

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 II of II

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Jennifer B. McCoy, Circuit Court Judge

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Ex Parte:

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

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v.

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Jack Love, individually, and behalf of all others similarly situated, Tri-County Roofing, Inc.,
Stanley's Vinyl Fence Designs, and W C Services, Inc. are the Respondents.

**PETITION PURSUANT TO RULE 241(d)(7), SCACR
ON BEHALF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY TO
REVIEW CIRCUIT COURT ORDER LIFTING APPEAL STAY**

(EXPEDITED RELIEF REQUESTED)

Pursuant to Rule 241(d)(7), SCACR, Appellant Builders Mutual Insurance Company
("Builders Mutual"), files this petition for the Honorable H. Bruce Williams of the Court of
Appeals to review the Order of the Honorable Jennifer B. McCoy dated April 25, 2019 that lifts
the automatic stay in the appeal and orders the civil action to trial on May 6, 2019. ("Stay Lift
Order")(Exhibit A).

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 verdict/award in the underlying actions even though parts of the verdict/award included non-insured damages.²

¹ Builders Mutual issued general liability insurance policies to Defendant/Respondent Tri-County Roofing, Inc. (“Tri-County Roofing”).

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).

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 B). 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 C). Builders Mutual moved to have the Circuit Court reconsider its Order/Statement of Judgment, requesting the Circuit Court provide an explanation, which the Circuit Court denied in its Order/Statement of Judgment Denying Motion to Reconsider. (Exhibit D).

Builders Mutual filed its Notice of Appeal on February 19, 2019. (Exhibit E). 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 F). 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 G).³ The Motion to Transfer the Case is pending.⁴ The parties to the appeal are currently in the Initial Brief stage.

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 H). 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?

On April 5, 2019, Judge McCoy issued an order stating, “[p]ursuant to Rule 205 and 241 of the SCACR, upon review of the Notices of Appeal filed by Builders Mutual Insurance Company and Nautilus Company on February [19], 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. (Exhibit I).

On April 16, 2019, 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”) filed their 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”)(Exhibit J).⁵ Builders Mutual filed a memorandum in opposition to the Petition to Lift Stay because it sought to lift the stay in an appeal and proceed with matters affected by the appeal. (Exhibit K).

On April 25, 2019, Judge McCoy heard oral arguments on the Petition to Lift Stay and issued the Stay Lift Order. (Exhibit A). The Stay Lift Order only states that the Plaintiff’s Petition to Lift the Automatic Stay is granted and trial will proceed May 6, 2019. Judge McCoy did not provide any factual findings or conclusions of law although requested to do so. Builders Mutual submits that the Circuit Court erred in lifting the automatic stay because the Circuit Court lacked jurisdiction to proceed with a trial involving Tri-County Roofing.⁶ Builders Mutual submits the Court of Appeals should reverse the Circuit Court.

⁵ The Petition to Lift Stay was not served on Builders Mutual as required by Rule 241(d)(5), SCACR.

⁶ The stay is automatic upon the filing of the Notice of Appeal. Rule 241(d)(3), SCACR.

**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 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).⁷

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(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 lower court may only act to enforce matters not stayed by the

⁷ 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 in the first place or for one of the exceptions in Rule 241(b), SCACR.

appeal.”⁸ *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.

⁸ Rule 225, SCACR is the predecessor to Rule 241, SCACR. For the purposes herein, the language is the same in each Rule.

To summarize, 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".

Judge McCoy erred in ruling that a trial can proceed on May 6, 2019 against Tri-County Roofing while the appeal is pending. 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.

Rule 241(c)(2), SCACR states that a 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), SCACR. The Circuit Court did not do so. The Circuit Court offered no solution or alternative that will attempt to preserve the jurisdiction of the appeal or to prevent the appeal from potentially becoming moot. 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. Judge McCoy gave no grounds for lifting the stay and took no action to address preserving the appeal.

Maintaining the automatic stay does not prejudice Palmetto Pointe in any way or leave it without a remedy. First, Palmetto Pointe could seek a remand from an appellate court if the circumstances of the particular case require it. *Arnal*, 371 S.C. at 519, 641 S.E.2d at 422, fn. 4. Second, the fact is the Petition to Lift Stay was, *in substance*, a motion to dismiss the appeal, for which only the Court of Appeals has jurisdiction pursuant to Rule 240(a) – (b), SCACR.

The South Carolina Supreme Court Has Held that the Denial of a Motion to Intervene is Immediately Appealable

The order denying the motion to intervene 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,⁹ 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 the trial of that action will still be necessary” - because insofar “as the rights of the [putative intervenor] are involved, the

⁹ *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....”

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 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 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 determin[e]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 relied on *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, and not immediately appealable, 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. Although the appeal has been 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 Transfer the Case to the South Carolina Supreme Court, Palmetto Pointe expressed no position (or objection) for the appeal.

Third, whether an appeal concerning a motion to intervene (by insurers) is immediately appealable 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 and not immediately appealable. *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 L). The present appeal is no different.

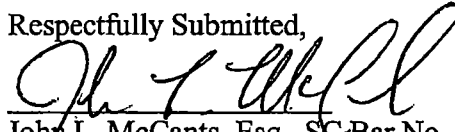
Palmetto Pointe Was Not Entitled to Emergency Relief

Palmetto Pointe sought emergency relief. The Notice of Appeal was filed on February 19,

2019. Palmetto Pointe did 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 Honorable H. Bruce Williams of the Court of Appeals reverse the Circuit Court.

Respectfully Submitted,



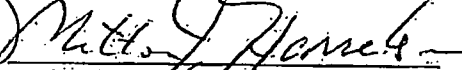
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April 26, 2019

Appellate Case No. 2019-000238

Verification for Petition Pursuant to Rule 241(d)(7), SCACR on Behalf of Appellant Builders Mutual Insurance Company to Review Circuit Court Order Lifting Appeal Stay (Expedited Relief Requested).

Builders Mutual Insurance Company

A handwritten signature in cursive script, appearing to read "Milton Harrelson", is written over a horizontal line.

By: Milton Harrelson

Exhibits Omitted Intentionally (267 Pages)

Petition Pursuant to Rule 241(d)(7), SCACR on behalf of Appellant Builders Mutual Insurance
Company to Review Circuit Court Order Lifting Appeal Stay filed April 26, 2019

**THE STATE OF SOUTH CAROLINA
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Jennifer B. McCoy, Circuit Court Judge

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Defendants,

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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 WC Services,
Inc. are the

Respondents.

**PLAINTIFFS-RESPONDENTS' RETURN TO PETITION
OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY
FOR REVIEW OF CIRCUIT COURT ORDER LIFTING STAY
AND/OR CROSS-MOTION TO DISMISS APPEAL,
GRANT LIMITED REMAND, OR OTHERWISE CONFIRM THAT
TRIAL MAY PROCEED AS SCHEDULED**

**Counsel identified on following page*

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*Attorneys for Plaintiffs-Respondents
Palmetto Pointe at Peas Island
Condominium Property Owners
Association, Inc., and Jack Love,
Individually, and on behalf of all
others similarly situated*

Plaintiffs-Respondents, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated (collectively, "Plaintiffs"), by and through their undersigned counsel, submit this return in opposition to the Petition Pursuant to Rule 241(d)(7), SCACR on Behalf of Appellant Builders Mutual Insurance Company¹ to Review Circuit Court Order Lifting Automatic Stay (the "Subject Petition") and/or, pursuant to rules 205, 240, 241, 260, and/or 269, SCACR, as well as any other applicable law (procedural and substantive), hereby cross-move this Honorable Court to dismiss this appeal, to grant a limited remand of this case, or to otherwise confirm that the circuit court may proceed as scheduled with the trial set to begin May 6, 2019 (the "Instant Cross-Motion").

INTRODUCTION

This construction defect litigation involves a 40-unit townhouse complex. At long last, after more than four years of discovery and other preliminaries, the case is—without question—ready for adjudication on the *merits* and for months has been set for a two-week, date-certain trial beginning May 6th (next Monday).² As reflected

¹ Appellant Builders Mutual Insurance Company is hereinafter referred to as "Builders Mutual."

² The case's operative scheduling is its *Fourth* Amended Consent Scheduling Order, filed May 16, 2018, which 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

in the order that Builders Mutual now asks for review, Judge McCoy has determined that the case can and should go to trial as scheduled.

To be clear, though it seeks to derail the scheduled trial of this case,³ Builders Mutual is not itself a party—nor in fact has it, or any of the other Appellant Insurers,⁴ ever actually sought to become one. This appeal, which includes notices filed/served by Builders Mutual and other the Appellant Insurers, is from Judge McCoy's denial of so-called motions to "intervene." Despite being styled as requests to "intervene", in point of fact these motions were no such thing, their substance and effect being something altogether different from the concept of intervention envisioned under Rule 24, SCRCR.

In the motions underlying the orders they have appealed, Builders Mutual and the other Appellant Insurers did not ask to be made "parties" to this case, only to be recognized—albeit in some unnamed, non-pleading capacity—as having a

the two dates." By order filed August 24, 2018, the case was assigned to the Honorable Jennifer B. McCoy "to hear and handle all pre-trial motions, including scheduling orders." Last fall, Judge McCoy helped the parties find and reserve a two-week term of court, i.e., the one beginning May 6th, capable of accommodating the trial of a case this size.

³ With apologies in advance for doing so, Plaintiffs are compelled here to state the obvious. Of all the actual case parties, it is of course only Plaintiffs who stand to lose from needless delay. For Plaintiffs, no trial means they cannot possibly win, while for all the other parties it means just the opposite, thus in turn conferring upon Builder Mutual the best coverage defense there is: no judgment against its insured in the first place.

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 like⁵—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 the circuit court to be tried in this case, but solely in respect of insurance coverage matters that are not—and could not properly be—before the circuit court to be tried in this case. In other words, the substance of this appeal is wholly irrelevant to the determination of the respective claims and defenses of the actual case parties, i.e., it has nothing—literally nothing—to do with the *merits* of the dispute actually before the circuit court for trial, but rather relates to matters of insurance coverage that cannot properly be injected into the trial of this case. *See Harleysville Group Insurance v.*

⁴ Together, the “Appellant Insurers” are Builders Mutual, Nautilus Insurance Company (“Nautilus”), and Nationwide Insurance Company (“Nationwide”).

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, SCRPC, 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”)).

Heritage Communities, Inc., 420 S.C. 321, 363, 803 S.E.2d 288, 311 (2017) (Pleicones, J., dissenting) (pointing to *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965),⁶ which is still good law, and accurately observing, “To the extent the majority relies upon [*Auto Owners Insurance Company, Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009)] to suggest [the insurer] is ‘at fault in not seeking an allocation of covered-damages, . . . there is no suggestion how [it] could have intervened in the[] lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law.”); Rule 411, SCRE (“Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.”).

This appeal (including the appeals noticed by Builders Mutual and the other Appellant Insurers) is not proper under S.C. Code Ann. § 14-3-330 and, consequently, the appeal has not actually had any affect on the circuit court’s ability to proceed with the case to begin with. But even if the appeal were proper, Judge McCoy has properly determined that the long scheduled trial of this ready-

⁶ *Sims* holds that an insurer will only be bound by material facts established against its insured in an underlying action if the respective interests of the insurer and the insured in opposing the claim against the insured are *identical*, i.e., where there is no conflict of interest between the insurer and the insured, and that there is a conflict of interest between them where the insurer “cannot defend the insured . . . and *at the same time* protect its own interests.”),

for-trial case can and should go forward without delay, and most respectfully, whether by denying the Subject Petition and/or by granting the Instant Cross-Motion, under both the governing law and guiding principles of equity, this Court should confirm the propriety Judge McCoy's determination and decline Builders Mutual's invitation to needlessly halt the progress of this case.

ARGUMENT

- 1. In two other recent cases presenting this exact situation, this Court twice confirmed the circuit court's ability to proceed with trial.**

See generally Exhibit J to the Subject Petition at sub-exhibits A and B (i.e., at Exhibits A and B to Plaintiffs' recent motion to Judge McCoy).

- 2. This appeal is not proper under § 14-3-330 and, consequently, it does not actually have, nor has it ever had, any impact on the circuit court's ability (jurisdictional or otherwise) to proceed with this case.**

The mere fact that a notice of appeal is served does not necessarily have any jurisdictional consequence at all. It is only a proper appeal, i.e., an appeal taken from an order or decision that the aggrieved party (the appellant) actually has a right to immediately appeal, that affects jurisdiction—and then only as to matters affected by the appeal. *See* Rules 205 (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.”); *see also* 241. If, however, an appeal is

not properly taken—as was the case here—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.”).

As this Court is well aware, the right to appeal is controlled by statute. The pertinent statute here is § 14-3-330. The only question raised here is whether “substantial right” provision of the statute is implicated. (See Subject Petition pp. 9–11 (arguing the denial of their motion to “intervene” is immediately appealable under § 14-3-330(2) as an order involving a substantial right).) The answer to this question is no.

As explained above, what Builders Mutual and the other the Appellant Insurers styled as motions to “intervene” were in fact nothing of the sort. What they challenge on appeal is not the denial of their requests to “intervene” but to be heard (not even necessarily to be agreed with) during trial (which trial Builders Mutual would have this Court prevent) 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. In other words, this is the bottom line: The relief Builders Mutual and the other Appellant Insurers sought in their motions to “intervene” was not something that they had a *right* to have under South Carolina law. *See Government Employee’s*

Ins. Co., Ex parte, 373 S.C. 132, 138–39, 644 S.E.2d 699, 702 (2007) (“[A] party must have standing to intervene in an action pursuant to Rule 24 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. . . . We find that [the insurer] does not have an interest relating to the property or transaction which is the subject of the action Additionally, we hold that the family court correctly found [the insurer] lacked standing because [the insurer] does not have an interest in the subject matter of the family court action. Stated differently, [the insurer] has no real interest in whether Cooper and Goethe have a valid common law marriage. [The insurer’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 [the insurer’s] intervention”) (internal citations and quotation marks omitted) (emphasis added)).

Logic dictates that a right must first in fact exist before it can be denied. Because the supposed substantial right upon which this appeal depends does not in fact exist, it was not—nor of course could it possibly have been—denied. Consequently, this appeal is improper, and Judge McCoy has properly determined to proceed with the trial of this case because the appeal does not have, nor in fact has it ever had, any impact on her power to hear and determine this case.

And to be clear, neither *Heritage Communities*, 420 S.C. 321, 803 S.E.2d

288, nor *Newman*, 385 S.C. 187, 684 S.E.2d 541, changes this analysis. As Justice Pleicones implies in his dissent in *Heritage Communities* (“To the extent the majority relies on *Newman* . . .”⁷), in neither *Newman* nor *Heritage Communities* did the majority opinions actually discuss intervention by an insurer. Indeed, the word “intervene” does not actually appear in the majority opinions in either case; it is found only in Justice Pleicones’s dissent in *Heritage Communities*, where, again, he accurately observes, “[t]o the extent the majority” implicitly suggests intervention by the insurer, it (the suggestion) is irreconcilable with extant South Carolina law, i.e., *Sims*.

Plaintiffs submit that the majority’s silence in the face of such a direct challenge by Justice Pleicones can support only one logical inference: that it (the majority) was *not* in fact suggesting intervention by the insurer—this proposition being underscored by the fact that the focus of majority’s decision was on the sufficiency of the insurer’s reservation of rights,⁸ and not on not insurer

⁷ *Heritage Communities*, 420 S.C. at 363, 803 S.E.2d at 311 (Pleicones, J., dissenting) (emphasis added).

⁸ See 420 S.C. at 358–59, 803 S.E.2d at 309 (“In sum, we find the Special Referee correctly found [the insurer] *failed to reserve the right to contest coverage* of actual damages and that punitive damages are covered under the CGL policies. We also find there is evidence in the record to support the Special Referee’s factual findings as to the progressive damages periods and that the Special Referee did not abuse its discretion in determining [the insurer’s] time on the risk at Magnolia North. We find loss-of-use actual damages at Riverwalk are subject to time-on-the-risk allocation but that punitive damages at both developments are not. We

intervention, which, again, the majority did not so much as mention by name. Conversely, it would seem absurd to think that the majority was in fact suggesting insurer intervention but, at the same time, either unable or unwilling to resolve so essential a question as Justice Pleicones raised—indeed, it would seem absurd to think that the majority would even broach such a subject by mere implication to begin with. Still, even if some doubt remains about what the majority meant, as between the clear language of *Sims* (which the majority never addressed, much less overruled) and the unclear language of the *Heritage Communities* majority, it is *Sims* that clearly controls unless and until our Supreme Court clearly says otherwise. See S.C. Const. art. V § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”).

- 3. Here, where 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.**

Regardless of what *Newman* and *Heritage Communities* mean, at this point, the Appellant Insurers’ rights cannot possibly be prejudiced if the scheduled trial goes forward. Any rights of the insurers have surely already been protected by the mere making of the motions to intervene and the denial thereof.

thus affirm in the Magnolia North matter and affirm as modified in the Riverwalk matter.”) (emphasis added).

The most that *Newman* and *Heritage Communities* could possibly require of the Appellant Insurers is to *try* to intervene and then *request* a certain verdict form. Neither *Newman* nor *Heritage Communities* grants an insurer the *right* to intervene, much less the right to dictate to the trial court the jury verdict form.

As Builders Mutual made clear in the Subject Petition, it was not only Plaintiffs, but its own insured, Defendant/Respondent Tri-County Roofing, Inc., who opposed its effort to “intervene” in this case. (Subject Petition p. 4 (“[Plaintiffs] and Tri-County Roofing objected to Builders Mutual being able to intervene in the Civil Action.”).) Having no means to force the trial court’s hand (as to intervention or the verdict form), and facing opposition from both their own insured and Plaintiffs, Builders Mutual has done all it can—and in turn all it could possibly be required—to do. And having done all it can do, it cannot later be accused of having failed to do something to protect its rights. Should there in fact be any good faith question after trial as to Builders Mutual’s indemnity obligation, both *Sims* and, indeed, Builders Mutual’s right to due process assure that its rights are protected as to any matters where its and its insured’s interests were not identical at trial—neither *Neman* nor *Heritage Communities* could possibly say otherwise.

Thus, Builders Mutual (and the other Appellant Insurers) will suffer no undue prejudice in terms of any binding determination of its rights via the trial of

this case and any good faith coverage questions that exist can be fully and fairly litigated in a separate action. (And, indeed, where else could they possibly be litigated—there is just no way that they could possibly be litigated in this trial, i.e., in the trial of the underlying dispute, without undue prejudice to at least some party by the undue injection of insurance matters into this dispute.)

This appeal is neither necessary to protect the Appellant Insurers' rights, nor are the issues raised in it necessary for the determination of this case on its actual merits. The case is ready to be tried, the long awaited (and hard to come by) trial date is finally upon us. (And indeed, at that, in any event, even any error in the foregoing analysis is nothing that cannot be corrected by the grant of a new trial—the Appellant Insurers stand to lose absolutely nothing by keeping this case on track for May 6th.)

Most respectfully, there is—quite literally—no good reason for this case not to go to trial on May 6th. (And even if by chance some contrary reason could be advanced in this regard, it would be vastly outweighed by the interest in judicial economy and avoidance of piecemeal appeals, as this Court has previously recognized, see Exhibit A (copies of orders from the *Univar* appeal), even where there is a right of immediate appeal—the Court determining nonetheless that the appeal should be held in abeyance and not proceed further until the trial was allowed to be conducted and concluded below.)

