARREN ANDERSON,)

Third-Party Defendants.)

Plaintiffs Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated, ("Plaintiffs"), by and through their undersigned counsel, respectfully submit this Memorandum in Opposition to the Motions for Intervention filed by Builders Mutual Insurance Company ("Builders Mutual"), Nationwide Mutual Insurance Company ("Nationwide"), Nautilus Insurance Company ("Nautilus"), and State Farm Fire and Casualty Company ("State Farm") (collectively the "Insurers" or "Movants"). For the reasons set forth herein, the Motions to Intervene should be denied.

SUMMARY OF ARGUMENT

None of the requisite elements necessary for intervention as a matter of right under Rule 24(a) of the South Carolina Rules of Civil Procedure, or for permissive intervention under Rule 24(b), have been satisfied by any of the Insurers. Moreover, allowing intervention at this stage would detrimentally prejudice Plaintiffs and the six defendants with coverage under the Insurers,¹ and would create an inherent conflict of interest between the Insurers and the attorneys they have appointed for their insureds. The Insurers' failure to comply with the procedural requirements for intervention under Rule 24 also makes denial of their Motions appropriate.

SUMMARY OF PERTINENT FACTS

From 2006 to 2007, the Defendants were involved in the construction of the 40-unit condominium complex in Charleston known as Palmetto Pointe at Peas Island ("Palmetto Pointe"). The General Contractor, Complete Building Corporation ("CBC"), hired various subcontractors, including:

¹ Builders Mutual insures Defendant Tri County Roofing, Inc. Nautilus insures Defendants Miracle Siding, LLC and Eloy Vasquez. Nationwide insures Defendants Stanley's Vinyl Fencing and WC Services. State Farm insures Defendant Toolin Heat and Air. Each of these defendants are referred to herein as the "Insureds" or "Defendants".

- Tri County Roofing, Inc. ("Tri County") to supply materials and labor for siding, roofing, gutters, decking and related waterproofing;
- Stanley's Vinyl Fencing ("Stanley's") to provide and install exterior railings;
- WC Services ("WCS") to provide and install fire sprinklers; and
- American Residential Services ("ARS") to provide mechanical/electrical.

In turn, some of these subcontractors hired second-tier subcontractors:

- Tri County hired Miracle Siding, LLC ("Miracle Siding") to install siding;
- Tri County hired Eloy Vasquez ("Vasquez") to install roofing, decking and related waterproofing; and
- ARS hired Toolin Heat and Air ("Toolin") to install mechanical systems.

In February 2015, Palmetto Pointe's construction defect case was commenced on behalf of the Condominium Association and Unit Owners at Palmetto Pointe. Plaintiffs allege the defendants negligently performed their work, substantially deviated from the standard of care, and breached express and implied warranties that should have attended their work.

In April 2015, Builders Mutual appointed counsel to defend its Insured, Tri County, in Plaintiffs' construction defect suit under commercial general liability policies for July 24, 2009 to July 24, 2014.

Also, in April 2015, Tri County named several of its second-tier subcontractors, including Miracle Siding and Vasquez, alleging negligent performance of their scopes of work, breach of express and implied warranties, breach of contract, and indemnity.

In August 2015, Nautilus appointed counsel for Miracle Siding under commercial general liability policies for February 16, 2005 to February 16, 2008 (cancelled effective July 15, 2007); and for Vasquez under policies from May 17, 2007 to May 17, 2008 and June 23, 2008 to June 23, 2012.

In April 2016, CBC named its second-tier subcontractors, including Stanley's and WCS, alleging negligence, breach of express/implied warranties, breach of contract, and indemnity.

In April 2017, Nationwide appointed counsel for WCS under commercial general liability policies from December 29, 2004 until cancellation on January 14, 2007.

In May 2017, Nationwide appointed counsel for Stanley's under commercial general liability policies from October 11, 2004 until cancellation effective February 10, 2007.

In September 2017, Nationwide filed cross-claims against WCS in a declaratory judgment action that is currently pending in the United States District Court, Charleston County.²

In November 2017, Plaintiffs added Stanley's and WCS as direct defendants.

In December 2017, ARS named its second-tier subcontractors as defendants, including Toolin. Shortly thereafter, in March 2018, State Farm appointed counsel for Toolin under commercial general liability policies for August 23, 2005 to June 18, 2008.

In January 2018, a two-day mediation was held during which Plaintiffs made efforts at resolving their construction defect claims but were unable to reach a resolution with the Insureds.

Also in March 2018, Builders Mutual filed a Motion to Intervene as insurer of Tri County. Builders Mutual asserts intervention would be for the "limited purpose" of submission of a special verdict form or general verdict form with interrogatories, and conferencing with the court/counsel at trial; in the event its Motion is denied, and a verdict is issued against its Insured, Builders Mutual requests that Plaintiffs be estopped from enforcing a general verdict. (Builders Motion/Memorandum at 3, 13, 15).

In April 2018, Nautilus filed two Intervention Motions as insurers of Miracle Siding and Vasquez. Nautilus states in its Motions that intervention would be for the "limited purpose" of

² FCCI Insurance Company v. Island Pointe LLC et al; 2:17-cv-01976-MBS.

preparing/submitting jury instructions, a special verdict form, and/or special interrogatories at trial. (Nautilus Motions at 2 and Memoranda at 6-7). If this relief is denied, Nautilus requests that it be allowed to conference with the court/counsel at trial and submit special interrogatories if a verdict is rendered against its insured; if this relief is also denied, Nautilus alternatively requests a finding that it not be bound by judgments against either Insured and be able to litigate coverage issues in a separate action. (Nautilus Motions at 3-4 and Memoranda at 8).

In May 2018, Nationwide filed two Intervention Motions as insurers of Stanley's and WCS for the "limited purpose" of obtaining facts to allocate covered versus non-covered damages, presenting the jury with a special verdict form and/or presenting special interrogatories. (Nationwide Motions/Memoranda at 5, 7). In the same month, Nationwide also filed a declaratory judgment action related to Stanley's in the United States District Court, Charleston County.³

In July 2018, a second mediation was held during which Plaintiffs gave a presentation that detailed their claims but were still unable to resolve their claims against the Insureds.

In September 2018, Plaintiffs deposed CBC's Expert, Al Schweickhardt, P.E., who opined that the work by the Insured Defendants at Palmetto Pointe amounted to violations of the code. (Pls' Ex. 826 attached as Ex. A).

In October 2018, State Farm filed a Motion to Intervene as insurer of Toolin for the "limited purpose" of submitting/participating in jury instructions, special interrogatories, and/or a special verdict; if this relief is denied, State Farm requests attendance at discussions in chambers, and submission of special interrogatories if a verdict is rendered against Toolin; alternatively, State Farm requests that it not be bound by a judgment against Toolin and the right to re-litigate facts

³ Nationwide Mutual Fire Insurance Company v. Stanley; 2:18-cv-01232-MBS

and issues relevant to a determination of coverage (State Farm Motion at 3-6). To date, Plaintiffs have been unable to resolve their claims against the Insured Defendants.

STANDARD OF REVIEW

Intervention may be sought as a matter of right under the provisions of S.C. R. Civ. P. 24(a), or permissively in the court's discretion under 24(b). In order to warrant intervention of right, the party seeking to intervene must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. *See* Rule 24(a), SCRPC ⁴; Ex Parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661 (1993).

It is axiomatic that a party have standing to intervene in an action pursuant to Rule 24, SCRPC. Ex parte GEICO v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007). The Court "must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2)." Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990).⁵ "Each case will be examined in the context of its unique facts and circumstances." Id.

Failure to establish even *one* of the elements precludes the intervenor's right to insert itself into the action. Ex Parte Reichlyn, 310 S.C. at 500 (court denied intervention motion due to untimeliness and declined to review remaining Rule 24(a)(2) factors because "failure to satisfy any one of the four requirements precludes intervention"); see also Teseniar v. Fenwick Plantation

⁴ Rule 24(a), SCRPC is the same as Rule 24(a), FRCP.

⁵ Builders Mutual cites Berkeley in support of intervention despite the fact that Berkeley does nothing to support intervention by an original party's insurer. This State's Supreme Court allowed intervention in Berkeley because the intervening party was a second utility company that would have been "impaired or impeded in its ability to protect its asserted interests unless allowed to intervene" and would have been unable to "collaterally attack any ruling adverse to them" otherwise. Berkeley, 302 S.C. 186, 191.

Tarragon, LLC, No. 2016-000185, 2018 WL 5830944, at *1 (S.C. Ct. App. Nov. 7, 2018) (“[F]ailure to prove one of the four requirements for intervention under Rule 24(a)(2) precludes the party from intervening.”).

Under Rule 24(b), the trial court may, at its discretion, allow a party to intervene in an action “when a statute confers a conditional right to intervene; or when an applicant’s claim or defense and the main action have a question of law or fact in common.” Rule 24(b), SCRPC. Permissive intervention requires the court to examine “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties” in exercising its discretion. Id. The Court of Appeals has analogized permissive intervention to permissive joinder, stating that “it seems clear the better rule is that permissive intervention should be allowed *only where the prospective intervenor has a cause of action or defense it could bring or assert.*” South Carolina Tax Com. v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 76 (S.C. Ct. App. 1988). Much like under Rule 24(a), courts consider the practical implications of a decision allowing intervention. Ex parte GEICO v. Goethe, 373 S.C. at 138, 644 S.E.2d at 702.

ARGUMENT

The Movants cannot satisfy the requirements to intervene under Rule 24. Their most fatal error is their failure to establish they have standing. They also have not set forth what their claims/defenses are, and whether those claims/defenses share questions of law or fact common with this construction defect case. These motions instead establish one overarching point: intervention, if allowed, will greatly prejudice the rights of the original parties in adjudicating this construction defect case.

A. The Insurers' Motions Fail to Satisfy Rule 24, SCRPC.

The Insurers have no real, material interest in the Palmetto Pointe construction defect action, which is required under Rule 24(a) to establish standing to intervene. The Motions lack timeliness, a threshold requirement under both types of intervention under Rule 24 (a) and (b). And, the Insurers cannot take advantage of permissive intervention pursuant to Rule 24(b) because none have asserted a claim or a defense that shares a question of law or fact in common with this action. Further, intervention will prejudice the adjudication of the rights of the original parties to this action, injecting insurance coverage questions into the trial of a complex construction defect action.

1.) The Insurers Do Not Have Standing in the Construction Defect Case.

The first reason why this Court should deny Insurers' Motion is because the Insurers lack the necessary standing to intervene in this action. As the South Carolina Supreme Court has explained:

[I]ntervention is only appropriate where the party seeking intervention has a real proprietary interest in the subject matter of the proceedings. An interest which is merely peripheral and not the real interest at stake will not warrant intervention.

Ex parte Gov't Emples. Ins. Co. v. Goethe, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2003) quoting Bailey v. Bailey, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) (internal quotations omitted); see also Rule 24(a), SCRPC.

Our Supreme Court has further explained that an insurer lacks standing to intervene where, like here, the insurer's interest in an action is limited to the potential financial implications of its outcome:

[W]e hold that the family court correctly found GEICO lacked standing because GEICO does not have an interest in the subject matter of the family court action. Stated differently, GEICO has no real interest in whether Cooper and Goethe have

a valid common law marriage. GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court. This interest is insufficient to warrant GEICO's intervention in Cooper's family court action under Rule 24(a)(2), SCRPC.

Goethe, 373 S.C. at 139, 644 S.E.2d at 703.⁶

The South Carolina District Court reached the same conclusion in the federal context with facts parallel to the ones at hand:

Penn National contends that because it would be required to fund at least part of Plaintiff's recovery *if* coverage under the Policy exists, it is the real party in interest and thus has an interest in the subject matter of this action. By this very statement, however, Penn National acknowledges that is nothing more than a contingent interest in the present action as there has yet to be an adverse coverage determination by this Court in the declaratory judgment action filed by Penn National on April 8, 2013. Penn National does not have an interest in the subject matter of this action, that is, Mr. Lewis's allegedly negligent operation of the Boat that, in turn, led to Mrs. Lewis's tort claim for damages against Defendants. Instead, Penn National's interest is the amount it may have to pay Defendant Excel if Plaintiff wins. Stated differently, Penn National's interest is in how much of any future award may be attributable to damages contemplated by the policy. [...] In so holding, the Court is also persuaded by the well-established policy of preventing insurers who reserve the right to deny coverage from controlling the defense brought against its insured.

Lewis v. Excel Mech., LLC, No. 2:13-CV-281-PMD, 2013 WL 3762904, at *2 (D.S.C. July 16, 2013) (internal citations omitted) (emphasis added); see also Island Pres. Co., LP v. State, No. 2010-UP-369, 2010 WL 10080179, at *3 (S.C. Ct. App. July 19, 2010) (“[A] party does not

⁶ Courts sitting in other jurisdictions have similarly found that an insurer does not have a “direct, substantial, and protectable interest” in intervening for the limited purpose of proposing special interrogatories or submitting special verdict forms to the jury so that the theories on which the jury’s verdict is based can be determined. See, e.g., also Travelers Indemnity Co. v. Dingwell, 884 F.2d 629, 641 (1st Cir. 1989) (affirming district court’s rejection of insurer’s claim to intervention as of right) (affirming district court’s rejection of insurer’s claim to intervention as of right); Cooke v. Town of Colorado City, Ariz., No. CV-10-08105-PCT-JAT, 2013 WL 5302194, at *4 (D. Ariz. Sept. 19, 2013) (denying intervention of insurer when the insurer’s interest in the litigation was limited to questions of coverage); Folkstone Mar., Ltd. v. CSX Corp., No. 88 C 4040, 1989 WL 165059, at *4 (N.D. Ill. Dec. 28, 1989) (“The Insurers’ interest arises solely from their contract with CSX, and the Insurers concede that their right of subrogation does not ripen until they have made a payment to CSX under the insurance contract”); Underwriters Ins. Co. v. E. Cent. Alabama Ford-Mercury, Inc., 574 So. 2d 716, 722 (Ala. 1990), as modified on denial of reh’g (Jan. 18, 1991).

necessarily have standing in one action merely because that action may affect its interest in another action.”).

Here, the Insurers do not have an interest in the property that is the subject of this action – the Palmetto Point condominiums. The Insurers also do not have an interest in the underlying transaction that is the subject of this litigation – the development and construction of the Palmetto Point condominiums. Rather, each of the Insurers’ interest arises solely out of the insurance policies they issued to their insured and the Insurers are only interested in how much these policies will have to pay. In other words, the Insurers’ interests in this action are, at this stage, hypothetical ones, contingent upon the *outcome* of the action itself. The Insurers are only interested in what amount their insureds may be found liable to pay. Because the Insurers have only a monetary interest in the outcome of this case, intervention is inappropriate. To hold otherwise runs contrary to the long-standing rule against allowing considerations of insurance coverage to impede and/or impact a plaintiff’s action for damages.

Further, the Insurers do not need to intervene in this action when they can protect any purported interests they may have by filing a declaratory judgment action, including the declaratory judgment action that at least one Insurer (Nationwide) has already filed.⁷ Addressing coverage issues in this action as well as the declaratory judgment action will only confuse the coverage question further and lead to inconsistent results.

Moreover, Insurers have not offered any persuasive argument on the standing subject. In fact, one Insurer admits “generally, insurers lack standing to intervene in underlying actions to

⁷ Builders Mutual erroneously concludes it has “no alternative” but to request intervention. (Builders Mutual Motion to Intervene at 8). In support, Builders Mutual cites two cases that both deal with declaratory judgments: Harleysville, 420 S.C. 321 (cross-appeals from declaratory judgment actions); Auto Owners Ins. Co. v. Newman, 385 S.C. 187 (2009) (declaratory judgment arising from an arbitration award). As discussed more below, the authority in this State points to the fact that each of the Insureds does have an alternative - a declaratory judgment action.

determine liability.”⁸ Rather, Insurers attempt to create a situation where an insurer should be allowed to circumvent the rules that govern intervention to allow it to participate in discovery that is nearly complete in this case, and submit a special verdict form and/or special interrogatories to the jury. What the Insurers style as intervention for a “limited purpose” is full intervention to act as a party during the trial of this case, and it is disingenuous for the Insurers to claim otherwise.

The Insurers rely heavily on the recent Harleysville case to support their argument that intervention for purposes of discovery, and submission of a special verdict form and/or special interrogatories is appropriate. However, “[t]he South Carolina Supreme Court’s recent decision in [Harleysville] does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.” Harbour Cove Condominium v. Centex Homes, et al., 2014-CP-26-7634 at *3-4 (S.C.C.P., Horry County Ct., October 13, 2017)(Ex. B) (motion to intervene denied because movant insurers’ interest arose “solely out of its contract of insurance with its insured and those interests are not appropriate to be litigated or interjected into this construction defect action”); Beach Villas at Ocean Keyes Property Owners Association, Inc. v. Ocean Keyes Development, LLC, et al., 2014-CP-26-6573 (S.C.C.P., Horry County Ct., October 12, 2017) (same)(Ex. C).

The Harleysville Court dealt with an insurer’s obligation to indemnify its insured for the entire amount of a jury verdict because the insurer did not issue an adequate reservation of rights letter to the insured prior to undertaking its defense. Id. at 350. Thus, even if Harleysville stood for the proposition that an insurer may have a sufficient interest to satisfy standing under Rule 24, the Insurers would need to have issued ROR Letters that provide specific notice to their Insureds

⁸ Nationwide has even admitted that “generally, insurers lack standing to intervene in underlying actions to determine liability,” citing Goethe, 373 S.C. at 138-39; Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98,101,441 S.E.2d 822, 823 (1994) (citing Blue Cross and Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35 (1980)). (Builders Mutual Motion/Memo at 3).

in order to rely on Harleysville. Plaintiffs have not been provided any ROR Letters issued by the Insurers and none were attached to their Motions.⁹

Moreover, Harleysville does not support the Insurers' efforts at intervention because Harleysville makes no reference to intervention whatsoever. Without any mention of it, Harleysville cannot be read to allow intervention by the Insurers. Hutto v. Southern Farm Bureau Life Ins. Co., 259, S.C. 170, 173, 191 S.E.2d 7, 9 (1972) (holding "it is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in a case and not mentioned in the opinion'"); Coleman v. Page's Estate, 202 S.C. 486, 491, 25 S.E.2d 559, 560 (1943) ("A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside.").

The courts of this State have not upheld a different standard for those who seek to intervene for a limited purpose. Even for an allegedly "limited" purpose, the Insurers *must* carry their burden of showing that they are entitled to intervention as a matter of right. Neither Rule 24 nor any applicable South Carolina case law allow for such "limited" intervention. Each of the Insurers must show it is a "real party in interest" in this action; they have not done so, and thus, intervention must be denied.

2.) The Insurers' Motions Are Not Timely.

⁹ Nationwide makes no reference to a reservation of rights in its Motion. Builders Mutual and State Farm generally reference they are defending their Insureds under a reservation of rights, but do not attach ROR Letters to their Motions. (State Farm Motion at 3; Builders Motion/Memorandum at 4). And, Nautilus references (but does not attach to its Motion) a letter that it states "specifically advised" its Insureds "concerning the coverage issues and the potential that some or all damages awarded against it may not be covered"; warning its Insureds to "take steps to allocate the verdict as to covered and non-covered claims and/or damages"; and setting forth various grounds in its ROR Letter(s). (Nautilus Motion at 3-4). It may be that (at least some) Movants' intervention efforts are meant to protect themselves due to their failure to give proper notice to their Insureds.

As evidenced by the record, the Insurers' Motions to Intervene are untimely, and therefore, the Insurers are precluded from intervening pursuant to Rule 24, SCRPC. Factors to be weighed in considering the timeliness of an intervention motion include: (1) the time that has passed since the applicant knew, or should have known, of his interest in the suit; (2) the reason for the delay; (3) the stage to which the proceedings have progressed; and (4) the prejudice to the original parties if intervention were permitted, and that to the applicant if denied. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991).

Here, the Insurers requested intervention in mid to late 2018 and offered no reason for their delay in seeking intervention. Two of these insurers, Builders Mutual and Nautilus, have provided three years of defense on behalf of their insureds; Nationwide has provided over a year of defense; and State Farm has provided a defense since just after its insured entered the case earlier this year. None of these Insurers should be allowed to intervene after gaining control over this litigation. Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) ("Therefore, by virtue of its duty to defend, an insurer gains the advantage of exclusive control over the litigation,") (internal citations and quotations omitted).

Given the Insurers' failures to act in a more timely manner, they must be precluded from intervening. To hold otherwise would significantly prejudice Plaintiffs as well as their Insureds. These and the remaining factors for timeliness weigh against the Insurers and thus the Insurers' applications for intervention should be denied as untimely.

3.) Allowing the Insurers to Intervene Would Create An Impermissible Conflict of Interest, Interfere with the Proper Adjudication Of the Defect Claims, and Prejudice Plaintiffs.

The Insurers' motions must be denied because an Insurer's participation creates an inescapable conflict of interest in how the insured's liability will be presented to the trier of fact.

Courts have recognized the inherent conflict of interest in insurance companies intervening in liability trials in which they have appointed counsel to defend the insured. See, e.g., Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E2d 523, 524 (1965) (Court found that, had insurer undertaken insured's defense and been allowed to assert that insured intentionally caused injuries, "a clear conflict of interests between insurer and insured would have been presented"); Lewis, 2013 WL 3762904 at *4 (denying intervention of insurance company and finding that "injecting the issues of coverage and Excel's liability into this action would prejudice the Parties."); Restor-A-Dent, 725 F.2d at 877 ("Allowing the insurer to intervene . . . might, as a practical matter, . . . exacerbate a potential conflict of interest for the attorney furnished by [the insurer] to represent [the insured]."); Hunter v. Peters, No. 423946, 2001 WL 34093937, at *2 (Conn. Super. Ct. Dec. 13, 2001) (denying intervention by the insurer, stating "[t]he jury's job is to determine whether the plaintiff has satisfied his burden of proof on the asserted causes of action [and the insurer's] proposed interrogatories will provide a distraction from that task. In addition, allowing such intervention may create a potential conflict of interest for the attorney furnished by [the insurer] to represent [the insured]."); Nieto v. Kapoor, 61 F. Supp. 2d 1177, 1195 (D.N.M. 1999), aff'd, 268 F.3d 1208 (10th Cir. 2001) (denying a motion for permissive intervention where the proposed intervenor/insurer's interests were "unquestionably antagonistic" to those of the defendant and therefore had the potential to prejudice the adjudication of his rights, since the defendant would "[n]ot only . . . have the burden of presenting a defense to Plaintiffs' accusations, but he will carry the additional burden of having his insurer interfere with his defense," and also finding that the better course of action was to allow the insurance company's already commenced but stayed declaratory action to resolve the coverage conflict at the conclusion of the primary litigation).

If intervention occurs, the insurance company, that retained counsel to defend the insured against construction defect claims, would be launching a second, separate offensive in the defect action to challenge coverage, and ultimately future indemnity payments, under the very policies it issued and under which it is simultaneously providing a defense. A fair adjudication of the construction defect claims and defenses asserted by the parties to this action is paramount; the Insurers' intervention in this trial does not further this end, it instead introduces an additional layer of complexity which is properly resolved in a separate suit. See Columbia Ins. Co. v. Reynolds, 225 F. Supp 3d 375 (2016) (declaratory judgment action held not to be ripe because verdict had not yet been entered in underlying suit).

Moreover, Plaintiffs' construction defect case will be hijacked if the Insurers intervene. The Insurers assert that if they were allowed to intervene, counsel for the Insurers would not announce themselves to the jury, and the Insurers would not be a party to the caption that the jury will see. Allowing the Insurers to intervene in this manner will interject insurance coverage issues into the trial of this case, requiring Plaintiffs to prepare and address unexplained coverage-related interrogatories to jurors in its case in chief. This will unnecessarily complicate the trial and confuse the jury, thus prejudicing Plaintiffs. Beach Villas at *5 (special interrogatories and/or special verdict forms requested by Insurers "will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues. . . . particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.") These considerations of prejudice to the original parties cannot be ignored, and weigh heavily against intervention.¹⁰ The reservation of rights

¹⁰ Builders Mutual and Nautilus argue they would be prejudiced if not allowed to intervene. (Builders Motion/Memorandum at 10, 14; Nautilus Motion at 7). However, the only prejudice considered in this analysis is prejudice to the "original parties" to the Underlying Action – not prejudice to non-parties such as the Insurers. Rule 24(b), SCRPC.

letter and ability to file a declaratory judgment action have long protected Insurers' interests without interfering with the original parties' rights to try the construction defect suit. These remain the proper tools for the Insureds here. (See Harbour Cove Order and Beach Villas Order, Ex. B and C; Sims, 247 S.C. 82)

4.) The Insurers Have No Claim or Defense that Shares a Question of Law or Fact in Common with Those in the Construction Defect Action.

The Insurers have not provided to the Court or to the parties a proposed pleading so as to show that it has any claims and/or defenses or that any such claims or defenses share questions of law or fact in common with those already propounded by the actual parties. Furthermore, the Insurers have not provided this Court with a copy of the special verdict form or special interrogatories they propose to submit to the jury. It is therefore impossible for Plaintiffs or the defendants to adequately oppose the content of the verdict form or interrogatories, and consequently, it is also impossible for this Court to assess the appropriateness of the verdict form or interrogatories. For this additional reason, the Insurers' proposed intervention is highly prejudicial to Plaintiffs and the defendants.

The Insurers make no mention of the claims or defenses that share a question of law or fact in common with those in this action other than to say they relate to covered versus non-covered damages. In failing to do so, the Insurers have not met their burden under Rule 24(b) of showing that their proposed "claim or defense and the main action have a question of law or fact in common." Rule 24(b), SCRPC. Intervention should be denied for this reason in addition to those enunciated in the foregoing sections.

As a practical matter, the Insurers cannot possibly have a claim or defense that involves whether or not the defendants violated their duties owed to Plaintiffs, which is the basis for all

claims and defenses propounded by Plaintiffs and disputed by the defendants. This fact, coupled with the fact that the Insurers have failed to comply with the pleading requirements of Rule 24(c), serve to defeat the Insurers' attempt to intervene.