WHEREFORE, Plaintiffs ask the Court to deny the Subject Petition and/or, pursuant grant the Instant Cross-Motion as may be necessary for the circuit court to proceed as scheduled with the trial of this case set to begin May 6, 2019.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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*Attorneys for Respondents
Palmetto Pointe at Peas Island
Condominium Property Owners
Association, Inc., and Jack Love,
Individually, and on behalf of all
others similarly situated
Charleston, South Carolina*

Dated: April 29, 2019

The South Carolina Court of Appeals

Keith Black,

Respondent,

v.

Matrix Outsourcing, LLC, Trinity
Manufacturing, Inc., and Univar USA,
Inc.,

Defendants,

Of Whom Univar USA, Inc. is the

Appellant.

EXHIBIT

A

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2005-CP-37-00604

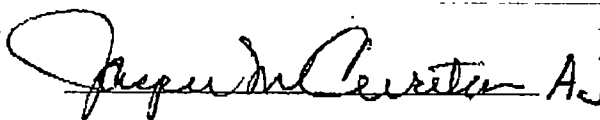
ORDER

Appellant filed a notice of appeal from a jury verdict rendered on November 17, 2008, and the trial court's denial of Appellant's post-trial motions. Appellant then filed a petition for supersedeas seeking to have the trial court's "oral order" lifting the automatic stay superseded in order for the trial on damages, which started on December 1, 2008, to be stayed. Although an oral order normally cannot be appealed, because the damages trial has started, we find the trial court's oral order lifting the stay has already taken effect. Therefore, we address the merits of Appellant's petition for supersedeas.

We agree with Appellants that the jury verdict on the issue of liability is properly on appeal to this Court. See Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972) (finding grant of summary judgment on the issue of liability, while leaving issue of damages for determination,

finally resolved the merits of every issue in the case, except for damages, and, therefore, was immediately appealable). After careful review, we deny the petition for supersedeas and decline to impose a stay on the damages trial; however, we hold this appeal in abeyance until the trial on the damages has concluded.

AND IT IS SO ORDERED.



Columbia, South Carolina

December 4, 2008

cc: Samuel W. Outen, Esq.
Stephanie Underwood Roberts, Esq.
Stephen L. Brown, Esq.
William L. Howard, Esq.
Duke R. Highfield, Esq.
Brandt R. Horton, Esq.
Russell G. Hines, Esq.
Robert Paul Foster, Esquire
William Walker, Jr., Esq.
The Honorable Sallie C. Smith
The Honorable J.C. Badley Nicholson, Jr.

FILED
12/4/08 *MA*

The South Carolina Court of Appeals

Scott F. Lawing,

Respondent

v.

Univar, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,
of whom Univar, Inc. is the

Defendants,

Appellant.

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2006-CP-37-00030

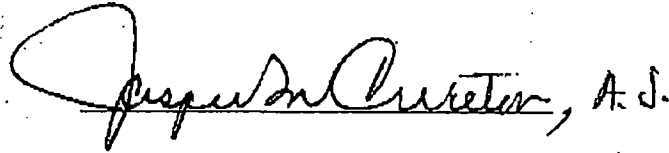
ORDER

Appellant filed a notice of appeal from a jury verdict rendered on November 17, 2008, and the trial court's denial of Appellant's post-trial motions. Appellant then filed a petition for supersedeas seeking to have the trial court's "oral order" lifting the automatic stay superseded in order for the trial on damages, which started on December 1, 2008, to be stayed. Although an oral order normally cannot be appealed, because the damages trial has started, we find the trial court's oral order lifting the stay has already taken effect. Therefore, we address the merits of Appellant's petition for supersedeas.

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finally resolved the merits of every issue in the case, except for damages, and, therefore, was immediately appealable). After careful review, we deny the petition for supersedeas and decline to impose a stay on the damages trial; however, we hold this appeal in abeyance until the trial on the damages has concluded.

AND IT IS SO ORDERED.

 Joseph M. Crutcher, A.J.

Columbia, South Carolina

December 4, 2008

cc: Samuel W. Outten, Esquire
Stephanie Underwood Roberts, Esquire
Stephen L. Brown, Esquire
William L. Howard, Esquire
Duke R. Highfield, Esquire
Brandt R. Horton, Esquire
Russell G. Hines, Esquire
Larry C. Brandt, Esquire
Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
The Honorable Sallie C. Smith
The Honorable J.C. Buddy Nicholson, Jr.

FILED

12/4/08

MA

The South Carolina Court of Appeals

Curtis Martin,

Respondent

v.

Univar, Inc., Trinity Manufacturing,
Inc., and Matrix Outsourcing, LLC,

Defendants,

of whom Univar, Inc. is

Appellant.

The Honorable J. C. Buddy Nicholson, Jr.
Oconee County
Trial Court Case No. 2005-CP-37-00605

ORDER

Appellant filed a notice of appeal from a jury verdict rendered on November 17, 2008, and the trial court's denial of Appellant's post-trial motions. Appellant then filed a petition for supersedeas seeking to have the trial court's "oral order" lifting the automatic stay superseded in order for the trial on damages, which started on December 1, 2008, to be stayed. Although an oral order normally cannot be appealed, because the damages trial has started, we find the trial court's oral order lifting the stay has already taken effect. Therefore, we address the merits of Appellant's petition for supersedeas.

We agree with Appellants that the jury verdict on the issue of liability is properly on appeal to this Court. See Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972) (finding grant of summary judgment on the issue of liability, while leaving issue of damages for determination, finally resolved the merits of every issue in the case, except for damages, and, therefore, was

immediately appealable). After careful review, we deny the petition for supersedeas and decline to impose a stay on the damages trial; however, we hold this appeal in abeyance until the trial on the damages has concluded.

AND IT IS SO ORDERED.

Joseph M. Curran A.J.

Columbia, South Carolina

December 4, 2008

FILED
12/4/08 *WMA*

cc: Samuel W. Outten, Esquire
Stephanie Underwood Roberts, Esquire
Stephen L. Brown, Esquire
William L. Howard, Esquire
Duke R. Highfield, Esquire
Brandt R. Horton, Esquire
Russell G. Hines, Esquire
Robert Paul Foster, Esquire
William P. Walker, Jr., Esquire
Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
The Honorable Sallie C. Smith
The Honorable J.C. Buddy Nicholson, Jr.

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)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

) vs.
)

) Island Pointe, LLC; et al.
)

☐ Defendant(s)

) Check box above indicating submitting party
)

Name, SC Bar No. and Address of Plaintiff's Attorney

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Telephone: (843) 724-6671
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Name, SC Bar No. and Address of Defendant's Attorney

James A. Atkins, Esquire
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Charleston, SC 29492-7595
Telephone: (843) 577-2026
fax: (843) 722-2867
e-mail: jatkins@clawsonandstaubes.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: Motion for a New Trial Against WC Services, Inc.

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.

Edward D. Buckley, Jr.
Signature of Attorney for ☒ Plaintiff(s) ☐ Defendant(s)

Dated: 5/28/2019

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 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
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: _____
(print name)

☐ MOTION FEE COLLECTED:

☐ CONTESTED – AMOUNT DUE: _____

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, et al,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2015-CP-10-0955

FILED
2019 MAY 28 PM 4:31
JULIE J. ARMSTRONG
CLERK OF COURT

**PLAINTIFFS' MOTION FOR A NEW
TRIAL AGAINST WC SERVICES, INC.**

Plaintiffs, by and through their undersigned counsel, within ten (10) days after the trial of this action, pursuant to Rules 50 and 59, SCRCP, and any other applicable procedural and/or substantive law, hereby move this Honorable Court as follows as against WC Services, Inc.: (1) for a new trial on the grounds that this court erred in failing to direct a verdict for the Plaintiffs based on the fire sprinkler system violating the applicable building code, the applicable City of Folly Beach ordinance, the fire sprinkler plans, and the Certificate of Compliance; and (2) for a new trial on the grounds that this court erred by failing to charge the controlling law applicable to fire sprinkler systems for two-family dwellings, namely R102.2 of the 2003 International Residential Code and the City of Folly Beach ordinance § 90.08 as requested by the Plaintiffs.

BRIEF BACKGROUND AND PROCEDURAL POSTURE

This case was before this court for a jury trial on May 6-16, 2019. On May 16, 2019, a verdict was rendered by the jury for the Plaintiffs against Complete Building Corp., Tri-County

Roofing, Wilson Lucas Sales d/b/a Miracle Siding, and Eloy Vasquez for \$6,500,000.00 in actual damages. Additionally, the jury awarded the Plaintiffs punitive damages against Complete Building Corp. and Tri-County Roofing in the amount of \$500,000.00 each. As to WC Services. The jury found that WC Services was not negligent and did not breach its implied warranty.

The Plaintiffs had previously timely moved for a directed verdict, as the only reasonable inference based upon the evidence in the record established that WC Services violated the provisions of § 90.08(C) of City of Folly Beach ordinance, as there was no evidence that a variance had been granted after a hearing before the Building Official, the Fire Marshall and a member of the construction industry appointed by City Council as set forth in § 90.08(C) and (D); and that WC services had violated the building code and the plans. The Plaintiffs' motion was denied, and the claims against WC Services were submitted to the jury. The Plaintiffs submitted requests to charge Numbers 38 and 39, which are key controlling provisions of law applicable to the claims against WC Services.

ANALYSIS

A. The Plaintiffs are entitled to a Judgment Notwithstanding the Verdict and/or a New Trial pursuant to Rule 50, SCRCP, as the Plaintiffs were entitled to a directed verdict, because the evidence unequivocally showed as a matter of law that the installed fire sprinkler system violated the applicable law, which violation constitutes negligence *per se*.

Respectfully, the Plaintiffs contend the trial court erred in denying their directed verdict motion on their claims of negligence and breach of implied warranty against WC Services. The evidence at trial unequivocally showed as a matter of law that WC Services' installation of the fire sprinkler system violated the applicable City of Folly Beach ordinance, or in the alternative, its installation within the fire rated wall between dwelling units violated the required fire rated assembly of the wall itself.

Pursuant to Rule 50(b), SCRCF, “a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict... If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.” A motion for judgment notwithstanding the verdict under Rule 50(b) is a renewal of the directed verdict motion and is limited to the grounds asserted in the directed verdict motion. *Glover v. N. Carolina Mut. Life Ins. Co.*, 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct. App. 1988). In deciding a motion for JNOV, the trial judge is concerned with the existence of evidence, not its weight. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003). Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 842 (Ct.App.1997). The court must determine whether any evidence existed on each element of the cause of action. *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989).

In order to establish a claim for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant’s breach was the actual and proximate cause of the plaintiff’s injury; and (4) the plaintiff suffered an injury or damages. *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007). Further, to establish a claim for breach of the implied warranty of workmanlike services, the plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner. *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008) (holding that a builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, and workmanlike manner).

At trial, the uncontroverted evidence established WC Services' failure to meet the industry standard of care in several aspects. Plaintiffs established the following evidence in regard to City of Folly Beach ordinance § 90.08:

- (a) City of Folly Beach ordinance § 90.08 was violated;
- (b) Table 1 of City of Folly Beach ordinance § 90.08 clearly states sprinklers may not be omitted from attics within two-family dwellings;
- (c) no evidence was presented that a variance was granted after a hearing by the Fire Chief, the Building Official and a member of the building industry appointed by City Council, as required under City of Folly Beach ordinance § 90.08(D); and
- (d) Ex. 679: Hall Letter – states only that sprinklers may be omitted from garages if there is a one (1) hour fire wall. It contains no indication that a variance was granted to allow omission of sprinklers in the attics.
- (e) The fire rated dwelling separation wall was penetrated at multiple levels within each unit, an uncontested code violation which negated the fire rating of that wall.

The uncontroverted evidence established the following:

- (a) fire sprinkler plans as certified in the engineer's Certificate of Compliance do not call for penetrations of the one-hour fire wall; and
- (b) Ex. 111: P101 does not call for any penetration of the one-hour fire wall by any piping component.

Defendants' experts readily and unequivocally acknowledged construction deficiencies and building code violations. Specifically, that there are over 1,000 firewall penetrations within the forty (40) units at Palmetto Pointe, all of which are fire code violations. Many of those penetrations occurred where the sprinklers were installed, as the sprinkler pipes created a chase within the separation wall and penetrated that wall at each floor level. Based on the above

evidence, the only reasonable inference to be drawn, viewed in the light most favorable to WC Services, is that the Plaintiffs are entitled to a verdict in their favor on the issue of liability as a matter of law, and, therefore, Plaintiffs are entitled to a Judgment Notwithstanding the Verdict and/or a New Trial pursuant to Rule 50, SCRCF.

B. The Plaintiffs are entitled to a New Trial pursuant to Rule 59, SCRCF on the grounds that the trial judge erred by failing to charge R102.2 of the 2003 International Residential Code and the City of Folly Beach ordinance § 90.08(C) and (D) as requested.

A trial court's authority to grant a new trial is rooted in Rule 59, SCRCF. Rule 59(a) permits a trial court to grant a new trial "to all or any of the parties and on all or part of the issues [...] in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State...." More specifically, Rule 59(d), SCRCF, states,

Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

Rule 51, SCRCF, which pertains to jury instructions, states, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."

A trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence. *Wall v. Suits*, 318 S.C. 377, 458 S.E.2d 43 (Ct.App.1995). If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. *Sanders v.*

Western Auto Supply Co., 256 S.C. 490, 183 S.E.2d 321 (1971). Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error. *Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991).

At trial, Plaintiffs submitted numerous jury instructions, including requested charges Numbers 38 and 39¹:

Request to Charge No. 38:

The 2003 International Residential Code provides that its provisions shall not be deemed to nullify any provisions of local, state or federal law.

Source: R102.2, 2003 International Residential Code:

“R102.2 Other laws. The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law.”

Request to Charge No. 39:

The City of Folly Beach had in place ordinance §90.08 during the construction of this project.

That ordinance states that, “Notwithstanding any provision to the contrary in the national or in any other applicable code, automatic fire sprinkler systems shall be installed and maintained in all new and commercial and multifamily construction...”

The ordinance further provides areas where sprinklers may be omitted for two-family units.

The ordinance allows the omission of sprinklers in carports and similar attached structures in two-family dwellings if they are separated from dwelling units by minimum one-hour fire rated construction.

The ordinance does not allow omission of sprinklers from attics in two-family units unless a variance is granted after a hearing by the Fire Chief, Building Official, and member of the building industry appointed by the City Council.

Reference: §90.08(A), §90.08(C) and §90.08(D) [Plaintiffs Exhibit No. 141]
§90.08 is attached.

¹ On May 13, 2019, during the trial, this court requested submissions of proposed jury charges via email. The above requested jury charges were sent via email to the court on May 14, 2019. (Exhibit A)

The requested charges accurately stated the correct law and should have been charged to the jury. Furthermore, there was ample evidence to support the charges to the jury. The Plaintiffs were clearly prejudiced by the refusal of the trial court to charge the requested code section and ordinance that were the only controlling statutory provisions applicable to the installation of the fire sprinkler system at the project. Therefore, this court erred in failing to charge Plaintiffs' requests to charge Numbers 38 and 39, and Plaintiffs are entitled to a new trial against WC Services.

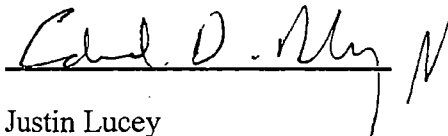
CONCLUSION

WHEREFORE, Plaintiffs moves for Judgment Notwithstanding the Verdict or a new trial upon the grounds set forth above.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By:



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(843) 724-5446
Attorneys for the Plaintiffs

May 24, 2019

Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading
was emailed to all counsel of record in this proceeding
this 28th day of May, 2019.

Amanda DeFato

FILED
2019 MAY 28 PM 4:31
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

DeMato, Amanda

From: DeMato, Amanda
Sent: Tuesday, May 14, 2019 10:49 AM
To: 'Laura Knight'; Shaun Hatch; McCoy, Jennifer Law Clerk (Alexandra Heaton); Rett Kendall; Justin Lucey
Cc: Jennifer Zambriczki; McCoy, Jennifer B. Secretary (Kathryn B. Stone); Stephanie Drawdy; Josh Evans; Buckley, Edward D. (Ed); Andrew N. Cole, Esquire (Carolina Gutter); Christopher Adams; Bo Wilson; Brandon Reeser; Wendy McCravy; Chris Ramsey; Jim Atkins; Kellie Hunt; Troy Thames; Tarsha M. Jefferson; Richelle Campbell (Chas Glass Asst); leonardtbrowne@gmail.com; Jasmine Wyman; Cerchione, Carla; Brent M. Boyd
Subject: RE: Palmetto Pointe v. Island Pointe, et al (Case No. 2015CP1000955): Plaintiffs' Notices of Publication
Attachments: Pls 141.pdf; 4301483.doc

Ms. Heaton,

Attached are two additional Plaintiffs' proposed jury charges. I am also attaching Plaintiffs' Exhibit No. 141 which is an attachment to Plaintiffs' Proposed Jury Charge No. 39.

Amanda DeMato
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402

From: Laura Knight <lknight@lucey-law.com>
Sent: Tuesday, May 14, 2019 9:53 AM
To: Shaun Hatch <shatch@clawsonandstaubes.com>; McCoy, Jennifer Law Clerk (Alexandra Heaton) <jmccoyle@sccourts.org>; Rett Kendall <rkendall@murphygrantland.com>; Justin Lucey <jlucey@lucey-law.com>
Cc: Jennifer Zambriczki <jzambriczki@lucey-law.com>; McCoy, Jennifer B. Secretary (Kathryn B. Stone) <jmccoysc@sccourts.org>; Stephanie Drawdy <sdrawdy@lucey-law.com>; Josh Evans <jevans@lucey-law.com>; Buckley, Edward D. (Ed) <ebuckley@yclaw.com>; DeMato, Amanda <ADemato@yclaw.com>; Andrew N. Cole, Esquire (Carolina Gutter) <acole@collinsandlacy.com>; Christopher Adams <cadams@collinsandlacy.com>; Bo Wilson <bwilson@wilsonheyward.com>; Brandon Reeser <breeser@wilsonheyward.com>; Wendy McCravy <wmccravy@wilsonheyward.com>; Chris Ramsey <cramsey@bosticlaw.com>; Jim Atkins <JAtkins@clawsonandstaubes.com>; Kellie Hunt <khunt@clawsonandstaubes.com>; Troy Thames <tthames@wjlaw.net>; Tarsha M. Jefferson <tjefferson@collinsandlacy.com>; Richelle Campbell (Chas Glass Asst) <rcampbell@collinsandlacy.com>; leonardtbrowne@gmail.com; Jasmine Wyman <JWyman@richardsonplowden.com>; Cerchione, Carla <Carla.Cerchione@wbd-us.com>; Brent M. Boyd <bboyd@murphygrantland.com>
Subject: RE: Palmetto Pointe v. Island Pointe, et al (Case No. 2015CP1000955): Plaintiffs' Notices of Publication

Ms. Heaton:

Attached please find a numbered version of Plaintiffs' proposed jury charges that are identical to those we sent last week. We numbered them so that we could refer to them by number in the charge conference.

Thank you,
Laura Knight

Palmetto Pointe at Peas Island POA, Inc., et al. v. Island Pointe, LLC, et al
Case No.: 2015-CP-10-0955

PLAINTIFF'S CHARGE NO. 38

I charge you that:

The 2003 International Residential Code provides that its provisions shall not be deemed to nullify any provisions of local, state or federal law.

Source: R102.2, 2003 International Residential Code:

“R102.2 Other laws. The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law.”

Palmetto Pointe at Peas Island POA, Inc., et al. v. Island Pointe, LLC, et al
Case No.: 2015-CP-10-0955

PLAINTIFF'S CHARGE NO. 39

I charge you that:

The City of Folly Beach had in place ordinance §90.08 during the construction of this project.

That ordinance states that, "Notwithstanding any provision to the contrary in the national or in any other applicable code, automatic fire sprinkler systems shall be installed and maintained in all new and commercial and multifamily construction..."

The ordinance further provides areas where sprinklers may be omitted for two-family units.

The ordinance allows the omission of sprinklers in carports and similar attached structures in two-family dwellings if they are separated from dwelling units by minimum one-hour fire rated construction.

The ordinance does not allow omission of sprinklers from attics in two-family units unless a variance is granted after a hearing by the Fire Chief, Building Official, and member of the building industry appointed by the City Council.

Reference: §90.08(A), §90.08(C) and §90.08(D) [Plaintiffs Exhibit No. 141]

§90.08 is attached.

(B) In all cases the person doing the burning shall remain on the premises at least one hour after the torch or flame-producing device has been used.
(^95 Code, § 2-2-5) Penalty, see § 10.99

§ 90.04 BURNING TRASH OR OTHER COMBUSTIBLE MATERIAL.

(A) Trash or other combustible material shall not be burned on the premises without specific authorization from the Department of Public Safety.

(B) A fire permit issued by the Department of Public Safety shall be required prior to the burning of trash or other combustible materials.
(^95 Code, § 2-2-6) (Am. Ord. passed 11-2-79) Penalty, see § 10.99

§ 90.05 DUTY OF PERSON STARTING FIRE; SCHEDULE OF BURNING.

(A) It is clearly the duty of all concerned to regulate the magnitude of any fire that may be started so as to control and extinguish it within the time limit set in order to avoid creating a fire hazard, danger, risk or peril.

(B) The schedule for burning shall be as follows: seven days per week the year around during the following months: March, April, May, June, July, August and September, from 9:00 a.m. to 6:00 p.m.; October, November, December, January and February, from 9:00 a.m. to 4:00 p.m.
(^95 Code, § 2-2-7)

§ 90.06 CONDEMNED BUILDINGS.

No owner of any building which has been condemned as unsafe and dangerous from a fire standpoint by the Director of Public Safety, after being notified by the Director in writing of the unsafe and dangerous character of the building, shall permit the same to stand or continue in that condition.
(^95 Code, § 2-2-8) Penalty, see § 10.99

§ 90.07 FAILURE TO ABATE FIRE HAZARD.

Failure to abate any fire hazard is in violation of this code and the violator shall upon conviction in the Municipal Court be punished as provided in this chapter.
(^95 Code, § 2-2-9) Penalty, see § 10.99

§ 90.08 SPRINKLER SYSTEMS.

(A) Notwithstanding any provision to the contrary in the national or in any other applicable code, automatic fire sprinkler systems shall be installed and maintained in all new commercial and multi-family construction and renovation where the renovation comprises 50% or more increases in the size of the existing structure. Sprinkler systems will also be required in all commercial and multi-family buildings which are less than 40% complete and require a new building permit. The total floor area of the building shall be computed without regard to separation walls and floors of less than four hours unpierced fire resistive construction. This section does not apply to and does not mandate the installation in new single-family homes or in single-family homes which are being renovated or rebuilt.

(B) The term "automatic sprinkler system," as used herein, is defined as an integrated system of underground and overhead piping, including a water supply such as a gravity tank, fire pump, reservoir, pressure tank or connection by underground piping to a public main, the system complying in all respects with the requirements for the systems contained in appropriate standards issued by the National Fire Protection Association. No automatic sprinkler system required by this section shall be installed without prior approval by the Fire Chief of the plans for installation, testing and maintenance of the system.

(C) Subject to the approval of the Fire Chief, sprinklers may be omitted from buildings where sprinklers are considered undesirable due to the nature of the contents, or in rooms or areas which are of noncombustible construction with noncombustible content.



<i>Acceptable Areas of Omission</i>	<i>Single-Family</i>	<i>Two-Family</i>
Bathrooms, less than 55 sq. ft. with non-combustible plumbing	x	x
Small closet, less than 24 sq. ft.	x	x
Open attached porches	x	x
Carports and similar attached structures	x*	x*
Attics, not used for living or storage	x	
Entrance foyers, not the only means of egress	x	
NOTE TO TABLE: *If attached structure is separated from dwelling units by minimum one-hour fire rated construction.		

(D) Variances to this section may be granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council.

('95 Code, § 2-2-10) (Ord. 87-16, passed 6-16-87; Am. Ord. 88-1, passed 2-16-88; Am. Ord. 88-10, passed 6-21-88)

§ 90.09 BUILDING HEIGHT LIMITS.

(A) The maximum height of all occupiable structures in the city shall be 50 feet above the elevation of the centerline of the nearest public street existing as of the date of this section. This section shall not be construed to relax more restrictive provisions found elsewhere in the code. For the purposes of this section, occupiable structures shall include all artificial structures except chimneys, flues, flagpoles, antennae, lighthouses, and public utility towers.

(B) The purpose of the building height limit is to preempt the threat of fire, to preserve the heritage of the city, and to retain the environmental benefits for the existing tree canopy.

(1) The Fire Department is without the necessary equipment to fight fires above 50 feet or prevent their spread to adjacent structures or forest. Serving a small, primarily residential community, the Fire Department is not able to accommodate intense or mid-rise commercial and multi-unit residential development.

(2) The City of Folly Beach owes its name to the founders of Folly Island, who declared it "well follied" for the dense foliage of the indigenous maritime forest. A building height limit of 50 feet mitigates the incursion of artificial improvements into the tree canopy of lands in the city.

(3) The maritime forest tree canopy provides wildlife habitat. The building height preserves canopy, which ranges from 45 to 55 feet above grade in a maritime forest, thus reducing habitat elimination. Moreover the tree canopy provides shade for small structures, residents, pedestrians, and shade plants.

(Ord. 21-06, passed 7-25-06)

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO. 2015-CP-10-00955
Palmetto Pointe at Peas	)	
Island Condominium Property	)	PARTIAL
Owners Association, Inc. et	)	TRANSCRIPT OF RECORD
al.,	)	
	)	
PLAINTIFFS,	)	ORIGINAL
	)	
VS.	)	
	)	
Island Pointe, LLC, et al.,	)	
	)	
DEFENDANTS.	)	

December 17, 2018

Charleston, South Carolina

B E F O R E:

The Honorable Jennifer B. McCoy

A P P E A R A N C E S:

For the Plaintiff:

Justin O'Toole Lucey, Esquire
Edward Buckley, Esquire

For the Defense:

John L. McCants, Esquire	James A. Atkins, Esquire
Samuel M. Wheeler, Esquire	Heather Chiovaro, Esquire
Andrew N. Cole, Esquire	Everette Kendall, Esquire
Nicholas A. Farr, Esquire	Ian S. Ford, Esquire
Janice Holmes, Esquire	Graham P. Powell, Esquire
Brandon T. Reeser, Esquire	
F. Cordes Ford, Esquire	

Certified Transcript Provided For: John L. McCants

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

ROA 539

I N D E XPARTIAL TRANSCRIPT:

HEARING - Motion to Intervene -- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 42

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: We have I believe is it three motions to
2 be heard today, cases; Mr. Lucey, is that your
3 understanding as well?

4 MR. LUCEY: I believe there's five intervention
5 motions.

6 THE COURT: Okay.

7 MR. LUCEY: We treat it as one, Your Honor, in
8 proposing a single memorandum.

9 THE COURT: All right.

10 MR. LUCEY: There is a motion to quash. And we
11 proceeded with briefing some recently filed motion for
12 summary judgment in case the Court had time to hear them.

13 THE COURT: Okay.

14 MR. LUCEY: And the oldest motion to intervene would
15 be Mr. McCants' motion by Builder's Mutual regarding
16 their insured Tri-County, who is a subcontractor on the
17 job.

18 THE COURT: Perfect. Why don't we just hear them in
19 the order of filing.

20 (WHEREUPON, break for the Court to hear an unrelated
21 matter first.)

22 (WHEREUPON, resume hearing 12/17/18, 10:13 a.m.)

23 THE COURT: Let's go back to this complex case. All
24 right. I am happy to hear from the first motion to
25 intervene. It is on behalf of Tri-County; is that

1 correct?

2 MR. MCCANTS: Yes, Your Honor.

3 THE COURT: How are you? If y'all don't mind just
4 for the court reporter's sake just making sure you state
5 your name for the record and the parties you represent.

6 MR. MCCANTS: Good morning. I am John McCants. And
7 I represent Builders Mutual Insurance Company.

8 THE COURT: All right. Yes, sir. Please proceed.

9 MR. MCCANTS: Thank you, Judge McCoy. Again, I am
10 John McCants on behalf of Builders Mutual. The matter
11 before Your Honor is a motion to intervene on behalf of
12 Builder's Mutual in this particular civil action for the
13 limited purpose of participating and drafting a
14 submission of special interrogatories and/or special
15 verdict form to a jury for the trial of the civil action.

16 Builder's Mutual Insurance Company has provided a
17 defense to one of the subcontractors which is Tri-County
18 Roofing. I believe Mr. Wheeler represents Tri-County on
19 a personal level, if you will. Also Builders Mutual has
20 retained previously among other insurers Mr. Andrew Cole
21 who is defending Tri-County in the underlying civil
22 action as well.

23 Builders Mutual has made this motion essentially on
24 two decisions at the South Carolina Supreme Court which
25 we contend and believe that the ability of Builders

1 Mutual to address coverage issues in a subsequent
2 declaratory judgment action, which I will generally refer
3 to as a DJ action. And the first decision is the Auto
4 Owners Newman case, Your Honor -- and I actually tried
5 all of the ones down the hall in front of the Honorable
6 Hicks Harwell ---

7 THE COURT: Okay.

8 MR. MCCANTS: --- many many years ago. And that
9 decision from 2009 was the second decision by the South
10 Carolina Supreme Court for that decision. But the
11 operative language in that case by the Honorable Chief
12 Justice Toal was - and I quote it because I think it is
13 important: We hold that any amount in the arbitrator's
14 allowance -- we hold that any amount in the arbitrator's
15 allowance allotted to the removal and replacement of the
16 defective stucco is not covered under the CGL policy.

17 Chief Justice Toal went on to say that the property
18 damage which may be covered in the policy is the only
19 portion covered and even if you have to access to get to
20 that property damage that removal to do so is not covered
21 and the replacement is not covered. So you have
22 isolated, allocated, and segregated damages continuing on
23 with the holding.

24 Nevertheless, it is not possible from the record for
25 the Court to determine what portion of the arbitrator's

1 itemized list of damages may be attributed to the
2 removal, replacement, of the defective stucco; and it is
3 not the purpose of the declaratory judgment action, which
4 is what that action was at the time, to relitigate the
5 issue of damages. Auto Owners had an opportunity to
6 raise this matter with the issue of damages. It was
7 litigated before the arbitrator who issued a binding --
8 final and binding order on the merits.

9 And then the court concluded that we affirm the
10 trial court's decision. In the conclusion section: We
11 affirm the trial court's decision and find that the CGL
12 policy issued by Auto Owners to Trinity, the general
13 contractor, covers the damage awarded by the arbitrator
14 to the homeowner. Although we reversed the trial court's
15 decisions to the extent it orders recovery; and the
16 policy to remove and replace the defective stucco there
17 is no evidence in the record, from the underlying action,
18 no evidence in the record indicating what damages may be
19 attributed to the removal and replacement of the stucco.

20 So on Auto Owners, Newman alone, practitioners have
21 moved to intervene in these cases in order to have a
22 court do the special interrogatory process.

23 I'm not sure if Your Honor has familiarity with that
24 and has experienced that yet, these efforts. But it is
25 an effort to segregate and allocate so that you don't

1 find yourself in a subsequent DJ action with a general
2 verdict and the DJ circuit court judge saying I can't
3 deal with this because ---

4 THE COURT: Right. I think it is a great idea.

5 MR. MCCANTS: So the one following decision --
6 that -- Auto Owners alone speaks to the issue as far as I
7 am concerned. But in 2017 the South Carolina Supreme
8 Court waded into this issue again in the Heritage
9 Community case.

10 Now in the Heritage Community case Harleysville
11 Insurance Company did not intervene in the underlying CD
12 case, all right. Harleysville made the intentional,
13 conscious decision to reserve, if you will, issues of
14 coverage in the subsequent DJ action. They entered into
15 an agreement with the insured. And that is in that
16 record. And chose to do what some refer to as a Sims v.
17 Nationwide proceeding where all matters are covered -- or
18 reserved to subsequent proceeding.

19 That didn't work. In Heritage Community case Judge
20 Milling, retired Judge Milling, acted as special referee
21 and he ruled very specifically in that decision - and I
22 will offer the decision for Your Honor - where he ruled
23 that Harleysville could have and should have intervened
24 and requested special interrogatories.

25 But Harleysville had chosen not to go that course;

1 and that course was subsequently found to be ineffective
2 by Judge Milling, which I submit to Your Honor was in
3 effect affirmed by the South Carolina Supreme Court.

4 The Supreme Court didn't have to address the
5 intervention on the face of it because intervention had
6 not been moved or attempted by Harleysville. But in no
7 less than three parts of the Harleysville -- excuse me,
8 the Heritage Community decision, the Supreme Court
9 addressed Judge Milling's finding that it would be too
10 difficult, too speculate, and impossible to take a
11 general verdict from a jury and descramble the egg and
12 figure out what the jury was thinking about.

13 So Judge Milling didn't allow it. The Supreme Court
14 talked about it three times with no criticism. In effect
15 affirming it. And I submit to this court the
16 Harleysville decision which did not allow them to have
17 the subsequent post-proceeding which has somewhat been
18 referred by the Supreme Court as the bifurcated effort.
19 So that was in effect.

20 And so faced with those two decisions Builders
21 Mutual has moved to intervene in this case.

22 Now as I indicated, Builders Mutual has retained
23 counsel to defend. And I would like to correct one part
24 of the memo I received on Friday from plaintiff's counsel
25 that Builders Mutual has been in since April of 2015. I

1 think correctly Builders Mutual has been defending since
2 January 2018. That's when it was brought in, asked to
3 come in and defend.

4 So brought in perhaps in the end of December; but
5 January 18th, 2018, Builders Mutual then attended a
6 mediation. They were -- the first one in this case. I
7 don't know if they mediated it before 2018. And then I
8 attended the second one in July.

9 Upon entering in January 2018 Builders Mutual
10 attended the mediation. And then I filed this motion in
11 March. And it has been pending of course. And I have
12 not asked it to be continued. I am not criticizing. It
13 is just it's -- this is our first opportunity to hear it.

14 So there has been no actual real delay to bringing
15 this motion on behalf of Builders Mutual.

16 THE COURT: Okay.

17 MR. MCCANTS: I submit to Your Honor it is timely.
18 And I submit to Your Honor it is timely in accordance
19 with other decisions by -- other decisions by a circuit
20 court judge.

21 And if the court will allow I will give you, Your
22 Honor, Judge Milling's -- I can file -- responses to the
23 plaintiffs. But I can file this decision if you want to.
24 Submit a paper copy right now.

25 THE COURT: I am happy to review it if you want me

1 to.

2 MR. MCCANTS: This is the lower court decision.

3 (WHEREUPON, document presented to the court.)

4 THE COURT: Right.

5 MR. MCCANTS: In the Heritage.

6 THE COURT: Okay.

7 MR. MCCANTS: And the decision -- the intervention
8 is, we submit to Your Honor, is timely. There is an
9 issue about whether it is timely or not. And I submit to
10 Your Honor that Builders Mutual has acted promptly and
11 there is no prejudice in this case at all for the time
12 period.

13 In fact I submit to Your Honor that this is really
14 this is a trial motion. It is a motion that ultimately
15 will be determined and adjudicated by the trial court.
16 Because the trial court will ultimately decide what
17 evidence is in the record.

18 There is no surprise here, I will submit. The
19 plaintiffs began this action. One can read the amended
20 complaint. The amended complaint has allegations in it
21 of insurance coverage, in an effort to trigger defenses
22 by insurers for all the parties you see in the courtroom
23 here today. So there is language in the amended
24 complaint that I submit to Your Honor is indicative of
25 requests for insurance coverage in this issue for these

1 subcontractors.

2 I will submit in response to the plaintiff's
3 position I am familiar with Judge Newman's decision. I
4 participated in it. I was one of the counsel in that
5 decision. I am also familiar with other decisions by
6 other judges in this state.

7 Judge Nicholson who ruled favorably for
8 intervention. And Judge Seals has ruled favorably for
9 intervention twice. And Judge Casey Manning in Columbia
10 who ruled in a case I am participating in to allow
11 intervention based on the good sense of parties, of all
12 things. So but Judge Manning had no problem with that.
13 And I am going to try to submit these decisions to Your
14 Honor.

15 So I will hand Your Honor the Corvey decision, Horry
16 County, which is an order granting intervention in the
17 Mitchell case in Lancaster County. The -- there is the
18 Commons case in Berkeley County and Horry County. So
19 these are decisions.

20 (WHEREUPON, document presented to the court.)

21 Now I will submit to Your Honor that there's not a
22 decision -- I think I can make this bold statement.
23 There is not a decision in the United States where an
24 insurer has been denied intervention and been held to or
25 bound by the general verdict.

1 I submit in this instance that the opposition I am
2 receiving is opposition to actually intervening and then
3 some attempt later to bind Builders Mutual to a general
4 verdict. Which I would think Justice Kittredge handled
5 that and covered that in his Heritage Community case
6 where he said you can't use a shield and a sword. If you
7 are not going to allow them to intervene then they can't
8 be bound by the general verdict.

9 And I would ask Your Honor to extend -- intervention
10 is not allowed then Builders Mutual have a protective
11 order such that any general verdict that would take place
12 in the case they would not be bound to it, they would not
13 suffer the consequences of that general verdict to the
14 extent there was no allocation or the allocation was done
15 poorly by the litigants.

16 So really the role of intervention is somewhat
17 passive. It is only participating in the trial portion.
18 I do not -- I would submit I am counsel for Builders
19 Mutual. I would not expect Mr. Cole and his defense
20 counsel to represent Builders Mutual's interest.

21 I think it's fairly clear with professional rules of
22 conduct that 5.4(c) requires Mr. Cole to represent his
23 client, which is Tri-County. So during the trial his
24 interest would be solely and exclusively to Tri-County,
25 and he would not be expected to do something.

1 So -- find the language of the judge. I don't
2 expect him -- I don't expect Mr. Cole to do something;
3 so, therefore, I would be doing it on behalf of Builders
4 Mutual.

5 My role would not be submitting evidence. I would
6 not be making arguments to the jury. And I would submit
7 that I would be -- I would submit that I would be truly
8 passive in that regard. I would just be akin to be held
9 to the jury charges which occur at the time at the trial.
10 (WHEREUPON, phone ringing.)

11 Let me read -- if Your Honor will -- because I
12 think this accurately sums up -- and I hope that is not
13 me.
14 (WHEREUPON, phone stops ringing).

15 I think in the Andrew Corley case which I have
16 handed up this is, if I recall right, Judge Seal.

17 THE COURT: Uh-huh.

18 MR. MCCANTS: And in this decision he says -- and
19 this goes to the intervention itself and timeliness. But
20 I think it speaks to the rule.

21 And it is Page 5 of his decision: In weighing these
22 factors the court does not find Selective's motion to
23 intervene to be untimely. The timeliness of the motion
24 must be judged in relation to its purpose. As indicated,
25 Selective seeks to intervene for the limited purpose.

1 Selective seeks only the ability to request that the
2 trial court submit a special verdict and/or special
3 interrogatories to the jury to determine the basis of the
4 jury's verdict against the insureds. If a verdict is
5 returned in favor of the plaintiffs against the insureds
6 Selective does not seek to actively participate in the
7 trial. That is with the limited purpose -- excuse me,
8 with the limited exception of making a motion if
9 necessary at the appropriate stage of the trial to submit
10 special verdict and/or special interrogatories to the
11 jury.