6.) Intervention by the Insurers Would Infringe on Plaintiffs' Due Process Rights.

Plaintiffs' due process rights would also be infringed upon if intervention is allowed. The procedural requirements of due process include a parties' rights to introduce evidence and confront and cross-examine witnesses. This State follows the United States Supreme Court in recognizing these rights:

Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.

McMahan v. S.C. Dep't of Educ.-Transportation, 417 S.C. 481, 493, 790 S.E.2d 393, 399-400 (Ct. App. 2016), reh'g denied (Sept. 23, 2016), cert. denied (Sept. 8, 2017) (quoting In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)). Here, Plaintiffs would be deprived of their rights to present evidence and cross-examine witnesses as to coverage issues that Insurers seek to include in this case if the Insurers' are allowed "limited" (or any) intervention into this matter.

B. The Insurers' Motions to Intervene are Procedurally Defective.

The Insurers' Motions to Intervene also fail because they are procedurally defective. Rule 24, SCRCF, which governs intervention, requires that a motion requesting intervention be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The absence of (i) separate pleading that specifically sets forth the claims and/or defenses for which they now seek to intervene and (ii) special verdict forms or special interrogatories that the Insurers

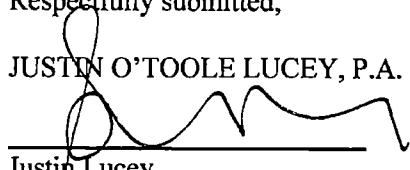
propose to submit to a jury following a verdict, warrant dismissal of the Insurers' Motions to Intervene.

CONCLUSION

Based upon the foregoing, this Court must deny each Motion to Intervene because each of the Movants has failed to satisfy the prerequisites necessary for intervention under Rule 24, SCRPC.

Respectfully submitted,

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Charleston, South Carolina
Dated: December 13, 2018

CERTIFICATE OF MAILING

2015-CP-10-955

I hereby certify that a copy of the foregoing pleading
was emailed to all counsel of record in this proceeding
this 13th day of December, 2015.

[Signature]

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CLERK OF COURT

Palmetto Pointe: Deposition of Al Schweickhardt, PE

June 27, 2018

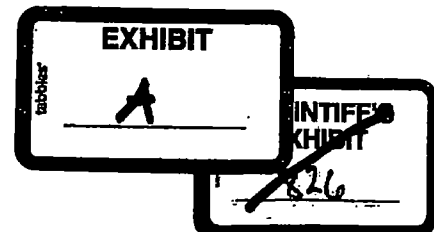
DEPOSITION POINTS – VOLUME 1

Code Violations:

- 1) CT siding (p. 26)
 - a. Inadequate nails (p. 105)
 - b. 9" boards don't meet wind loads (p. 105)
 - c. Substrate fastening inadequate (pp. 113, 115)
 - i. Spec'd use of Southern Pine (pp. 114, 116)
 - d. Failure to engage framing (p. 106)
- 2) HVAC duct insulation (code of laws) (pp. 26, 199)
- 3) Firestopping in attic (p. 26)
 - a. General (pp. 94, 220)
 - b. Perpendicular wood members (p. 198)
 - c. Ridge vent gap through firewall (pp. 101, 192, 223)
- 4) Corrosion of piling bolts – 4 units (pp. 23, 26), plus several (p. 217)
- 5) Fastening of floor diaphragm at one location looked at (p. 26)
- 6) Six rear decks with leaks at post intersection (p. 28)
- 7) Excessive shingle overhang (pp. 69, 127, 146)
- 8) Corroded post base trim nails (p. 71)
- 9) Low sloped roofs without double membrane and/or shingles on very low sloped roofs (pp. 83-5, 182-3)
- 10) Missing flashing on rear posts at six residences (p. 91)
- 11) Incorrect fasteners in fascia (p. 150)
- 12) Attachment of railing mounting plate to siding (pp. 176-7)
- 13) Rail post fastened through stair tread (p. 180)
- 14) Inadequate length rail plate fasteners (p. 192)

Violations of Industry Standards:

- 1) Above code violations 1-5 (pp. 26-27)
- 2) Coil stock adjacent to treated lumber (p. 27)
- 3) Improper shingle starter strip (pp. 27, 38) **CODE**
- 4) Reversed lapped weather barrier at base of wall z-flashing (p. 27)
- 5) Mixing of deck products between manufacturers (p. 64)
- 6) Attaching pump jacks through shingles (pp. 104, 150)
- 7) Trim in contact w shingles (pp. 133, 140, 148, 151)
- 8) Unpainted wood (p. 134)
- 9) Concrete control joints (p. 179)
- 10) Pinched duct turns (p. 191)



- 11) Connector plate in contact with Pressure Treated wood corroding (pp. 194-5, 216) strapping (p. 223)
- 12) Lack of sealant gap around window perimeter edge (pp. 167-8) *Manufacturer*

Unallocated:

- 1) Mid-rail support rubbing deck (pp. 51, 63)
- 2) Abrupt drip flashing edge transition creating gaps and water intrusion and damage (pp. 78-9, 162) *Manufacturer*
- 3) Unconfirmed firestopping at bottom of common wall (pp. 175, 23) *Code Violation*
- 4) Gaps in front post flashing not supposed to be there (pp. 110, 157, 160) *Code Violation*
- 5) Open seams between deck coating and posts (p. 144) - *Code*
- 6) Privacy walls (pp. 182-8) - *Code*
- 7) Ponding 7/16" deep (p. 200) 1/2" deep depression (p. 215) - *Manufacturer*

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

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

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

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

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

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



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

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

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

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

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

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

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

DISCUSSION OF THE LAW

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

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

BACKGROUND

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

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

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

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

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

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

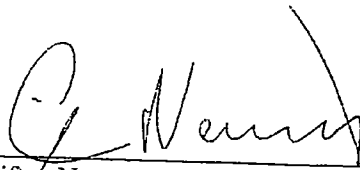
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel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

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

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12 2017



Clifton Newman
Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

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

Plaintiff,

vs.

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

Defendants.

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

Third-Party Plaintiffs,

vs.

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

Third-Party Defendants.

) IN THE COURT
) OF COMMON
) PLEAS
) FIFTEENTH
) JUDICIAL
) CIRCUIT

) CASE NO. 2014-
) CP-26-6573

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

THIS MATTER comes before this Court upon Motions of Canopus US Insurance Inc.

("Canopus"); Hartford Fire Insurance, Hartford Casualty Insurance Company and Hartford

Underwriters Insurance Company (collectively "Hartford"); and Selective Insurance Company of



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

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

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

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

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

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

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

of their respective insured(s); and

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

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

DISCUSSION OF THE LAW

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

BACKGROUND

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

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

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

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

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

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

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

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

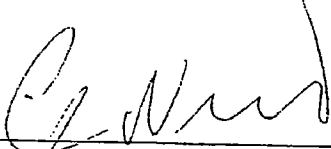
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel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

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

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 11, 2017



Clifton Newman
Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc., et al.,

Plaintiffs,

vs.

Island Pointe, LLC, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-00955

**TRI-COUNTY ROOFING, INC.'S
MEMORANDUM IN OPPOSITION TO
BUILDERS MUTUAL INSURANCE
COMPANY'S MOTION TO INTERVENE**

The Defendant, Tri-County Roofing, Inc. ("Tri-County"), by and through its undersigned attorneys, respectfully submit this Memorandum in Opposition to Builder Mutual Insurance Company's ("Builders Mutual") Motion to Intervene, on a limited basis, in this action pursuant to Rule 24 of the South Carolina Rules of Civil Procedure.

FACTS

This suit arises from the Defendants' alleged defective construction of the Palmetto Pointe at Peas Island condominium development, which is comprised of forty townhome-style condominiums, in addition to a clubhouse. Tri-County performed, among other things, roofing and flashing work on the project. In their most recent amended complaint, the Plaintiffs allege negligence, gross negligence, breach of warranties against Tri-County. As Builders Mutual discusses in its motion, it issued a string of commercial general liability policies to Tri-County, and it is providing a defense to Tri-County under these policies. (Mot., pp. 3-4)

Builders Mutual specifically requests to avoid becoming a named party in this action. (Mot., p. 13). Instead, Builders Mutual has filed its motion to intervene for the limited purpose of providing what it argues are necessary jury interrogatories. (See Generally Mot.). Through

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CLERK OF COURT

these interrogatories, Builders Mutual, remaining an anonymous non-party, would obtain information from the jury about whether awarded damages are attributable to Tri-County's "work" or to resulting "property damage."¹ Builders Mutual's goal of asking these interrogatories is to separate covered from excluded damages.

ARGUMENTS

It must be stressed from the onset that, by making its intervention motion, 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, should an award be 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 the motion. Logic would suggest that this Court should deny categorically any motion that has such a damaging result.

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, at this point, purely speculative, coverage, have no place in this litigation. Builders Mutual has no claims to make or damages to allege in this action. It does not own the property at issue. It was not a contractor, subcontractor or supplier who might have

¹ This Court is unquestionably aware of the purpose of such specific jury interrogatories. "Your work" is almost universally excluded from CGL policies, while resulting "property damages" is generally a covered loss, as described by the South Carolina Supreme Court's opinion in *Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (2011).

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 doing until making this motion 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. (holding that an insurer "cannot possibly defend the state court action and protect both its own interests and interests of its insureds.").

I. Builders Mutual reliance on *Newman* and *Harleysville* is misguided because the decisions make no mention of Rule 24, SCRPC, 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.

Throughout its motion, 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.). 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....” (Mot., p. 9). 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. (Mot., p. 9). 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.

II. 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.

Builders Mutual runs through quickly 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 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*, our Supreme 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. The Supreme 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 before this court. At issue in this action is 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 wants 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.

This desire to intervene on a very limited basis should be instructive about whether Builders Mutual 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. (Mot., p. 13). 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, SCRC, 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 assumes far too much about how testimony and evidence will be presented at trial. 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. 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. (Mot., p. 13). To ensure that it can provide interrogatories that make any sense, from evidentiary standpoint, Builders Mutual would have to hijack the litigation from afar and ensure the record is developed appropriately, a notion repugnant to bedrock principles of insurer good-faith and fair dealings.

Third, if Builders 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 are at least four similar intervention motions pending before this Court. 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 deny Builders Mutual’s motion.

III. 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, should 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. 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), our Supreme 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 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 motion. 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 this motion. Builders Mutual has put Tri-County on an island, and its actions runs contrary to its duty to defend Tri-County in this case.

CONCLUSION

For all of the above-stated reasons, this Court should deny Builders Mutual’s motion to intervene in this action on a limited basis.

(Signature on following page)

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Dec. 13, 2018
Charleston, South Carolina

17-310

STATE OF SOUTH CAROLINA

COUNTY OF CHARELSTON

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; COMPLETE
BUILDING CORPORATION; TRI-
COUNTY ROOFING, INC.; CREEKSIDE,
INC; AMERICAN RESIDENTIAL
SERVICES, LLC D/B/A ARS/RESCUE
ROOTER CHARLESTON; ANDERSEN
WINDOWS, INC.; ATLANTIC
BUILDING CONSTRUCTION
SERVICES, INC. N/K/A ATLANTIC
CONSTRUCTION SERVICES, INC.;
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;
CORNERSTONE CONSTRUCTION AND
MARK MALLOY D/B/A
CORNERSTONE CONSTRUCTION;
MIRACLE SIDING, LLC AND WILSON
LUCAS SALES D/B/A MIRACLE

IN THE COURT OF COMMON PLEAS

THE NINTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-10-00955

FILED
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AM 11:14
JAN 2 2015

SIDING, LLC; MARK PALPOINT A/K/A
MICAH PALPOINT; ELROY ALONZO
VASQUEZ; CHRIS A/K/A JOHN DOE 61;
ALDERMAN CONSTRUCTION;
STANEY'S VINYL FENCE DESIGNS;
COHEN'S DRYWALL COMPANY, INC.;
MOSELY CONCRETE; HAND A
FRAMING CONSTRUCTION, LLC
A/K/A H&A FRAMING
CONSTRUCTION, LLC AND D/B/A
H AND A FRAMING, LLC, H&A
CONSTRUCTION, AND HAND A
CONSTRUCTION; JMC
CONSTRUCTION, INC.; JMC
CONSTRUCTION, LLC; JOHN DOE 1-
15,

DEFENDANTS.

COMPLETE BUILDING
CORPORATION, INC.,

THIRD-PARTY PLAINTIFF,

V.

LEONARD T. BROWNE AND
CHRISTOPHER N. UNION,

THIRD-PARTY DEFENDANTS.

CREEKSIDE, INC.,

THIRD-PARTY PLAINTIFF,

V.

CHRISTOPHER N. UNION,

THIRD-PARTY DEFENDANT.

**Builders Mutual Insurance Company's Notice of Motion and Motion to Reconsider Form 4
Judgment in Civil Case Denying Motion to Intervene**

TO: Counsel of Record:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for Builders Mutual Insurance Company ("Builders Mutual"), will move before the Honorable Jennifer B. McCoy, for the Ninth Judicial Circuit, ten (10) days from the date of this motion, or as soon thereafter as counsel may be heard, pursuant to Rule 59(e), SCRPC, for an order reconsidering the Form 4 Judgment in a Civil Case, ("Form 4"), filed on December 18, 2018, denying Builders Mutual's Motion for Intervention Pursuant to Rule 24, SCRPC to Have the Court Submit a Special Verdict Form and/or General Verdict Form Accompanied by Answer to Interrogatories Pursuant to Rule 29, SCRPC ("Motion to Intervene"). Builders Mutual received a copy of the Form 4 on December 20, 2018 from another insurer's counsel.

Rule 59(e), SCRPC is the civil procedure for which Builders Mutual may request the Court to reconsider the Form 4. Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-79 (2004). The South Carolina Supreme Court has stated that Rule 59(e) provides a party "one final chance not only to call the court's attention to a possible misapprehension of an earlier

argument, but also to revisit a previously raised argument.” Elam v. South Carolina Dep’t of Transp., 361 S.C. at 22, 602 S.E.2d at 779.

Builders Mutual respectfully request that the Court issue an order that contains factual findings and legal conclusions. As it stands, Builders Mutual does not know the factual or legal basis for the Court’s decision to deny the Motion to Intervene.

Rule 24(a)(2), SCRCP, permits intervention as of right based on the following criteria: (1) there is a timely application; (2) movant asserts an interest relating to the property or transaction which is the subject of the action; (3) movant demonstrates that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) movant demonstrates that its interest is inadequately represented by other parties. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714 (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)).¹ In analyzing intervention for a particular case, the South Carolina Supreme Court has recognized that intervention controversies arise in a myriad of contexts. Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714. The Supreme Court has stated the following about intervention:

[W]e interpret the rules to permit liberal intervention particularly where as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected. Accordingly, [the Supreme Court] must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2).

Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714.

“Each case will be examined in the context of its unique facts and circumstances.” Berkeley Elec., 302 S.C. at 189, 394 S.E.2d at 714. There is precedent in South Carolina for limited intervention.

¹ To the extent the Court does not grant intervention pursuant to Rule 24(a)(2), Builders Mutual request that the Court grant intervention pursuant to Rule 24(a)(b).

See Davis v. Jennings, 302 S.C. 502, 405 S.E.2d 601 (approving intervention by a third party to challenge a protective order). Further, Builders Mutual submits that naming an insurer as a party or disclosing that Tri-County is insured is not permissible under South Carolina law. See Major v. Nat'l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976); see also Trancik v. USAA Ins. Co., 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003).

Builders Mutual's motion to intervene is timely. Plaintiffs contend that Builders Mutual appointed counsel to defend its insured, Tri-County, in April 2015 and therefore Builders Mutual's motion untimely.² Plaintiffs' contention on the date is wrong. Builders Mutual was put on notice of the Civil Action by letter dated January 15, 2018. (Exhibit A). Builders Mutual attended the mediation that took place on January 30 and 31, 2018. Thereafter, Builders Mutual served its Motion to Intervene on March 22, 2018. The Motion to Intervene came before the Court for the first time on December 17, 2018. Builders Mutual is informed that a jury trial is not scheduled until May 2019.

Builders Mutual submits that the Honorable William H. Seals, Jr. has addressed timeliness correctly in the following wherein Judge Seals granted a motion to intervene for Selective Insurance Company in a construction defect case like the present action:³

The Court does not find Selective's motion to intervene to be untimely. The timeliness of the motion must be judged in relation to its purpose. As indicated, Selective seeks to intervene for a limited purpose. Selective seeks only the ability

² Plaintiffs filed a written objection to the Motion to Intervene on December 14, 2018. Plaintiffs did not serve the written objection on Builders Mutual. Defendant Tri-County Roofing, Inc. ("Tri-County") served an objection to the Motion to Intervention on December 13, 2018.

³ Plaintiffs cite the Orders of the Honorable Clifton Newman in the Beach Villas and Harbour Cove construction defect cases that are or were pending in the Circuit Court in Horry County. Judge Newman did not find that the motions to intervene filed by several insurers to be untimely. The motions to intervene were filed between two and three months before a date certain trial in October 2017.

to request that the trial court submit a special verdict and/or special interrogatories to the jury to determine the basis for the jury's verdict against the insureds, if a verdict is returned in favor of the Plaintiff's 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, as 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 insurance coverage issues. The jury will not be informed that Selective has intervened or is represented in the courtroom. Selective's motion for submission of special interrogatories or a special verdict will occur entirely outside the presence of the jury.

Order Granting Motion to Intervene, 2009-CP-26-6392, Honorable William H. Seals, Jr. (March 21, 2011).

Plaintiffs are not surprised or prejudiced by the Motion to Intervene. From the start of the Civil Action, Plaintiffs have sought insurance coverage for the damages alleged in the Civil Action against Defendants including Tri-County. Plaintiffs' counsel are experienced and fully knowledgeable about insurance coverage for construction defects claims. Plaintiffs alleged language in their Complaint that tracks the law on insurance coverage for a construction defect claim in Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) ("Newman") and Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011) ("Crossmann"). The allegations were written to trigger a defense by insurers for the defendant contractors and ultimately for indemnity.

"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." (Complaint ¶ 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. (Complaint ¶ 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.” (Complaint ¶ 23).

Since Builders Mutual began providing a defense in January 2018, the parties have conducted two mediations (January 2018 and July 2018) wherein insurers were required by Rule 6, SCADR to attend. The law on the duty to defend and mediations require the insurers to participate, but the Court’s Form 4 precludes Builders Mutual from being able to participate in a procedure to seek an allocation of any jury verdict in favor of Plaintiffs, if any, and to avoid the consequences of a general verdict to an insurer that occurred in Newman and Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017)(“Heritage Communities”).

Builders Mutual submits that it has an interest relating to the property or transaction which is the subject of the action; and that Builders Mutual has shown that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest. Builders Mutual submits that it seeks to avoid the legal consequences of a general verdict placed on the insurers in Newman and Heritage Communities. Builders Mutual submits that Builders Mutual being made to pay an entire verdict or judgment (that includes covered and non-covered damages) is prejudicial to Builders Mutual, contrary to South Carolina law on insurance coverage and can be prevented by the Court allowing Builders Mutual to intervene on a limited basis to seek special interrogatories.

Under established South Carolina law, a standard CGL insurance policy does not insure all of the damages that Plaintiffs seek to recover against Tri-County. A CGL insurance policy does not insure Tri-County’s (alleged) defective construction itself or the defective installation of the

roofs and other work. Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 8, 747 S.E.2d 426, 430 (2013); Crossmann, 395 S.C. at 50, 717 S.E.2d at 594; Newman, 385 S.C. at 197-98, 684 S.E.2d at 546. A CGL insurance policy does not insure the costs to repair Tri-County's defective work even if the cost of removing the defective work is incidental to repairing water damaged other property that may possibly be insured under a CGL insurance policy. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546. A CGL insurance policy does not insure the costs to replace Tri-County's alleged defective work. Newman, 385 S.C. at 197-98, 684 S.E.2d at 546. Further, S.C. Code Ann. ¶ 38-61-70 states that faulty workmanship is not an insured loss:

....

(B) Commercial general liability insurance policies shall contain or be deemed to contain a definition of "occurrence" that includes:

- (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and
- (2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.

In two published decisions, the South Carolina Supreme Court has required the insurer in each appeal to pay a general verdict arising in a construction defect civil action where the Supreme 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, Inc., 420 S.C. 321, 803 S.E.2d 288. The South Carolina Supreme Court held in Newman the following:

Accordingly, we 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.

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 re-litigate 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.

Newman, 385 S.C. at 199, 684 S.E.2d at 547.

In Heritage Communities, the Supreme Court reached the same result. In Heritage Communities, the Supreme Court cited with approval the finding of the special referee, in the declaratory judgment action deciding insurance coverage, who concluded, “that it would be improper and purely speculative to attempt to allocate the juries' general verdicts between covered and non- covered damages. Accordingly, the special referee ordered the full amount of the actual damages in the construction-defect suits would be subject to Harleysville's duty to indemnify in proportion with its time on the risk.” Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294. Further, the Supreme Court stated, “the Special Referee also found the ‘Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict’ as to the negligent construction, breach of warranty, and breach of fiduciary duty claims, and the Special Referee refused to ‘engage in unguided speculation with respect to this issue of [allocating losses], particularly when the dilemma now confronting Harleysville is of its own making’.” Heritage Communities, Inc., 420 S.C. at 363, 803 S.E.2d at 311 fn. 11.

The Honorable J.C. Nicholson, Jr. ruled in favor of Selective Insurance Company (“Selective”) being able to intervene on a limited basis in a construction defect case not unlike this case or the underlying actions in Newman and Heritage Communities.⁴ Judge Nicholson found

⁴ The Honorable William H. Seals, Jr. ruled similarly in two construction defect cases. *Michael Ingram v. Lauderdale Bay Developer*, Civil Action No. 2017-CP-26-2854. *Order Granting Motion to Intervene* filed on October 18, 2018 (copy submitted to Court); and *Andrew and Diane Corvey v. Hall Custom Homes of South Carolina, LLC*, Civil Action No. 2009-CP-26-6392, *Order Granting Motion to Intervene* filed on March 28, 2011 (copy submitted to Court).

that Selective did have an interest in the subject matter of the litigation and that the disposition of the action may impede Selective's ability to protect its interest. Judge Nicholson found that Selective sufficiently showed prejudice if intervention were denied. Judge Nicholson stated the following:

A denial would result in the impairment of [Selective's] interest in that Selective may ultimately be compelled to pay the entire judgment despite the fact that a portion of that judgment may not be a covered risk for which a premium was paid. That very result occurred in Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), and given the admonitions by the Supreme Court, this Court believes that Selective in fairness should be permitted to intervene in this action to prevent the same detrimental result from occurring here.

Order Granting Motion to Intervene, 2013-CP-08-0179, Honorable J.C. Nicholson, Jr. (January 17, 2017)(copy submitted to Court).

Tri-County argues that Builders Mutual's interest as an insurer is insufficient for intervention and cites Gov't Employee's Ins. Co., Ex parte, 373 S.C. 132, 644 S.E.2d 699 (2007). In Gov't Employee's Ins. Co., the Supreme Court found that GEICO's interest in the financial implications of the family court decision was peripheral to the subject matter and did not warrant intervention. Gov't Employee's Ins. Co., 373 S.C. at 138, 644 S.E.2d at 702. Builders Mutual submits that based on Newman and Heritage Communities that reliance on Gov't Employee's Ins. Co., is legally erroneous, as Builders Mutual will be deprived of its legal rights and insurance benefits will be determined in the construction defect case if Builders Mutual is not allowed to intervene.

To the extent the Court does not allow limited intervention, Builders Mutual request that the Court issue an order that protects Builders Mutual from the legal consequences of a general verdict placed on the insurers in Newman and Heritage Communities. Builders Mutual request that

the Court find that Plaintiffs and Tri-County have the sole and exclusive burden for allocating damages during trial between non-covered damages and potentially covered damages; and that to the extent there is a general jury verdict, Plaintiffs and Tri-County shall fully bear the legal consequences for having opposed intervention and for not having the jury allocate at all or not having the jury allocate sufficiently covered versus non-covered damages.

Plaintiffs and Tri-County contend that Builders Mutual can protect its interest by filing a declaratory judgment action. Builders submits that a declaratory judgment action before the end of the Civil Action does not protect Builders Mutual. Simply put, indemnity in this case cannot be decided before a verdict is rendered in the Civil Action. In contrast to the duty to defend, which is based on pleadings, the duty to indemnify an insured is based on the findings of the trier of fact. See Ellett Bros., v. U.S. Fidelity & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001) citing Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 476 S.E.2d 708, 711 (1996). A declaratory judgment court cannot make findings of fact concerning “property damage” unless and until the jury has rendered a verdict; and to do so is reversible error. Auto-Owners v. Rhodes, 405 S.C.584, 604, 748 S.E.2d 781, 791 (2013)(“We hold the declaratory judgment action was procedurally proper save for a ruling on issues regarding property damages as there are related questions of fact that must be decided by a jury or retrial.”).

The duty to indemnify is based on the obligation in a CGL insurance policy to pay a judgment rendered against an insured. Sloan Const. Co., Inc. v. Central Nat. Ins. Co. of Omaha, 269 S.C.183, 236 S.E.2d 818 (1977). The standard ISO CGL insurance policy form states, “[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” See Heritage Communities,

Inc., 420 S.C. at 333, 803 S.E.2d at 295.⁵ At this point, there is no final jury verdict or judgment for which a court hearing a declaratory judgment concerning insurance can adjudicate how much “property damage”, if any, is covered by the policies. The parties do not know at this point whether a jury will award Plaintiffs all that Plaintiffs request at trial; whether a jury will award less than what is requested or a compromised amount; or a whether a jury will find in favor of Tri-County and awards no damages to Plaintiffs. If the third option occurs, there will be no reason for a declaratory judgment action at all.