12 Selective is not seeking to participate in
13 discovery. Selective is not attempting to delay the
14 trial. And I say the same here today for Builders
15 Mutual. And finally, Selective is not seeking
16 declaratory relief from this court and is not asking this
17 court to determine any coverage issues.

18 Selective's motion for the submission of special
19 interrogatories, special verdict will incur entirely
20 outside of the presence of the jury.

21 In light of the purpose of the proposed intervention
22 the motion cannot be deemed untimely. The insureds have
23 shown no legal prejudice. There will be no delays, etc.

24 And I submit that is a synopsis of what Judge Seals
25 gives of what Builders Mutual is asking for in this

1 proceeding in terms of its limited appearance so that we
2 don't have a general verdict and I am not told by a court
3 later, the circuit court or even the appellate court,
4 that Mr. McCants we can't unravel this, it's too
5 speculative and so forth.

6 THE COURT: Okay.

7 MR. MCCANTS: Intervention is provided by Rule 24.
8 I appreciate narrow interpretations of Rule 24. The
9 Geico case I have dealt with that. And Geico has a
10 limited holding. I think it predates the decisions in
11 Auto Owners and Harleysville.

12 It doesn't address this very difficult situation of
13 how do you deal with this allocation from a jury. We
14 have a rule to do it, Rule 49. It is a complex case.
15 This is no more complex than getting the jury to
16 understand industry standards, building codes, etc. And
17 the jury will have to deal with those issue as well.

18 I suggest to Your Honor the format would follow
19 based on the evidence. I could draft something for you
20 today that may look like interrogatories. But the fact
21 of the matter is it would be based on the evidence
22 submitted by the parties. And so it would be premature
23 to provide anything otherwise.

24 I am not going to suggest that other evidence be
25 admitted. In effect I deal with and address what

1 evidence is admitted by the litigants. We have a burden
2 of proof as well in regard to coverage.

3 And so we are affected. With all due respect, the
4 parties in the case right now do not represent the
5 interests of Builders Mutual which is one of the criteria
6 and issue for Rule 24.

7 Mr. Weiland, who is personal counsel, opposes my
8 intervention. Plaintiff opposes the intervention.

9 THE COURT: Right.

10 MR. MCCANTS: And I won't expect Mr. Cole to do this
11 as well. So leaving no party in the courtroom perhaps
12 except for Your Honor sua sponte doing it there is no
13 party there who represents the interests of Builders
14 Mutual except for counsel for this.

15 THE COURT: Okay.

16 MR. MCCANTS: Also I would like to put into the
17 record the estimate that has been provided from
18 discovery. I will get that and submit it to Your Honor
19 in response to comments made by counsel in their brief I
20 received on Friday.

21 The estimate has a breakdown and an allocation. And
22 I submit to Your Honor that part of the homework was
23 already done in terms of allocations for this. These
24 estimate -- or this estimate is allocated.

25 So with that said I request that Builders Mutual be

1 allowed intervention on this limited basis.

2 I'm not sure if Your Honor is the trial judge. I
3 saw an order that gave me -- for the pretrial matters in
4 this case.

5 THE COURT: Correct.

6 MR. MCCANTS: But anyway, I understand trial will be
7 in May. So we are not talking about next week.

8 THE COURT: Right.

9 MR. MCCANTS: So ---

10 THE COURT: And I think we -- that is probably
11 partially withheld. And in fact I think we discussed
12 they don't schedule us out six months in advance anymore
13 so.

14 MR. MCCANTS: Right. So with that said I will thank
15 you very much.

16 THE COURT: Yes, sir. Thank you.

17 Mr. Lucey, happy to hear from you.

18 MR. LUCEY: May it please the court. Justin Lucey
19 for the plaintiffs.

20 We actually don't know what Builders Mutual role
21 would be if they were admitted into this case, for
22 several reasons. One is, is they did not file a
23 complaint in intervention. They have not filed an
24 official document stating what they seek in this case.

25 They have violated Rule 24 because of that. And

1 there is no such rule called partial intervention. It
2 doesn't exist.

3 They do not have the standing to intervene. It has
4 been ruled in this state several times including the Goff
5 case cited in plaintiff's brief that a contingent
6 financial interest in an outcome is not adequate standing
7 for intervention.

8 There is a reason that counsel needed to hand the
9 court the trial court's order in the Harleysville case,
10 and that is because what the trial court held is not what
11 our Supreme Court held. They are two very different
12 holdings.

13 I believe Mr. McCants may have interpreted the trial
14 court holding correctly, but he did not discuss with the
15 court the actual holding in Harleysville by the Supreme
16 Court.

17 The actual holding in Harleysville was that the
18 carrier, the insurance carrier, had waived all right to
19 challenge any portion of the verdict based upon an
20 inadequate reservation of rights letter that the carrier
21 had issued.

22 The carrier had engaged in a typical carrier
23 practice where they send a reservation of rights letter
24 early in the litigation permitting them to take control
25 of the defense while still having a conflict of interest;

1 because they are still risking the denial of coverage,
2 they are still asserting that they may not cover. And
3 they engaged in a typical practice where they copied out
4 18 pages of the policy, stuck it in a letter, and called
5 it a reservation of rights letter.

6 And the Supreme Court said you can't do that; you
7 must provide your insured with actual notice as to the
8 exclusion you are relying upon and your position as to
9 why it applies; you can't just send this 20-page letter
10 of policy excerpts.

11 We find Builder's Mutual -- excuse me, not Builder's
12 Mutual. It is the other carrier in that case. We find
13 that carrier did not do so. And we know they knew how to
14 do so because they did specifically describe their
15 reservation of rights as to punitive damages.

16 So the Supreme Court could say we know that this
17 wasn't an accident because where they wanted to they
18 adequately described what the conflict of interest was
19 and why they were going to pursue it and how they were
20 going to pursue it.

21 Now in getting to the end of the road in that case,
22 in deciding that you can't have an ambiguous reservation
23 of rights letter, our Supreme Court did cite several out-
24 of-court out-of-jurisdiction cases which say that there
25 is a conflict as to the issue of damages. And it didn't

1 say the carrier had a right to intervene or should
2 intervene. It said a carrier has a duty to advise its
3 insured before verdict that a general verdict might not
4 be in their best interest.

5 It didn't say anything about intervention. It
6 didn't say anything about the right to intervene.

7 And so the two cases we rely upon, or the movant
8 relies upon, Harleysville, that is out. The Supreme
9 Court ruled really different than Judge Miller. That is
10 out.

11 Then we go back to Newman. It is unclear that
12 Newman stands for the proposition that Builders Mutual
13 would have this Court believe. It is unclear.

14 Keeping in mind please, Newman was the second
15 action. It was the DJ action. It wasn't the original
16 action. The inadequate record referred to by the Supreme
17 Court appears, just as arguably, to be the inadequate
18 record that was made in the DJ action. It didn't have to
19 be in the arbitration.

20 Now there may have also been an inadequate record in
21 the arbitration; but that didn't fix it in the DJ action.
22 And the court said, we can't tell what's what; so you get
23 the whole verdict; that is it.

24 And we also have to keep in mind too that even if
25 Newman is not as it appears to be, that was an

1 arbitration proceeding. That was not a jury trial.
2 There was less risk of mixing insurance issues in front
3 of the trier of fact.

4 Now there's four factors for intervention, none of
5 which is satisfied by this movant. And they take big
6 issue with timeliness. Well, they may not have been
7 provided the defense they should have for this entire
8 case, but somebody over there provided a defense. And we
9 are not responsible for what the defendant does or
10 doesn't do with his notifications of character. And
11 timeliness is a huge issue in this case. Because I would
12 like to hand to the Court the deposition list that has
13 occurred in this case. It is in excess of 40 depositions
14 wherein the question is relevant to the special verdict,
15 special interrogatory, that Builders Mutual one day will
16 show us but they say they want to ask the jury about.
17 Well, those questions weren't asked in any of these 40
18 depositions.

19 The issue has not been litigated. At this point in
20 time plaintiffs have a single issue, what damage did the
21 defendants cause and what it is going to cost to fix it.
22 The proximate cause, the cost to repair it.

23 It may be that in the trial of this case we don't
24 even need to separate out Tri-County from the general
25 contractor. This is a unique case. Tri-County actually

1 is almost like a sub general contractor in this case. It
2 hired almost all of the other subcontractors.

3 So while it is not officially the general
4 contractor, it is almost a general contractor. And to
5 the extent that we settle out issues that aren't related
6 to Tri-County scope we may have the same scope for the
7 general contractor and for the Tri-County, the general
8 sub subcontractor.

9 What they're -- then would make us do is try a
10 separate case against each defendant. We are not
11 presently obligated to do that. That is a huge different
12 issue. That is a huge additional issue in what is
13 already a complicated case.

14 Now let's look at that for a second. There's a
15 reason that Builders Mutual hasn't given this Court it's
16 proposed interrogatory. What Builders Mutual hasn't told
17 this Court is that the general contractor, CBC, is an
18 additional insured on their policy.

19 So it comes to the Court saying we just want to know
20 what the consequential damages are as to Tri-County, but
21 that won't do them any good because they need to know
22 what the consequential damages are as to the general
23 contractor. Because they are insuring two different
24 parties.

25 And it has to be evaluated in two completely

1 different ways. Every insurance policy in the world
2 says, to the extent that there's more than one insured on
3 this policy, you must -- we must evaluate each claim as
4 if it is the only insured. So there has to be a
5 completely different evaluation.

6 And furthermore there's the question of is Builders
7 Mutual liable for its subcontractor's work. Is Builders
8 Mutual liable for the consequential damages of the
9 subcontractor's work. Two different questions. Two
10 completely different questions.

11 So we now have four different types of causation
12 that Builders Mutual is going to want to have this jury
13 divy up. Four different types with completely different
14 rules as to interpretation. Will the your-work exclusion
15 that applies to the subcontractor apply in the same
16 manner or in a different manner to the general
17 contractor? It is going to be a different manner.

18 And this is getting way over the head of the jury
19 now. I am holding in my hand a multipage, six-page
20 detailed spreadsheet with every insurance policy in this
21 case that we know of. I would be happy to hand it to the
22 court but then some might say I would have to hand it to
23 my opposition too ---

24 THE COURT: That's all right.

25 MR. LUCEY: --- and it's my work product. But this

1 shows dozens of carriers. We already got five here today
2 moving. Are we going to allow two dozen carriers in?

3 Once that door is open there's no reason to not --
4 deny anybody else's motion. That is a complicated
5 matter.

6 So what we see in the rules regarding intervention
7 and the cases interpreting them, the four factors,
8 timeliness, sufficient interest and standing, interest
9 inadequately protected by those in the case and no
10 alternatives, those four factors have some subjectivity
11 to it. So the court says when your're applying that
12 subjectivity apply it in a commonsense way, does this
13 really work or not.

14 We are now at the point without the intervention
15 where we have up to four different phases in our jury
16 trial after we rest the case.

17 We first have our actual damage phase. Some judges
18 have not -- no longer let us put the reckless conduct
19 interrogatory on the actual damage verdict form. They
20 are concerned we are mixing issues.

21 So then we have the reckless conduct phase.
22 Depending on the outcome of that phase we may have an
23 allocation phase or a punitive damage phase or both.

24 Your Honor, on Friday night at midnight two years
25 ago I argued the punitive damage phase to a jury. At

1 midnight on a Friday night after a full week. And it was
2 already over their head. We are going to add one more
3 phase to that on insurance phase?

4 An example of another question, Your Honor, where
5 all of these policies have a progressive damage
6 exclusion, are they going to ask the court to submit that
7 to the jury, which policies of yours are covered and
8 which ones are not because of the progressive damage
9 exclusion.

10 Yes, the judges in this state have ruled both ways.
11 Judge McDonald has denied it twice. Judge Harrington has
12 denied it. Judge Newman has denied it three or four
13 times.

14 So as far as denials I guess the parties are
15 probably -- can hand up just about the same number of
16 orders. But Judge Newman looked at Harleysville and he
17 agreed that it did not provide a bases for intervention.
18 He specifically wrote that in his order.

19 Your Honor, this is a complicated matter. We don't
20 need to be trying insurance in this case. I think the
21 movant themselves said all they want is for their motion
22 to be denied so that they claim that they can later say
23 that they are not bound in the next action. It should be
24 denied. They should all be denied.

25 And one of the five movants on intervention,

1 actually as Mr. McCants says, has personal counsel here
2 that has filed their own memorandum because they had
3 something to add.

4 THE COURT: Mr. Wheeler, what do you want to add?
5 Tell me first of all -- I will let you state your name
6 for the record and exactly in what capacity you are
7 representing Tri-County first.

8 MR. WHEELER: Sam Wheeler, Your Honor. Personal
9 counsel for Tri-County. I would obviously join Mr.
10 Lucey's arguments.

11 I am not going to repeat any of those. Because,
12 honestly, I don't understand them. I am not involved in
13 this case. You know, I don't have his knowledge of
14 facts ---

15 THE COURT: You state your candor.

16 MR. WHEELER: Yeah, well, I don't have his knowledge
17 of the facts in the case nor do I have Mr. McCants'
18 knowledge of the Newman decision. I wasn't involved in
19 that either.

20 Humble, personal counsel here for a roofer. I would
21 just back up a little bit, that the thing that I gather
22 the most from Mr. McCants' memorandum it is on Page 9 and
23 he is speaking to the Harleysville's decision. He says
24 the Supreme Court did not hold that it would be improper
25 for an insured to intervene. I would submit to you that

1 absence of law does not equal law itself.

2 And I think the dissent which he is arguing kind of
3 highlights my issue of this motion and it is moreover
4 there is no suggestion of how Harleysville could have
5 intervened in these lawsuits and asserted a defense
6 against coverage without creating an impermissible
7 conflict of interest in violation of established South
8 Carolina law. Hence my role here. Hence silence of
9 hired counsel behind me for Tri-County.

10 Builders Mutual's motion just creates a giant
11 conflict of interest. And if they are allowed to go in
12 and submit these interrogatories just continues that
13 conflict of interest.

14 Two points again I want to hammer home: Rule 24
15 doesn't allow this. It doesn't allow for limited
16 intervention. And I think what Builders Mutual is
17 avoiding in this whole motion is the elements themselves
18 in Rule 24 and then prerequisite to those elements is a
19 standing issue.

20 It has no interest other than a financial interest
21 in this litigation. It is not a homeowner. It is not a
22 property owner. It is not a builder or sub, material
23 supplier. It is an insurance company attempting to step
24 in, effectively ghost write interrogatories. So it would
25 just kind of drop on the jury. And purely for its own

1 financial well-being.

2 That is the type of interest that has been ruled as
3 peripheral by both the Geico and the Bailey v. Bailey
4 decisions. That while they predate the Harleysville and
5 Newman's decision, they are still good law. It doesn't
6 mean they are not good law.

7 This kind of out-here interest is purely financial.
8 It is not -- it does not warrant intervention into a
9 case. They are not coming in as a party. They are
10 coming in as a person writing interrogatories.

11 Thank you, Your Honor.

12 THE COURT: Okay. Who else ---

13 MR. MCCANTS: Your Honor, can I say ---

14 THE COURT: --- do I need to hear from? We have got
15 two people standing up. Happy to hear from either one of
16 you.

17 MR. COLE: Well, let me ---

18 THE COURT: Mr. Cole, just say your name again just
19 for her behalf. Thank you.

20 MR. COLE: Andrew Cole. I am here for Tri-County.

21 THE COURT: Thank you.

22 MR. COLE: I was retained by several insurance
23 policies to defend Tri-County in this case. We had a
24 construction law CLE about a week ago where this topic
25 was one of the topics. And we had a heated discussion

1 about what my role here as defense counsel for the
2 insurer and hired by the insurance copy should be and
3 whether or not we should oppose it or whether or not we
4 should stand for the insurance company.

5 I will tell you I am not comfortable taking either
6 of those positions. So officially -- because I don't
7 think the answer is answered with any of the case law of
8 what I should do, since I am in an inherent conflict of
9 interest between my insurance carrier and my client.

10 So officially I'm standing up to say I'm not taking
11 a position in this, and I hope that whatever ruling we
12 get it doesn't overcomplicate the trial. That's all I
13 have.

14 THE COURT: All right. Thank you. Yes sir?

15 MR. BUCKLEY: Your Honor, I am Ed Buckley. I am
16 associated with Mr. Lucey here in this case. And I
17 unlike most of the lawyers in this case primarily handle
18 defense of these cases.

19 So I want to give you the perspective of Mr. Cole
20 as I have experienced it over about 20 years of doing
21 this and about 15 years of this issue being presented
22 against -- as I felt, against me and my client by the
23 carriers who hired me.

24 There is no more difficult position than to be in
25 the position of having to explain to someone like

1 Tri-County that I am really here representing you; I know
2 that all of these bills are being paid by Harleysville or
3 Builders Mutual or whomever they are being paid by, but
4 trust me my loyalty is entirely with you.

5 To allow intervention is not only unnecessary
6 because there is the declaratory judgment route, ---

7 THE COURT: Right.

8 MR. BUCKLEY: --- there are declaratory judgment --
9 there is a declaratory judgment action pending across the
10 street right now in this case. All of these issues can
11 be handled there. And there is no reason in the world to
12 allow a surreptitious hidden client, hidden interest, to
13 participate in a trial. And at the point we are at now
14 we have no idea what their intentions really are.

15 We have never -- I've never seen one of these
16 motions where the actual reservation of rights letters
17 were attached and the interrogatories were attached.
18 Because we would be entitled to litigate all of that to
19 determine whether they are entitled to submit anything to
20 the jury.

21 And to add that extra burden on us and create that
22 enormous and unbearable conflict on people like Mr. Cole
23 in this case and me in other cases I'm defending, is not
24 what this court should be about.

25 Thank you.

1 THE COURT: Thank you.

2 MR. MCCANTS: May I briefly ---

3 THE COURT: Respond briefly.

4 MR. MCCANTS: Right.

5 THE COURT: Sure. And then we will move on to the
6 next.

7 MR. MCCANTS: I just want to briefly respond to
8 the -- in part the inadequate ROR. The ROR is presented
9 in this situation and given to the insurer as a
10 confidential communication work-product to the insurer.

11 This case is not to litigate ROR's in a construction
12 defect case. The Supreme Court in Harrington said it on
13 a very very limited basis, where there was an insolvent
14 defendant, before we were going to allow the ROR to be
15 admitted in the DJ action. It has no relevancy.

16 I also submit to this court the ROR issue in
17 Harrington was whether the contractor was advised of the
18 allocation by the general verdict and so forth.

19 They have counsel here. They are on notice. They
20 have been advised. They have written a nice memorandum
21 on their interpretation of law. So there is no doubt
22 that the insured in this case knows about allocation. If
23 they don't know it after today I am not sure what more to
24 tell them.

25 Complexity of this case, the complexity of this case

1 is something you just have to deal with. These
2 construction cases, while I appreciate Mr. Lucey's
3 comments, but that is for the trial judge to decide and
4 handle. He can decide, no, I am not going to do that,
5 these are beyond the evidence, etc., and so forth.

6 With regard to Mr. Cole, with regard to Mr. Buckley
7 comment, they represent when they are defense counsel
8 they represent the insurer and the insurer exclusively.

9 That was addressed pretty detailed in the recent
10 Century indemnity case which was reheard this week. Both
11 majority and the minority agreed at the Supreme Court
12 level that their duty of loyalty is exclusive to their
13 client, the insured, not the insurance company. That's
14 why I'm here representing the company. Mr. Cole does not
15 do that.