Builders Mutual submits that a circuit judge hearing an insurance coverage action will find that an allocation must be and should have been performed in the underlying action – as did the special referee in Heritage Communities. Builders Mutual submits that the South Carolina Supreme Court requires the same or for there to be an allocation in the underlying action or the present Civil Action. The declaratory judgment action in this case does not proceed until the jury verdict or judgment is rendered.

Plaintiffs and Tri-Counties’ position that Builders Mutual can simply file a declaratory judgment does not protect Builders Mutual from the consequences of a general verdict. In Heritage Communities, Harleysville made the intentional decision to not intervene in the underlying construction defect action and to instead contest coverage in a subsequent declaratory judgment proceeding consistent with the law in Sims v. Nationwide, 247 S.C. 82, 145 S.E.2d 523 (1976). However, the special referee rejected this course of action and found that the court could not unravel the general verdict; and the special referee stated that Harleysville Insurance instead could

⁵ S.C. Code Ann. ¶ 38-61-70 states in part as follow: “(1) ‘Commercial general liability insurance policy’ means a contract of insurance that covers occurrences of damages or injury during the policy period and insures a construction professional for liability arising from construction related work.”

have intervened pursuant to Rule 24, SCRCP in the underlying construction defect action and requested special interrogatories pursuant to Rule 49, SCRCP. *Order, Harleysville Group Insurance v. Heritage Communities, Inc. et al.*, 2009-CP-26-11862 (Filed March 13, 2013)(John M. Milling, Special Referee)(“Harleysville made the decision not file a motion to intervene or otherwise seek an allocated verdict as it could have done under Rule 24, 49, SCRCP.”)(copy submitted to Court).

There is no absolute conflict in Builders Mutual intervening for the limited purpose to seek special interrogatories. First, Tri-County is represented by defense counsel Andrew Cole, Esq. Mr. Cole’s client is Tri-County and not the insurers who retained him to defend Tri-County. Rule 5.4(c), RPC, Rule 407, SCACR (“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”). Mr. Cole must act in the best interest of Tri-County even if that means differing with Builders Mutual on the form and content of special interrogatories at trial. Second, any conflict is moot. Samuel M. Wheeler, Esq. of Smith Closser, P.A. entered an appearance on behalf of Tri-County as additional counsel and objected to the Motion to Intervene.

Builders Mutual submits that it had demonstrated that its interest is inadequately represented by other parties. This burden is minimal and Builders Mutual need only show that the representation of its interests “may be” inadequate. *Berkeley Elec.*, 302 S.C at 191, 394 S.E.2d at 716. It should be undisputed that Palmetto Pointe and Tri-County *may be* inadequate to represent Builders Mutual’s position. Both Tri-County and Palmetto Pointe filed written objections to the Motion to Intervene. Palmetto Pointe and Tri-County want a court hearing a declaratory judgment to find as the Supreme Court did in *Newman* and *Heritage Communities*. Both parties seek to wield

a sword and a shield against Builders Mutual, which is prohibited by law. Heritage Communities, 420 S.C. at 356-57, 803 S.E.2d at 308.

Plaintiffs argue that Builders Mutual must in effect produce its reservation of rights letter sent to Tri-County in order to intervene. Builders Mutual submits that its reservation of rights letter is irrelevant and moot for the purposes of the Civil Action. In Heritage Communities, a declaratory judgment action commenced after the jury verdicts, the Supreme Court affirmed the special referee's finding that the Harleysville Insurance Company's reservation of rights letter was inadequate because the letter(s) failed to advise the insureds of the need to allocate covered versus non-covered damages during the trial in order to later determine insurance coverage; and advise the insured of any conflict that may exist between the insured and insurer. See Heritage Communities, 420 S.C. at 341, 803 S.E.2d at 299.

First, whether Builders Mutual's reservation of rights letter is adequate may be relevant for a later declaratory judgment action as it was in Heritage Communities. Second, Plaintiffs do not have standing to obtain the reservation of rights letter. In Heritage Communities, the Supreme Court found that the special referee did not err in allowing the judgment creditor to have the reservation of rights due to the "specific circumstances" of the case. Heritage Communities, 420 S.C. at 337, 803 S.E.2d at 297. The specific circumstances were that the insured was insolvent and not defending the declaratory judgment action. Heritage Communities, 420 S.C. at 337, 803 S.E.2d at 297. The present circumstances are factually distinguishable. Tri-County is being defended and Tri-County has hired additional counsel to oppose Builders Mutual or address insurance. Further, the reservation of rights is moot. Tri-County has filed a written objection and its counsel can specifically advise Tri-County on the consequences of a general jury verdict for insurance

coverage; and address any conflict. There is no lack of notice or understanding by Tri-County that may have taken place with the insureds in Heritage Communities.

Finally, the reservation of rights is Builders Mutual's work product that is prepared in anticipation of and for litigation and is protected by Rule 26(b)(3), SCRCP. The document also contains the mental impressions, conclusions, opinions, legal theories of counsel that are protected from disclosure. Plaintiffs are not entitled to the production. Plaintiffs can read the insurance policies produced in the Civil Action and decide for themselves (on the advice of counsel) the coverages provided by the policies. Plaintiffs are entitled to copies of the insurance policies only in accordance with Rule 26(b)(2), SCRCP. Should the Court consider the reservation of rights somehow relevant in the Civil Action and wish to review the same, Builders Mutual will produce the document for an *in camera* review by the Court only. However, Builders Mutual submits that a reservation of rights has no factual or legal relevancy in the Civil Action.

Opposing parties submit that allowing special interrogatories will make the trial too complex. The circuit court has the power to exercise reasonable control over the mode and order of the trial. Rule 611(a), SCRE. Rule 49, SCRCP, is a rule of civil procedure specifically formulated to have juries answer questions about the basis for their verdict. Builders Mutual is not seeking to do something that has no basis in the South Carolina Rules of Civil Procedure. Builders Mutual submits that the Court should not avoid using Rule 49, SCRCP, because a construction defect case may be complex. The Court should proceed on the premise that Rule 49, SCRCP, is a procedure that can work as noted by the Fifth Circuit Court of Appeals in the following:

The consequences to the insureds of a nonallocated verdict is the catastrophic total loss of coverage. The risks to the insurer in requesting an allocated verdict are of no such magnitude, if of any consequence at all. A request for identification of the two types of damages reveals neither the presence of insurance nor the amount of coverage. 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 v. Hoch, 468 F.2d 973, 979 (5th Cir. 1972)(Duke cited in Heritage Communities).

Second, Builders Mutual submits that asking a jury to answer interrogatories is not nearly as complicated as other tasks required by juries in construction defect cases, including having a jury grasp building code, industry standards, and construction estimates. Builders Mutual submits that interrogatories tailored to how much a jury awards for removing and replacing the Tri-County's work versus the cost to repair moisture damaged sheathing is much less complicated than Palmetto Pointe's burden of proof on liability and damages overall. Also, the task is practically completed already in this case based on Palmetto Pointe's estimate that was submitted to the Court that evidences and separates cost to repair faulty work versus property damage. Thus, the next step is for a jury to affirm how much of that estimate or what parts of that estimate, *if any*, will be awarded as damages against Tri-County. Builders Mutual submits that a circuit court judge can and does have control over the trial to complete this task and can do so without overly complicating the trial or confusing the jury.

Plaintiffs contend that they must know now what the special interrogatories will be in the Civil Action. Builders Mutual submits that any special interrogatories will be based on the evidence admitted at trial, which, again, is the basis for a jury verdict and thus indemnity. Builders Mutual submits that any interrogatories will be consistent with the well-established law in Newman, (and Crossman) that holds that the cost to remove and replace Tri-County's faulty workmanship is not insured even if such costs are incidental to repairing "property damage" or water damaged building materials that may be covered by the policy. Newman, 385 S.C. at 198,

684 S.E.2d at 546. Special interrogatories depend on the proof at trial and drafting is essentially premature just as the parties and a presiding judge have not yet prepared jury charges. That said, some conceptual interrogatories may read as follows:

1. Do you find that Defendant Tri-County Roofing's work proximately caused any physical injury to tangible property for which Tri-County Roofing is liable to Plaintiffs?

Yes ____; No ____.

If you answer "No" to Interrogatory No. 1, do not answer Interrogatory No. 2.

2. If you answer "Yes" to Interrogatory No. 1, list the physically injured tangible property on the lines provided below. To answer this Interrogatory, you may use descriptions of property described in exhibits or in witnesses' testimony. In addition, if you answered "Yes" to Interrogatory No. 1, write the dollar amount in the blank below for the costs to repair the physically injured tangible property excluding any costs to remove and replace Tri-County's work.

Dollar Amount: _____.

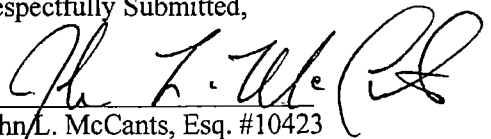
3. Do you award any loss of use damages against Tri-County Roofing? If you answer "Yes", please write the dollar amount in the blank below.

Yes ____; No ____.

Dollar Amount: _____.

Civil Action No.: 2015-CP-10-00955
Builders Mutual Insurance Company's Rule 59(e) Motion

Respectfully Submitted,


John L. McCants, Esq. #10423
Rogers Lewis Jackson Mann and Quinn, LLC
PO Box 11803 (29211)
1901 Main Street, Suite 1200
Columbia, SC 29201
Ph: 803-978-2834
Fax: 803-252-3653
jmccants@rogerslewis.com
**ATTORNEY FOR BUILDERS MUTUAL
INSURANCE COMPANY**

December 27, 2018

EXHIBIT A



Andrew N. Cole, Jr. 803.256.6433 F: acole@collinsandlacy.com

January 15, 2018

VIA E-MAIL
Milton Harrelson
Builders Mutual Insurance
[REDACTED]

**CONFIDENTIAL DOCUMENT:
REDACTED FOR WORK
PRODUCT DOCTRINE**

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., et al. v. Island Pointe, LLC, et al. [& Tri-County Roofing, Inc.]; and Tri-County Roofing, Inc. (3rd-Party P.) v. Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction, Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC, Mark Palpoint a/k/a Micah Palpoint, Eloy Alonzo Vazquez, and Chris a/k/a John Doe 61 (3rd-Party Ds.)
Civil Action No. 2015-CP-10-955
[REDACTED]
[REDACTED]

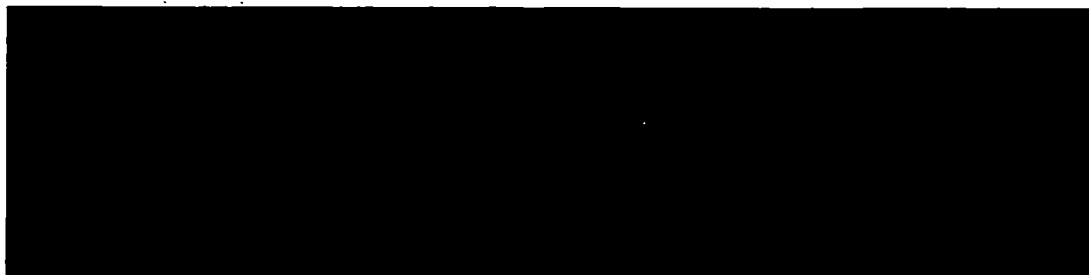
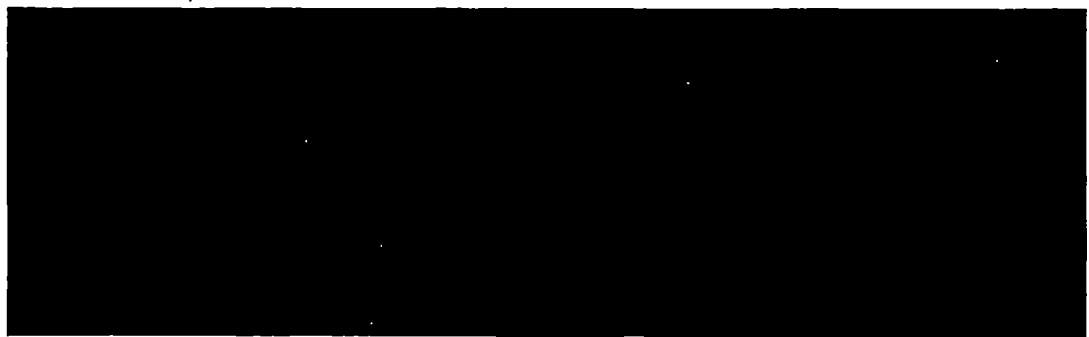
Dear Milton:

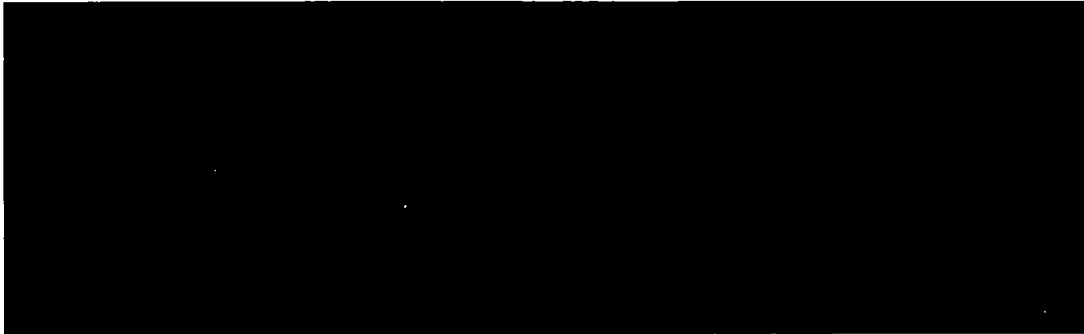
I have been defending the defendant Tri-County Roofing, Inc. in the above-referenced action under policies issued by Scottsdale (policy effective July 24, 2006 through July 24, 2007) and Lloyd's, London with Raphael & Associates as TPA (policy effect July 24, 2007 through July 24, 2008). I am sending this letter to you because this case is scheduled to be mediated soon on January 30-31, 2018, and I am making an official inquiry to ask if Builders Mutual will be joining in/sharing in the defense of Tri-County Roofing.

I am aware of the policies from Scottsdale and Lloyd's that cover years 2006-2008. I am following up with a subsequent Lloyd's policy from 2008-2009. Although I do not have the actual policy numbers, I understand that Builders Mutual issued policies starting in or after 2009.

[REDACTED]

[REDACTED]





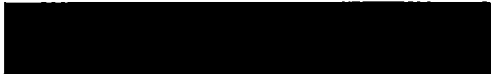
I thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew N. Cole", written over the word "Sincerely,".

Andrew N. Cole

cc: Scott Nirenberg, Raphael & Associates
Bruce Canade, Scottsdale Insurance Co



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Nationwide Mutual Insurance Company, et al.
☐ Plaintiffs

v.

Kelly Flooring Products, Inc., et al
☐ Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.
2015-CP-10-0955

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Edward D. Buckley, Jr., Esquire, Bar No.
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29402
phone: (843)720-5446 fax:
e-mail: ebuckley@ycrlaw.com other:

Defendant's Attorney:
Tim J. Newton
Murphy & Grantland, PA
Post Office Box 6648
Columbia, SC 29260
phone: 803-782-4100 fax: 803-782-4140
e-mail: tnewton@murphygrantland.com other:

- ☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

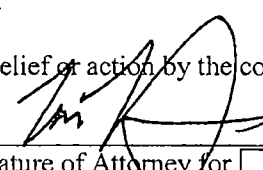
SECTION I: Hearing Information

Nature of Motion: Nationwide Mutual Insurance Company's Motion to Reconsider
Estimated Time Needed: 20 minutes Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

January 2, 2019

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: 25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed: _____

Collected by: _____

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2015-CP-10-00955

Nationwide Mutual Insurance Company,

Petitioner,

IN RE:

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Jack
Love, individually, and on behalf of all others
similarly situated,

Plaintiff,

vs.

Island Pointe, LLC, *et al.*,

Defendants.

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION BY
NATIONWIDE MUTUAL
INSURANCE COMPANY**

FILED
2019 JAN -4 AM 11:48
JULIE J. ARMSTRONG
CLERK OF COURT

TO: ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT Applicant, Nationwide Mutual Insurance Company (hereinafter Nationwide) hereby moves for reconsideration of this Court's denial of its motion to intervene in this action. This Motion is made pursuant to Rules 52(b) and/or 59(e) of the South Carolina Rules of Civil Procedure. This Motion seeks reconsideration of the Order denying all pending motions to intervene which was entered by The Honorable Jennifer Blanchard McCoy and filed with the Court of Common Pleas for Charleston County on December 18, 2018.

Nationwide has not been served with a copy of the above-referenced Order. Due to a technical issue, counsel for Nationwide did not receive e-mails related to this matter until January 2, 2019. Counsel's e-mail provider (Outlook), was automatically sending all e-mails related to the pending motions to the Junk folder. Nevertheless, counsel became aware through a verbal

conversation with other counsel. Accordingly, Nationwide is hereby filing its Motion to Reconsider at the earliest possible opportunity.

Nationwide's Motion is made upon the same grounds as those raised by State Farm Fire and Casualty Company ("State Farm") and Nautilus Insurance Company ("Nautilus") in their Motions to Reconsider, both of which were filed on December 31, 2018. To conserve judicial resources, Nationwide hereby incorporates the grounds asserted by State Farm and Nautilus into this Motion.

Pursuant to Rule 11, SCRCP, undersigned counsel certifies that consultation would serve no useful purpose.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire (SC Bar #7941)
Timothy J. Newton, Esquire (SC Bar #71640)
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100; ext. 1242
(803) 782-4140 (facsimile)
Email: tnewton@murphygrantland.com
Attorneys for Nationwide Mutual Insurance
Company

Columbia, South Carolina
January 2, 2019

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

RECEIVED

FEB 19 2019

SC Court of Appeals

Ex Parte:

Builders Mutual Insurance Company, Appellant,

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.

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

v.

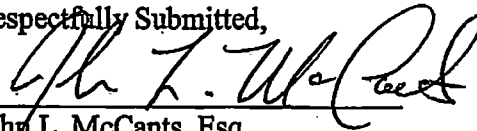
Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete.....Third-Party Defendants.

Of whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and behalf of all others similarly situated, and Tri-County Roofing, Inc. are the Respondents.

NOTICE OF APPEAL

Builders Mutual Insurance Company ("Appellant") appeals the Order/Statement of Judgment of the Honorable Jennifer B. McCoy, dated December 17, 2018, denying the Motion for Intervention filed by Builders Mutual Insurance Company; and the Appellant appeals the Order/Statement of Judgment of the Honorable Jennifer B. McCoy, dated January 16, 201[9], denying the Motion for Reconsideration filed by Builders Mutual Insurance Company. Appellant received written notice of entry of the Order/Statement of Judgment denying the Motion to Reconsider on January 21, 2019.

Respectfully Submitted,



John L. McCants, Esq.

SC Bar No. 10423

Rogers Lewis Jackson Mann & Quinn, LLC

PO Box 11803 (29211)

1901 Main Street, Suite 1200

Columbia, SC 29201

Tele: (803) 978-2834

Fax: (803) 252-3653

jmccants@rogerslewis.com

Attorney for Appellant Builders Mutual Insurance Company

February 19, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

RECEIVED

FEB 19 2019

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.
PLAINTIFF(S)

Island Pointe, LLC, et al.

DEFENDANT(S)

SC Court of Appeals

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motions for Intervention filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2764
Judge Code

12/1718
Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

RECEIVED

FEB 19 2019

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.
PLAINTIFF(S)

Island Pointe, LLC, et al.

DEFENDANT(S)

SC Court of Appeals

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motions for Reconsideration of this court's ruling on Motions to Intervene filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

A. McCoy
Circuit Court Judge

2764
Judge Code

1/16/18
Date

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

RECEIVED

FEB 27 2019

SC Court of Appeals

RECEIVED

FEB 27 2019

S.C. SUPREME COURT

Ex Parte: Builders Mutual Insurance Company, Appellant,

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, and Tri-County Roofing, Inc. are the Respondents.

MOTION TO TRANSFER CASE TO THE SUPREME COURT

Pursuant to Rule 204(b), SCACR, Appellant Builders Mutual Insurance Company ("Builders Mutual"), moves to certify the case for immediate review by the Supreme Court.

The appeal arises from a civil action styled *Palmetto Pointe at Peas Island Condominium Property Owners Association et al. v. Tri-County Roofing, Inc. et al.* Civil Action No. 2015-CP-10-00955 (the "Civil Action"). The Plaintiffs in the Civil Action commenced the action against the developer, design professionals and contractors (collectively, "Defendants") who were involved in the original design and construction of the condominium buildings that comprise the Palmetto Pointe residential community. The Plaintiffs allege that the buildings were constructed improperly and seek damages against Defendants based on what Plaintiffs allege it will cost to make future repairs to the buildings. Plaintiffs will seek to satisfy any verdict in favor of the Plaintiffs from general liability insurance policies issued by insurers to Defendants.¹

Builders Mutual moved to intervene in the Civil Action for the limited purpose of having the Circuit Court submit a special verdict form and/or special interrogatories to a jury in order to

¹ Builders Mutual issued general liability insurance policies to Defendant/Respondent Tri-County Roofing, Inc. ("Tri-County Roofing"). Builders Mutual is providing a defense to Tri-County Roofing through Andrew Cole, Esq. of the law firm Collins & Lacy, P.C., pursuant to a reservation of rights.

allocate a verdict, if any, in favor of Plaintiffs and avoid the consequences of a general verdict that occurred to the insurers in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009) ("*Newman*") and *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 332, 803 S.E.2d 288, 294 (2017) ("*Heritage Communities*"). The consequences in *Newman* and *Heritage Communities* were that the insurers were required to pay the entire verdict/award in the underlying actions even though parts of the verdict/award included non-insured damages.²

Plaintiffs and Tri-County Roofing objected to Builders Mutual being able to intervene in the Civil Action.³ The Circuit Court entered its Order/Statement of Judgment denying the Motion to Intervene filed by Builders Mutual. (Exhibit A). The Circuit Court did not provide an explanation for the ruling. Builders Mutual moved to have the Circuit Court reconsider its Order/Statement of Judgment, including to provide an explanation for the ruling, which the Circuit Court denied in its Order/Statement of Judgment Denying Motion to Reconsider. (Exhibit A).

² Builders Mutual submits that substantive issues of insurance coverage are established and will be addressed or discussed in the appeal with citations to the Supreme Court's decisions in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011) ("*Crossmann*") ("In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not."); *Newman*, 385 S.C. at 198, 684 S.E.2d at 546 (These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco—even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy—and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover."). The present appeal concerns procedures. *Newman* and *Heritage Communities* did not provide definitive procedural guidelines which has resulted in insurers seeking to intervene on a limited basis in construction defect civil actions to guard against a general verdict. If there is a verdict in favor of Plaintiffs, the objective is to have separated beforehand or contemporaneously those costs which are to remove and replace Tri-County's work (not covered) from those cost which are to repair "property damage" (potentially covered).

³ Tri-County Roofing hired personal counsel who objected to the Motion to Intervene filed by Builders Mutual.

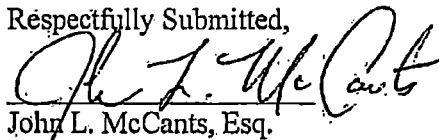
Builders Mutual filed a Notice of Appeal on February 19, 2019 with the Court of Appeals. The appeal presents at least one major issue that is recurring in construction defect civil litigation in South Carolina and will continue to recur: If there are to be consequences to a liability insurer for a general verdict, what procedures can an insurer follow to preclude those consequences or to assure there is an allocated verdict for insurance coverage purposes? Builders Mutual seeks certification for the Supreme Court to decide the issues to be presented and for Builders Mutual to be able to avoid the legal consequences of a general verdict of past precedent for the present Civil Action.

Transferring a case to the Supreme Court “is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.” Rule 204(b), SCACR. The Supreme Court has granted certification in appeals, either on the motion of a party or the Court’s own motion, presenting recurring questions affecting liability insurers and insureds with respect to construction defect litigation. *See Heritage Communities; Crossmann; Newman; Bennett and Bennett Const., Inc. v. Auto-Owners Ins. Co.*, 405 S.C. 1, 747 S.E.2d 426 (2013); *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013); and *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005). Further, the Supreme Court granted a Motion to Transfer the Case, like the present one, in a recent appeal filed by insurers in Appellate Case No. 2017- 02146 concerning the denials of motions to intervene in an underlying construction defect case.⁴ Builders Mutual submits that absent intervention or an appeal, the trial in the Civil Action would have gone forward to an unallocated or general verdict. It thus makes eminent sense to resolve the issues raised by *Newman* and *Heritage Communities* before a trial in the Civil

⁴ The parties in Appellate Case No. 2017- 02146 settled the appeal and underlying civil action before oral arguments in the Supreme Court.

Action; and Builders Mutual submits that a most efficient way is certification under Rule 204(b), SCACR. For these reasons, Builders Mutual moves pursuant to Rule 204(b), SCACR for certification by the Supreme Court for immediate review of the case.

Respectfully Submitted,



John L. McCants, Esq.

Rogers Lewis Jackson Mann and Quinn, LLC

SC Bar No. 10423

PO Box 11803 (29211)

1901 Main Street, Suite 1200

Columbia, SC 29201

Ph: 803-978-2834

Fax: 803-252-3653

jmccants@rogerslewis.com

**ATTORNEY FOR APPELLANT BUILDERS
MUTUAL INSURANCE COMPANY**

February 27, 2019

Exhibit A

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant
	or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motions for Intervention filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

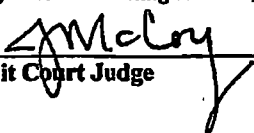
ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2764	12/17/18
Circuit Court Judge	Judge Code	Date

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motions for Reconsideration of this court's ruling on Motions to Intervene filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

A. McCoy
Circuit Court Judge

2764
Judge Code

1/16/18
Date

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, 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 others similarly situated, ... Plaintiffs,

v.

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

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

v.