16 I would not expect neither Mr. Wheeler or Mr. Cole
17 to object to this intervention, because somebody has to
18 allocate. It is who has to do that job is the ultimate
19 question. And I'm doing it because they are not. And I
20 am trying to prevent a general verdict.

21 I have not seen the solution here offered by the
22 other side. A DJ action, you cannot adjudicate a DJ in
23 this case until the jury speaks. Indemnity is based on
24 what the jury finds.

25 Justice Beatty for the Supreme Court in the Auto

1 Owner's road case reversed the DJ judge for making
2 findings of coverage of fact, occurrence of property
3 damage, before the jury rendered a verdict. That is the
4 same thing here.

5 So to file a DJ and have it sit on the books until
6 this case is over you just as well -- I submit to Your
7 Honor it is more proper to file a DJ in a case like this
8 after the verdict, because then you would have something
9 to adjudicate.

10 I am not going to be able to tell a federal judge or
11 a circuit court judge anything about this case until this
12 case is decided. So a DJ is not the solution. In Auto
13 Owners was a DJ, Heritage a DJ. In both cases the
14 Supreme Court bound the insurer to the general verdict.
15 I am trying to prevent that.

16 THE COURT: All right. Anything else?

17 MR. LUCEY: Yes, ma'am. Builders Mutual appears to
18 be alone in their position that a DJ cannot be the
19 vehicle. We have been sued now three times in this case
20 in federal court by provided carriers. This -- we have
21 got two DJ's still pending against us. And one of them
22 actually sued every carrier in this case, as we
23 understand it.

24 Thank you, ma'am.

25 THE COURT: All right.

1 MR. FARR: Your Honor, just for -- my name is Nick
2 Farr with Gallivan, White & Boyd. I represent State Farm
3 Fire and Casualty Company. We also have a motion to
4 intervene.

5 And I just wanted to clarify. I don't know if we
6 were doing this collectively or we were going to wait.
7 My arguments are exactly the same as Mr. McCants. He was
8 very eloquent with his arguments. And I would just
9 piggyback on anything that he said. But I didn't know
10 kind of how the court wanted to handle this.

11 THE COURT: It is really up to y'all. I certainly
12 don't need to hear the same argument three or four or
13 five times. So to the extent you have anything different
14 to add on behalf of your client -- which is again for the
15 record who?

16 MR. FARR: State Farm Fire and Casualty.

17 THE COURT: State Farm, okay.

18 MR. FARR: And also, I got an email from Tim Newton
19 who represents Nationwide who has also filed a motion to
20 intervene. I -- according to his email he said he
21 didn't -- he did not have notice of the hearing but he
22 was on his way. I don't know if he is here yet or not.

23 THE COURT: Okay.

24 MR. FARR: But I think he would join in all of these
25 arguments as well so.

1 THE COURT: Okay.

2 MR. FARR: Just for the record.

3 THE COURT: State Farm, Nationwide. Who else
4 besides these three?

5 MS. HOLMES: And I am ---

6 THE COURT: Yes, sir.

7 MS. HOLMES: --- Janice Holmes. I'm here on behalf
8 of Nautilus Insurance Company.

9 THE COURT REPORTER: I'm sorry, I missed your name.

10 MS. HOLMES: Janice Holmes. J-A-N-I-C-E. I would
11 also join in the arguments that were made by counsel here
12 for Builders Mutual, Mr. McCants. Thank you.

13 THE COURT: And then you -- you filed a motion to
14 intervene on behalf of your client as well, ---

15 MS. HOLMES: I did.

16 THE COURT: Nautilus?

17 MS. HOLMES: Yes.

18 THE COURT: Okay.

19 MS. HOLMES: There were two motions. One for --
20 Miracle Siding and then also one for Alonzo Vasquez.

21 THE COURT: Okay. All right. Anybody else?

22 MR. REESER: Your Honor, my name is Brandon Reeser.
23 I have been retained by Nautilus Insurance Company and
24 represent ---

25 THE COURT: Okay.

1 MR. REESER: --- Vasquez and Wilson Lucas Sales DB
2 Miracle Siding, LLC. Since these arguments are global I
3 just wanted to join in Mr. Cole's comments and put that I
4 shared his position on the record as defense counsel for
5 those issues.

6 THE COURT: All right.

7 MR. FORD: Your Honor, briefly.

8 THE COURT: Sure.

9 MR. FORD: Cordes Ford on behalf of American
10 Residential Services, LLC, a subcontractor --
11 representing a subcontractor for the case that did HVAC
12 and electrical.

13 The State Farm motion is brought on behalf of one of
14 ARS's subcontractors. I will go on record supporting the
15 position of the plaintiffs and Mr. Wheeler on behalf of
16 the insured and in that position on behalf of ARS.

17 THE COURT: Okay. Sure. Anything else to add
18 or ---

19 MR. FORD: Well ---

20 THE COURT: You don't have to. I don't mean to put
21 you on the spot.

22 MR. FORD: I will just ---

23 THE COURT: Now is the time.

24 MR. FORD: I will just -- I will just -- you know,
25 not to pile on, but Mr. McCants made a statement that he

1 won't take action until the evidence is submitted by the
2 parties at trial.

3 Well, for the defense counsel who are involved in
4 submitting evidence at trial I believe that puts us in a
5 very uncomfortable position of conflict. Because we have
6 got to consider what evidence to oppose and what evidence
7 to present, knowing all the while that special --
8 interrogatories might be asked at the end that go to the
9 question of coverage. And we know on behalf of our
10 clients that our clients are better off if there is -- if
11 there is damage found that it is covered.

12 So I think that puts into our thought process
13 something that is inappropriate for us to be thinking
14 about during trial.

15 Thank you.

16 THE COURT: Anybody else? Yes sir.

17 MR. LUCEY: And our response is pretty much the same
18 except to again emphasize, Your Honor, and in partial
19 response to one of Mr. McCants' last points, we may not
20 be entitled to the reservation of rights letters under
21 whatever normal circumstances might be. These are not
22 normal circumstances.

23 They are coming into a case where they don't belong.
24 The only way for us to know what they want to achieve at
25 the jury trial, at the end, is to have that reservation

1 of rights letter or a pleading or both. We don't have
2 any of that here.

3 So for that additional reason -- and we have none of
4 the reservation of rights letters from -- or they were
5 not attached to the motions from Nautilus, Nationwide,
6 State Farm, or Builders Mutual. So they are all the
7 same.

8 THE COURT: Okay.

9 MR. ADKINS: Your Honor, I feel compelled to speak.

10 THE COURT: That is fine.

11 MR. ADKINS: Jim Adkins. I represent a
12 subcontractor, WC Services. It is going to be brief.

13 THE COURT: Mr. Atkins, are you with Clawson and
14 Staubes?

15 MR. ADKINS: Yes, I am.

16 THE COURT: And I only bring that up --
17 apparently -- I need to do this when they are on the
18 record as opposed -- I think my clerk was recently
19 offered a position with Clawson and Staubes. I am happy
20 to recuse myself from the matter to the extent your
21 client is related to this if that poses a problem for
22 anybody. Don't know that she has accepted an offer yet.
23 But I think this is recent -- a recent transaction.

24 But if anybody -- I will tell you, I think out of an
25 abundance of caution I am just going to step off of the

1 bench for about 30 seconds or a minute and let y'all hash
2 out amongst yourselves and then come back on the record.

3 You standing up just reminded me of that fact,
4 notified me of this morning. So I think ---

5 MR. LUCEY: The plaintiffs don't need the Court to
6 leave. We waive.

7 (WHEREUPON, break was had 10:47 a.m. while judge steps
8 off bench.)

9 (WHEREUPON, resume hearing 12/17/18, 10:51 a.m.)

10 THE COURT: Okay. Have y'all have time to discuss
11 it?

12 (WHEREUPON, counselors voice they have no objections to
13 proceeding with hearing under Judge McCoy.)

14 THE COURT: Okay. All right. I appreciate y'all
15 letting us put that on the record briefly. All right.
16 And with that, Mr. Adkins, please continue.

17 MR. ADKINS: Yes, ma'am. My client in the case is
18 Dixie Services. It requires -- from the subcontractor,
19 general contractor; and they're insured by Nationwide.
20 And as was previously stated by Mr. Cole with respect to
21 what you are hearing on the various motions to intervene,
22 including one that has been filed by Nationwide, I am
23 taking no position on the issue.

24 THE COURT: Okay. Thank you.

25 Yes, sir?

1 MR. KENDALL: Good morning. I am Everette Kendall
2 on behalf of CBC and the general contractor. We are
3 additional insured on a number of these policies. And in
4 that regard we would join the plaintiffs in objecting to
5 the intervening.

6 THE COURT: Okay. Thank you.

7 MR. POWELL: Your Honor, Graham Powell. Can the
8 Court just do that for everybody since not everybody here
9 feels like they need to stand up.

10 THE COURT: Yeah, absolutely.

11 MR. POWELL: Please stand up ---

12 THE COURT: I mean to the extent -- I mean I don't
13 know ---

14 MR. POWELL: Everybody is protected who needs to be.
15 I am not joining in that. I just wanted to move along.

16 THE COURT: All right. Well, that is why I said if
17 anybody feels the need -- it certainly is not necessary
18 from my perspective but. All right.

19 Well, motion to intervene I will look at the cases
20 y'all handed up from various circuit courts and most
21 certainly the Supreme Court cases y'all have cited. And
22 I expect to issue a ruling within the next day or two on
23 that. I don't think that will take me very long.

24 What is next? Is there a partial summary judgment
25 motion pending as well or ---

1 MR. LUCEY: I think a motion to quash ---

2 THE COURT: Motion to quash. All right.

3 Yes, sir?

4 MR. MCCANTZ: May I be excused?

5 THE COURT: Absolutely. Yes. By all means everyone

6 in here you -- if you want to leave at any time you are

7 not held hostage.

8 (WHEREUPON, end of partial transcript for motions to

9 intervene.)

10 (WHEREUPON, various attorneys exit the courtroom.)

11 (WHEREUPON, begin Anderson Windows motion to quash and

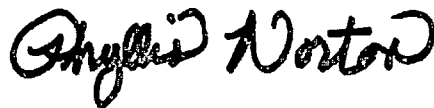
12 for protective order.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on December 17, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: April 16, 2019

Certified Transcript Provided For: John L. McCants
Certification Reference #2019-0416

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

2)

3 COUNTY OF CHARLESTON) CASE NO. 2015-CP-10-0955

4)

5 Palmetto Pointe as Peas) Transcript of Record
Island Condominium)

6 Property Owners)

7 Association, Inc., and)

8 Jack Love,) Date: April 25, 2019

9 individually, and on)

10 behalf of all others)

11 similarly situated,

12 Plaintiffs,

13 vs.

14 Island Pointe, LLC,
Leonard T. Browne,
15 Complete Building
Corporation, et. al,

16 Defendants.

17

18 * * * * *

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B E F O R E:

20

The Honorable Jennifer McCoy

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23

Denise J. Lauder, RPR
Ninth Judicial Circuit

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25

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COURT'S EXH 1 Copy of Order 31

1 (The following proceedings were held
2 April 25, 2019, 9:47 a.m., Court of Common Pleas,
3 Judge McCoy.)

4 THE COURT: All right. We're here on
5 Plaintiff's motion to lift the stay, I understand;
6 is that correct?

7 MR. BUCKLEY: Yes, Your Honor.

8 THE COURT: Initially, at least. I'm
9 happy to hear from you.

10 MR. BUCKLEY: Ed Buckley, Your Honor,
11 for the plaintiffs. And here with me today is
12 Justin Lucey and my partner Russ Hines.

13 The first thing I want to point out for
14 Your Honor, if I can approach the bench --

15 THE COURT: Sure.

16 All right. I've reviewed what you've
17 handed up.

18 MR. BUCKLEY: On April 8th, the day
19 this Court issued its order, we were in the process
20 of taking depositions as noticed by Mr. Kendall in
21 my office. Actually, these depositions were
22 taken -- the first deposition was taken in
23 Mr. Lucey's office, and we then transferred for the
24 rest of the seven days to my office.

25 At 1:05, we decided, before we began

1 the third deposition of Mr. Peters, that we would
2 put a stipulation on the record as to how we would
3 proceed. Everyone wanted to make sure that by
4 proceeding with the depositions, nobody was waiving
5 any future objection to the jurisdiction of this
6 Court to proceed with any matters that were not on
7 appeal.

8 I made it very clear at that time that
9 the plaintiffs were putting on the record that the
10 plaintiffs want to make it clear that we're going
11 to challenge by all available means the order
12 signed by Judge McCoy, which is staying this case
13 based on the intervenors' appeal, because we do not
14 believe that the appeal of an intervenor should be
15 allowed to stay this case.

16 If anyone relied on that stay to their
17 detriment, they have nobody to blame but
18 themselves. They have not proven that they relied
19 in any way on the stay, to their detriment.
20 They've just made illusory allegations in that
21 regard.

22 Another initial matter, Your Honor, I
23 see that Mr. Kendall's not at counsel table. Only
24 the carriers' attorneys are at counsel table. I do
25 not believe they have a right to be heard here

1 today. They have removed themselves from your
2 jurisdiction by appealing. Their issues are under
3 the exclusive jurisdiction of our appellate courts,
4 not Your Honor.

5 However, the other issues -- all other
6 issues are under the exclusive jurisdiction of Your
7 Honor, not the appellate court.

8 What issues are those? The issues to
9 determine admissibility of evidence at trial; the
10 issues to determine discovery disputes; the issues
11 to determine whether or not parties get to testify,
12 experts, for example; the issues of whether or not
13 construction defects exist at this project; who may
14 be responsible for those construction defects; the
15 cost of repairing those construction defects;
16 consequential, actual, and punitive damages as a
17 result of those defects; and potentially loss of
18 use to the owners because they may have to move out
19 of their residences in order to have their
20 properties repaired.

21 During the seven days, beginning on the
22 eighth and ending on the sixteenth, Mr. Kendall and
23 his colleagues on the defense side took 39 owner
24 depositions in this case. For him to tell this
25 Court that we stood down, that anybody stood down

1 after your order is simply untrue.

2 What is on appeal? What does the
3 appellate court have jurisdiction over? Only the
4 insurers' petitions, the denial of your order
5 denying their petitions to intervene in this case.

6 And it's not even really an
7 intervention. They never sought to become parties
8 to the case. The only parties to this case are the
9 parties on the caption in the underlying
10 litigation.

11 The parties have a right to be -- to
12 have a trial of this case, which is in its fifth
13 year. The fourth anniversary came in February of
14 2019. We are now into the fifth year. To allow
15 this case to continue to be stayed for another two
16 or three years while the appeal goes forward would
17 be a denial of justice. It would be a denial of
18 this Court's authority to exercise control over the
19 trial of this case.

20 And most importantly, if we go forward
21 as scheduled and as this case has been scheduled
22 since October 31st of 2018, in all likelihood, more
23 parties will settle out just as Creekside did last
24 week.

25 As you may recall, you got notice that

1 Creekside was withdrawing its motion -- or
2 withdrawing its opposition.

3 There are actually several things
4 before Your Honor that Your Honor can rule on and
5 needs to rule on. Number one, the order lifting
6 the stay; number two, the FCCI motion to intervene.
7 That's an insurer for Mr. Kendall's client.

8 And Mr. Kendall -- by issuing the
9 Court's stay order in this case on the 8th, Mr.
10 Kendall has actually received the relief he sought,
11 which was a stay.

12 It's interesting that he's not up here
13 at this table. He's the only party -- or the only
14 lawyer for any party who has a right to be arguing
15 before you.

16 What happens if you're wrong, if you
17 lift the stay and you're wrong? The same thing
18 that always happens: We go up on appeal and you
19 get a new trial. But why have piecemeal appeals?
20 Why go through two and a half, three years of
21 appeals with this nonsense of an interference as
22 opposed to an intervention?

23 Instead, Your Honor, allow the case to
24 go to trial and let's appeal the judgment that
25 results and consolidate the appeals and save

1 everybody a huge amount of time, effort, and
2 judicial resources.

3 Mr. McCants and I have been down this
4 road before, as Your Honor can see, right here in
5 this courthouse. At that time, there was a young
6 judge named Stephanie McDonald, who was a trial
7 judge in the case of Montclair.

8 Mr. McCants moved to intervene on
9 behalf of the carrier called ALIA; intervention was
10 denied. When it was denied, he immediately sought
11 relief in the court of appeals. The same day that
12 he sought that relief, Judge Fuge signed the order
13 saying proceed to trial.

14 Similarly, in the case where
15 Frankenmouth moved to intervene in another case
16 where I think Judge Dennis denied the motion to
17 intervene, the case was then subsequently up for
18 trial before Judge Young. Frankenmouth appealed
19 shortly before trial.

20 Within about a three or four-day
21 period, this is what happened: The plaintiffs
22 moved to lift the stay before Judge Young. Judge
23 Young advised everybody by e-mail he did not
24 believe that that appeal by an intervening
25 insurance company stayed the trial, and he planned

1 to proceed unless he heard to the contrary from
2 Columbia, from the appellate courts.

3 At that point, there was a petition for
4 a supersedeas under Rule 241 to the appellate
5 court. Ironically, who signed the order directing
6 the trial to go forward? Judge McDonald who's now
7 on the court of appeals.

8 We also have had a case where Vic Rawl,
9 Junior appealed six different orders from the
10 Honorable Roger Young during the course of a class
11 action. And Judge Young, in that order that we've
12 attached as part of our motion -- our memorandum,
13 ruled that he did not believe -- he had concerns
14 about whether that order was -- those orders were
15 appealable, but, in any event, wasn't going to stop
16 the class action from proceeding while those issues
17 were on appeal.

18 I've actually -- in my 35 years of
19 practice, Your Honor, I've actually had this happen
20 about ten times, and I've been on the other side of
21 this table. I've been on this table (indicating)
22 when it was happening when the insurance carrier
23 was right here.

24 I tell you one thing that I've always
25 done, I've opposed it. Always.

1 And I've told the carrier, I'm sorry,
2 but I'm going to have to oppose this because I
3 don't represent you. I represent this insured and
4 it is not in his best interest to have this trial
5 stayed or stopped while you guys can go up to the
6 court of appeals and do nothing but delay this
7 process.

8 To tell you how outrageous this can
9 get -- this is real life. This really happened.
10 This guy right here, Russ Hines, my partner -- a
11 very nasty burn case was in trial in Walhalla.
12 Judge Nicholson was the judge. We were monitoring
13 the trial. We are not -- on behalf of a carrier.
14 We were not participating in the trial.

15 The judge bifurcated the issues of
16 liability and damages. This guy, Mr. Hines, filed
17 a notice of intent to appeal after the liability
18 verdict came down and before the damages hearing
19 could start.

20 Well, guess what happened? The Court
21 ruled in Univar that that was an appealable order,
22 but it shouldn't stay the rest of the case. And
23 Judge Nicholson correctly proceeded with that after
24 voicing his sincere and utter outrage. But that's
25 how ridiculous it can get.

1 How much more ridiculous can this case
2 get? Let me point this out: If we are at trial
3 and we -- all the evidence is in, all the motions
4 for judgment as a matter of law have been heard,
5 we're arguing about jury charges, form of verdict
6 and what we're going to do to get the case to the
7 jury.

8 At that point, a potentially
9 intervening insurance carrier says, we move to
10 intervene. You deny that motion. We notice our
11 appeal. They notice their appeal. Judge, this
12 case is stayed. It can happen. It will happen.

13 We tried a case in front of
14 Judge Newman, Mr. Lucey and I, in the summer of
15 2014. In that case, Robert Lyles was on the
16 defense side. There were a number of insurance
17 carriers. There were motions to intervene. There
18 was an appeal right before trial. Judge Newman
19 proceeded with trial.