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

and

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

v.

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

Of Whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated, and Tri-County Roofing, Inc. Respondents.

**RETURN TO MOTION TO TRANSFER
CASE TO SUPREME COURT**

Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Stephanie L. Drawdy, Esquire
SC Bar No. 70205
Justin O'Toole Lucey, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29201
Telephone: 843.849.8400
E-Mail: jlucey@lucey-law.com

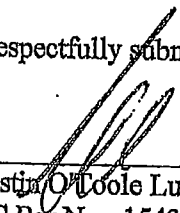
and

Edward D. Buckley, Jr., Esquire
SC Bar No.: 994
Young Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402
Telephone: 843.577.4000
Email: ebuckley@ycrlaw.com

*Attorneys for the Respondents Palmetto Pointe
at Peas Island Condominium Property Owners
Association, Inc. and Jack Love, Individually, and
on behalf of all others similarly situated*

Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated, take no position on Appellant Builders Mutual Insurance Company's Motion to Transfer Case to the Supreme Court.

Respectfully submitted,



Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Stephanie L. Drawdy, Esquire
SC Bar No. 70205
Justin O'Toole Lucey, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29201
Telephone: 843.849.8400
E-Mail: jlucey@lucey-law.com

and

Edward D. Buckley, Jr., Esquire
SC Bar No.: 994
Young Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402
Telephone: 843.577.4000
Email: ebuckley@ycrlaw.com

*Attorneys for the Respondents Palmetto Pointe at
Peas Island Condominium Property Owners
Association, Inc. and Jack Love, Individually, and
on behalf of all others similarly situated*

Mount Pleasant, SC
March 8, 2019

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON)

CASE NO.: 2015-CP-10-0955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Jack
Love, individually, and on behalf of all other
similarly situated,

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

Island Pointe, LLC, Leonard T. Browne,
Complete Building Corporation, et al.

Defendant.)

Plaintiff's Attorney:
Justin O'Toole Lucey, Bar No. 15438
Address:
Post Office Box 806
Mt. Pleasant, SC 29465
Phone: 803-849-8400 Fax 843-849-8406
E-mail: jlucey@lucey-law.com Other: _____

Defendant's Attorney:
Everett A. Kendall, II, Bar No. 8450
Address:
Post Office Box 6648
Columbia, SC 29260
Phone: 803-782-4100 Fax 803-782-4140
E-mail: rkendall@murphygrantland.com Other: _____

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion for Continuance of Trial

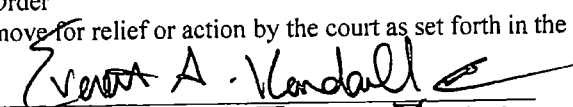
Estimated Time Needed: 15 min

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

04/01/2019
Date submitted

SECTION III: Motion Fee

- ☒ **PAID - AMOUNT: \$ 25.00**
☐ **EXEMPT:**
(check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2015-CP-10-0955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc., and Jack
Love, individually, and one behalf of all other
similarly situated,

Plaintiffs,

v.

Island Pointe, LLC, Leonard T. Browne,
Complete Building Corporation, *et al*

Defendants.

Tri-County Roofing, Inc.,

Third Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy
d/b/a Cornerstone Construction, *et al*

Third Party Defendants.

Creekside, Inc.,

Third-Party Plaintiff,

v.

Christopher N. Union,

Third-Party Defendants.

FILED
2019 APR -3 PM 1:22
JULIE J. ARYSTEOPOULU
CLERK OF COURT

**MOTION FOR CONTINUANCE OF
TRIAL**

(EXPEDITED HEARING REQUESTED)

TO ALL PARTIES:

PLEASE BE ADVISED THAT DEFENDANTS LISTED BELOW hereby jointly move before this Honorable Court, and hereby request an expedited hearing, seeking a continuance of the trial of this matter, currently scheduled for May 6, 2019. This Motion is made pursuant to Rule 40(i)1) of the South Carolina Rules of Civil Procedure and Rule 205 of the South Carolina Rules of Appellate Procedure based upon the following grounds:

1. On March 27, 2018, Builders Mutual Insurance Company filed a Motion to Intervene in this matter. An order denying the Motion was issued December 17, 2018. The Motion to Reconsider was denied on January 16, 2019. On February 19, 2019, Builder's Mutual filed a Notice of Appeal and has subsequently filed a Motion to transfer the appeal to the South Carolina Supreme Court.
2. On April 30, 2018, Nautilus Insurance Company filed a Motion to Intervene in this matter. An order denying the Motion was issued December 18, 2018. The Motion to Reconsider was denied on January 17, 2019. On February 20, 2019, Nautilus filed a Notice of Appeal and has subsequently filed a Motion to transfer the appeal to the South Carolina Supreme Court.
3. On May 7, 2018, Nationwide Mutual Insurance Company filed a Motion to Intervene in this matter. An order denying the Motion was issued December 18, 2018. The Motion to Reconsider was denied on January 17, 2019. On February 22, 2019, Nautilus filed a Notice of Appeal and has subsequently filed a Motion to transfer the appeal to the South Carolina Supreme Court.
4. On January 18, 2019, FCCI Insurance Group filed a Motion to Intervene in this matter. No hearing has been held on this Motion.

5. All of the Motions to Intervene seek leave to participate in the trial of the case in order to present Special Interrogatories to the jury. As such, the denial of these Motions affects the mode of trial.
6. Upon information and belief, no motion or other action has been undertaken by any party to dismiss or expedite the pending appeals.
7. Upon information and belief, no motion to lift the stay imposed by SCRAP 205 has been filed by any party.
8. The trial of this case is expected to take ten days. The trial will involve the testimony of up to 30 witnesses, including six to eight experts. Many of the witnesses and experts will need to attend trial for most or all of the proceeding. Some of the witnesses will be traveling from out of state.
9. Preparation and attendance at the trial of this will result in significant effort on the part of the attorneys, parties and witnesses.

Pursuant to Rule 205 of the South Carolina Rules of Appellate Procedure, the trial court does not currently have jurisdiction to conduct a trial because it is directly affected by the appeal. It does not seem likely that the appeals will be withdrawn or otherwise resolved before May 6, 2019.

Given the significant burden and hardship that is imposed on parties and witnesses in preparing for a trial of this magnitude, fairness and judicial economy advise that the trial date of this case be continued until the Remittur is returned to the trial court.

To give effect and meaning to the Motion, an expedited hearing is requested.

C/A 2015CP1000955
Motion for Continuance

WE SO MOVE.

MURPHY & GRANTLAND P.A

BY: Everett A. Kendall
Everett A. Kendall, II
4406B Forest Dr.
Columbia, SC 29206
Attorneys for Complete Building Corporations

BAKER, RAVENEL & BENDER, LLP

BY: S. Markey Stubbs
S. Markey Stubbs, Esquire
P.O. Box 8057
Columbia, SC 29202-8057
Attorneys for Creekside, Inc.

RICHARDSON, PLOWDEN & ROBINSON, P.A.

BY: David A. Anderson, Esq.
David A. Anderson, Esq.
Jasmine Wyman, Esq.
P.O. Drawer 7788
Columbia, SC 29202
Attorneys for Mosley Concrete

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF Charleston

CASE NO.: 2015-CP-10-0955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, Inc. and Elizabeth
A. Bushey, Individually, and on behalf of all others
similarly situated

☐

Plaintiff(s)

vs.

Island Pointe, LLC; Leonard T. Browne; Complete
Building Corporation; Tri-County Roofing, Inc.;
Creekside, Inc.; American Residential Services,
LLC d/b/a ARS/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.; WC
Services, Inc.; CRG Engineering, Inc.; Certainteed
Corporation; Kelly Flooring Products, Inc. d/b/a
Carpet Baggers; and John Doe 1-60

☐

Defendant(s)

Check box above indicating submitting party

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Name, SC Bar No. and Address of Plaintiff's Attorney

Edward D. Buckley, Jr. SC Bar #:994
Address: Young Clement Rivers, LLP
Post Office Box 993
Charleston, SC 29402-0993
Telephone: (843) 724-6671
fax: (843) 579-1370
e-mail: ebuckley@ycrlaw.com

Name, SC Bar No. and Address of Defendant's Attorney

Everett A. Kendall, II, Esquire
Murphy & Grantland, P.A.
4406B Forest Dr.
Columbia, SC 29206
(803)256-2233
rkendall@murphygrandland.com

- ☒ MOTION HEARING REQUESTED (attach *written* motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (COMPLETE SECTIONS II and III)

SECTION I: HEARING INFORMATION

Nature of Motion: Plaintiffs' Motion for Reconsideration of and/or Relief from Order Staying Case

Estimated Time Needed: 30 minutes

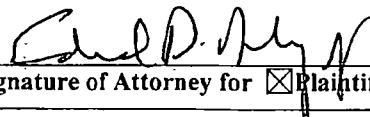
Court Reporter Needed?: ☒ YES ☐ NO

SECTION II: MOTION TYPE

☒ Written Motion Attached

☐ Form Motion -

I hereby move for relief or action by the Court as set forth in the attached proposed order.



Dated: April 16, 2019

Signature of Attorney for ☒ Plaintiff(s) ☐ Defendant(s)

SECTION III: MOTION FEE

☒ PAID - AMOUNT \$ 25.00

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency w. Indigent Party
☐ Sexually Violent Predator Act
☐ Post-Conviction Relief
☐ Motion for Stay Bankruptcy
☐ Motion for Publication
☐ Motion for Execution (Rule 69, *SCRCP*)
☐ Proposed order submitted at request of the Court; or, reduced to writing
from motion made in open court per judge's instructions

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 2015-CP-10-0955

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; COMPLETE)
BUILDING CORPORATION; TRI-COUNTY)
ROOFING, INC.; CREEKSIDE, INC.;)
AMERICAN RESIDENTIAL SERVICES, LLC)
d/b/a ARS/RESCUE ROOTER)
CHARLESTON; ANDERSEN WINDOWS,)
INC.; ATLANTIC BUILDING)
CONSTRUCTION SERVICES, INC. n/k/a)
ATLANTIC CONSTRUCTION SERVICES,)
INC.; 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;)
CORNERSTONE CONSTRUCTION and)
MARK MALLOY d/b/a CORNERSTONE)
CONSTRUCTION; MIRACLE SIDING, LLC)
and WILSON LUCAS SALES d/b/a MIRACLE)
SIDING, LLC; MARK PALPOINT a/k/a)
MICAH PALPOINT; ELROY ALONZO)
VASQUEZ; CHRIS a/k/a JOHN DOE 61;)
ALDERMAN CONSTRUCTION;)
STANLEY'S VINYL FENCE DESIGNS;)
COHEN'S DRYWALL COMPANY, INC.;)
MOSELY CONCRETE; HAND A FRAMING)
CONSTRUCTION, LLC a/k/a H&A)
FRAMING CONSTRUCTION, LLC and d/b/a)
H AND A FRAMING, LLC, H&A)
CONSTRUCTION, and HAND A)

Priority Matter
Expedited Hearing Requested

**PLAINTIFFS' MOTION FOR
RECONSIDERATION OF AND/OR
RELIEF FROM ORDER STAYING CASE
AND/OR PETITION TO LIFT OR
OTHERWISE MODIFY ANY STAY
AS MAY BE NECESSARY FOR THIS
CASE TO PROCEED AS SCHEDULED
TO TRIAL ON THE MERITS
BEGINNING MAY 6, 2019**

FILED
2019 APR 16 PM 4:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

CONSTRUCTION; JMC CONSTRUCTION,)
INC.; JMC CONSTRUCTION, LLC; JOHN)
DOE 1-15,)

Defendants.)

COMPLETE BUILDING CORPORATION,)
INC.,)

Third-Party Plaintiff,)

v.)

LEONARD T. BROWNE and CHRISTOPHER)
N. UNION,)

Third-Party Defendants.)

CREEKSIDE, INC.,)

Third-Party Plaintiff,)

v.)

CHRISTOPHER N. UNION,)

Third-Party Defendant.)

AMERICAN RESIDENTIAL SERVICES,)
LLC,)

Third-Party Plaintiff,)

v.)

VICTOR HUGO HERNANDEZ;)
HERNANDEZ ELECTRIC, LLC; LILIANA)
ROJAS FLORES; MARTIN BARR d/b/a)
PORT CITY STRUCTURED WIRING;)
KELLER ELECTRIC, LLC; JOHN TOOLIN)
d/b/a JOHN F. TOOLIN HEAT AND AIR;)
RUSSELL "RUSTY" HILL d/b/a RUSTY'S)
HEATING & AIR; and WARREN)
ANDERSON,)

Third-Party Defendants.)

NOW COME Plaintiffs, by and through their undersigned counsel, pursuant to Rules 59(e) and/or 60(b), SCRCR, and/or Rule 241, SCACR, as well as any other applicable law (procedural and substantive), and hereby move this Honorable Court to reconsider and/or otherwise grant relief from its Order Staying Case, filed April 5, 2019 (the “Stay Order”),¹ and/or petition the court to lift or otherwise modify any stay as may be necessary for this case to proceed as scheduled to trial on the merits beginning May 6, 2019.

INTRODUCTION

By way introduction, Plaintiffs will cut to the chase about what they are asking the Court to do and, most respectfully, why the Court should do it. Despite a perhaps unwieldy title, at bottom, the instant filing presents the Court with this straightforward request: *Please do not further delay the trial of this case (which is already over four years old and is, without question, ready for adjudication on the merits) on account of the pending appeal taken by the Appellant Insurers² (who are themselves not parties to the case, and whose appeal has nothing at all to do with the respective claims and defenses of the actual case parties), but instead determine that the case should proceed to trial beginning May 6, 2019, as indeed it is duly scheduled to proceed but for the Stay Order.* As explained below, contrary to what the Continuance Seeking Defendants³ represented to the Court (in the motion for continuance that seems to have prompted the Stay Order⁴), the Court has jurisdiction to conduct the scheduled trial and, most respectfully, under

¹ Plaintiffs received written notice of entry of the stay order on April 8, 2019.

² The “Appellant Insurers” are, collectively, Builders Mutual Insurance Company (“Builders Mutual”), Nautilus Insurance Company (“Nautilus”), and Nationwide Insurance Company (“Nationwide”).

³ Specifically, the “Continuance Seeking Defendants” are, collectively, Defendants Complete Building Corporations, Creekside, Inc., and Mosley Concrete.

⁴ Filed April 3, 2019, the motion was made on the ground, simply asserted by the Continuance Seeking Defendants in conclusory fashion, that because of the Appellant Insurers’

both the governing law and guiding principles of equity, should exercise it. Indeed, this point is proved by Exhibits A, B, and C, all of which are attached hereto and incorporated herein by reference, which not only contradict the Continuance Seeking Defendants' assertion that the Court may not proceed with trial, but in the cases of Exhibits A and B (which are comprised of pertinent record materials from other recent cases where, in the face of non-party insurers' eve-of-trial appeals from the denial of so-called motions to "intervene," our Court of Appeals twice confirmed the trial court's ability to proceed with trial) flat out disprove this delay tactic.

BACKGROUND

Now some two months into its fifth year, this residential construction defect lawsuit was filed on February 13, 2015. In short, the case is about alleged defects and damage throughout a 40-unit townhouse complex, i.e., whether, in fact, they exist, and, if so, who, if anyone, is liable for them. It has been fully discovered and is ready to be fully adjudicated in this Court *on the merits*—in other words, the issues actually framed by the parties' respective pleadings, i.e., *all* the claims and defenses actually in issue between the actual named parties to the case, are ripe for decision.

The operative scheduling order for this case is the *Fourth* Amended Consent Scheduling Order, filed May 16, 2018. It provides that "[t]h[e] case is subject to being called to trial not before August 15, 2018 or six (6) months from the date of service of any defendant still in the case at time of trial, whichever is the later of the two dates." By order filed August 24, 2018, the case was assigned to Her Honor "to hear and handle all pre-trial motions, including scheduling orders." Thanks to Her Honor's help in finding and reserving a two-week term of court capable

appeal this Court "does not currently have jurisdiction to conduct a trial because it is directly affected by the appeal." (Mot. for Continuance p. 2.)

of accommodating litigation of this size, by the time of the Stay Order, the case had been duly set for a date-certain trial beginning May 6, 2019.

According to the Stay Order, however, because of the appeals taken by the Appellant Insurers, “the Appellate Court has exclusive jurisdiction over this case at this time[,]” and “[t]herefore, the case is . . . STAYED.” (Stay Order p. 3.) The Appellant Insurers’ appeals of course relate to the Court’s (correct) decision to deny their respective motions to “intervene” (purportedly made pursuant to Rule 24, SCRCPP), which motions asked not that they be made “parties” to the litigation, only that they be recognized—albeit in some unnamed, pleading-free capacity—as having a status that would allow them, at such future time as the matter was taken up during trial, to voice input about what the verdict form should look like—and, to be clear, not about what it should look like in respect of any issue necessary to a full and final adjudication of the merits of the actual controversy before this Court, but in fact solely in respect of insurance coverage matters that are not before this Court.⁵

Thus, as it stands, the situation is this: After more than four years of discovery and other preliminaries, this case is in fact ready for trial on the merits, and in spite of the difficulty in finding sufficient court time to actually conduct a trial in a case of this size, this case is in fact (but for the Stay Order) actually set to begin trial on May 6, 2019; however, the actual parties to

⁵ See (Builders Mutual Mot. to Intervene p. 15 (moving to intervene “for the limited purpose of participating in the drafting and the court’s submission of a special verdict form and/or general verdict form accompanied by answer to interrogatories to the jury pursuant to Rule 49, SCRCPP, so that the jury can allocate damages as discussed herein that are being sought against [their respect insureds]”)); (Nautilus Mot. to Intervene p. 4 (“seek[ing] leave pursuant to South Carolina Rule of Civil Procedure 24 to intervene in the Lawsuit for the limited purpose of requesting special interrogatories in the event a general verdict is entered against [its insured]”)); (Nationwide Mot. to Intervene p. 7 (“mov[ing] to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of obtaining factual evidence necessary for allocating between covered and non-covered damages under [its] Policy and participating in the submitting of a special verdict form or submitting special interrogatories to the jury in order to obtain findings of fact necessary for that allocation”)).

the case must nonetheless hurry up and wait on the resolution of their respective claims and defenses (and, of course, in practical terms, the long awaited redress or relief that hinges thereon) while *nonparties*—nonparties who are, after all, nonparties because this Court has already correctly determined that they should be nonparties—appeal the denial of their supposed right to be heard (not even necessarily to be agreed with) during trial (which trial, of course, their actions are presently preventing) as to the form of a verdict that their names will not be on, in respect of matters of insurance that are not before this Court. (Of course, to be clear, of the actual case parties, it is only Plaintiffs who stand to lose from needless delay. For Plaintiffs, no trial means they cannot possibly win; for everyone else it means just the opposite. This point is well illustrated by the fact that none of the Continuance Seeking Defendants is even insured by any of the Appellant Insurers. In other words, the Continuance Seeking Defendants do not actually have any interest in the substance of the issues involved in the pending appeal. Thus explains the conclusory way in which they represented to the Court the supposedly dire jurisdictional consequences of the pending appeals: Why would they want the Court to have jurisdiction to try the case—they might actually have to try it.)

To put it charitably, any delay in the trial of this case on account of the Appellant Insurers' appeal is a dollar waiting on a dime. Worse yet, it is "heads I win, tails you lose" for the Appellant Insurers, who, by making unmeritorious motions to "intervene" and duly lost them, have effectively won the right to derail the entire case—a case which they are not, and ought not to be, a part of in the first place. (And, again, all the other actual case parties but Plaintiffs are, quite literally, happy to sit back and watch.) In truth, though, the Appellant Insurers do not have this right, and most respectfully, this Court should not allow them to exercise it.

PERTINENT LAW

While it is true that, “[u]pon the service of the notice of appeal, the appellate court . . . ha[s] exclusive jurisdiction *over the appeal*; the lower court . . . [still] ha[s] jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241.” Rule 205, SCACR (emphasis added). Moreover, as Rule 205 makes expressly clear, “Nothing in the[] [South Carolina Appellate Court] Rules . . . prohibit[s] the lower court . . . from proceeding *with matters not affected by the appeal*.” (emphasis added).

Rule 241 furthers this point, clarifying what it means for the appellate court to have, as Rule 205 puts it, “exclusive jurisdiction *over the appeal*” (emphasis added). “As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay *matters decided in the order, judgment, decree or decision on appeal*, and to automatically stay *the relief ordered in the appealed order, judgment, or decree or decision*.” Rule 241(a) (emphasis added). “This automatic stay continues in effect for the duration of the appeal *unless* lifted by order of the *lower court, . . . appellate court, or judge or justice of the appellate court*.” *Id.* (emphasis added). “The *lower court . . . retains jurisdiction over matters not affected by the appeal* including the authority to enforce any matters not stayed by the appeal.” *Id.* (emphasis added).

Thus, even where an appeal is properly taken and the automatic stay applies, the trial court (this Court here) has jurisdiction over matters not affected by the appeal and, moreover, is duly empowered to lift the automatic stay. Indeed, it is to this Court (the trial court) that the party seeking to have the stay lifted is supposed to turn first for relief: “Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay . . . must first be made to the lower court . . . which entered the order or decision on appeal.” Rule 241(d)(1). “In determining whether an order should issue pursuant to this

Rule, the . . . court . . . should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2).

Moreover, and although completely unmentioned by the Continuance Seeking Defendants, the mere fact that a notice of appeal is filed/served does not necessarily have any jurisdictional consequence at all. Only a properly taken appeal, i.e., an appeal taken where there is in fact a right of immediate appeal, affects jurisdiction—and then only as to matters affected by the appeal, as explained above. If an appeal is not properly taken it is a nonevent insofar the continued progress of the case in the trial court is concerned. *See S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay proceedings in the lower court.”).

GROUND

1. **In two other recent cases presenting this exact situation, the Court of Appeals has twice confirmed the trial court’s ability to proceed with trial.**

See generally **Exhibits A** and **B**.

2. **As was previously recognized by the Honorable Roger M. Young, Sr., a fellow judge of this Court, the presiding trial judge has discretion to assess whether an appeal prohibits it from going forward with trial, and when the trial judge is of the opinion that the appeal does not operate to prevent trial from going forward, the trial court should proceed with trial unless ordered not to by the appellate court. In other words, where there is good reason to question whether an appeal has any rightful impact on the continued progress of the case in the trial court, it is proper for the trial judge to recognize the same and proceed to trial as duly scheduled, putting the onus on any party seeking to stop such a trial to seek and obtain relief in the appellate court.**

See **Exhibit A** at p. 35; **Exhibit C**; *cf. Tillman v. Tillman*, 420 S.C. 246, 251, 801 S.E.2d 757, 760 n.1 (Ct. App. 2017) (“We are not persuaded by Appellant’s statement in his brief that the appeal was necessary because the motion to amend could not be heard in circuit

court before trial. *There may be a strategy motivating the appeal other than tactical delay, but we cannot think of a rational one.*”) (emphasis added).

3. There is good reason to question whether the Appellant Insurers’ appeals have any rightful impact on the continued progress of this case before this Court.

See generally Exhibits A and B. As stated above, in both of these cases, the Court of Appeals specifically confirmed the trial court’s authority to proceed with trial. It should also be noted that, as reflected in Exhibit A at pp. 40–43, the Court of Appeals specifically questioned whether the orders on appeal were immediately appealable, requesting that the parties brief the matter. No such briefs were ever filed, however, because the matter quickly settled and the appeal was dismissed. See Exhibit A at pp. 44–49.

Moreover, the right to appeal is controlled by statute. The pertinent statute here is S.C. Code Ann. § 14-3-330. Essentially, it would allow for the Appellant Insurers’ appeals if the challenged orders involved the merits or affected a substantial right of the Appellant Insurers.

The Continuance Seeking Defendants do not even suggest the challenged orders involve the merits—and indeed they do not. The Continuance Seeking Defendants do, however, assert the “substantial right” prong of the statute is implicated. (*See* Mot. for Continuance p. 2 (asserting that the appealed orders “affects the mode of trial”).) Most respectfully, this is simply not so.

It must be remembered that what the Appellant Insurers called motions to “intervene” were in fact nothing of the sort, but rather, as explained above, something altogether different from the concept of intervention envisioned under Rule 24. There is no South Carolina law whatsoever granting the Appellant Insurers the right to “intervene” as they asked—indeed, the

Court's correct denials of the motions reflects this point. Simply put, having established no such substantial right, the Appellant Insurers were not denied a substantial right.

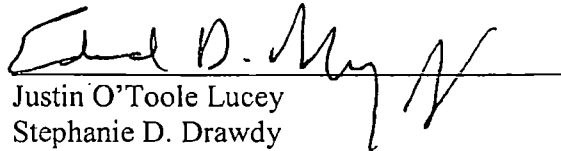
4. **As Judge Young also recognized, where, as here, a stay of the challenged orders is not necessary to preserve the jurisdiction of the appeal or to prevent a contested issue from becoming moot, and the circumstances are such that a stay of the orders is not in the interests of justice or judicial economy, the matter should proceed in the trial court. This reason supports lifting or otherwise modifying any stay that might otherwise be called for here as may be necessary for this case to proceed as scheduled to trial on the merits beginning May 6, 2019.**

See Exhibit C at p. 2.

WHEREFORE, Plaintiffs so move/petition for relief as stated above, allowing this case to proceed to trial to determine the validity of the respective claims and defenses of the actual parties plaintiff and defendant, who are indeed the only parties who actually have substantial rights to be adjudicated here. Again, Plaintiffs respectfully request an expedited hearing on this matter. Plaintiffs reserve all rights to supplement this motion/petition with any further briefing/argument or submission(s) as the Court may allow or require.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
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Attorneys for Plaintiffs

Dated: April 16, 2019

2015-CP-10-0955
CERTIFICATE OF SERVICE

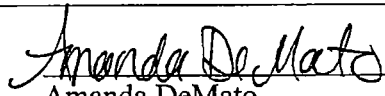
I, the undersigned legal assistant of the law office of Young Clement Rivers, LLP, do hereby certify that I have served a copy of the foregoing Plaintiffs' Motion for Reconsideration of and/or Relief from Order Staying Case and/or Petition to Lift or Otherwise Modify Any Stay as May Be Necessary for This Case to Proceed as Scheduled to Trial on the Merits Beginning May 6, 2019 by electronic transmission and/or U.S. Mail to the following counsel of record:

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FILED
2019 APR 16 PM 4:35
JULIE J. ARMSTRONG
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Amanda DeMato
April 16, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Employers Mutual Casualty
Company,

Petitioner,

IN RE:

Phillip Jefferson,

Plaintiff,

vs.

James White Construction, LLC and
James White, Individually,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2016-CP-10-4055

**PETITIONER'S NOTICE OF
MOTION AND MOTION TO
INTERVENE**

FILED
2017 DEC 29 AM 11:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service hereof, exclusive of the date of service, or at such time as the Court may determine, the undersigned attorneys for the proposed intervenor, Employers Mutual Casualty Company ("EMC"), will move the Court for an order pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, permitting EMC to intervene in the above-captioned action, outside the presence of the jury and for the limited purpose of protecting its interest under certain commercial general liability policies and commercial umbrella policies issued by it to James White Construction, LLC ("JWC"). Specifically, EMC seeks to intervene in this action solely for the purpose of requesting, outside the presence of the jury, that special interrogatories and/or a special verdict or a general verdict form accompanied by interrogatories be submitted to the jury from which the parties can make a determination of the apportionment of damages for each cause of action, if

any, awarded to the plaintiff and against JWC and resolve issues of fact, from which a determination of insurance coverage (or lack thereof) may be made. *See* Rule 49, South Carolina Rules of Civil Procedure; *Harleysville Grp. Ins. Co. v. Heritage Cmty., Inc.* No. 27698, 2017 LEXIS 8 (S.C. Jan. 11, 2017) ("The right to control the litigation carries with it certain duties," including "the duty not to prejudice the insured's rights by failing to request special interrogatories, or a special verdict in order to clarify coverage of damages.").

This motion is based on the following grounds:

1. EMC issued a series of commercial general liability and commercial umbrella policies of insurance to JWC with policy periods spanning from September 10, 2015 to September 10, 2017.

2. In this action, the plaintiff alleges that, from 2010 or 2011 until 2016, JWC has been dumping fill dirt on his property which JWC knew or should have known was not suitable for building upon. The plaintiff asserts negligence, negligent misrepresentation, nuisance, and trespass claims against JWC. *See* Amended Complaint. EMC is providing a defense to JWC in this action under a full and complete reservation of rights under the policies.

3. EMC maintains that there may not be coverage for some or all of the claims made by the plaintiff in the action because the claims and/or damages, if any, do not constitute an occurrence resulting in property damage and/or coverage is otherwise excluded under the policies.

4. EMC does not seek to actively participate in the pretrial or trial of this action other than to make a motion, at the appropriate time, to submit a special verdict form and/or special interrogatories to the jury, after the close of evidence. By proceeding in this manner, there will be no mention of insurance coverage during the trial and, therefore, no resulting

prejudice to the insured. EMC's intervention will also not cause delay or interference with the trial of this case.

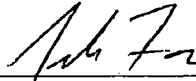
5. EMC's interests are not adequately nor completely represented by other parties to the action. As discussed above, EMC has an interest in the litigation separate from the actual defense of its insured. EMC also has an interest with regard to its obligation to indemnify JWC if a verdict is returned on any non-covered claims or damages.

6. Intervention as a matter of right in this case is warranted because EMC has an interest relating to the subject matter of this case and is so situated that in the absence of such intervention, the disposition of the action may, as a practical matter, impair or impede EMC's ability to protect that interest. Moreover, EMC's interest is not adequately represented by the existing parties, in that defense counsel retained to represent JWC may not advocate any coverage position which would be against the interest of JWC.

7. Alternatively, EMC is entitled to permissive intervention in that a determination of EMC's policies, coverages, exclusions and defenses in this action have common questions of fact relating to the damages, if any, that may be awardable to the plaintiff.

This motion is made pursuant to Rules 24(a) and 24(b) of the South Carolina Rules of Civil Procedure and is supported by the pleadings in this matter, a supporting memorandum, if filed, and all applicable statutory and common law.

Signature on following page.

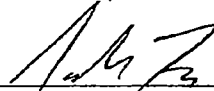


Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
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(864) 271-9580

Attorneys for Petitioner,
Employers Mutual Casualty Company

Greenville, SC
December 27, 2017

The undersigned certified that consultation with counsel would serve no useful purpose.



Nicholas A. Farr

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Frankenmuth Mutual Insurance)
Company,)
Petitioner,)
IN RE:)
Phillip Jefferson,)
Plaintiff,)
vs.)
James White Construction, LLC and)
James White, Individually,)
Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2016-CP-10-4055

**PETITIONER'S NOTICE OF
MOTION AND MOTION TO
INTERVENE**

FILED
2018 JAN -8 PM 2:53
JULIE J. AMSTUTZ
CLERK OF COURT
BY _____

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service hereof, exclusive of the date of service, or at such time as the Court may determine, the undersigned attorneys for the proposed intervenor, Frankenmuth Mutual Insurance Company ("Frankenmuth"), will move the Court for an order pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, permitting Frankenmuth to intervene in the above-captioned action, outside the presence of the jury and for the limited purpose of protecting its interest under certain commercial general liability policies and commercial umbrella policies issued by it to James White Construction Co., LLC ("JWC"). Specifically, Frankenmuth seeks to intervene in this action solely for the purpose of requesting, outside the presence of the jury, that special interrogatories and/or a special verdict or a general verdict form accompanied by interrogatories be submitted to the jury from which the parties can make a determination of the apportionment

of damages for each cause of action, if any, awarded to the plaintiff and against JWC and resolve issues of fact, from which a determination of insurance coverage (or lack thereof) may be made. *See* Rule 49, South Carolina Rules of Civil Procedure; *Harleysville Grp. Ins. Co. v. Heritage Cmty., Inc.* No. 27698, 2017 LEXIS 8 (S.C. Jan. 11, 2017) ("The right to control the litigation carries with it certain duties," including "the duty not to prejudice the insured's rights by failing to request special interrogatories, or a special verdict in order to clarify coverage of damages.").

This motion is based on the following grounds:

1. Frankenmuth issued a commercial general liability policy of insurance to JWC with a policy period spanning from September 10, 2013 to September 10, 2015.
2. In this action, the plaintiff alleges that, from 2010 or 2011 until 2016, JWC has been dumping fill dirt on his property which JWC knew or should have known was not suitable for building. The plaintiff asserts negligence, negligent misrepresentation, nuisance, and trespass claims against JWC. *See* Amended Complaint. Frankenmuth is providing a defense to JWC in this action under a full and complete reservation of rights under the policies.
3. Frankenmuth maintains that there may not be coverage for some or all of the claims made by the plaintiff in the action because the claims and/or damages, if any, do not constitute an occurrence resulting in property damage within its policy period and/or coverage is otherwise excluded under the policy.
4. Frankenmuth does not seek to actively participate in the pretrial or trial of this action other than to make a motion, at the appropriate time, to submit a special verdict form and/or special interrogatories to the jury, after the close of evidence. By proceeding in this manner, there will be no mention of insurance coverage during the trial and, therefore, no

resulting prejudice to the insured. Frankenmuth's intervention will also not cause delay or interference with the trial of this case.

5. Frankenmuth's interests are not adequately nor completely represented by other parties to the action. As discussed above, Frankenmuth has an interest in the litigation separate from the actual defense of its insured. Frankenmuth also has an interest with regard to its obligation to indemnify JWC if a verdict is returned on any non-covered claims or damages.

6. Intervention as a matter of right in this case is warranted because Frankenmuth has an interest relating to the subject matter of this case and is so situated that in the absence of such intervention, the disposition of the action may, as a practical matter, impair or impede Frankenmuth's ability to protect that interest. Moreover, Frankenmuth's interest is not adequately represented by the existing parties, in that defense counsel retained to represent Frankenmuth may not advocate any position which would be against the interest of JWC and may not attempt to protect Frankenmuth's coverage position.

7. Alternatively, Frankenmuth is entitled to permissive intervention in that a determination of Frankenmuth's policies, coverages, exclusions and defenses in this action have common questions of fact relating to the damages, if any, that may be awardable to the plaintiff.

This motion is made pursuant to Rules 24(a) and 24(b) of the South Carolina Rules of Civil Procedure and is supported by the pleadings in this matter, a supporting memorandum, if filed, and all applicable statutory and common law.

Signature on following page.



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Attorneys for Petitioner,
Frankenmuth Mutual Insurance Company

Greenville, SC
January 4, 2018

The undersigned certified that consultation with counsel would serve no useful purpose.



Phillip E. Reeves

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2016-CP-10-405

Philip Jefferson,

Plaintiff,

vs.

James White Construction, LLC and James
White, Individually,

Defendants.

NOTICE OF MOTION AND
MOTION TO INTERVENE BY
FIREMEN'S INSURANCE COMPANY OF
WASHINGTON, D.C.
FOR THE LIMITED PURPOSE OF
SUBMITTING A SPECIAL VERDICT FORM
OR SPECIAL INTERROGATORIES

TO: ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to Rule 24(a)(1), SCRPC, or, in the alternative, pursuant to Rule 24(b)(2), SCRPC, Applicant, Firemen's Insurance Company of Washington, D.C. (hereinafter Firemen's) hereby moves to intervene in this action for the limited purpose of submitting a special verdict form or special interrogatories to the jury.

All America is entitled to intervention as a commercial general liability ("CGL") carrier for Defendants JAMES WHITE CONSTRUCTION, LLC and JAMES WHITE, INDIVIDUALLY hereinafter collectively ("James White Construction"), as its rights may be affected by a disposition of this case on the merits. This motion is made on the following grounds:

1. James White Construction is a named insured under four CGL policies (hereinafter collectively "the Policies") issued by Firemen's. Policy number CPA 0122862-4 was in effect from September 10, 2009 to September 10, 2010. The policy was renewed annually under policy numbers CPA 0122862-41 (2010-11), CPA 0122862-42 (2011-12), and CPA 0122862-43 (2012-13). All four policies contain commercial general liability (CGL) coverage with limits of \$1,000,000 per occurrence and \$2,000,000 in the aggregate. Copies of the Policies are attached as Exhibits A, B, C, and D respectively.

2. The Policies only cover "sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' . . . to which this insurance applies." (Exh. A, B, C, and D Form CG 0001, ¶ 1.A.1.a.)

3. The Policies only apply to "property damage" if it is caused by an "occurrence." (Id. at ¶ 1.A.1.b.(1).)

4. The Policies define "property damage" as physical injury to tangible property, including all resulting loss of use of that property. (Id. at ¶ V.17.) "Occurrence" is defined as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions." (Id. at ¶ V.13.)

5. Under the contractual terms of the Policies, as interpreted by South Carolina law, defective construction is not covered. Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011). However, resulting damage to otherwise non-defective components may constitute covered "property damage" caused by an "occurrence," satisfying the requirements of the insuring agreement. Id.

6. Additionally, the contractual terms of the Policies exclude coverage for business risks such as defective construction. (Exh. A, B, C, and D Form CG 0001, ¶ 1.A.2.j., k., l., m., and n.)

7. The Policies exclude coverage for "bodily injury" or "property damage" arising out of the discharge, dispersal, seepage, migration, release or escape of "pollutants." The policy defines "pollutants" to mean various irritants or contaminants. (Exh. A, B, C, and D Form CG 0001, ¶ 1.A.2.f. and Form CG 2165 (12/04).)

8. Upon information and belief, the Plaintiffs in this matter intends to present evidence of defective construction by James White Construction at the trial of this action.

9. To the extent damages are awarded against James White Construction for defective construction, the damages awarded are not damages to which the Policies apply, and they are therefore not covered.

10. To the extent damages are awarded against James White Construction for "property damage" arising out of the discharge, dispersal, seepage, migration, release or escape of "pollutants," the damages awarded are not covered.

11. The contractual terms of the Policies and South Carolina law require an allocation between covered and non-covered damages.

12. Firemen's contends that this allocation does not involve relitigating the issue of damages; it is rather a determination of the amount of covered damages under the contractual terms of the Policies and South Carolina law based upon a review of the evidence submitted at trial in this action. Nevertheless, the Supreme Court of South Carolina has recently held in *dicta* that this contractual allocation of covered damages may not be made in a separate coverage action. Harleysville Group Ins. v. Heritage Cmities, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 21, 36 n.11).

13. The court did not clarify this holding in its final opinion. Harleysville Group Ins. v. Heritage Cmities, Inc., et al., 420 S.C. 321, 803 S.E.2d 288 (2017). Instead, the court cited a prior case in which allocation was not allowed due to failure to raise the issue in an underlying arbitration proceeding. See Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009). Thus, it appears that South Carolina law may not allow insurers to obtain facts necessary for determinations involving liability coverage for construction defect claims in separate declaratory judgment actions.

14. Generally, insurers lack standing to intervene in underlying actions to determine liability. Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 138-39, 644 S.E.2d 699, 702-03

(2007); Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (1994) (citing Blue Cross and Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35 (1980)). These holdings were based upon the understanding that factual determinations for coverage purposes could be litigated in separate coverage actions. See Ex Parte GEICO, 373 S.C. at 137, 644 S.E.2d at 702. Harleysville appears to contradict this prior understanding.

15. Notice and opportunity to be heard are fundamental requirements of due process. If Firemen's is denied any forum for obtaining facts necessary for its allocation for coverage purposes, then its due process rights are violated in violation of both state and federal law.

16. Accordingly, Firemen's hereby moves to intervene in this action for the limited purpose of participating in the drafting of a special verdict form or submitting special interrogatories to the jury regarding the amount of any damages award that is for covered damages.

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

18. Firemen's motion to intervene is timely. This motion is being filed in advance of trial, and it is not expected to impact discovery. The parties participated in a mediation held on December 21, 2017 in a good faith effort to resolve the case out of court, but a settlement could not be reached.

19. Firemen's has an interest relating to the property or transaction which is the subject of this action. As discussed above, this action represents the only forum in which Firemen's can obtain an allocation as to the amount of covered damages under the Policies.

20. Firemen's is in a position such that, without intervention, disposition of this action will impair or impede its ability to protect that interest. The Supreme Court appears to have held that if intervention is not sought, an insurer waives its right to seek an allocation as to the amount of covered damages. Harlevsille, 2017 WL 105021 at *7 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547.

21. Firemen's is not adequately represented by other parties to this action. None of the parties to this action have an incentive to seek an allocation as to the amount of covered damages. The interests of the Plaintiffs and James White Construction are aligned against the interest of Firemen's. Indeed, federal courts often realign parties to coverage litigation to reflect the fact that the interests of the liability carrier are adverse to the interests of both the plaintiffs and the defendants in the underlying tort litigation. See Bi-Lo, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, C.A. No. 0:14-cv-00335-CMC, 2014 WL 12605522 at *7-8 (D.S.C. Apr. 30, 2014). When the interests of the party seeking intervention are adverse to the interests of the party litigants, "there is an obvious lack of adequate representation." In re Horry Bountv State Bank, 361 S.C. at 509, 604 S.E.2d at 726.

22. Accordingly, Firemen's has satisfied all of the elements for intervention of right under Rule 24(a)(2). The use of the mandatory term "shall be permitted to intervene" demonstrates that this right is not subject to this Court's discretion.

23. In the alternative, Firemen's also moves to intervene under Rule 24(b). Permissive intervention is allowed at the court's discretion based upon the existence of a common question of fact or law between the underlying litigation and the intervenor's claims or defenses. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 75 (Ct. App. 1988). Sound administrative procedure favors the disposition of all claims or defenses in a single action. Id. As

discussed above, this action represents the only forum in which an allocation of covered versus non-covered damages can be made.

24. Firemen's motion to intervene is made for the limited purpose of presenting the jury with a special verdict or special interrogatories for a finding as to allocation between covered and non-covered damages. Courts have allowed limited intervention for a special purpose. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (holding that intervention is appropriate for third-party challenges to protective orders).

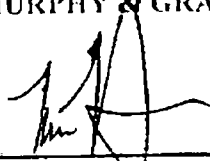
25. Upon information and belief, the granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original parties to the instant action, in that intervention is for the limited purpose of determining the form of the verdict to be submitted to the jury, and intervention will not impact the ability of the original parties to present their claims and/or defenses at trial.

Firemen's respectfully moves to intervene in this action pursuant to Rule 24(a) and (b) for the limited purpose of participating in the drafting of a special verdict or submitting special interrogatories to the jury in order to obtain findings of fact necessary for an allocation between covered and non-covered damages under the Policies. The grounds for this Motion are set forth above.

[Signature page follows]

Respectfully submitted,

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*Attorneys for Firemen's Insurance Company or
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Columbia, South Carolina
January 2, 2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PHILLIP JEFFERSON,

Plaintiff,

vs.

JAMES WHITE CONSTRUCTION, LLC, and
JAMES WHITE, individually,

Defendants.

2016-CP-10-4055
IN THE COURT OF COMMON PLEAS

Case No. 2016-CP-10-04055

**ORDER DENYING NON-PARTY
INSURERS' MOTIONS TO INTERVENE**

FILED
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JULIE J. JAMES
CLERK OF COURT

The matter came before the Court upon separate Motions to Intervene filed by insurance carriers Employers Mutual Casualty Company, Firemen's Insurance Company of Washington, D.C. and Frankenmuth Mutual Insurance Company ("Insurers"). These carriers are insurers for Defendants James White Construction, LLC and James White, individually ("Defendants") and seek to intervene in this action, pursuant to Rule 24, SCRPC, for the limited purpose of submitting special interrogatories and/or verdict questions to the jury related to the allocation of covered and non-covered damages during the upcoming trial. I heard the motion in open court on January 12, 2018 at which time all parties and non-party Insurers appeared through their attorneys. I have reviewed the file along with all submissions and applicable law and considered arguments of counsel as well. Based upon the record and applicable law, I deny Insurers' Motions to Intervene for the reasons explained below.

FACTS

This case concerns allegations that unsuitable quality fill dirt was delivered and deposited on Plaintiff's property located on Huro Road in Mount Pleasant, South Carolina. Plaintiff filed his Amended Complaint on August 31, 2016. Insurers insured Defendants under a series of

Amel

policies applicable to Plaintiff's claims and hired counsel to represent Defendants under a reservation of rights at the onset of this litigation. On December 29, 2017 – almost 16 months after this action was commenced – Insurers filed the present motions, pursuant to Rule 24, SCRPC. This case is now set for a date certain trial beginning on June 18, 2018.

LAW

Rule 24(a), SCRPC, provides for intervention as of right (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Rule 24(b), SCRPC, allows permissive intervention when (1) a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Rule 24(b), SCRPC.

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

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

ANALYSIS

Since the South Carolina Supreme Court published its opinion in the case of Harleysville Grp. Ins. V. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017), insurers have attempted to intervene in cases on the eve of trial for the purpose of submitting special interrogatories and/or verdict questions to the jury related to the allocation of covered and non-covered damages. However, the court's opinion in Harleysville opinion does not mandate that insurers have a right to intervene to ask special interrogatories or request special verdict forms.

In this matter, Insurers cannot meet the requirements for intervention under Rule 24, SCRCP. First, Insurers have not proffered a statutory right to intervene, conditional or otherwise. Second, Insurers do not have an interest in the property that is the subject of this action, located on Huro Road in Mount Pleasant, South Carolina, and Insurers do not have an interest in the underlying interactions between Plaintiff and Defendants that is the subject of this litigation. Insurers' interests arise solely out of their contracts of insurance with Defendants and those interests are not appropriate to be litigated or interjected into this action. Finally, if Insurers were to be permitted to intervene at this stage of the litigation then it would be to the detriment of Defendants, their insureds, as a result of an impermissible conflict of interest that would be created and the likelihood of confusing the jury.

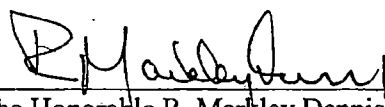
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ORDER

Accordingly, and based upon the foregoing, it is therefore

ORDERED, ADJUDGED AND DECREED that Non-Party Insurers Employers Mutual Casualty Company, Firemen's Insurance Company of Washington, D.C. and Frankenmuth Mutual Insurance Company's Motions to Intervene are Denied.

AND IT IS SO ORDERED.



The Honorable R. Markley Dennis, Jr.
Presiding Judge

May 16, 2018
Charleston, South Carolina

Rme/4

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No: 2016-CP-10-4055

FILED
CLERK OF COURT
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P112
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Ex Parte: Frankenmuth Mutual Insurance Company
and Employers Mutual Casualty Company.....Appellants,

In re: Phillip Jefferson.....Respondent,

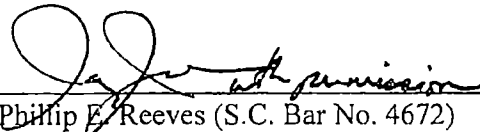
v.

James White Construction, LLC and James White, Individually..... Respondents,

NOTICE OF APPEAL

Pursuant to Rules 201 and 203 of the South Carolina Appellate Court Rules,
Appellants Frankenmuth Mutual Insurance Company and Employers Mutual Casualty
Company hereby appeal the Charleston County Court of Common Pleas Order Denying
Non-Party Insurers' Motions to Intervene, dated and filed May 16, 2018.

Respectfully submitted,



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June 13, 2018

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87002

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2016-CP-10-04055

RECEIVED

JUN 13 2018

SC Court of Appeals

Ex Parte:

Firemen's Insurance Company of Washington, D.C., ...Appellant,

In Re:

Phillip Jefferson, ...Respondent,

v.

James White Construction, LLC and James White, Individually, ... Respondents.

NOTICE OF APPEAL

Appellant Firemen's Insurance Company of Washington, D.C. (hereinafter
"Firemen's"), appeals the ruling of the Honorable R. Markley Dennis, Jr. filed May 16,
2018. Appellant received notice of the ruling denying Firemen's Motion to Intervene on

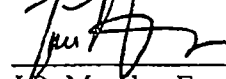
May 22, 2018. This action is set for trial beginning on Monday, June 18, 2018.

Firemen's appeal affects mode of trial. A copy of the final Order is attached.

June 13, 2018

Respectfully submitted,

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Attorneys for Frankenmuth Mutual
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2016-CP-10-4055
PHILLIP JEFFERSON,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>MOTION TO LIFT STAY</u>
	)	(Priority Matter)
	)	
JAMES WHITE CONSTRUCTION, LLC	)	
and JAMES WHITE, individually	)	
	)	
Defendants.	)	
	)	

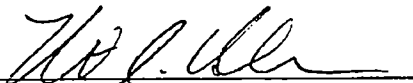
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 CLERK OF COURT

Pursuant to Rule 241 of the South Carolina Rules of Appellate Procedure, Plaintiff, Phillip Jefferson (hereinafter, "Mr. Jefferson") moves for an order to lift any stay associated with the Notices of Appeal filed on June 13, 2018 by non-parties Frankenmuth Mutual Insurance Company, Employers Mutual Casualty Company, and Firemen's Insurance Company of Washington, D.C . Pursuant to Rule 11, the undersigned counsel certifies that communication with opposing counsel could not timely be had and/or would serve no useful purpose.

The grounds for this motion is that the motions appealed upon involve non-parties to this action, and that the matters decided in the Orders have no bearing on any of the claims and defenses between the Plaintiff and Defendants.

WHEREFORE, Mr. Jefferson respectfully requests that the Court lift the stay as it may pertain to the Plaintiffs and Defendants, allow the trial to proceed on Monday, June 18, 2018, and/or require the non-parties post a bond in the amount of Plaintiff's demand.

HALVERSEN & ASSOCIATES, LLC

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Attorneys for the Plaintiff

June 15th, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No: 2016-CP-10-4055

Ex Parte: Frankenmuth Mutual Insurance Company
and Employers Mutual Casualty Company.....

Appellants,

In re: Phillip Jefferson.....

Respondent,

v.

James White Construction, LLC and James White, Individually..... Respondents,

APPELLANT FRANKENMUTH MUTUAL INSURANCE
COMPANY'S PETITION FOR WRIT OF SUPERSEDEAS TO
STAY TRIAL SCHEDULED FOR JUNE 18, 2018
IMMEDIATE ACTION REQUIRED: 1 BUSINESS DAY
UNTIL TRIAL

Appellant Frankenmuth Mutual Insurance Company ("Frankenmuth") petitions this Court to stay the trial scheduled for June 18, 2018, until the underlying appeal is resolved because the issues on appeal have a substantial effect on the trial of this matter. Significantly, Appellant has timely appealed an order denying its motion to intervene in this action for the purpose of requesting, outside the presence of the jury, that special interrogatories and/or a special verdict or a general verdict form accompanied by interrogatories be submitted to the jury from which the parties can make a determination of the apportionment of damages for each cause of action, if any, awarded to Respondent Phillip Jefferson and resolve issues of fact, from

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SC Court of Appeals

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which a determination of insurance coverage (or lack thereof) may be made. *See* Rule 49, South Carolina Rules of Civil Procedure; *Harleysville Grp. Ins. Co. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 341, 803 S.E.2d 288, 299 (S.C. 2017) ("The right to control the litigation carries with it certain duties," including "the duty not to prejudice the insured's rights by failing to request special interrogatories, or a special verdict in order to clarify coverage of damages."). Due to the limited time until the current trial date, Appellant requests immediate review by this Court.¹

FACTUAL/PROCEDURAL HISTORY

Appellant Frankenmuth, along with Appellants Employers Mutual Casualty Company ("EMC") and Firemen's Insurance Company of Washington, D.C. ("Firemen's"), issued a series of commercial general liability policies of insurance to Respondent James White Construction, LLC ("JWC") which were in effect from September 10, 2009 to September 10, 2017. On August 4, 2016, Respondent Jefferson commenced a lawsuit in the Charleston County Court of Common Pleas against Respondents JWC and James White, individually, in which he alleges that, from 2010 or 2011 until 2016, JWC has been dumping fill dirt on his property which JWC knew or should have known was not suitable for building upon. The plaintiff asserts negligence, negligent misrepresentation, nuisance, and trespass claims against JWC. Appellants are providing a defense to JWC in this action under a full and complete reservation of rights under their respective policies.