20 During the trial, there was another
21 notice of appeal filed. Again, everybody says,
22 Judge, you can't go forward with this trial.

23 We did. We went to trial. We got a
24 big verdict. We settled the case.

25 The parties for this case have a right

1 to have their claims and defenses adjudicated. The
2 only parties with substantial rights to be decided
3 are the plaintiffs, the defendants, and the
4 third-party defendants. Insurance carriers have no
5 substantial right to play any role in this trial
6 and they have no right to be here today.

7 This Court is the only court that has
8 jurisdiction over all the issues that matter to the
9 parties. And I implore Your Honor to exercise your
10 jurisdiction and put the case back on the roster
11 for the 6th.

12 I can assure you that in all likelihood
13 it will not take the full two weeks, because many
14 of the people who are here or didn't bother to come
15 today will be not there for the trial.

16 Thank you.

17 THE COURT: Thank you.

18 Who would like to speak?

19 MR. Newman: Yes, Your Honor. Tim
20 Newman representing Nationwide, one of the
21 carriers.

22 MR. BUCKLEY: Your Honor, I just want
23 to voice my objection on the record.

24 THE COURT: Yes. I think it was made
25 earlier, but it's certainly renewed. Noted for the

1 record. Thank you.

2 MR. NEWMAN: Objection to?

3 THE COURT: You even appearing at
4 counsel table since you're not technically -- your
5 client you're representing is not actually a party
6 to the case, but go ahead. Continue.

7 MR. BUCKLEY: Let me go ahead and --

8 THE COURT: How about you say it?

9 MR. BUCKLEY: Let me go ahead and state
10 it.

11 THE COURT: Go ahead.

12 MR. BUCKLEY: Yeah. Your Honor, my
13 objection to Mr. Newman stating anything in this
14 courtroom is he's not a counsel of record for any
15 party to this case, and he has appealed all issues
16 that pertain to him.

17 The sole court that has jurisdiction
18 over anything that matters to him is the court of
19 appeals at this time, and the same thing goes for
20 Mr. McCants.

21 THE COURT: Thank you. Noted. And I
22 will, over your objection, allow Mr. Newton to
23 speak at this time.

24 MR. NEWTON: Likewise, I object to the
25 way some of these arguments were made. I think

1 that we can argue these things in a civil manner.

2 Now, we did not -- listen, I represent
3 Nationwide. We have John McCants here from
4 Builders Mutual and Janice Holmes for Nautilus.
5 There's actually another carrier that has filed a
6 motion to intervene and that does involve Complete
7 Building Corp. I believe Brett's here and then
8 James Glenn.

9 A couple things I want to say. First
10 of all, it was admitted that when you're
11 representing -- when the lawyer representing the
12 defendants -- say there was a contractor -- the
13 plaintiffs have sued a bunch of contractors. That
14 lawyer doesn't represent the insurance company.

15 So you have three different -- we call
16 it the tripartite relationship. There is the
17 plaintiff that sues the defendant. Then you have
18 this other contractual relationship between the
19 insured defendant and that defendant's carrier.

20 The -- when the plaintiff sues the
21 defendant, the carrier cannot just act on its own
22 behalf. The carrier -- the carrier has to hire a
23 lawyer to defend that claim and the insurer is not
24 a party.

25 But the problem is -- and this -- Your

1 Honor, I'm sensitive to the situation of, you know,
2 the delay. In fact, we went ahead and moved to get
3 this thing right up to the supreme court because we
4 do need an answer to this question. We really do.

5 Because this whole thing -- and, you
6 know, what I really object to, this whole thing was
7 not created by insurance companies or insurance
8 company lawyers. This whole situation was created
9 by the supreme court.

10 By inserting certain things into the
11 Newman opinion, they said, in particular, that
12 certain issues can't be decided in a DJ that's set
13 up to handle the insurance issues.

14 So -- and, in fact, the Court went so
15 far as to hold that if certain things were not
16 gotten on the record in what we call the underlying
17 case, the tort case against the contractor, then
18 that's waived.

19 So then the question becomes, okay, how
20 can our rights be -- how can insurance companies'
21 rights be adjudicated when there's nobody there?
22 Nobody's standing there to -- to act on its behalf.
23 That's how this all -- that's how this all got
24 started.

25 Right now Your Honor has already ruled

1 that this -- it's jurisdictional. The case is
2 stayed. So what this really is, as I see it, this
3 is a motion for reconsideration. And really,
4 there's no changing the law. There's none of the
5 factors that -- that drive a motion to reconsider
6 apply here.

7 But to the extent they're moving to
8 lift the stay, I just want to point out that
9 there is -- I think the standard -- you know, we're
10 all sort of trying to feel our way forward on this
11 because it is unusual, what the court did in Newman
12 in Harleysville, so it's hard to understand how to
13 do this.

14 But Rule 205 says that any -- that once
15 there is an appeal filed, the appeals court has
16 exclusive jurisdiction and that the lower court or
17 the trial court cannot proceed on anything, any
18 matters that affect the appeal. That's the issue.
19 That's what we are here today to talk about.

20 If -- assuming that you get past the
21 motion to reconsider and the fact that you've
22 already ruled, it does this -- affect a matter on
23 appeal.

24 And the whole point here is that the
25 Supreme Court has ruled that certain things have to

1 be decided in this case that affect -- I mean,
2 Nationwide has filed DJs. And, in fact, the judge
3 let us go forward, but the whole problem is if the
4 Supreme Court says certain things have to be cited
5 in this trial, then we need to be here to assert
6 our rights.

7 Now, Ed has made a big deal of the fact
8 that the insurance companies are not parties. That
9 is what's on appeal. So, you know, there is no --
10 he has no right to say that. In fact, the
11 insurance company, the insurance carriers have
12 moved to intervene so that they can do whatever it
13 is -- and that's what Newman -- we didn't limit our
14 request to requesting special interrogatories or
15 special verdict form. We want to do whatever it is
16 that Newman requires us to do in this case.

17 If that makes us parties or whatever, I
18 mean, I think the Supreme Court has to figure that
19 out. They imposed this on us by saying we waived
20 it by not doing it, but then they never gave us a
21 way to do it. So now here we are trying to figure
22 it out.

23 So I think that practically -- you
24 know, just assuming you pass the standard,
25 practically it makes most sense to let the Supreme

1 Court figure it out because then this will all
2 stop.

3 All this intervention, it happened as a
4 result of Newman, which the Supreme Court kind of
5 sprung on the parties in that case. And then the
6 initial Harleysville opinion, which said that if --
7 you know, don't kind of double down on that because
8 you didn't raise this, there's an alternative
9 ground, but what we really want here is not delay.

10 We just want to know -- we just need to
11 have the Court rule on how this is supposed to be
12 set up.

13 And the plaintiffs are going to --
14 they're going to seek a general verdict, which is,
15 here's -- you know, the defendants were negligent
16 and here's the amount of damages. Boom.

17 But the supreme court said that if we
18 don't get this allocated under Crossmann and the
19 statutes that have been passed, you have to figure
20 out what was defective, what it damaged, and kind
21 of separate out the damages that way.

22 And so, anyway, just to get past the
23 practical things again, back to the standard, what
24 Ed and Justin have to prove is that this will --
25 they're the ones seeking to stop the stay. And so

1 what they have to prove is that this is going to
2 moot an issue on appeal or that -- let me just read
3 from a rule, Rule 241.

4 This is what the Court is supposed to
5 consider: Whether an order is necessary to
6 preserve the jurisdiction of the appeal or prevent
7 a contested issue from becoming moot.

8 That is rule -- Appellate Rule
9 241(c)(2). That's what they have to prove here
10 because we're not seeking to supersedeas. We don't
11 even think we have to. And I understand it's been
12 done, but I don't think the appellate rule requires
13 it.

14 I think that they move to lift the
15 stay -- there's a general rule, automatic stay.
16 Then there's the exceptions and -- if, like, for
17 instance, they go get a money judgment, that would
18 be an exception.

19 So in order to get a stay if that went
20 on appeal, you'd have to get a supersedeas. That's
21 where supersedeas comes in.

22 But this is an automatic stay case, and
23 so Your Honor has ruled it's jurisdictional, and I
24 do think it is. It's a matter that affects the
25 appeal because once they try the case and get a

1 general verdict, you can't unscramble the egg.

2 That's what the supreme court has said.

3 So that is -- that is the whole
4 question: Do -- how do you do this if it has to be
5 done?

6 And so we definitely object to the
7 argument that the insurance carriers are not
8 parties. In fact, they moved to intervene and
9 that's on -- that's on appeal, and I don't think
10 this Court has, at this point, authority to make
11 that determination. That's what we're trying to
12 get decided.

13 And because the whole -- the way the
14 verdict comes down is the whole issue that's on
15 appeal; that makes it jurisdictional because it's
16 affected.

17 Now, we have looked at -- we put in our
18 briefs the Stokes-Craven case that defines effects
19 very broadly. Judge Beatty -- that's right,
20 Justice Beatty, who has written a number of cases
21 that involve insurance issues, but in that
22 particular case the issue was whether -- you had a
23 legal malpractice case and then an underlying case
24 that brought up legal malpractice case.

25 And what Justice Beatty said was that

1 you have to -- that the statute of limitations gets
2 stayed, gets tolled, until the appeal runs out in
3 the underlying case. So what essentially he's
4 saying is that affects -- even another case can
5 affect the merit -- you know, what's on appeal.

6 And so we think definitely that because
7 of -- and it's not our -- you know, it's not
8 something we made up. It's something that the
9 supreme court said, that you have to somehow get
10 these things on the record so that you can allocate
11 a verdict.

12 And since that's what is on appeal,
13 that -- that the trial is affected by the issues on
14 appeal; therefore, it's jurisdictional. It's
15 actually subject matter jurisdiction. I understand
16 there's some -- a footnote that says it's not, but
17 then there are plenty of other cases that says it
18 is.

19 So we think that subject matter
20 jurisdiction of how you -- how the verdicts are to
21 be set up is on appeal right now. And since it is,
22 this case can't go forward.

23 Now, you know, we -- there's been some
24 examples of some other cases where other things
25 have been done. In -- the one case involved a pile

1 of dirt. A guy let some people dump dirt on his
2 property and then later he said that it wasn't, you
3 know, the right kind of dirt.

4 You know, that's not a construction
5 defect case. There was other issues in the -- in
6 fact, my client in that case didn't even -- we
7 filed notice of appeal, but we didn't pursue it.

8 We don't think we need to pursue
9 supercedeas. That goes away. Supercedeas has a
10 much different standard, so that's why that's all
11 distinguishable.

12 So the bottom line here, and we can go
13 on and on about this, we are sensitive to the fact
14 that it delays the case. Understood. But we want
15 to get -- we want to get this hammered out so we
16 don't have to keep going through this.

17 It's not a charade. It's something
18 that -- I mean, I didn't want to do it. I would
19 much rather decide everything in a DJ, but here we
20 are. It's because the supreme court kind of put us
21 in that position, but the issue here is, is going
22 forward with the trial a matter affected by the
23 appeal?

24 And I think it definitely is because
25 the whole issue is how the verdict has to be set up

1 and how can you try the -- and the last thing I
2 want to say here is, if, in fact, you go forward
3 with the trial and then the supreme court says you
4 have to do it some other way, then the whole thing
5 is null and void. We'd have ab initio. That's
6 what happened in -- I think it was the Arnell case.

7 But, anyway, it was a family court
8 case. The husband got hit with a contempt order
9 and the appeal court came back and said, well, that
10 order is void ab initio because it was a matter
11 affected by the appeal.

12 And in the Arnell case, *Arnell v.*
13 *Frasier* 37 SC 512, I believe -- sorry, my eyes are
14 getting bad on me -- the Court goes through a
15 number of issues and just issue by issue decides
16 whether it's a matter affected by the appeal.

17 The key language from that court is
18 under Rule 225, which is the predecessor to
19 Rule 241, the lower court may not act or issue
20 orders that affect an issue on appeal.

21 There you are. Thank you, Your Honor.

22 THE COURT: Thank you.

23 Anybody else?

24 MR. MCCANTS: May it please the Court?

25 I'm John McCants on behalf of Builders Mutual and

1 let me respond first to the standing issue. Of
2 course we have standing. They have moved, pursuant
3 to the appellate court rules, pursuant to 241, to
4 lift the stay, and the first tier to do that is to
5 ask the lower court.

6 So they are doing something pursuant to
7 the --

8 THE COURT REPORTER: I can't hear you,
9 Mr. McCants. I'm sorry.

10 MR. MCCANTS: I'm sorry. I'll speak
11 up.

12 THE COURT REPORTER: Thank you.

13 THE COURT: If you want to move the
14 podium or stand up, make yourself at home.

15 And while you're doing that,
16 Mr. McCants, and getting your notebook squared
17 away, we have some visitors in the courtroom,
18 everybody.

19 (There was a break in these
20 proceedings.)

21 THE COURT: Thank you. Mr. McCants.

22 MR. MCCANTS: Thank you, Your Honor.

23 Again, I'm here on behalf of Builders Mutual
24 Insurance Company, and Builders Mutual does have
25 standing. Part of the motion that's been presented

1 to this Court is a petition to lift the stay. That
2 petition to lift the stay is pursuant to Rule 241
3 of the appellate court rules.

4 The appellate court rules can be
5 standing. The first level that they move it has to
6 go through is the lower court, and then may go to
7 the appellate court. So this is part of my appeal.
8 This is that Builders Mutual -- we do have
9 standing.

10 Number two, this is very
11 straightforward with regard to the stay. The South
12 Carolina Supreme Court -- and I have referred to
13 published decisions by the appellate court, the
14 South Carolina Supreme Court, and the court of
15 appeals that very matter of factually say, Your
16 Honor, with all due respect, cannot issue orders
17 that affect the appeal.

18 It does affect the appeal. We have
19 attempted to intervene. Respectfully, your Court
20 denied it. We have appealed that decision. We've
21 asked to be part of the trial in order to have
22 special interrogatories. If it goes to a general
23 verdict, then our appeals may effectively be moot.
24 So I will argue that.

25 So what we've asked to do respectfully

1 is to intervene. That's been denied. That's on
2 appeal. So going forward with a petition to lift
3 stay does straightforwardly affect the appeal.

4 Two published decisions -- I heard some
5 stories, I heard delaying nonsense, et cetera, but
6 with all due respect, we're doing this by the
7 rules. The rules allow it. The supreme court
8 allows it.

9 I have briefed extensively about
10 intervention and the appellate rights and the
11 automatic appeal and the ability to appeal would be
12 deleted.

13 I have tried to move this along in some
14 measure by almost immediately moving to transfer
15 the case to the South Carolina Supreme Court. So
16 I'm doing what we can to get the issue to the -- to
17 the judicial body that probably needs to answer
18 these questions.

19 Thank you very much.

20 THE COURT: Yes, sir. Thank you.

21 Yes, ma'am.

22 MS. HOLMES: I'm Janice Holmes, I'm
23 here on behalf of Nautilus Insurance Company. I'm
24 not sure if Your Honor needs to hear any additional
25 argument. I would join in with the argument of

1 counsel for Builders Mutual and Nationwide.

2 THE COURT: Okay. Thank you.

3 MR. BUCKLEY: I omitted to object to
4 Nautilus. Same objection as to Nautilus, Your
5 Honor.

6 THE COURT: Sure. I understand that to
7 be a blanket objection to these counsels on behalf
8 of the interveners. Thank you for that.

9 Yes, sir.

10 MR. KENDALL: May it please the Court?

11 THE COURT: Yes, sir.

12 MR. KENDALL: Everett Kendall on behalf
13 of CBC. And my name has been thrown around, so I
14 felt like I needed to stand up and speak for just a
15 moment. I sat behind the rail simply because the
16 chairs at counsel table were full. I don't think
17 you waive any rights to participate in a hearing by
18 sitting behind the rail.

19 First, just a comment on the
20 stipulation that we entered into when we received
21 word of the order.

22 THE COURT: And you know what,
23 Mr. Kendall? I'm going to have this marked as
24 Court's Exhibit 1 while we're --

25 MR. KENDALL: Thank you.

1 THE COURT: -- discussing it. Please
2 continue.

3 (PLF. EXH. 1, Copy of Order, in
4 evidence.)

5 MR. KENDALL: We received word of the
6 order indirectly. Somebody happened to see it on
7 the website. It didn't come through e-mail on the
8 day you filed it. And so when we did get it, we
9 stopped and talked among ourselves.

10 The primary consideration in going
11 forward was the fact that we had scheduled 40-plus
12 depositions to take place over a seven-day workday
13 period. We were stacking five and six deep. Folks
14 were coming in from out of town; they were taking
15 time off work.

16 Stephanie Drawdy had done an enormous
17 amount of work to schedule those homeowners the way
18 she did. Out of respect for her and for the
19 homeowners, we thought it better to go forward.

20 We thought we avoided the very use of
21 that that has happened here today. We thought we
22 had said this will not be used as a sword. We are
23 doing this as a conciliation for the inconvenience
24 of the lawyer, Ms. Drawdy, and these witnesses.

25 THE COURT: Well, I think that's how,

1 at least, this Court interpreted it.

2 MR. KENDALL: Thank you. I just wanted
3 to clarify that that's what happened in that case.

4 THE COURT: Sure.

5 MR. KENDALL: I also just want to
6 comment on this aspect of things. I moved for a
7 continuance. I did not move for a stay. I don't
8 have to move for a stay, and I don't know that
9 that's even a thing. A stay is in place.

10 THE COURT: A stay is automatic.

11 MR. KENDALL: Correct.

12 THE COURT: Okay.

13 MR. KENDALL: So I asked the Court
14 to -- we had been here at a status conference and
15 you raised -- the question had come up and there
16 was no motion pending before you. There was
17 nothing to act on, so I suggested -- I thought,
18 I'll ask for a continuance until it sort of gets
19 resolved, because I felt like this is where we
20 would be, is that there would be a stay that would
21 come into play. So I asked for the continuance.

22 That has not been ruled upon, but the
23 basis of that remains the same as it does now; and
24 that is, that because of the potential to moot and
25 to make futile, everything we do in preparing for

1 and for prosecuting this trial because of a stay,
2 and/or potentially the result of the appeal itself,
3 judicial economy, fairness to all parties concerned
4 would suggest that a continuance should be granted.

5 At that time, and still to this day
6 there has been no motion that I'm aware of to lift
7 that -- to dismiss the appeals. So those appeals
8 are going forward.

9 And so, Your Honor, I move in that --
10 and the reason I am, as you know, in a -- as all
11 defense counsel are in these situations, in a bit
12 of a precarious situation. Mine's a little bit
13 different due to the terms of an agreement that has
14 been reached.

15 But, in general, we can't take a
16 position specifically on the issue. So I came on
17 behalf of myself and the defendants to say, can we
18 please not go forward if this thing is going to be
19 moot? And that's sort of the kind of approach that
20 we've taken.

21 So, Your Honor, I think that if -- to
22 put us through what potentially could be a mock
23 trial is -- is so costly to the court system and to
24 the defendants and to the plaintiffs. And,
25 unfortunately, like has been said, we didn't create

1 the situation; we're trying to live in it. And
2 this is what we thought was the response that was
3 appropriate for us. So thank you, Your Honor.

4 THE COURT: Sure.

5 Mr. Cole.

6 MR. COLE: Yes, ma'am. Your Honor.

7 I'm Andrew Cole, Tri-County, who -- builders mutual
8 is one of my carriers for Tri-County and for
9 JMC Construction. I'm not going to spend a lot of
10 time up here talking.

11 I don't want to get into too many of
12 the prejudices, but I -- what did strike me is part
13 of the argument we got from plaintiff's counsel is
14 that the defendants should have just ignored your
15 duly filed order that you sent staying the case.