Because there are questions as to whether some or all of the claims made and damages claimed by Respondent Jefferson in this matter are covered by their respective policies of insurance, Appellants each filed motions to intervene pursuant to Rule 24 of the South Carolina

¹ Because of the exceptional circumstances of this matter and the limited time for review, Appellant has included the order as provided to it by the Court. Appellant will provide a certified copy of the order when it is made available by the Charleston County Clerk's Office pursuant to Rules 241(1) and 241(4)(C).

Rules of Civil Procedure for the limited purpose of protecting their interests under their policies by requesting special interrogatories and/or a special verdict form be submitted to the jury if this matter proceeds to trial. (Ex. 1, Frankenmuth's Motion to Intervene). The motions were heard by Judge R. Markley Dennis, Jr, on January 12, 2018. By order dated May 16, 2018, Judge Dennis denied Appellants' motions to intervene. (Ex. 2, Order Denying Insurers' Motions to Intervene).

On June 13, 2018, Appellants filed a notice of appeal of Judge Dennis' May 16, 2018, order. Appellants informed Judge Roger Young, the trial judge set to preside over the June 18, 2018 trial of this matter, via email that a notice of appeal had been filed. (Ex. 3, Email correspondence between counsel and the trial court, dated June 13, 2018). Thereafter, Respondent Jefferson filed a motion to lift any stay generated by the notice of appeal pursuant to Rule 241 of the South Carolina Appellate Court Rules. (Ex. 4, Plaintiff's Motion to Lift Stay). On June 14, 2018, Judge Young informed the parties that the appeal did not automatically stay the trial and that, unless the appellate court ruled otherwise, the matter would proceed to trial on June 18, 2018. (Ex. 5, Email correspondence between trial court and counsel, dated June 14, 2018).

Appellant now petitions this Court and seeks a writ to stay the upcoming trial until resolution of the appeal.

STANDARD OF REVIEW

A supersedeas is an extraordinary writ, which appellate courts use only when necessary to preserve the fruits of a meritorious appeal, to avoid irreparable harm, or to prevent a miscarriage of justice. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) ("[T]he purpose...of a supersedeas...is to...preserve to appellant the fruits of a

meritorious appeal where they might otherwise be lost to him.”); *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 304, 69 S.E. 604, 606 (1910) (explaining that a supersedeas should be issued “only to the extent clearly made to appear to be necessary to prevent irreparable injury or a miscarriage of justice.”).

ARGUMENT

The June 18, 2018 trial should be stayed pending the outcome of the appeal because (1) the filing of a notice of appeal automatically stays the trial and (2) a stay of the trial is necessary to preserve the fruits of a meritorious appeal and to avoid irreparable harm to Appellant.

Rule 205, SCACR, provides an appellate court with exclusive jurisdiction over matters on appeal. The lower court may only proceed with matters not affected by the appeal. Rule 241(a), SCACR, in governing matters which are stayed while on appeal, provides as follows:

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Thus, a lower court may not act or issue orders that affect an issue on appeal, which would include, but not be limited to, proceeding to trial.

In *Tillman v. Oakes*, the Court acknowledged that the question of determining whether a lower court may proceed with a case once an order has been appealed is “a difficult one to answer.” 398 S.C. 245, 254, 728 S.E.2d 45, 50 (2012). The inquiry for this Court is whether Appellant and its appeal are affected by proceeding with the trial of this matter. The answer must be yes.

Appellant is an insurer providing a defense to Respondents-Defendants under a

reservation of rights. In *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, the South Carolina Supreme Court set forth certain duties of an insurer providing a defense to an insured under a reservation of rights, including the duty to ensure that a verdict entered against its insured is allocated between covered and non-covered damages. 420 S.C. 321, 341, 803 S.E.2d 288, 299 (2017) (quoting *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994) (“The right to control the litigation carries with it certain duties,” including “the duty not to prejudice the insured’s rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.”).² Pursuant to this obligation, Appellant moved to intervene in this action solely to make such a request. The order denying this motion is at issue in this appeal.

If the matter proceeds to trial prior to a decision on Appellant’s appeal, the jury will not be presented with a special verdict form and/or special interrogatories. Rather, to the extent a verdict is entered against Respondents-Defendants, the verdict will be a general verdict. If faced with a general verdict, Appellant faces the possibility of having to indemnify its insureds for the entire verdict if at least one of several claims submitted to the jury is covered. See *Owners Ins. Co. v. Clayton*, 364 S.C.555, 561-62, 614 S.E.2d 611, 614-15 (2005). To prevent this inequity, the Court in *Harleysville* established that an allocated verdict must be obtained in the underlying trial. Appellant is attempting to comply with *Harleysville* but will be deprived of that opportunity

² It should be noted that *Harleysville* may also be construed to place a similar burden on the insured to request an allocated verdict. See *Harleysville*, 420 S.C. 321, 338-39, 803 S.E.2d 288, 297-98 (citing *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 618 (Minn. 2012) (holding that “when an insurer notifies its insured that it accepts the defense of a claim under a reservation of rights that includes covered and non-covered claims, the insurer not only has a duty to defend the claim, but also to disclose to its insured the insured’s interest in obtaining a written explanation of the award that identifies the claims or theories of recovery actually proved and the portions of the award attributable to each”). The Respondents-Defendants, however, have opposed Appellant’s motion to intervene to request such an allocation.

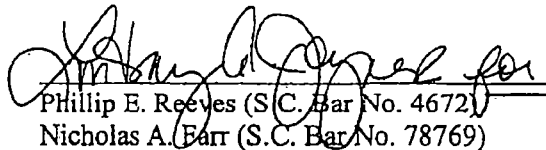
should this matter proceed to trial prior to a resolution of its appeal.

Appellant has a substantial interest in the outcome of the trial and preserving the ability to request that the jury be presented with a special verdict form and/or special interrogatories to obtain a determination of the damages, if any, attributable to covered and non-covered claims. Proceeding with a trial which may result in a general verdict if Respondents-Defendants are found liable to Respondent Jefferson prior to a decision on the merits of the appeal may either (1) render Appellant's appeal moot, leaving Appellant with the possibility of having to indemnify its insureds for an unallocated general verdict that includes covered and non-covered claims or (2) result in having to try the case a second time in the event Appellant's appeal is successful. As such, a supersedeas should be granted to preserve the fruits of a meritorious appeal, to avoid irreparable harm, and to prevent a miscarriage of justice. Further, Appellant contends that no bond or undertaking is required as a judgment has as a monetary judgment has not been entered in this matter.

CONCLUSION

For these reasons, Appellant respectfully requests this Court to issue a stay and to continue the trial of this matter until the appeal is resolved.

Respectfully submitted,



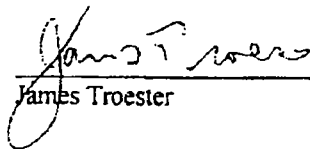
Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
Gallivan, White & Boyd, P.A.
Post Office Box 10589
Greenville, South Carolina 29603
(864) 271-9580
Attorneys for Appellant

Greenville, South Carolina

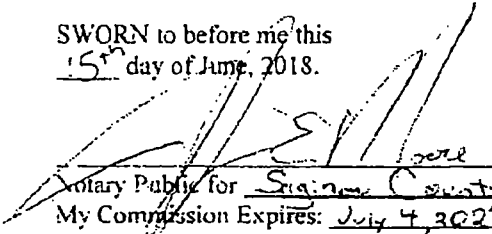
June 15, 2018

STATE OF Michigan)
)
COUNTY OF Saginaw) VERIFICATION

PERSONALLY APPEARED before me, James Troester, who after being duly sworn, says that he has read the foregoing Petition, knows the contents thereof, and that the same are true and correct to the best of his own knowledge, saving and excepting as to those matters alleged therein on information and belief, and, as to those, he believes them to be true.


James Troester

SWORN to before me this
15th day of June, 2018.


Notary Public for Saginaw County
My Commission Expires: July 4, 2023

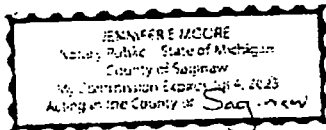


EXHIBIT 5

Nick Farr

From: Young, Roger <ryoungj@sccourts.org>
Sent: Thursday, June 14, 2018 2:10 PM
To: Dan
Cc: Yount, Adam; Brent Halversen; Emily Medlin; Young, Roger Law Clerk (Taylor Grooms); Nick Farr; Rogers; rteague@wardfirm.com; Phil Reeves; Tim J. Newton; paralegal@slotchiverlaw.com
Subject: Re: Phillip Jefferson v. James White Construction, LLC and James White, Individually (C.A. No. 2016-CP-10-4055) M&G File No.: 1465-0021

The word I get from Columbia is that this is one of those cases where the appellant thinks the appeal automatically stays the pending trial, and it is up to me to decide if I agree or not. They will only act if someone files something asking them to tell me to stop the trial.

I am of the opinion this appeal does not automatically stay the trial.

Therefore, unless I get something from the appellate courts telling me to stop, be ready to go to trial Monday. Please send me pre-trial briefs, voir dire and proposed jury charges by the end of the day Friday.

Roger Young

On 6/14/18, 12:52 PM, "Dan" <dan@slotchiverlaw.com> wrote:

Thank you Judge. We will await word from you. In the interim, please let us know if you want a Pre trial brief in advance of trial, assuming we are going forward.

Dan

Daniel S Slotchiver
Slotchiver & Slotchiver LLP
44 State Street
Charleston SC 29401
843-577-6531

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error.

> On Jun 14, 2018, at 11:00 AM, Young, Roger <ryoungj@sccourts.org> wrote:

>

> I have someone at the COA looking out for the appeal so they can make a decision as to whether the appeal stays the case. As of a few minutes ago the notice of appeal has not been filed with the COA. I will let you know what they decide when they get it and make a decision.

>

> RY

>

> From: "Yount, Adam" <ayount@hsblawfirm.com>

> Date: Wednesday, June 13, 2018 at 4:24 PM
 > To: Brent Halversen <Brent@halversenlaw.com>, Emily Medlin <emedlin@murphygrantland.com>, Roger Young <ryoungj@sccourts.org>, Taylor Grooms <ryounglc@sccourts.org>
 > Cc: "nfarr@gwblawfirm.com" <nfarr@gwblawfirm.com>, Rogers <JRogers@wardfirm.com>, "dan@slotchiverlaw.com" <dan@slotchiverlaw.com>, "rteague@wardfirm.com" <rteague@wardfirm.com>, "preeves@gwblawfirm.com" <Preeves@gwblawfirm.com>, "Tim J. Newton" <tnewton@murphygrantland.com>
 > Subject: RE: Phillip Jefferson v. James White Construction, LLC and James White, Individually (C.A. No. 2016-CP-10-4055) M&G File No.: 1465-0021
 >
 > Judge Young,
 >
 > Please have this confirm that Defendants join in the referenced Motion to Lift Stay.
 >
 > Thanks,
 >
 > Adam
 >
 >
 > [Haynsworth Sinkler Boyd, P.A.]<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.hsblawfirm.com_home.php&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskfWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=5n5qmcZzCeI8EA1ZF98idbOo3Ab_zwJZGhoRV7nLcWE&e=>
 > Adam N. Yount | Attorney | Haynsworth Sinkler Boyd, P.A.
 >
 > 134 Meeting Street, 3rd Floor (29401) | Post Office Box 340 (29402) | Charleston, South Carolina
 > Phone: 843.722.3366 | Fax: 843.722.2266 | Direct: 843.720.4484
 > website<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.hsblawfirm.com_home.php&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskfWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=5n5qmcZzCeI8EA1ZF98idbOo3Ab_zwJZGhoRV7nLcWE&e=> |
 bio<https://urldefense.proofpoint.com/v2/url?u=http-3A__hsblawfirm.com_attorneys_adam-2Dn-2Dyount&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskfWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=G4N33f0dwrYnQLenzQXEUQm_fkjfaDUSQAAA_Hs9qlU&e=> |
 vCard<https://urldefense.proofpoint.com/v2/url?u=http-3A__hsblawfirm.com_vcard_adam-2Dn-2Dyount&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskfWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=xW3Tyoz8OVu9ANxGQ2WbRgGoPsO_POLjb-3edaK2TSw&e=> |
 map<https://urldefense.proofpoint.com/v2/url?u=http-3A__maps.google.com_maps-3Fq-3D134-2BMeeting-2BStreet-2C-2BCharleston-2C-2BSC-26hl-3Den-26ll-3D32.781971-2C-2D79.93176-26spn-3D0.024896-2C0.055575-26sll-3D34.852869-2C-2D82.394929-26sspn-3D0.01215-2C0.027788-26vpsrc-3D6-26hnear-3D134-2BMeeting-2BSt-2C-2BCharleston-2C-2BSouth-2BCarolina-2B29401-26t-3Dm-26z-3D15&d=DwMFAG&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskfWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=3ISXaToY3mj4Wx6SF0EnU9dpZW8Qd3rIIHNzqU4mjzc&e=> |
 email<<mailto:ayount@hsblawfirm.com>>
 >
 >
 >
 >
 >
 >
 > From: Brent Halversen [<mailto:Brent@halversenlaw.com>]
 > Sent: Wednesday, June 13, 2018 4:22 PM

> To: Emily Medlin; ryoungj@sccourts.org; ryounglc@sccourts.org
 > Cc: nfarr@gwblawfirm.com; Rogers; dan@slotchiverlaw.com; rteague@wardfirm.com; Yount, Adam; preeves@gwblawfirm.com; Tim J. Newton
 > Subject: RE: Phillip Jefferson v. James White Construction, LLC and James White, Individually (C.A. No. 2016-CP-10-4055) M&G File No.: 1465-0021
 >
 > Judge Young,
 >
 > Attached is the Plaintiff's Motion to Lift Stay associated with any of these notices of appeal that the various Insurance companies have just filed this afternoon in our case. The Defendants in the case, through Adam Yount, have just indicated to me that they also join in this motion.
 >
 > Given that we have a one week date certain before your Honor that starts on Monday of next week, I am sure I speak for everyone in asking that the Court rule upon the motion as soon as possible in light of the number of people involved in trial preparation, travelling etc. We believe that any stay invoked by the filing of the notices should be lifted consistent with the rulings of other courts in South Carolina. I have attached one such ruling from Judge Newman to that effect. Thank you for your consideration.
 >
 > Brent
 >
 >
 >
 > _____
 > Brent Souther Halversen, Esq.
 > Halversen & Associates, LLC
 > 171 Church Street, Suite 330
 > Charleston, South Carolina 29401
 > (843) 284-5790 tel.
 > (864) 326-4844 fax.
 > brent@halversenlaw.com<mailto:brent@halversenlaw.com>
 > www.halversenlaw.com<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.halversenlaw.com_&d=DwMFag&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=gIX2g4ctOFJAM0d-MqMR-XsuVclXWkmM4xiiWcK_xvM&m=-XQTIKOs7fskfWqhggGqnEJ-TtIXUKBhwLOeZhpRZDk&s=M3WBaXYFWDlaS-yMM6XN1yleWkPjoiX9eFI77ItnWS4&e=>
 > [Company logo]
 >
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 >
 > *** IRS CIRCULAR 230 NOTICE *** Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication.
 >
 >
 >
 >

> From: Emily Medlin <emedlin@murphygrantland.com<mailto:emedlin@murphygrantland.com>>
> Sent: Wednesday, June 13, 2018 3:25 PM
> To: ryoungj@sccourts.org<mailto:ryoungj@sccourts.org>; ryounglc@sccourts.org<mailto:ryounglc@sccourts.org>
> Cc: nfarr@gwblawfirm.com<mailto:nfarr@gwblawfirm.com>; Rogers
<jrogers@wardfirm.com<mailto:jrogers@wardfirm.com>>; Brent Halversen
<Brent@halversenlaw.com<mailto:Brent@halversenlaw.com>>;
dan@slotchiverlaw.com<mailto:dan@slotchiverlaw.com>; rteague@wardfirm.com<mailto:rteague@wardfirm.com>;
ayount@hsblawfirm.com<mailto:ayount@hsblawfirm.com>;
preeves@gwblawfirm.com<mailto:preeves@gwblawfirm.com>; Tim J. Newton
<tnewton@murphygrantland.com<mailto:tnewton@murphygrantland.com>>
> Subject: Phillip Jefferson v. James White Construction, LLC and James White, Individually (C.A. No. 2016-CP-10-4055)
M&G File No.: 1465-0021

>
> Judge Young,
>
> I hope this email finds you well! The above-case matter is currently set for trial starting Monday morning, June 18, 2018. We have attached our Notice of Appeal filed on behalf of Firemen's Insurance Company of Washington, D.C. appealing the Order Denying our Motion to Intervene which was Ordered on May 16, 2018. Our Notice of Appeal is being hand-delivered today to the Court of Appeals for filing. All parties have been emailed and mailed a hard copy of the attached also.

>
> Thank you,
> Emily
> [cid:image003.png@01D28B5E.CB6890A0]
> Murphy & Grantland, P.A.
> Emily Medlin, CP
> Paralegal/Legal Assistant to Chris Majure
> Legal Assistant to Tim Newton
> emedlin@murphygrantland.com<mailto:bpierce@murphygrantland.com>
> Post Office Box 6648
> Columbia, South Carolina 29260
> 803-782-4100 ext. 1307
> 803-782-4140 fax

>
> Please be advised that this e-mail and any files transmitted with it are confidential attorney-client communications or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient, please do not read, copy or retransmit this communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

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> _____
> CONFIDENTIALITY NOTICE: This e-mail and any files transmitted with it are confidential and may contain information which is legally privileged or otherwise exempt from disclosure. They are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please immediately notify the sender and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing, or copying of this e-mail is strictly prohibited. mmcorp

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The South Carolina Court of Appeals

Ex Parte: Frankenmuth Mutual Insurance Company and
Employers Mutual Casualty Company, Appellants,

In Re: Phillip Jefferson, Respondent,

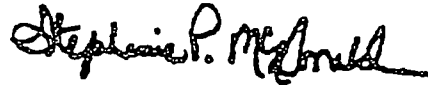
v.

James White Construction, LLC and James White,
individually, Respondent.

Appellate Case No. 2018-001094

ORDER

Appellants' motion to stay the trial is denied. Judge Roger M. Young, Sr. may proceed with the trial set for Monday, June 18, 2018.



FOR THE COURT

Columbia, South Carolina

FILED

cc:

The Honorable Roger M. Young, Sr.
Phillip E. Reeves, Esquire
Nicholas Andrew Farr, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire
Adam Noah Yount, Esquire
Brent Souther Halversen, Esquire

June 15, 2018



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 18, 2018

Mr. Phillip E. Reeves, Esquire
PO Box 10589
Greenville SC 29603

Mr. Nicholas Andrew Farr, Esquire
PO Box 10589
Greenville SC 29603

Re: Ex Parte: Frankenmuth Mutual Insurance Company and Employers Mutual
Casualty Company
Appellate Case No. 2018-001094

Dear Counsel:

This Court has received your notice of appeal. A preliminary review of the order(s) challenged on appeal indicates it might not be immediately appealable.

Accordingly, it is requested that all counsel serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memoranda.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire
Adam Noah Yount, Esquire
Brent Souther Halversen, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 18, 2018

Mr. John Robert Murphy, Esquire
PO Box 6648
Columbia SC 29260

Mr. Timothy J. Newton, Esquire
PO Box 6648
Columbia SC 29260

Re: Ex Parte: Firemen's Insurance Company of Washington, D.C.
Appellate Case No. 2018-001103

Dear Counsel:

This Court has received your notice of appeal. A preliminary review of the order(s) challenged on appeal indicates it might not be immediately appealable.

Accordingly, it is requested that all counsel serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memoranda.

Very truly yours,

V. Claire Allen, Deputy

CLERK.

cc: Brent Souther Halversen, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire

The South Carolina Court of Appeals

Ex Parte: Frankenmuth Mutual Insurance Company and
Employers Mutual Casualty Company, Appellants,

In Re: Phillip Jefferson, Respondent,

v.

James White Construction, LLC and James White,
individually, Respondents.

Appellate Case No. 2018-001094

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2016CP1004055

ORDER

It appears to the satisfaction of the Court that the above case has been fully and finally settled by agreement between the parties. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED

June 29, 2018

cc:

Phillip E. Reeves, Esquire

Nicholas Andrew Farr, Esquire

Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire
Adam Noah Yount, Esquire
Brent Souther Halversen, Esquire

The South Carolina Court of Appeals

Ex Parte: Firemen's Insurance Company of Washington,
D.C., Appellant,

In Re: Phillip Jefferson, Respondent,

v.

James White Construction, LLC and James White,
Individually, Respondents.

Appellate Case No. 2018-001103

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2016CP1004055

ORDER

It appears to the satisfaction of the Court that the above case has been fully and finally settled by agreement between the parties. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Elaine Allen, Deputy
CLERK

Columbia, South Carolina

FILED

June 29, 2018

cc:

John Robert Murphy, Esquire
Timothy J. Newton, Esquire
Brent Souther Halversen, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 17, 2018

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Ex Parte: Frankenmuth Mutual Insurance Company and Employers Mutual
Casualty Company
Lower Court Case No. 2016CP1004055
Appellate Case No. 2018-001094

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Phillip E. Reeves, Esquire
Nicholas Andrew Farr, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire
Adam Noah Yount, Esquire
Brent Souther Halversen, Esquire

ROA 425

Exhibit A p. 48



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 17, 2018

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Ex Parte: Firemen's Insurance Company of Washington, D.C.
Lower Court Case No. 2016CP1004055
Appellate Case No. 2018-001103

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: John Robert Murphy, Esquire
Timothy J. Newton, Esquire
Brent Souther Halversen, Esquire
Daniel Scott Slotchiver, Esquire
John Elliott Rogers, II, Esquire
Ginger D. Goforth, Esquire
Carl Reed Teague, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2008-CP-10-6897

Montclair Property Owners Association (a South Carolina Non-Profit Corporation) and Montclair Property Owners Association Board of Directors for and on behalf of all owners of the Montclair Horizontal Property Regime,

Plaintiffs,

vs.

Bruce E. Kinney, Individually and as an incorporation for Montclair Homes, LLC; Montclair Homes, LLC, a South Carolina Limited Liability Company (Declarant-Master Deed); Cremco, LLC, an Illinois Limited Liability Company; Montclair Associates Limited Partnership, an Illinois Limited Liability Company; Montclair Property Owners Association a/k/a Montclair Homeowners Association (Grantor Control Period); Bruce Kinney as an officer or director in the Montclair Property Owners Association a/k/a Montclair Homeowners Association (Grantor Control Period), a SC non-profit corporation; Church Creek Construction, LLC and Larry Elsey, Individually and d/b/a ECI or Elsey Construction a/k/a Elsey Construction, Inc.; and Roger Lockey;

Defendants.

FILED
2012 SEP 13 PM 4:13
JULIE J. ARMSTRONG
CLERK OF COURT

**MOTION TO INTERVENE
FOR THE LIMITED PURPOSE OF REQUESTING SPECIAL INTERROGATORIES
AND/OR SPECIAL VERDICT FORM**

Alea London, LTD ("Alea"), pursuant to Rule 24 of the South Carolina Rules of Civil Procedure (SCRCP), and other applicable law, hereby moves before the Court to enter an order

permitting Alea to intervene in the civil action for the limited purpose of participating in a request for special verdict form and/or general verdict form accompanied by written interrogatories pursuant to SCRCP 49.¹

Alea issued insurance policies with general liability coverage to Defendant Church Creek Construction LLC ("Church Creek"), effective, with the noted exception, for the following periods: 1) July 25, 2003 to July 25, 2004; 2) July 25, 2004 to July 25, 2005; and 3) July 25, 2005 to July 25, 2006 (together, "Policy").² The third policy period cancelled effective October 18, 2005. The Policy provides in part that the insurance applies to "property damage" as defined in the Policy, only if the "property damage" occurs during the policy period.

¹ RULE 49. SPECIAL VERDICTS AND INTERROGATORIES

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

² Copies of the Policy will be made available for review.

The civil action is a construction defect one. The Plaintiff, the Montclair Property Owners Association, Inc., alleges that Church Creek is liable for alleged construction defects in condominium buildings. Plaintiff alleges progressive property damages caused by an occurrence. (See Third Amended Complaint ¶ 35). Plaintiff alleges that the damages have progressed since 2003. (See Third Amended Complaint ¶ 35).

**Insurance Coverage Law for a Progressive Property
Damage Construction Defect Claim**

The allegations made by Plaintiff will be governed in part by the recent South Carolina Supreme decision in Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011)(“Crossmann”). In Crossmann, the South Carolina Supreme Court addressed insurance coverage for a construction defect case related to a building’s exterior envelope and resulting progressive water intrusion damages to other parts of a building. The facts in Crossmann are similar generally to the ones in the present matter. Crossmann Communities of North Carolina, Inc. constructed the condominium buildings that suffered from construction defects and resulting water intrusion damages. In a lawsuit, the homeowners alleged that Crossmann Communities defectively installed the exterior siding on the buildings, which resulted in water penetration and progressive damage to other parts of the buildings. Crossmann Communities settled with the homeowners and then filed a declaratory judgment action seeking to have the insurers reimburse Crossmann Communities for the amount paid in settlement.