16 I remember when I heard about that,
17 because I had somebody covering those depositions
18 for me on that Monday, that I went to the Court's
19 website to try to pull up a copy of that order, but
20 I could not going through the regular portal
21 because the case had been completely removed from
22 the active trial docket and said that the case had
23 been stricken.

24 It did note that it was because it was
25 stayed, but it meant essentially that the case

1 wasn't around anymore.

2 And so we had an order that, you know,
3 now the plaintiffs are saying, well, don't pay
4 attention to what the judge said.

5 And also on that point, that order is
6 something that distinguishes what everybody has
7 been arguing here about trying to get a supersedeas
8 and other motions in front of the appellate court.
9 That was an order that was already filed that said,
10 the case is no longer right now.

11 I was trying to think of how this
12 applies if we try to undo the stay, which is what
13 they're trying to get to. It's kind of like a 40J
14 motion, where -- and I'm not trying to advocate
15 that we get a whole other year for the case to go
16 out there, but the essence of a 40J motion is, once
17 the case is put on the docket, you have a little
18 bit of time between when it was taken off or when
19 it's put back on before you have to try the case.

20 And you also, when you look at the
21 regular rules as well, once the case gets put onto
22 the active trial docket, you still have at least 30
23 days before you have to go forward.

24 So now we've got a time where there has
25 been some delay in the stay being ordered, then we

1 have the motion to appeal or to redo your motion
2 for the stay, and now we've got a week to get
3 ready.

4 I've sent a letter or sent an e-mail
5 that had some points that I don't think the
6 plaintiffs' prejudice is as bad as they're crying,
7 but I do think there is some prejudice that -- I
8 don't think they want to try this thing twice, if
9 they have to. I know the defendants don't want to
10 try this thing twice if we don't have to.

11 I think one thing we can all agree on
12 is we want the supreme court to make it so we don't
13 have to be here again on another case like this
14 that's going to be a big mess, no matter how it
15 goes forward, because there's going to be so many
16 parties, so many experts, and it's going to be a
17 lot of issues that are going to have to be dealt
18 with.

19 So I would like the supreme court -- if
20 they could just poof in here right now and tell us
21 this is what's going to happen, I would love it,
22 but I think the circumstance that we have right
23 here is since the case was removed, I think it's a
24 prejudice to just put it back on the docket at this
25 point.

1 Thank you.

2 THE COURT: Okay.

3 MR. HORTON: Your Honor, Greg Horton
4 for Andersen Windows. We have no insurance carrier
5 in this case. I just want to give you a real quick
6 rundown, subject to Mr. Buckley's opposition to me
7 being able to speak here.

8 Whenever we got word that the case was
9 stayed on the 8th, which was a Monday, I had
10 corporate witness deposition preps lined up for
11 that week. I had an expert reserved for a two-week
12 trial. I immediately notified everybody that the
13 case has been stayed.

14 I did stand down with regard to
15 preparing those witnesses. We did not finish our
16 summary judgement motions because the pretrial
17 order I assumed at that point was void; we did not
18 finish our motions in limine; and we, otherwise,
19 went about the business of taking care of other
20 cases.

21 I agreed to attend a mediation in
22 another case and prepared for that on the 17th. I
23 did the same thing with regard to a mediation on
24 the 16th. In other words, I backfilled my schedule
25 so that I would not, you know, suffer the

1 consequences of not working hours within a defense
2 firm and, otherwise, dealt with other cases.

3 I now know -- have been in touch with
4 my expert. He backfilled his schedule too. He's
5 got a trial now on May 13th through 15th elsewhere
6 in the country. He's got an arbitration on May
7 16th. He's unavailable May 6th and 7th.

8 So I do believe, in addition to the
9 time that I've lost myself, that Andersen
10 Corporation, in particular, would be prejudiced if
11 we were forced to go to trial on the 6th.

12 Thank you, Your Honor.

13 MR. THAMES: Your Honor, I'm Troy
14 Thames. I represent Stanley's Vinyl Fence Designs.
15 He's one of the defendants and he is insured by
16 Nationwide, who has their counsel here.

17 Without belaboring the point, the last
18 two parties have eloquently stated the very same
19 issues that I feel my client has and why we would
20 be prejudiced if this case was to go back on the
21 trial docket with a week, essentially, to get ready
22 for trial. So we have the same argument.

23 THE COURT: Thank you.

24 Anyone else?

25 MS. WYMAN: Your Honor, I'm Jasmine

1 Wyman, and I'm here on behalf of Mosely Concrete.
2 I'd just like to add that I echo the sentiments of
3 defense counsel. In light of the order staying the
4 case, my client's deposition was postponed. So we
5 do not have the benefit of his deposition at this
6 point if we were ordered to proceed to trial on
7 May 6th.

8 THE COURT: All right.

9 MS. WYMAN: Thank you.

10 THE COURT: Anyone else? Okay. No one
11 else?

12 MR. BUCKLEY: Can I just say a couple
13 of things, Judge?

14 THE COURT: Sure.

15 MR. BUCKLEY: The Stokes-Craven case
16 was interesting to me because we were -- we didn't
17 handle the trial of that case. It was a case
18 involving a nondisclosure of a prior wreck damage
19 to a vehicle with a dealership up in Manning.

20 And other counsel handled the trial; we
21 handled the appeal. There were about 50 pages of
22 opinions by the Supreme Court. And I called up
23 Dino Moskos when we got those and I asked him who
24 won. And he said, I don't know. I think I did.

25 Subsequently, that case went on and on

1 and on on the issue of attorneys' fees and then,
2 ultimately, the Stokes-Craven dealership sued their
3 trial counsel for malpractice. We did not
4 represent Stokes-Craven in that case and, in fact,
5 Stephen Brown and I were deposed in that case.

6 And the issue in that case has nothing
7 to do with anything here. The issue in that case
8 was very clear and very simple: Should a lawyer --
9 or should a client have to sue his lawyer because
10 of a bad result that he claims was the result of
11 malpractice where the actual result itself is on
12 appeal?

13 It makes no sense for a court to have
14 ruled that way, as they did in the Epstein case
15 years and years ago. In that case, our supreme
16 court correctly analyzed that and said, why in the
17 world would we have a lawyer being sued during the
18 two or three years the appeal of the underlying
19 action is pending?

20 In fact, you might actually have a case
21 where the lawyer goes to trial, has a verdict
22 against him, and the appeal gets -- the decision in
23 the underlying case gets reversed on appeal.

24 So that is what was at issue in
25 Stokes-Craven, and I happen to know about that more

1 than I like.

2 In addition, FCCI, Nationwide, and
3 Nautilus now have declaratory judgment actions
4 pending in federal court. They could have been
5 litigating all of the issues that we hear about on
6 this motion for mock intervention throughout the
7 course of those DJ action and have done nothing in
8 that record.

9 THE COURT: Well, that was kind of the
10 first thing that came to my mind is, you know,
11 these motions. I understand this case was
12 designated complex at some point in time last fall,
13 and I was named the judge on the case, so to speak,
14 and I've heard these motions to intervene.

15 I don't have the file in front of me.
16 I don't know when these motions to intervene were
17 filed, but maybe you can enlighten me. Was it
18 pretty soon after the complaint was filed and --

19 MR. BUCKLEY: No, Your Honor. No, Your
20 Honor. 2018, I think, where were the earliest of
21 the motions, May, I believe, of 2018.

22 THE COURT: So in terms of, you know,
23 trying to understand how do we proceed from these,
24 I don't think it's waiting two or three years into
25 litigation. I think, you know, perhaps the best

1 practices might indicate doing a little bit
2 earlier, but I don't know. Hopefully we'll all get
3 some instruction soon.

4 MR. BUCKLEY: And in fairness to Your
5 Honor, we actually moved in the federal court for
6 the federal court to abstain under federal
7 extension document because these issues were
8 pending in the state court, and we lost that
9 motion.

10 THE COURT: Okay.

11 MR. BUCKLEY: They have done nothing
12 since then. Nothing. And they can litigate all
13 those issues over there. They can litigate them
14 now. They can litigate them during our trial or
15 after our trial, but we need a trial so that all of
16 these issues can be appealed at one time. Thank
17 you.

18 MR. MCCANTS: May I respond?

19 THE COURT: Sure.

20 MR. MCCANTS: Number one, I was
21 noticed -- my client was noticed of this civil
22 action in January of 2018.

23 THE COURT: Okay.

24 MR. MCCANTS: So I was not sitting
25 around since 2015.

1 THE COURT: That's why I posed the
2 question, because I just didn't know. So I
3 appreciate you letting me know.

4 MR. MCCANTS: So -- and I filed my
5 motion to intervene and it was heard in December.
6 I understand.

7 Second, with regard to the declaratory
8 judgment action, I spent 11 years on *Auto Owners v.*
9 *Rose*. And that case went up to the court of
10 appeals and went to the supreme court of the
11 underlying and insurance coverage actions I was
12 involved in.

13 And Justice Beatty very clearly said,
14 you cannot make a decision about coverage, property
15 damage, and occurrence issues until the trial has
16 been adjudicated and there is a verdict.

17 So from my client's standpoint,
18 Builders Mutual, there's no reason necessarily to
19 have a DJ action, because any federal judge or a
20 state court judge can't adjudicate coverage when
21 the jury speaks and -- based on the verdict. So to
22 say that we can have all this litigated and done
23 with is really untrue.

24 MR. NEWMAN: Tim Newman, for
25 Nationwide. Again, we filed our motion to

1 intervene a year ago.

2 THE COURT: Okay.

3 MR. NEWMAN: I mean, so it wasn't heard
4 until December.

5 Also, the DJ that we filed, it's
6 exactly what he said. They filed a motion to
7 abstain. It took us all this time. The judge just
8 ruled, what? Within the past few weeks? One of
9 them. Then, the other one, we just literally, I
10 don't know, within the past week or so, got the
11 order saying we could go forward.

12 And I understand. I mean -- but,
13 again, it's just what we've been talking about.
14 What are we -- what do we do in the DJ? I mean,
15 you say we could be deciding all this, but Newman
16 says that you can't do that in the DJ.

17 THE COURT: All right. Mr. Lucey, you
18 stood up at some point in time.

19 MR. BUCKLEY: He was just yelling at
20 me, Your Honor.

21 THE COURT: Oh, okay.

22 MR. LUCEY: There can be no doubt that
23 the carrier has run privy with their insureds.
24 Their insureds got notice of this action in
25 February and March of 2016. The carrier is not --

1 '15.

2 The carrier is not in a position to
3 say, oh, we just got notice a year and a half ago.
4 They were privy with their insureds.

5 THE COURT: Okay. And I certainly
6 didn't mean by any stretch of means for my question
7 to elicit any sort of animosity between the
8 attorneys, but...

9 MR. MCCANTS: Record of notice of
10 builders mutual is in the record.

11 THE COURT: Okay. Do I need to hear
12 anything from anybody else on the petition to lift
13 the automatic stay while the record is open?

14 Okay. I am going to lift the automatic
15 stay and order that the trial go forward. You
16 know, the stay was automatic.

17 Part of the problem in the delay, I
18 guess, in me putting out the order was, you know --
19 and I think I sent an e-mail out to the attorneys,
20 several of these motions to reconsider were filed
21 and I simply didn't know. The copy wasn't served
22 on the Court.

23 And so just so we all know, in this
24 courthouse when you file a motion to reconsider, if
25 it's not served on the judge, we have no way of

1 knowing that it's been filed. So the clerk's
2 office doesn't notify us in any way, shape, or
3 form.

4 So I think what happened is that some
5 people started e-mailing my clerk and saying, hey,
6 what's this motion to reconsider? Are we going to
7 be heard?

8 And we were like, what motion to
9 reconsider are you talking about?

10 So that is reason for some of the
11 delay, and just to make it clear. I think the
12 only -- you know, the question I'm looking at is
13 really does this affect the trial?

14 And I think Mr. Newton addressed that
15 best on behalf of these attempted intervenors,
16 that, you know, your wish to have special
17 interrogatories or special verdict form, or
18 whatever it is that you're trying to seek to have
19 at trial would affect the trial.

20 But at this point in time, given that
21 I've denied the motion to intervene, I feel like
22 lifting the stay at this point in time is
23 consistent with my prior rulings. I'm going to
24 order the trial to go forward.

25 I understand the arguments also made on

1 behalf of counsel of the named defendants, that
2 this is going to prejudice you or that your
3 calendars have somehow gotten rearranged as a
4 result of the stay that was automatic under the
5 rules, but it's going forward. We're going to go
6 and get ready.

7 We all signed up for this when we were
8 lawyers, and we know this is just how it works. So
9 we're just going to have to deal with it and move
10 on.

11 Now, there are some other motions I
12 think that need to be dealt with. We set aside,
13 obviously, two days, today and tomorrow, to deal
14 with pretrial motions and I'm happy to hear from
15 anyone who's ready. Or I'm happy to take a 10- or
16 15-minute break and let everybody sort of reconvene
17 and reassess, and we can do it that way.

18 MR. MCCANTS: Briefly, Your Honor, I
19 would likely -- I will need a written order.

20 THE COURT: Oh, of course. No doubt.
21 That will be issued today. Of course. Certainly,
22 under 241(d) (2), I'm sure that you are going to
23 proceed today. We'll get you that order.

24 And what we can do, Mr. McCants, as a
25 courtesy, once we sign it and file it all, I can

1 actually have Alex scan a clocked-in copy to all
2 attorneys of record. Is that sufficient with you?

3 MR. MCCANTS: And certified, yes, Your
4 Honor.

5 THE COURT: Sure. No problem. We'll
6 do that.

7 MR. BUCKLEY: Your Honor, there are a
8 couple of matters that Your Honor had already ruled
9 on in prior orders. One of them was depositions of
10 Mosley Concrete. That was cancelled by Mosley
11 Concrete's counsel after you issued the order.

12 I don't know that we need a new order,
13 but I would like for you to just state on the
14 record that they are required to produce Mr. Mosley
15 to be deposed as your prior order indicated. There
16 was a specific date that has now passed in that
17 order.

18 And if Your Honor would like to pick a
19 date, I don't know what Mosley's attorney would say
20 about that, but, you know, we didn't take it
21 because they cancelled it.

22 THE COURT: Okay. Well, subject to --
23 who is counsel for Mosley? Yes, ma'am.

24 MS. WYMAN: Jasmine Wyman, Your Honor.
25 Well --

1 THE COURT: You're probably going to
2 need a few minutes to call your client, I would
3 imagine, so...

4 MS. WYMAN: Yeah --

5 THE COURT: We'll do that. I tell you
6 what, let me take about a 15-minute break for the
7 attorneys. I will talk to these students and
8 answer any questions they have.

9 You might have some discussions that
10 you need to have off the record at this point in
11 time. This would be a good time for that, okay.

12 MR. BUCKLEY: Thank you, Judge.

13 THE COURT: All right. So we'll be at
14 ease for the next 15 minutes. We'll reconvene
15 about 10:45.

16 (A recess transpired.)

17 THE COURT: All right. What are we
18 doing next?

19 MR. LUCEY: Your Honor, a few of the
20 attorneys are still out in the hall, but we have
21 agreed on a schedule, and I think the attorneys
22 present can confirm this is what we agreed to.

23 THE COURT: Okay. And I can wait if
24 you want to --

25 (Off-the-record conference.)

1 THE COURT: All right. We're ready.

2 MR. LUCEY: Your Honor, Mr. Flynn has a
3 pending motion to intervene, which he sees the
4 writing on the wall, but we would like to get it on
5 the record.

6 THE COURT: Absolutely.

7 MR. LUCEY: Incorporate the prior
8 arguments perhaps and do it quickly. And we,
9 plaintiffs, object.

10 The parties have agreed that on that
11 Monday the 29th of April, by 5:00 p.m., the
12 plaintiffs will serve their trial exhibit list on
13 the defendants. And by 5:00 p.m., on Tuesday the
14 30th, the defendants will respond with either their
15 objections or non-objections or other comments, and
16 provide us any supplemental exhibits they intend to
17 offer that are not already on our list.

18 That way -- and plaintiffs will
19 respond, if they can, to defendants by the time we
20 have a hearing the next morning, if Your Honor
21 gives it to us, which I'll get back to in a second.

22 Before that, we're tentatively shooting
23 for the previously Andersen deposition to take
24 place on Tuesday the 30th. Counsel is going to
25 check with his client to see if he can confirm

1 that.

2 The group agreed collectively to ask
3 you to see if you could hear pretrial motions on
4 Wednesday morning. We're not aware that there are
5 any pending. I don't know what they might be. We
6 just wanted to reserve a spot.

7 THE COURT: Let me ask you this:
8 Because this had come up I think at the last status
9 conference, that I think I had advised you that
10 next week there is not a circuit judge in the state
11 since we have this mandatory conference in
12 Spartanburg.

13 And not that it matters, but I just --
14 I don't have a court reporter. Somebody posed the
15 question, why can't we hire our own? I think I
16 told you, you're barking up the wrong tree. They
17 really frown on that. They just don't -- it's not
18 like a frown. They told us flat out you can't do
19 it.

20 So having said that, Mr. Buckley made
21 some representations that this might not take a
22 full two weeks. Okay. What about if we pick the
23 jury Monday the 6th and then, you know, reserve
24 Monday and Tuesday for pretrial motions, and then
25 tell the jury to come back Wednesday morning? I

1 mean, would that be okay?

2 MR. LUCEY: Plaintiffs would agree to
3 reserve Monday afternoon. We prefer to start
4 Tuesday morning. We don't think you need a day and
5 a half, if it's okay with the Court.

6 THE COURT: Well, I don't know. I
7 mean, I don't know what you need.

8 MR. LUCEY: We discussed the fact that
9 while we're all going to have motions in limine,
10 that the record of a Court granting those at the
11 commencement of trial is very thin, so...

12 THE COURT: Right. I'm just telling
13 you, I'm not going to be available to hear motions
14 on Wednesday, the 1st.

15 MR. LUCEY: Yes, ma'am.

16 THE COURT: So in lieu of that, what I
17 can offer you would be Tuesday the 7th. That's
18 kind of where I am. I mean, the 6th and 7th. We
19 could just have the jury come back Wednesday
20 morning instead of Tuesday morning, if needed.

21 And you know what? Let's just be a
22 little bit flexible, if we can. I mean, I
23 understand everybody has to make their record or
24 whatever, but, I mean, I physically can't do it on
25 Wednesday the 1st, so that's off the table.

1 MR. HORTON: And Justin, Your Honor, in
2 light of that, can we move the defendant's list of
3 exhibits and objections from the 30th to either the
4 1st or the 2nd? That's the best at this point.

5 MR. LUCEY: We're fine with the 1st.

6 MR. HORTON: Sounds good.

7 MR. LUCEY: And we had also agreed that
8 the previously ordered Mosley deposition, counsel
9 will try to arrange that for noon on Friday the
10 3rd.

11 And we have agreed on a mandatory
12 3:00 p.m., Friday the 3rd, exhibit conference
13 amongst counsel. Unless we have an agreement as to
14 the exhibit list or a fair understanding of
15 objections, et cetera in advance, we'll all meet in
16 person.

17 And that we had also agreed that the
18 motions in limine to be heard, if any, on Monday,
19 will be filed and served on the Court and opposing
20 counsel by 9:00 a.m. the prior Friday, May 3rd.

21 Is there anything that I've missed,
22 gentlemen?

23 I don't believe so.

24 And now with Your Honor's input, we've
25 agreed to Monday afternoon for hearing any motions.

1 MR. HORTON: And just to clarify one
2 thing, dispositive motions filed by the 3rd?

3 MR. LUCEY: We had agreed all motions,
4 all pretrial motions of any kind will be filed and
5 served by 9:00 a.m. Friday morning.