Crossmann may be divided into two parts. The first part is the Supreme Court’s analysis of the insuring agreement portion of the policy. The Supreme Court analyzed whether the facts written above constituted an “occurrence” of “property damage” as written in the insuring agreement portion of the policy and decided in other insurance coverage decisions around the

country. Crossmann, 395 S.C. at 46, 717 S.E.2d at 592.³ In finding the facts did constitute an “occurrence” of “property damage”, and an insured loss in that case, the Supreme Court recognized that there may be insured and uninsured losses in a construction defect claim. See Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. The Supreme Court stated, “[i]n sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute ‘property damage,’ but the defective construction would not.” Crossmann, 395 S.C. at 50, 717 S.E.2d at 594.

The second part of Crossmann is the Supreme Court’s analysis of the allocation of multi-year, progressive property damages, as alleged by Plaintiff in their pleadings, between insurer(s) and the insured. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. The Supreme Court adopted a “time on risk” formula for allocating progressive property damages that may occur over multiple years. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. The Supreme Court described the formula it adopted as follows: “[t]he basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.” Id. at 65, 717 S.E.2d at 601. Moreover, the Court stated, “[b]y making the denominator the total number of years during which the damage progressed, a policyholder who chose not to purchase coverage for certain years will be left with the

³ The parties in Crossmann stipulated that they would not argue the applicability of any policy exclusions. Crossmann, 395 S.C. at 46, 717 S.E.2d at 592. The parties presented the coverage question on the basis of the presence or absence of an “occurrence”. Crossmann, 395 S.C. at 46, 717 S.E.2d at 592.

responsibility for whatever portion of the total loss is attributed to those uninsured years.” Id. at 65, 717 S.E.2d at 601 Fn. 14.

The Court concluded, “[t]his formula is not a perfect estimate of the loss attributable to each insurer's time on the risk. Rather, it is a *default rule* that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof. However, absent such proof, assuming an even progression is a logical default.” Id. In summary, the Supreme Court stated as follows:

In sum, we construe the standard CGL policy to require that each insurer cover only that portion of a loss attributable to property damage that occurred during its policy period. In light of the difficulty in proving the exact amount of damage incurred during each policy period, we adopt the formula above as the default method for allocating shares of the loss. Trial courts may vary from this default formula where appropriate to the circumstances of a particular case, but they must remain faithful to the premise that each insurer is responsible only for a pro rata portion of the total loss, and each pro rata portion must be defined by the insurer's time on the risk.

Id. at 66, 717 S.E.2d at 603.

The purpose of the motion herein is to do as instructed in Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) (“Newman”) and segregate damages. In Newman, the South Carolina Supreme Court also addressed the issue of insurance coverage for construction and design defects related to a building’s envelope and resulting water intrusion claims to other portions of the building structure. The facts in Newman involved a construction defect claim arising out of the construction of a single family house. The homeowner and homebuilder submitted the claim to binding arbitration; and Auto Owners Insurance Company provided defense counsel to the builder pursuant to an insurance policy with commercial general liability coverage. The arbitrator awarded damages to the homeowner based on a contractor’s

itemized cost of repair proposal that included an estimate for the costs to remove and replace the stucco siding, as well as an allowance to repair any water-damaged sheathing and framing that may be found once the stucco was removed from the house.

After the arbitrator issued the award, Auto-Owners filed a declaratory judgment civil action with respect to the issue of insurance coverage for the removal and replacement of the stucco system and the allowance for any resulting water damaged sheathing and/or framing. The trial court ruled in favor of the homeowner holding that the policy covered both the cost for the removal and replacement of the stucco and the allowance for any water damaged sheathing and framing. Auto-Owners appealed.

The Supreme Court in Newman held that while there was an occurrence of property damage, i.e., faulty construction, performed by a subcontractor to the builder (insured), that resulted in physically damaged sheathing and framing (property damage), the CGL policy did not cover the cost to remove and replace the stucco and relied on Exclusion N, the "Recall of Products, Work or Impaired Property" exclusion :

C. Damages awarded for replacement of the defective stucco

Auto-Owners finally argues that even if an "occurrence" warrants recovery for the Homeowner's property damage, the trial court erred in determining that the CGL policy covered the arbitrator's itemized allowance for replacing and repairing the defective stucco itself as an incidental cost to repairing the damage to other property. We agree.

Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself. Specifically, the policy exclusion provides that the insurance does not cover damages "claimed for any loss, cost or expense ... for the repair, replacement, adjustment, removal or disposal of ... 'Your product'; ... 'Your work'; or ... 'Impaired property'; if such product, work or property is withdrawn ... from use ... because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco-even when the replacement of the defective work may be

incidental to the repair of property damage covered by the policy-and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover. See L-J 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we 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.

Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546.

Although the Supreme Court ruled that Exclusion N excluded coverage for the removal and replacement of the stucco, the Supreme Court nonetheless required Auto-Owners to pay the entire judgment (removal and replacement included) because it found that Auto-Owners had not addressed the issue in the underlying arbitration. The Supreme Court stated the following:

Nevertheless, it is not possible from the record before the Court to determine what portion of the arbitrator's itemized list of damages may be attributable 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 (Citation Omitted)

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

Footnote 5 reads as follows:

Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 547

The Supreme Court did not provide specific guidance on how an insurer is to raise the

matter of insurance coverage in the underlying liability civil action. SCRPC 24 permits intervention as of right where the party seeking intervention submits a timely application, the party claims an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and the interest of the party may not be adequately represented by the existing parties. Ken's Cabana, LLC v. Flemington Props., LLC (Ex parte Horry County State Bank), 604 S.E.2d 723 (S.C. Ct. App. 2004). Alea meets the requirements, thus entitling it to intervene as a matter of right.

Alea's application is timely. Alea is seeking to intervene for the limited purpose of participating in the special interrogatories and/or the verdict form. At this time, the preparation of these documents is not even imminent. Further, the trial in the civil action will not be delayed, and Alea assures the court that its motion to intervene will not delay or disrupt the legal proceedings prior to trial.

The next requirement to consider is whether Alea claims an interest relating to the property or transaction that is the subject of this action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest. Based upon Newman and South Carolina law discussed below, Alea satisfies the requirement.

The construction defect civil action should be free of the mention of insurance. See Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335, 340-41 (1962) ("The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it").

In recognition of potentially divergent interests among insurers and insureds, the Rules of Professional Conduct, Rule 407, SCACR, mandate that counsel for Church Creek owes a duty of loyalty only to Church Creek, not Alea, if their interests diverge. Specifically, Comment 11 of Rule 1.8, RPC, Rule 407, SCACR states:

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. . . . Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.

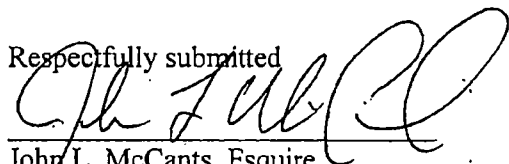
Further, Rule 5.4(c), RPC, Rule 407, SCACR states, "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Accordingly, when Alea retained counsel to defend Church Creek under a reservation of rights, that counsel represented *only* Church Creek's interests, and *not* Alea's interests, with respect to any duty to present evidence as to categories of damages which may fall within a policy exclusion.

The Supreme Court has a long history of not allowing the existence of insurance to be introduced in litigation between a third party plaintiff and an insured. Hence, Alea should not be made to intervene as a named party, to be identified to a jury or otherwise appear in the underlying trial between Plaintiff and Church Creek. See Dobson v. American Indemnity Co., 227 S.C. 307, 87 S.E.2d 869, 870 (1955). The bar exists to prevent a jury's liability determination from being improperly influenced or prejudiced. See also Cox v. Employers Liability Assur. Corp., 191 S.C. 233, 236, 196 S.E. 549, 550 (1938) ("The writer of this opinion, after twelve years' experience upon the trial bench, knows of no more effective method of embalming a defense than that of informing a jury in a negligence case that the defendant in the

suit is protected against their verdict by liability insurance.”); Horsford v. Carolina Glass Co., 92 S.C. 236, 258-59, 75 S.E. 533, 541 (1912) (“There can be no doubt on the bench or at the bar that, in an action by an employee against his employer to recover damages for personal injury, both reason and authority forbid bringing into the evidence or argument the fact that defendant is protected by employer’s liability insurance. Such evidence or argument has a manifest and strong tendency to carry the jury away from the real issue and to lead them to regard carelessly the legal rights of the defendant on the ground that someone else will have to pay the verdict.”).

If this Court finds that Alea is not entitled to intervention as of right under SCRCP 24(a), Alea respectfully requests that it be entitled to permissive intervention under SCRCP 24(b) for the above reasons.

Respectfully submitted



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ATTORNEY FOR ALEA LONDON LTD

September 11, 2012

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

MONTCLAIR PROPERTY OWNERS
ASSOCIATION (A SOUTH CAROLINA
NON-PROFIT CORPORATION) AND
MONTCLAIR PROPERTY OWNERS
ASSOCIATION BOARD OF
DIRECTORS FOR AND ON BEHALF
OF ALL OWNERS OF THE
MONTCLAIR HORIZONTAL
PROPERTY REGIME,

PLAINTIFFS,

VS.

BRUCE E. KINNEY, INDIVIDUALLY
AND AS AN INCORPORATOR FOR
MONTCLAIR HOMES, LLC;
MONTCLAIR HOMES, LLC, A SC
LIMITED LIABILITY COMPANY
(DECLARANT - MASTER DEED);
CREMCO, LLC, AN ILLINOIS
LIMITED LIABILITY COMPANY;
MONTCLAIR ASSOCIATES LIMITED
PARTNERSHIP, AN ILLINOIS
LIMITED PARTNERSHIP;
MONTCLAIR PROPERTY OWNERS
ASSOCIATION A/K/A MONTCLAIR
HOMEOWNERS ASSOCIATION
(GRANTOR CONTROL PERIOD);
BRUCE E. KINNEY AS AN OFFICER
OR DIRECTOR IN THE MONTCLAIR
PROPERTY OWNERS ASSOCIATION
A/K/A MONTCLAIR HOMEOWNERS
ASSOCIATION (GRANTOR CONTROL
PERIOD), A SC NON-PROFIT
CORPORATION; AND CHURCH
CREEK CONSTRUCTION, LLC.

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2008-CP-10-6897

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

FILED
Entered in date Canceled
4/11/13

**ORDER DENYING ALEA'S
MOTION TO INTERVENE
FOR THE PURPOSE OF
REQUESTING SPECIAL
INTERROGATORIES**

This action arises from the conversion of the Montclair Apartments to condominium units. Plaintiffs filed the initial complaint in this matter on December 5, 2008. On January 12, 2010, Plaintiffs filed a Second Amended Complaint naming Church Street Construction, LLC ("Church Creek"), as an additional defendant. Church Creek answered the Second Amended Complaint on March 17, 2010. In the initial Consent Scheduling Order, signed on April 22, 2010, mediation was to be conducted on or before February 15, 2011, and the case was subject to be called for trial on or after March 15, 2011.

The First Amended Scheduling Order was filed on February 3, 2011. In that order, the Honorable Kristi Harrington granted the parties leave to request a "date certain" trial and ordered that the case was subject for trial on or after September 26, 2011. A Second Amended Consent Scheduling Order set the case for trial not before February 1, 2012. The Third Amended Consent Scheduling Order, signed on April 30, 2012, set the matter for a two-week date certain trial. The case has been mediated three times, and the trial is set to begin on Monday, October 1, 2012.

On September 13, 2012, Alea London, LTD ("Alea") filed a Motion to Intervene for the Limited Purpose of Requesting Special Interrogatories and/or a Special Verdict Form. Alea, the general liability carrier for Church Street Construction, seeks to submit special interrogatories to the jury to, presumably, assist with the division of any money damages between the covered and non-covered acts of its insured. The Court heard Alea's motion on September 26, 2012.

Rule 24(a) of the South Carolina Rules of Civil Procedure provides that:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"Thus, a party seeking intervention under Rule 24(a)(2) must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties." *In re Horry County State Bank*, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004). When a party seeks to intervene, "each case will be examined in the context of its unique facts and circumstances." *Id.*

At the outset, the Court finds Alea's application to be untimely. Alea's insured, Church Creek, was named a defendant in January of 2010. The case has been mediated three times, and over four months prior to the filing of Alea's Rule 24 motion, the court reserved a two-week date certain term for the trial of this case.

More significantly, Plaintiffs contend that intervention at this late date would prejudice them as discovery has been completed, and they have not conducted any discovery directed to address Alea's clear attempt to deny or severely limit coverage to its insured, Church Creek. Church Creek would likewise be prejudiced as it was not aware during discovery that its independent counsel would need to take depositions regarding coverage for his client as to the alleged negligent construction and resulting damage.

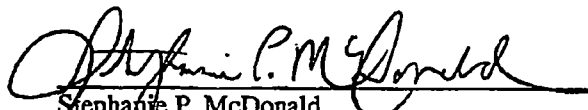
Further, Alea has failed to demonstrate that absent intervention, "disposition of this action may impair or impede its ability to protect" its interest in the underlying litigation. Alea's counsel acknowledged that the carrier analyzed and declined to file a declaratory judgment action addressing the coverage issues that it asserts are relevant in this case. Indeed, the questions which the parties in the underlying case have not yet asked (due to the unfortunate timing of Alea's motion) would still be appropriate in a declaratory judgment action addressing

the coverage issue. There is currently a federal declaratory judgment action pending, *Scottsdale Ins. Co. v. Montclair Associates Limited Partnership et al*, Civil Action No. 2:10-CV-03157, which Alea could have joined in order to address any legitimate coverage concerns arising from this litigation.

In the current case, Church Creek's trial counsel has continued to represent his client, Alea's insured -- for over two years, through voluminous discovery, numerous pre-trial motions, and the repeated mediations -- without objection from Alea or Alea's insured. Both Alea and its insured share the objective to minimize exposure to liability and to minimize any damages that could be awarded as a result of Church Creek's work on the Montclair conversion.

For these reasons, on the eve of the two-week trial set to begin on Monday, October 1, 2012, Alea's Motion to Intervene under Rule 24 of the South Carolina Rules of Civil Procedure is denied.¹

AND IT IS SO ORDERED.


Stephanie P. McDonald
Presiding Judge, Ninth Judicial Circuit

Dated: September 28, 2012

Charleston, South Carolina

¹ For the reasons set forth in the analysis of Rule 24(a), Alea's alternative Rule 24(b) request that it be entitled to permissive intervention under Rule 24(b) is likewise denied.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2008-CP-10-6897

Montclair Property Owners Association (a South Carolina
Non-Profit Corporation) and Montclair Property Owners
Association Board of Directors for and on behalf of all
owners of the Montclair Horizontal Property Regime; and
Church Creek Construction, LLC

Respondents.

v.

Alea London, LTD,

Appellant.

NOTICE OF APPEAL

Appellant, Alea London, LTD ("Alea"), hereby appeals the order of the Honorable
Stephanie P. McDonald issued orally on September 26, 2012, on Alea's Motion to Intervene For
the Limited Purpose of Requesting Special Interrogatories and/or Special Verdict Form.
Appellant has not received written notice of entry of the oral Order. Trial is scheduled to
commence on October 1, 2012.

September 28, 2012

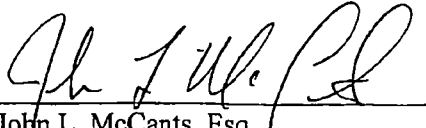

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Exhibit B p. 15

ROA 441

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The Honorable Stephanie P. McDonald
Circuit Court Judge
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The Honorable Julie J. Armstrong

Charleston County Clerk of Court
100 Broad Street, #106
Charleston, SC 29401

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2008-CP-10-6897

Montclair Property Owners Association (a South Carolina
Non-Profit Corporation) and Montclair Property Owners
Association Board of Directors for and on behalf of all
owners of the Montclair Horizontal Property Regime; and
Church Creek Construction, LLC

Respondents.

v.

Alea London, LTD,

Appellant.

EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS

Appellant, Alea London, LTD ("Alea"), moves before the South Carolina Court of Appeals for a Writ of Supersedeas requiring the trial court to not commence the trial of the civil action on Monday, October 1, 2012.

Appellant filed a Motion to Intervene For the Limited Purpose of Requesting Special Interrogatories and/or Special Verdict Form (the "Motion") on September 13, 2012. A copy of the Motion is attached hereto. The motion was heard by the Honorable Stephanie P. McDonald on September 26, 2012; and Judge McDonald denied the Motion by oral ruling during the hearing. Alea filed a Notice of Appeal on September 28, 2012. Judge McDonald ruled on Friday

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JULIE J. ARMSTRONG
CLERK OF COURT
BY DSB

afternoon, September 28, 2012, that she intends to proceed with the trial on Monday, October 1, 2012, despite the Notice of Appeal.

The South Carolina Code provides a statutory right to appeal and provides, in pertinent part, as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas . . . ;
- (2) **An order affecting a substantial right** made in an action when such order (a) **in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action**, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment

S.C. Code Ann. § 14-3-330.

Pursuant to subsection 14-3-330(2), the South Carolina courts have held that “when a trial court’s order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.” *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). Alea has a right to immediately appeal the trial court’s order denying intervention as of right under South Carolina Rule of Civil Procedure 24(a). An order refusing a petition to be made a party to a cause is appealable. *Rutledge v. Tunno et. al.*, 63 S.C. 205, 41 S.E. 308 (1902). The trial court’s order denying intervention as of right affects a substantial right of Alea—that is, to participate and protect its interests in this action in accordance with *Auto-Owners Insurance Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009). Proceeding with the trial may effectively moot the appeal. The *Flagstar* Court goes on to state that “these cases not only permit, but indeed require, immediate appeal in the event of a denial of a mode to trial

to which one is entitled as a matter of right. Failure to immediately appeal such an order forever bars appellate review." Flagstar, 341 S.C. at 72, 533 S.E.2d at 333.

The United States Supreme Court addressed the appeal of a motion to intervene under the Federal Rules of Civil Procedure in Brotherhood of Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). In Brotherhood of Trainmen, the U.S. Supreme Court held the following:

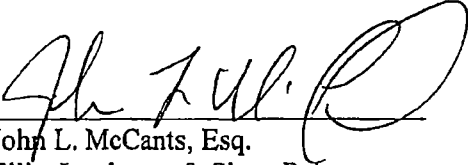
Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. *United States v. California Co-op. Canneries*, 279 U.S. 553, 556, 49 S.Ct. 423, 424, 73 L.Ed. 838. The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability.

But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. See *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 508, 61 S.Ct. 666, 668, 85 L.Ed. 975.

Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. **If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it.** In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the Brotherhood's right to intervene in the proceeding brought under s 16(12) of the Interstate Commerce Act.

Wherefore, Alea request that the Court of Appeals enter a Writ of Supersedeas commanding the trial court not to hold the trial of the civil action and recognize the Notice of

Appeal filed by Alea so that the appeal can proceed in the jurisdiction of the South Carolina Court of Appeals.



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Attorney for Appellant

September 28, 2012

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The Honorable Stephanie P. McDonald
Circuit Court Judge
100 Broad Street, Suite 427
Charleston, South Carolina 29401

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, #106
Charleston, SC 29401



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

September 28, 2012

Via U.S. Mail and Facsimile
Mr. John Lucius McCants
PO Box 2285
Columbia SC 29202

Re: Montclair Property Owners v. Alea London
Appellate Case No. 2012-213037

Dear Counsel:

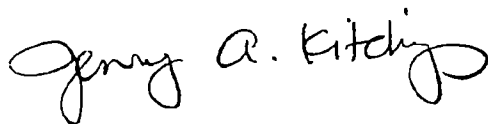
The following order has been endorsed on your Emergency Petition for Writ of Supersedeas in the above matter:

"Denied.

s/ John Cannon Few C.J.
For the Court

September 28, 2012."

Very truly yours,

A handwritten signature in cursive script, reading "Jenny A. Kitching". The signature is fluid and elegant, with a large, stylized initial "J".

CLERK

cc: Joseph Edwin Dapore
Edward D. Buckley, Jr.
Frank M. Cisa
Thomas Hayden Hessee
Roy Pearce Maybank
Thomas Bacot Pritchard
Timothy W. Bouch
Thomas C. Salane
The Honorable Stephanie McDonald

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2008-CP-10-6897

FILED
2012 OCT -3 PM 1:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

Montclair Property Owners Association (a South Carolina
Non-Profit Corporation) and Montclair Property Owners
Association Board of Directors for and on behalf of all
owners of the Montclair Horizontal Property Regime; and
Church Creek Construction, LLC

Respondents.

v.

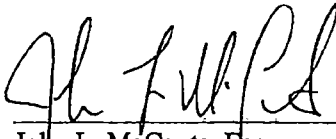
Alea London, LTD,

Appellant.

AMENDED NOTICE OF APPEAL

Appellant, Alea London, LTD ("Alea"), hereby appeals the Order of the Honorable
Stephanie P. McDonald Denying Alea's Motion to Intervene for the Purpose of Requesting
Special Interrogatories issued on September 28, 2012, and received by Appellant on the same
day. A copy of the Order is attached hereto.

October 1, 2012


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The Honorable Stephanie P. McDonald
Circuit Court Judge
100 Broad Street, Suite 427
Charleston, South Carolina 29401

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, #106

Charleston, SC 29401

The South Carolina Court of Appeals

Montclair Property Owners Association (a South Carolina Non-Profit Corporation) and Montclair Property Owners Association Board of Directors for and on behalf of all owners of the Montclair Horizontal Property Regime; and Church Creek Construction, LLC,
Respondents,

v.

Alea London, LTD, Appellant.

Appellate Case No. 2012-213037

The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2008CP1006897

ORDER

This Court has received the "appellant's motion to dismiss appeal". No return has been received. Therefore, the appellant's motion to dismiss the notice of appeal is hereby granted. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

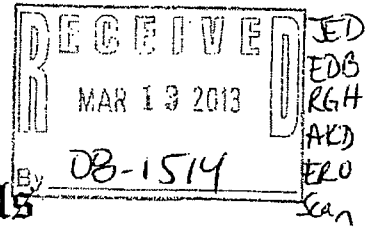
FILED

861 2.2013

Columbia, South Carolina

cc:

John Lucius McCants
Joseph Edwin Dapore
Edward D. Buckley, Jr.
Frank M. Cisa



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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March 11, 2013

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Montclair Property Owners v. Alea London
Lower Court Case No. 2008CP1006897
Appellate Case No. 2012-213037

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: John Lucius McCants
Joseph Edwin Dapore

Edward D. Buckley, Jr.
Frank M. Cisa

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2007-CP-07-3166

JIM LANCASTER, NANCY)
LANCASTER, ART HOLLAND,)
JEANNETTE HOLLAND, WENDELL)
TURNER, PHYLLIS TURNER, JACK)
BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND)
OTHERS SIMILARLY SITUATED,)

PLAINTIFFS,)

vs.)

GEORGIA-PACIFIC CORPORATION)
AND/OR GEORGIA-PACIFIC LLC,)
GRAYCO HOME CENTER, INC., DEL)
WEBB COMMUNITIES, INC., AN)
ARIZONA CORPORATION, RAZOR)
COMPONENT SYSTEMS, INC., A)
SOUTH CAROLINA CORPORATION,)
RAZOR ENTERPRISES, INC., A)
TEXAS CORPORATION, AND DJ)
CONSTRUCTION CO., LLC,)

DEFENDANTS.)

**ORDER REGARDING
INTERLOCUTORY APPEALS**

2012 MAY 14 AM 11:51
JENNIFER A. ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

THIS MATTER COMES BEFORE THE COURT via Defendant Del Webb Communities, Inc.'s ("Del Webb") request for a conference call. The requested conference call was held on May 11, 2012, during which the impact of the appeals recently taken by Del Webb and Defendant Georgia-Pacific Corporation and/or Georgia-Pacific LLC ("Georgia-Pacific") was discussed.

Both Del Webb and Georgia-Pacific have appealed six interlocutory orders that the Court has entered in the conduct of this class action. The Plaintiffs have filed motions in the Court of Appeals to dismiss the appeals taken by Del Webb and Georgia-Pacific on the grounds that the orders identified in their respective notices of appeal are interlocutory and not immediately

R

appealable. The Plaintiffs have also moved the Supreme Court to certify and expedite the appeals for its direct and immediate review; particularly, immediate and expedited consideration and disposition of their motions to dismiss the appeals.

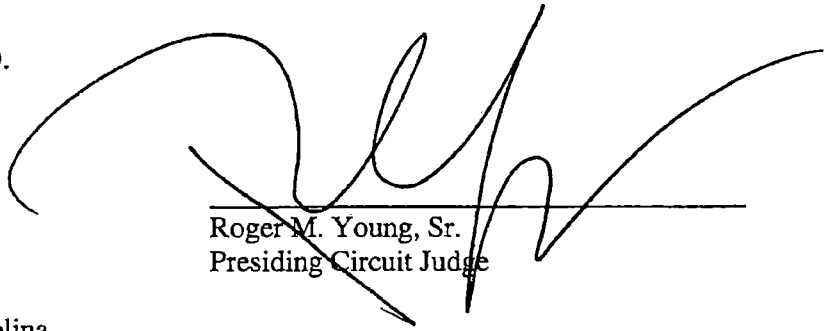
Del Webb asks this Court to rule that all of the orders identified in its notice of appeal are stayed because of its appeal, to include the present May 15, 2012 opt-out deadline set forth in the class notice, which notice was mailed to the putative class members by the Plaintiffs' counsel following this Court's order approving and authorizing class notice. Georgia-Pacific does not ask that the opt-out deadline be stayed, but asks for a stay of the Court's preliminary case management and scheduling order with respect to matters after the opt-out deadline.

After due consideration of this matter, I find that a legitimate question exists as to whether any of the interlocutory orders appealed by Del Webb and Georgia-Pacific is immediately appealable, and I am concerned that they are not. If the appeals are improperly taken, they should have no rightful impact upon the continued progress of this now four-plus-year old case. *See S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986) ("Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay proceedings in the lower court.") Moreover, I find that a stay of the appealed orders is not necessary to preserve the jurisdiction of the appeal or to prevent a contested issue from becoming moot. Further still, I find that, under the circumstances, a stay of the appealed orders is not in the interests of justice or judicial economy. Accordingly, I find that the orders identified in Del Webb and Georgia-Pacific's notices of appeal are and should be operative and decline the requests to stay these orders.

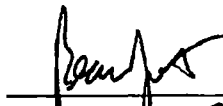
<SIGNED ON THE FOLLOWING PAGE>

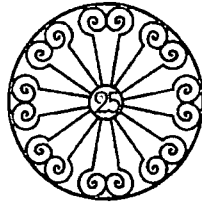
A handwritten signature in black ink, appearing to be a stylized 'R' followed by a flourish.

AND IT IS SO ORDERED.



Roger M. Young, Sr.
Presiding Circuit Judge

 South Carolina
Dated: 5/14/12



YCR LAW

Edward D. Buckley, Jr.

Direct Dial: (843) 724-6671
Direct Fax: (843) 579-1370
E-mail: ebuckley@ycrlaw.com

April 16, 2019

VIA HAND DELIVERY

Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.
and Elizabeth A. Bushey, Individually, and on behalf of all others similarly
situated v. Island Pointe, LLC, et al.
Case No.: 2015-CP-10-0955
YCR File: 15491-20150066

Dear Ms. Armstrong:

Enclosed please find a motion cover sheet and an original and two (2) copies of **Plaintiffs' Motion for Reconsideration of and/or Relief from Order Staying Case and/or Petition to Lift or Otherwise Modify Any Stay As May Be Necessary for This Case to Proceed as Scheduled to Trial on the Merits Beginning May 6, 2019** in the above-referenced matter. Please file the original and return the file-stamped copies to me. I have also enclosed a check in the amount of \$25.00 for the filing fee.

If you have any questions please do not hesitate to contact me.

With kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Edward D. Buckley, Jr.

EDB/akd

Enclosure(s)

cc: All Counsel of Record (VIA E-MAIL ONLY)
The Honorable Jennifer B. McCoy (VIA E-MAIL ONLY)

STATE OF SOUTH CAROLINA

COUNTY OF CHARELSTON

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; COMPLETE
BUILDING CORPORATION; TRI-
COUNTY ROOFING, INC.; CREEKSIDE,
INC; AMERICAN RESIDENTIAL
SERVICES, LLC D/B/A ARS/RESCUE
ROOTER CHARLESTON; ANDERSEN
WINDOWS, INC.; ATLANTIC
BUILDING CONSTRUCTION
SERVICES, INC. N/K/A ATLANTIC
CONSTRUCTION SERVICES, INC.;
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.; CERTAINTED CORPORATION;
KELLY FLOORING PRODUCTS, INC.,
D/B/A CARPET BAGGERS;
CORNERSTONE CONSTRUCTION AND
MARK MALLOY D/B/A
CORNERSTONE CONSTRUCTION;
MIRACLE SIDING, LLC AND WILSON
LUCAS SALES D/B/A MIRACLE
SIDING, LLC; MARK PALPOINT A/K/A
MICAH PALPOINT; ELROY ALONZO
VASQUEZ; CHRIS A/K/A JOHN DOE 61;
ALDERMAN CONSTRUCTION;
STANEY'S VINYL FENCE DESIGNS;
COHEN'S DRYWALL COMPANY, INC.;
MOSELY CONCRETE; HAND A

IN THE COURT OF COMMON PLEAS
THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2015-CP-10-00955

FILED

2019 APR 24 PM 12:16

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

FRAMING CONSTRUCTION, LLC
A/K/A H&A FRAMING
CONSTRUCTION, LLC AND D/B/A
H AND A FRAMING, LLC, H&A
CONSTRUCTION, AND HAND A
CONSTRUCTION; JMC
CONSTRUCTION, INC.; JMC
CONSTRUCTION, LLC; JOHN DOE 1-
15,

DEFENDANTS.

COMPLETE BUILDING
CORPORATION, INC.,

THIRD-PARTY PLAINTIFF,

V.

LEONARD T. BROWNE AND
CHRISTOPHER N. UNION,

THIRD-PARTY DEFENDANTS.

CREEKSIDE, INC.,

THIRD-PARTY PLAINTIFF,

V.

CHRISTOPHER N. UNION,

THIRD-PARTY DEFENDANT.

**MEMORANDUM IN OPPOSITION BY APPELLANT BUILDERS MUTUAL
INSURANCE COMPANY TO PETITION TO LIFT STAY**

Pursuant to Rule 241(b), SCACR, Appellant Builders Mutual Insurance Company ("Builders Mutual"), submits this memorandum in opposition to Respondent Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.'s and Jack Love's, individually, and behalf of all others similarly situated's (together "Palmetto Pointe") Motion for Reconsideration

of and/or Relief from Order Staying Case and/or Petition to Lift Stay or Otherwise Modify Any Stay as May be Necessary for this Case to Proceed as Scheduled to Trial On the Merits Beginning on May 6, 2019 (the “Petition to Lift Stay”).

The appeal arises from a civil action styled *Palmetto Pointe at Peas Island Condominium Property Owners Association et al. v. Tri-County Roofing, Inc. et al.* Civil Action No. 2015-CP-10-00955 (the “Civil Action”). Palmetto Pointe commenced the action against the developer, design professionals and contractors who were involved in the original design and construction of the condominium buildings that comprise the Palmetto Pointe residential community. Palmetto Pointe alleges that the buildings were constructed improperly and seek damages against Defendants based on what Palmetto Pointe alleges it will cost to make future repairs to the buildings. Palmetto Pointe will seek to satisfy any verdict in favor of Palmetto Pointe from general liability insurance policies issued by insurers to Defendants.¹

Builders Mutual moved to intervene in the Civil Action for the limited purpose of having the Circuit Court submit a special verdict form and/or special interrogatories to a jury in order to allocate a verdict, if any, in favor of Palmetto Pointe and avoid the consequences of a general verdict that occurred to the insurers in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 546 (2009) (“*Newman*”) and *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 332, 803 S.E.2d 288, 294 (2017) (“*Heritage Communities*”). The consequences in *Newman* and *Heritage Communities* were that the insurers were required to pay the entire

¹ Builders Mutual issued general liability insurance policies to Defendant/Respondent Tri-County Roofing, Inc. (“Tri-County Roofing”).

verdict/award in the underlying actions even though parts of the verdict/award included non-insured damages.²

Although the Civil Action has been pending since February 12, 2015, Builders Mutual was only put on notice of a claim or the Civil Action against Tri-County Roofing by letter dated January 15, 2018. (Exhibit A). After attending a mediation on January 30 and 31, 2018, Builders Mutual moved to intervene in the Civil Action on March 22, 2018. Builders Mutual's motion to intervene was first scheduled and heard by the Circuit Court on December 17, 2018. Palmetto Pointe and Tri-County Roofing objected to Builders Mutual being able to intervene in the Civil Action. The Circuit Court entered its Order/Statement of Judgment denying the Motion to Intervene filed by Builders Mutual. (Exhibit B). Builders Mutual moved to have the Circuit Court reconsider its Order/Statement of Judgment, which the Circuit Court denied in its Order/Statement of Judgment Denying Motion to Reconsider. (Exhibit C).

² Builders Mutual submits that substantive issues of insurance coverage are established and will be addressed or discussed in the appeal with citations to the Supreme Court's decisions in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011) ("*Crossmann*") ("In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not."); *Newman*, 385 S.C. at 198, 684 S.E.2d at 546 (These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco—even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy—and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover."). The present appeal concerns procedures. *Newman* and *Heritage Communities* did not provide definitive procedural guidelines which has resulted in insurers seeking to intervene on a limited basis in construction defect civil actions to guard against a general verdict. If there is a verdict in favor of Palmetto Pointe, the objective is to have separated beforehand or contemporaneously those costs which are to remove and replace Tri-County's work (not covered) from those cost which are to repair "property damage" (potentially covered).

Builders Mutual filed its Notice of Appeal on February 19, 2019. (Exhibit D). Builders Mutual filed a Motion to Transfer the Case to the South Carolina Supreme Court on February 27, 2019 pursuant to Rule 204(b), SCACR. (Exhibit E). Palmetto Pointe filed a response with the Supreme Court stating that it took no position with regard to the Motion to Transfer the Case. (Exhibit F).³ The Motion to Transfer the Case is pending.⁴ The parties to the appeal are currently in the Initial Brief stage.

The Petition to Lift Stay includes both a Motion to Reconsider and an Order Staying Case entered on April 5, 2019 and a Petition to Lift or Otherwise Modify any Stay. First, Builders Mutual submits that the Circuit Court cannot proceed with a trial involving Tri-County Roofing because the Circuit Court lacks subject matter jurisdiction and a stay was automatic upon the filing of the Notice of Appeal.⁵ Second, to the extent that the Circuit Court grants relief that does not affect Builders Mutual's appeal, Builders Mutual does not have an objection to the Circuit Court doing so.

The South Carolina Supreme Court Has Held that a Lower Court May Only Act As to Matters Not Stayed by an Appeal

Rule 205, SCACR, states as follows:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have

³ The Supreme Court granted a Motion to Transfer the Case, like the one filed by Builders Mutual, in a recent appeal filed by insurers in Appellate Case No. 2017- 02146 concerning the denials of motions to intervene in an underlying construction defect case. (Exhibit G). The parties in Appellate Case No. 2017- 02146 settled the appeal and underlying civil action shortly before scheduled oral arguments in the Supreme Court.

⁴ The appeal presents at least one major issue that is recurring in construction defect civil litigation in South Carolina and will continue to recur: If there are to be consequences to a liability insurer for a general verdict, what procedures can an insurer follow to preclude those consequences or to assure there is an allocated verdict for insurance coverage purposes?

⁵ The stay is automatic upon the filing of the Notice of Appeal. Rule 241(d)(3), SCACR.

jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 205, SCACR concerns subject matter jurisdiction. *See Arnal v. Fraser*, 371 S.C. 512, 519, 641 S.E.2d 419, 423 (2007). The appellate court has exclusive jurisdiction over the appeal with the exception of matters not affected by the appeal; and the appellate court retains jurisdiction until the remittitur is sent to the lower court. *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013).⁶

Rule 241(a), SCACR, provides:

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 241(d)(1), SCACR states, “[e]xcept where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or a supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal.” Simply because a party must first file a motion with a lower court does not mean that a lower court is empowered to do something that it does not have jurisdiction to do. Rule 241(a), SCACR does not expand the power of a lower court. *See Arnal*, 371 S.C. at 519, 641 S.E.2d at 422. The Supreme Court has stated, “[u]nder Rule 205 and the last sentence of the above-quoted portion of Rule 225, the lower court may not act or issue orders that affect an issue on appeal. Under Rule 225, the

⁶ The Circuit Court has jurisdiction to entertain petitions for writs of supersedeas, which is inapplicable herein. A supersedeas is a procedure to impose a stay where none existed.

lower court may only act to enforce matters not stayed by the appeal."⁷ *Arnal*, 371 S.C. at 519, 641 S.E.2d at 422. (emphasis added). Both Rule 205, SCACR and Rule 241, SCACR specifically limit the power of the Circuit Court to only do that which is not affected by the appeal.

The relation between Rule 205(b), SCACR and Rule 241(a), SCACR is addressed by the Court of Appeals in *Tillman v. Oakes*, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012). Writing for the Court of Appeals, now Justice John Cannon Few explains in more detail the two appellate court rules and the limited power of a lower court during an appeal:

When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241. If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal. This is the purpose of a stay under Rule 241- to determine whether the appealed order may be carried out or enforced - not to determine whether the action may proceed in the lower court while the appeal is pending. (emphasis added).

The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. (emphasis added). The rule provides: "Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal..." Under Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal, but is specifically allowed to proceed with matters not affected by the appeal. The rule states: "Nothing in these Rules shall prohibit the lower court ... from proceeding with matters not affected by the appeal." Rule 205, SCACR; *see also* Rule 241(a), SCACR ("The lower court ... retains jurisdiction over matters not affected by the appeal..."). Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a "matter[] affected by the appeal" under Rules 205 and 241(a)(Citations Omitted)(emphasis added).

Tillman v. Oakes, 398 S.C. at 255, 728 S.E.2d at 50-51.

⁷ Rule 225, SCACR is the predecessor to Rule 241, SCACR. For the purposes herein, the language is the same in each Rule.

To summarize Justice Few's conclusions, first, the purpose of a stay under Rule 241, SCACR is not to determine whether the action may proceed in the lower court while the appeal is pending. Second, the existence or nonexistence of a stay under Rule 241, SCACR does not control the trial court's power to proceed with the action. Third, whether a lower court may proceed with an action during the pendency of the appeal is governed by Rule 205, SCACR. Fourth, a lower court's power to proceed is determined by whether the issue sought to be litigated before the trial court during the appeal is a "matter[] affected by the appeal".

The Circuit Court cannot proceed to trial with Tri-County Roofing.⁸ There is no genuine dispute that proceeding to trial against Tri-County Roofing affects Builders Mutual's appeal. For the definition of the word "affects", the South Carolina Supreme Court cites to the definition of the word in Black's Law Dictionary 68 (10th ed. 2014) (defining "affect" to "produce an effect on; to influence in some way"). *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E. 485, 494 (2016). Proceeding to trial raises the prospect that the issues on appeal may become moot if the action goes to trial against Tri-County Roofing and the jury delivers a general verdict. Builders Mutual moved to intervene and be a part of the trial so as to avoid a general verdict against Tri-County Roofing. The Circuit Court did not allow Builders Mutual to do so and whether Builders Mutual can do so is now the issue on appeal. Palmetto Pointe has offered no solution or alternative that will in fact preserve the jurisdiction of the appeal or to prevent the appeal from

⁸ Furthermore, Rule 241(c)(2), SCACR states that a court "should consider whether such an order [to lift the stay] is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. In other words, a lower court can take action that is necessary to preserve the appeal or prevent it from becoming moot. The converse is the rule too. A lower court cannot take action that does not preserve the appeal or that causes the appeal to become moot.

potentially becoming moot.⁹ Palmetto Pointe simply wishes to press forward to a general verdict and will later argue that Builders Mutual and other insurers are bound by the general verdict.

Denying the Petition to Lift Stay does not prejudice Palmetto Pointe in any way or leave it without a remedy. First, Palmetto Pointe may petition the Court of Appeals, *that does have jurisdiction*, and if the Court of Appeals chooses to do so, it can impose limitations, on the lifting of the stay, in order to retain jurisdiction or not make the appeal moot. Second, similarly, a party can seek a remand from an appellate court if the circumstances of the particular case require it. *Arnold*, 371 S.C. at 519, 641 S.E.2d at 422, fn. 4. Third, the fact is the Petition to Lift Stay is, *in substance*, a motion to dismiss the appeal, which must be filed with the Court of Appeals under Rule 240(a) – (b), SCACR.

The South Carolina Supreme Court Has Held that the Denial of a Motion to Intervene is Immediately Appealable

Palmetto Pointe argues for the Circuit Court to declare the appeal interlocutory and proceed with a trial. Palmetto Pointe cites to *South Carolina Public Service Authority v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 537 (1986) for the proposition that, “when an order is interlocutory and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, not does it stay further proceeding in the lower court.” First, it is critical to note that whether the appeal in *Arnold* was interlocutory was an issue before the South Carolina Supreme Court on a motion to dismiss the appeal. *Arnold*, 287 S.C. at 536, 340 S.E.2d at 585. Albeit pending for over two months, Palmetto Pointe has not moved to dismiss Builders Mutual’s appeal. When faced with an opportunity to express a position about the appeal, in response to Builders Mutual’s Motion to

⁹ Palmetto Pointe, and other parties, can agree to waive any coverage or not seek insurance from Builders Mutual for any claim or judgment rendered in the Civil Action. Palmetto Pointe can agree to request the special interrogatories and suffer the consequences if not done adequately or sufficiently for the purposes of a later declaratory judgment action concerning insurance coverage.

Transfer the Case to the South Carolina Supreme Court, Palmetto Pointe expressed no position (or objection) for the appeal.

Second, whether an appeal concerning a motion to intervene (by insurers) is interlocutory has been decided by the Court of Appeals adversely to Palmetto Pointe's position in two recent appeals. The Court of Appeals denied motions to dismiss appeals concerning intervention based on arguments made by the respondents that the appeals are interlocutory. *Order, Beresford Commons Homeowners Ass'n, Inc. v. Portrait Homes-South Carolina, LLC, et al.*, Appellate Case No. 2017-000202 (March 7, 2017); *Order, Ex Parte: Hartford Fire Insurance Company In Re: The Harbour Cove Condominium Association*, Appellate Case No. 2017-002146 (January 24, 2018). (Exhibit H). The present appeal is no different.

Third, the order denying the motion to intervene is not interlocutory and is immediately appealable as a matter involving a substantial right. S.C. Code § 14-3-330(2). "An order affects a substantial right and is *immediately appealable* when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action' " *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (quoting S.C. Code § 14-3-330(2)) (emphasis added). Interpreting precisely the same statutory language,¹⁰ the South Carolina Supreme Court 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

¹⁰ *Johnson/Rutledge*, 63 S.C. at ___, 41 S.E. at 309 ("Section 11 of the Code provides that 'the supreme court shall have exclusive jurisdiction to review upon appeal *** an order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.'"). The current statute, S.C. Code Ann. Section 14-3-330, provides identically under (2): "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: ... (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken...."

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). *See also* 15 S.C. Jur. Appeal and Error § 23 South Carolina Jurisprudence (September 2017 Update) (“The refusal of a petition to intervene is directly appealable ‘[i]n so far as the rights of appellant are involved, the order affects a substantial right, and in effect determines the action and prevents a judgment from which an appeal might be taken.’”); *Ex parte Wells*, No. 2012-MO-002, 2012 WL 10906587, at *1 & n.1 (S.C. Sup. Ct. filed March 7, 2012) (allowing immediate appeal of an order denying a request to intervene in an abuse and neglect action) (citing *Johnson/Rutledge*) (please note that this is opinion states “[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by rule 268(d)(2), 8(d)(2), SCACR”); *Ex parte Carter v. L.C.*, No. 2015-001006, 2017 WL 164493, at *2 (S.C. Ct. App. filed January 13, 2017) (citing *Johnson/Rutledge* with favor that “an order denying a motion to intervene is immediately appealable”) (please note that this is opinion states “[t]his opinion has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by rule 268(d)(2), SCACR”).

The order denying Builders Mutual’s motion to intervene “in effect determine[d] the action and prevent[ed] a judgment from which an appeal might be taken,” within the meaning of *Johnson/Rutledge*, 63 S.C. at ___, 41 S.E. at 309. Builders Mutual therefore has a right to an immediate appeal under S.C. Code § 14-3-330(2) as has been established in South Carolina. In the present matter, the Circuit Court ruled on the merits, and therefore the case is clear that the denial of the motion to intervene is immediately appealable. *See Ex parte Johnson (Rutledge v. Tunno)*,

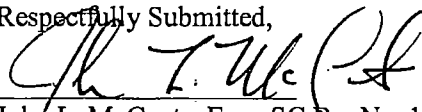
supra. The question of whether Builders Mutual has any right or obligation to intervene is inextricably intertwined with the merits of the controversy or a jury verdict involving Tri-County Roofing.

Palmetto Pointe is Not Entitled to Emergency Relief

Palmetto Pointe seeks emergency relief. The Notice of Appeal was filed on February 19, 2019. Palmetto Pointe does not explain why it waited until April 16, 2019 to ask a court to lift the stay as it may relate to a trial involving Tri-County Roofing. Second, throughout its Petition to Lift Stay, Palmetto Pointe discusses the passage of time, and the years gone by; and how Palmetto Pointe must now have a trial or it will be prejudiced. Under the Rules of Civil Procedure, Palmetto Pointe was allowed to move the case to the jury trial roster within six months of filing the Civil Action in 2015. Rule 40(d), SCRPC. While one understands that a construction defect action may involve complex construction industry issues, Palmetto Pointe itself chose to lengthen the time for the action and make it unwieldy by suing numerous parties instead of the developer and general contractor alone. Palmetto Pointe bears responsibility for the passage of time.

Wherefore, Builders Mutual request that the Circuit Court deny the relief requested by Palmetto Pointe.

Respectfully Submitted,



John L. McCants, Esq., SC Bar No. 10423
Rogers Lewis Jackson Mann and Quinn, LLC
PO Box 11803 (29211)
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Columbia, SC 29201
Ph: 803-978-2834
Fax: 803-252-3653

jmccants@rogerslewis.com

**ATTORNEY FOR APPELLANT BUILDERS
MUTUAL INSURANCE COMPANY**

April 22, 2019

Exhibit A



Andrew N. Cole | D: 803.256.6433 | E: acole@collinsandlacy.com

January 15, 2018

VIA E-MAIL
Milton Harrelson
Builders Mutual Insurance
[REDACTED]

**CONFIDENTIAL DOCUMENT:
REDACTED FOR WORK
PRODUCT DOCTRINE**

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., et al. v. Island Pointe, LLC, et al. [& Tri-County Roofing, Inc.]; and Tri-County Roofing, Inc. (3rd-Party P.) v. Cornerstone Construction and Mark Malloy d/b/a Cornerstone Construction, Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC, Mark Palpoint a/k/a Micah Palpoint, Eloy Alonzo Vazquez, and Chris a/k/a John Doe 61 (3rd-Party Ds.)
Civil Action No. 2015-CP-10-955
[REDACTED]

Dear Milton:

I have been defending the defendant Tri-County Roofing, Inc. in the above-referenced action under policies issued by Scottsdale (policy effective July 24, 2006 through July 24, 2007) and Lloyd's, London with Raphael & Associates as TPA (policy effect July 24, 2007 through July 24, 2008). I am sending this letter to you because this case is scheduled to be mediated soon on January 30-31, 2018, and I am making an official inquiry to ask if Builders Mutual will be joining in/sharing in the defense of Tri-County Roofing.

I am aware of the policies from Scottsdale and Lloyd's that cover years 2006-2008. I am following up with a subsequent Lloyd's policy from 2008-2009. Although I do not have the actual policy numbers, I understand that Builders Mutual issued policies starting in or after 2009.

[REDACTED]

[REDACTED]

COLLINS & LACY, P.C. 1330 Lady Street, Sixth Floor | Columbia, SC 29201 | Post Office Box 12487 (29211)

P: 803.256.2660 F: 803.771.4484 collinsandlacy.com

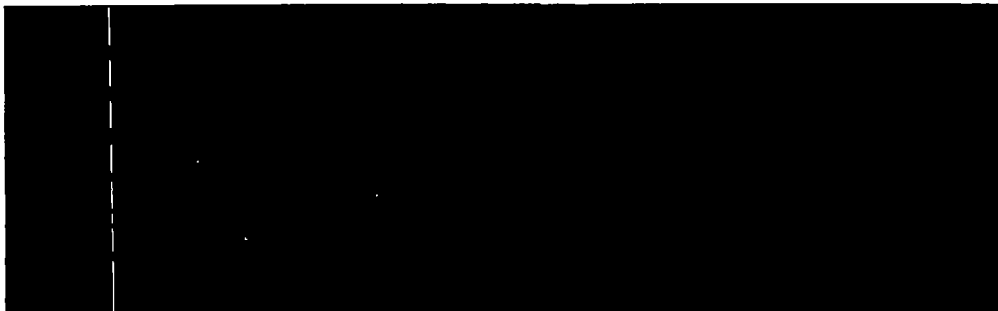
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



I thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew N. Cole", is written over the word "Sincerely,".

Andrew N. Cole

cc: Scott Nirenberg, Raphael & Associates
Bruce Canade, Scottsdale Insurance Co



Exhibit B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant
	or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motions for Intervention filed by Builders Mutual Insurance Company, Nationwide Mutual Insurance Company, Nautilus Insurance Company, and State Farm Fire and Casualty Company are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

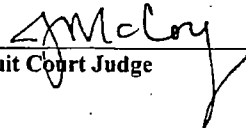
	2764	12/17/18
Circuit Court Judge	Judge Code	Date

Exhibit C

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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ORDER INFORMATION

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E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

A. McCoy
Circuit Court Judge

2764
Judge Code

1/16/18
Date

Exhibit D

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

RECEIVED

FEB 19 2019

SC Court of Appeals

Ex Parte:

Builders Mutual Insurance Company, Appellant,

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.

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

v.

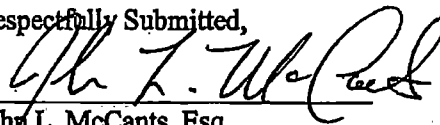
Alderman Construction; Stanley's Vinyl Fence Designs; Cohen's Drywall; and Mosley Concrete.....Third-Party Defendants.

Of whom Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and behalf of all others similarly situated, and Tri-County Roofing, Inc. are the Respondents.

NOTICE OF APPEAL

Builders Mutual Insurance Company ("Appellant") appeals the Order/Statement of Judgment of the Honorable Jennifer B. McCoy, dated December 17, 2018, denying the Motion for Intervention filed by Builders Mutual Insurance Company; and the Appellant appeals the Order/Statement of Judgment of the Honorable Jennifer B. McCoy, dated January 16, 2019, denying the Motion for Reconsideration filed by Builders Mutual Insurance Company. Appellant received written notice of entry of the Order/Statement of Judgment denying the Motion to Reconsider on January 21, 2019.

Respectfully Submitted,



John L. McCants, Esq.

SC Bar No. 10423

Rogers Lewis Jackson Mann & Quinn, LLC

PO Box 11803 (29211)

1901 Main Street, Suite 1200

Columbia, SC 29201

Tele: (803) 978-2834

Fax: (803) 252-3653

jmccants@rogerslewis.com

Attorney for Appellant Builders Mutual Insurance Company

February 19, 2019
Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

RECEIVED

FEB 19 2019

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

SC Court of Appeals

Submitted by:	Attorney for : ☐ Plaintiff	☐ Defendant
	or	
	☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

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- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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Circuit Court Judge

2764

Judge Code

12/17/18

Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

RECEIVED

FEB 19 2019

SC Court of Appeals

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.
PLAINTIFF(S)

Island Pointe, LLC, et al.

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

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A. McCoy
Circuit Court Judge

2764

Judge Code

1/16/18

Date