6 THE COURT: And we'll get through
7 whatever we can Monday afternoon. The jury will
8 have to call back every night after 6:00. And if
9 we have to tell them to wait until Wednesday to
10 report, we can do that if it appears that as of
11 Monday afternoon we have the need to have motions
12 heard Tuesday.

13 MR. LUCEY: Yes, ma'am. And one other
14 thing then, if I may, which we haven't had a chance
15 to discuss. I've been here on multiweek trials on
16 more than one occasion where inadvertently the
17 multiweek jury gets struck last. And that always
18 creates a problem with people having conflicts and,
19 also, makes for a longer multiweek trial for the
20 jurors, because we sit around all day striking the
21 third jury.

22 If there's any way we could ask the
23 Court whether --

24 THE COURT: The last time that we had
25 one in this courthouse, we picked it first. Yeah,

1 we'll just -- we can make arrangements to do that.

2 MR. LUCEY: Thank you, Your Honor.

3 THE COURT: You know -- okay. Go
4 ahead.

5 MR. HORTON: Your Honor, you know a
6 great concern of mine that I mentioned earlier was
7 that my expert may be committed to another trial or
8 arbitration. My hope is that something out there
9 will resolve and that he will become free, but will
10 you guys work with me to get the expert up that
11 first week?

12 MR. LUCEY: Plaintiff consents to his
13 expert being called out of order, Your Honor.

14 THE COURT: Yeah, we can call somebody
15 out of order. Flexibility is the name of the game.

16 All right. What else do I need to do
17 this morning?

18 Yes, sir, Mr. Cole?

19 MR. COLE: Your Honor, just adding to
20 the point earlier. I think we all relied on your
21 duly filed order, and this came as a little bit of
22 a surprise when we got this. Also Brandon Reeser,
23 who is the attorney for Vasquez and Miracle Signs,
24 who -- he is in hearings all day today with
25 Judge Newman up in Myrtle Beach.

1 And he did not bring to the Court,
2 because he wasn't sure that you would undue your
3 stay, his wife is being induced with their second
4 kid on the 6th.

5 THE COURT: Okay.

6 MR. COLE: And so he --

7 THE COURT: He had brought to my
8 attention at some point that a baby was -- I didn't
9 know about being induced.

10 MR. COLE: And so that would be --

11 THE COURT: Is there someone else in
12 his firm that can --

13 MR. COLE: I don't know who else may be
14 prepared to go forward. I think he was thinking he
15 would abandon the mother that afternoon if he had
16 to.

17 THE COURT: That sounds horrible.
18 Hopefully, somebody in his firm can get briefed on
19 the matter and come in his place.

20 MR. COLE: All right. Thank you, Your
21 Honor.

22 THE COURT: But, I mean, you know, I'm
23 sorry. I mean...

24 Yes, ma'am.

25 MS. WYMAN: Your Honor, in that same

1 vein -- Jasmine Wyman again. I think I know what
2 your response is going to be, but for the record,
3 lead counsel for Mosley Concrete had scheduled a
4 medical procedure for May 8th that will have him
5 out of commission for the rest of that week. Just
6 for the record.

7 THE COURT: For the record. Okay. I
8 appreciate that. Lead counsel for Mosley Concrete?

9 MS. WYMAN: David Anderson.

10 THE COURT: Okay. All right. I
11 appreciate you letting me know.

12 Certainly, I mean, gosh, I'm not
13 without a heart. I'll accommodate anybody's
14 personal circumstances as much as we can, and I
15 know Plaintiff's counsel will too. We're all
16 human. So I'll certainly accommodate any of those
17 as well as we can.

18 All right. What else can I do for you
19 this morning? I need to hear another motion to
20 intervene. FCCI or -- is that right?

21 MR. FLYNN: That's correct, Your Honor.

22 THE COURT: Put that on the record.
23 I'm happy to do that.

24 MR. LUCEY: Your Honor, Plaintiffs
25 already informed Jamie that we do not object to him

1 incorporating all prior arguments to expedite the
2 matter.

3 THE COURT: Okay. Well, I'll let him
4 say whatever he wants to on the record.

5 MR. FLYNN: Thank you, Your Honor.

6 THE COURT: This is certainly a record
7 that will be read. Go ahead.

8 MR. FLYNN: I'm Jamie Flynn. I
9 represent FCCI Insurance Company, which has a
10 pending motion to intervene.

11 THE COURT: Okay.

12 MR. FLYNN: I am aware of the prior
13 argument of the other carriers and their motions to
14 intervene, and I don't have new ground to plow in
15 that regard as far as different insights on what
16 the case law is. And so, largely -- and I do want
17 to say a little bit, but I'm not going to say what
18 I would say if I was the first one to argue this
19 before you.

20 But it's our position, as similar to
21 the other carriers, that both Auto Owners v. Newman
22 and the Harleysville v. Heritage cases required the
23 insurance carriers to move to intervene for the
24 purpose of seeking either the special interrogatory
25 special verdict form.

1 Our motion to intervene, unlike, I
2 think -- Nationwide, was maybe a little more
3 expansive. It's more narrow in scope than theirs
4 and is limited to that purpose. We're not seeking
5 to be part of discovery in the case or to actually
6 participate in questioning witnesses and whatnot at
7 trial, unless Your Honor determines that that's
8 what Auto Owners v. Newman requires, which is, we
9 will admit, not perfectly clear.

10 But we would submit, without the
11 ability to have the jury apportion between covered
12 and noncovered damages, because there is a question
13 of what damages a jury might award, would be
14 covered under FCCI's commercial general liability
15 insurance policy, that there does need to be an
16 allocation such that there's not a situation like
17 was discussed in Newman like was discussed in
18 Heritage v. Harleysville.

19 Hopefully, that sums up the position.
20 I know you're well-versed on these arguments. I
21 can answer any questions you may have.

22 THE COURT: You know, it's an
23 interesting area. We've hashed it out several
24 times already in this case. What exactly those
25 decisions ask the carriers to do is relatively

1 unclear.

2 And I understand that we're all sort of
3 trying to figure out exactly where do we go from
4 here? What is our duty with respect to figuring
5 out these coverage issues after a general verdict
6 form is returned?

7 I just don't believe it's through
8 special verdict forms or interrogatories or
9 something that would sort of place a burden like
10 that on a jury to sort of determine the coverage
11 issues. I don't think that's appropriate.

12 And for that reason, I will
13 respectfully deny your motion to intervene and cite
14 the same ground as all the other denials.

15 MR. FLYNN: Thank you.

16 THE COURT: Yes, sir.

17 MR. FLYNN: Will there be a formal
18 order on that?

19 THE COURT: It will be a form, the
20 same -- some kind of form order. I think the
21 record we have is enough.

22 MR. FLYNN: Thank you, Your Honor.

23 THE COURT: Yes, sir. Thank you very
24 much.

25 And, likewise, when you file your

1 motion to reconsider, if you just don't mind
2 e-mailing my clerk a copy. That way we can
3 consider that and you can join your counterparts.

4 MR. FLYNN: If we do that, I will
5 certainly --

6 THE COURT: Sure. Yes. Just that way
7 we can keep the paperwork squared away. Okay?

8 MR. FLYNN: Thank you.

9 THE COURT: Yes, sir. Thank you.
10 What else can I do today?

11 MR. BUCKLEY: That's all there was,
12 Your Honor.

13 THE COURT: Anything else? All right.
14 Thank you all very much.

15 (These proceedings were concluded at
16 10:10 a.m.

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1 CERTIFICATE OF REPORTER

2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 1st day of May, 2019 at
13 Charleston, Charleston County, South Carolina.

14

15

16

17 S/Denise Lauder_____
18 Carol Denise Lauder
19 Registered Professional
20 Reporter, CP
My Commission expires
February 27, 2028

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Standard Estimate Report
Palmetto Pointe LOU remov

Loss of Use Removed from Estimate

Project name	Palmetto Pointe LOU remov
Estimator	Jay
Labor rate table	Standard Labor
Equipment rate table	Standard Equipment
Bld date	2:00 PM
Report format	Sorted by 'Group phase/Phase' 'Detail' summary

ROA 643



Standard Estimate Report
Palmetto Pointe LOU remov

Item	Description	Takeoff Qty	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Name	Amount	Amount	Amount
1000.000 GENERAL REQUIREMENTS												
1062.100	Bond/Certif Insurance											
30	Builders Risk Insurance	1.00	ls	-	-	-	-	96,000.00	/ls	96,000	-	96,000
	Bond/Certif: Insurance										0	96,000
1300.010	Personnel: Supervision											
10	Superintendent	110.00	wk	1,900.00	/wk	209,000	-	-	-	-	-	209,000
10	Asst. Superintendent (Quality Control)	110.00	wk	1,100.00	/wk	121,000	-	-	-	-	-	121,000
	Personnel: Supervision					330,000						330,000
	8,800.00 Labor hours											
	8,800.00 Equipment hours											
1510.010	Utilities: Temporary											
10	Temp Electricity (office trailer)	28.00	mo	-	-	-	-	-	-	3,120	0	3,120
40	Mobile Phone (Super & Asst)	52.00	mo	-	-	-	-	-	-	4,420	0	4,420
80	Temp Toilet	28.00	mo	-	-	270.00	/mo	7,020	-	-	-	7,020
	Utilities: Temporary							7,020		-	-	7,020
										7,540	-	14,560
1520.010	Temp: Facilities											
10	Tool Trailers	26.00	mo	-	-	-	-	-	-	-	-	-
10	Office Trailer	26.00	mo	-	-	-	-	-	-	5,714	-	5,714
	Temp: Facilities									9,123	-	9,123
	24,728.49 Equipment hours									14,837	-	14,837
1520.020	Temp: Supplies											
10	Cups & Ice	26.00	mo	0.00	0	120.00	/mo	3,120	-	-	-	3,120
	Temp: Supplies							3,120		-	-	3,120
	520.00 Labor hours											
1520.030	Office Supplies											
8	Super - Laptop (allocated use \$400/yr)	1.00	ls	-	-	-	-	-	-	800	-	800
10	Job Sign	1.00	ea	60.00	/ea	60	850.00	/ea	850	-	-	910
	Office Supplies					60		850		-	-	910
	3.000 Labor hours									800	-	1,710
1540.010	Tools & Equipment											
10	Super: Truck Expense	26.00	mo	0.00	0	0.00	0	-	-	16,900	-	16,900
10	Asst. Super: Truck Expense	26.00	mo	0.00	0	0.00	0	-	-	16,900	-	16,900
50	Super: Gas Expense	26.00	mo			450.00	/mo	11,700	-	-	-	11,700
50	Asst. Super: Gas Expense	26.00	mo			450.00	/mo	11,700	-	-	-	11,700
50	Equip: Gas Expense	26.00	mo	0.00	0	300.00	/mo	7,800	-	-	-	7,800
50	Forklift Rental	26.00	mo			0.00	0	26.27	/mo	683	-	683
50	Man Lift Rental	22.00	mo			0.00	0	30.23	/mo	665	0	665
	Tools & Equipment						31,200			1,348	-	149,460
	3,560.00 Labor hours											
1540.020	Temp: Construction Aids											
20	Scaffold - Rental	1.00	ls	0.00	0	0.00	0	-	-	630,000	-	630,000
20	Scaffold Labor Install - Tear Down	1.00	ls	0.00	0	0.00	0	313,824.00	/ls	313,824	-	313,824
	Temp: Construction Aids										-	313,824
	0.700 Labor hours										630,000	943,824
1560.100	Temporary Controls											
10	Temp Weather Protection - Exterior (500 sf per unit)	40.00	ea	1,000.00	/ea	40,000	450.00	/ea	18,000	-	-	58,000
40	Interior Zip Walls & Dust Protection - Interior (move 2 to 4 times per unit)	40.00	ea	600.00	/ea	24,000	300.00	/ea	12,000	-	-	36,000

Standard Estimate Report
Palmetto Pointe LOU remov

Item	Description	Takeoff Qty	Labor		Material		Subcontract		Name	Equipment		Other	Total
			Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount		Amount	Amount		
	Temporary Controls			64,000		30,000							94,000
	3,428.571 Labor hours												
1562.010	Temp Relocation												
30	Move out home owners	0.00 unit	-	-	-	-	0.00	0		-	-	0	
40	Store Furniture (additional 4 months per unit)	0.00 mn	0.00	0	-	-	0.00	0		-	-	0	
40	Temp Lodging (40 units x 16 weeks)	0.00 wk	0.00	0	-	-	-	-		-	-	0	
40	Meal reimbursement for homeowners	0.00 dy	0.00	0	-	-	-	-		-	-	0	
40	Electrical Power reimbursement for homeowners	0.00 mn	0.00	0	-	-	-	-		-	-	0	
40	Water service reimbursement for homeowners	0.00 mn	0.00	0	-	-	-	-		-	-	0	
40	Change HVAC Filters	0.00 unit	0.00	0	0.00	0	-	-		-	-	0	
	GENERAL REQUIREMENTS			394,060		72,190		411,172		802,637	0	1,680,059	
	16,312.271 Labor hours												
	33,528.49 Equipment hours												
1730.000	DEMOLITION												
1736.010	Demo: Wood												
30	Remove Exterior Sheathing & Studs (assumed 20% damage)	15,800.00 sf	2.98 /sf	46,488	0.00	0	-	-		0	0	46,488	
150	Remove Exterior (handl) Siding	78,000.00 sf	0.83 /sf	64,740	-	-	-	-		0	-	64,740	
150	Remove Exterior Hard Trim	87,700.00 lf	0.62 /lf	54,374	-	-	-	-		0	-	54,374	
150	Remove Applied Trim @ Columns	720.00 ea	10.00 /ea	7,200	-	-	-	-		0	-	7,200	
150	Remove Building Wrap	78,000.00 sf	0.21 /sf	16,380	-	-	-	-		0	-	16,380	
150	Remove Exterior (handl) Siding @ Club House	1,484.00 sf	0.83 /sf	1,215	-	-	-	-		-	-	1,215	
150	Remove Building Wrap	1,464.00 sf	0.21 /sf	307	-	-	-	-		-	-	307	
	Demo: Wood			190,705									190,705
	9,535.23 Labor hours												
	13,147.40 Equipment hours												
1737.010	Demo: Roofing												
10	Remove Shingles	780.00 sq	0.00	0	-	-	55.00 /sq	42,900		-	-	42,900	
10	Remove Roofing Felt (Included with Shingles)	780.00 incl	0.00	0	-	-	-	-		-	-	-	
10	Trash Chutes for removal	20.00 ea	-	-	-	-	1,000.00 /ea	20,000		-	-	20,000	
10	Remove Shingles - Club House	27.00 sq	-	-	-	-	55.00 /sq	1,485		-	-	1,485	
	Demo: Roofing							64,385					64,385
	803.50 Labor hours												
1738.010	Demo: Doors & Windows												
120	Remove Windows	400.00 ea	72.00 /ea	28,800	-	-	-	-		-	-	28,800	
130	Remove Exterior Window Trim	400.00 ea	18.00 /ea	7,200	-	-	-	-		0	-	7,200	
130	Remove Interior Window Trim	7,560.00 lf	1.22 /lf	9,223	-	-	-	-		0	-	9,223	
	Demo: Doors & Windows			45,223									45,223
	9,359.99 Labor hours												
	7,960.00 Equipment hours												
1739.050	Demo: Misc Items												
50	Remove Porch Coatings (Seal-o-Flax)	160.00 ea	450.05 /ea	72,007	-	-	-	-		0	-	72,007	
50	Remove Railings	5,645.00 lf	8.571 /lf	48,383	-	-	-	-		-	-	48,383	
	Demo: Misc Items			120,390									120,390
	139,690.042 Labor hours												
	1,161.00 Equipment hours												
1739.010	Demo: Finishes, Floors												
50	Remove Wood Floor	22,605.00 sf	1.20 /sf	27,126	-	-	-	-		-	-	27,126	
110	Remove Wood Shoe Mold	5,632.00 lf	0.68 /lf	3,717	-	-	-	-		0	-	3,717	
110	Remove Carpet	28,867.00 sf	0.55 /sf	15,877	-	-	-	-		0	-	15,877	
110	Remove tile	6,462.00 sf	3.00 /sf	19,386	-	-	-	-		0	-	19,386	

Standard Estimate Report

Palmetto Pointe LOU remov

Item	Description	Takeoff Qty	Labor		Material		Subcontract		Name	Equipment	Other	Total
			Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount				
	Demo: Finishes, Floors			68,106								68,106
	3,305.30 Labor hours											
	409.81 Equipment hours											
1739.080	Demo: Finishes, Ceilings											
40	Remove Sheetrock Ceiling @ 1st Floor Ceilings	32,513.00 sf	0.70 /sf	22,759								22,759
	Demo: Finishes, Ceilings			22,759								22,759
	1,625.65 Labor hours											
1739.080	Demo: Exterior Finishes											
40	Remove Gutters	2,384.00 lf	2.00 /lf	4,768			0.00	0		0		4,768
40	Remove Downspouts	3,650.00 lf	1.00 /lf	3,650			0.00	0		0		3,650
	Demo: Exterior Finishes			8,418								8,418
	603.40 Labor hours											
	120.68 Equipment hours											
1739.160	Demo: Mechanical/Elect											
20	Remove Duct Insulation (included with Mech quote)											
1740.010	Clean Up											
10	Current Cleanup - weekly general cleanup	110.00 wk	600.00 /wk	66,000	35.00 /wk	3,850						69,850
10	Current Cleanup - weekly general cleanup (Club House Bldg)	4.00 wk	600.00 /wk	2,400	35.00 /wk	140						2,540
20	Dumpsters - for demolition (8 per Bldg)	120.00 ea								72,000	0	72,000
20	Dumpsters - General & New work (1 every 2 wks)	62.00 ea								31,200	0	31,200
20	Dumpsters - for demolition (Club House Bldg)	6.00 ea								3,600	0	3,600
60	Final Cleanup	58,000.00 sqft					0.40 /sqft	23,200				23,200
	Clean Up			68,400		3,990		23,200		108,800		202,390
	2,504,560.00 Labor hours											
1760.010	Punchlist, Etc											
10	Punchlist, etc (Carp 2.5 wk per Bldg)	20.00 ea	2,500.00 /ea	50,000	800.00 /ea	16,000						66,000
	Punchlist, Etc			50,000		16,000						66,000
	2,500.00 Labor hours											
DEMOLITION				572,000		19,990		87,585		108,800	0	786,375
	3,071,983.11 Labor hours											
	22,798.68 Equipment hours											
2000.000	SITEWORK											
2620.010	Drainage Corrections											
60	6" Drainage Piping	1,280.00 lf	0.00	0	0.00	0	25.00 /lf	32,000		0		32,000
70	12" Drainage Piping	320.00 lf	0.00	0	0.00	0	31.00 /lf	9,920		0		9,920
80	15" Drainage Piping	460.00 lf	0.00	0	0.00	0	37.00 /lf	17,020		0		17,020
90	12x12 Catch Basin	30.00 ea	0.00	0	0.00	0	1,500.00 /ea	45,000		0		45,000
100	16x16 Catch Basin	4.00 ea	0.00	0	0.00	0	1,700.00 /ea	6,800		0		6,800
100	Flap Valves	12.00 ea					750.00 /ea	9,000				9,000
110	Wood Bulkhead	220.00 lf	0.00	0	0.00	0	75.00 /lf	16,500		0		16,500
110	CMU back of Units 1641 thru 1651	1.00 ls	0.00	0	0.00	0	6,101.00 /ls	6,101		0		6,101
	Drainage Corrections							142,341				142,341
	2,327.00 Labor hours											
2800.010	Landscaping & Irrigation											
50	Landscaping Repair (each bldg)	20.00 ea	0.00	0	0.00	0	4,000.00 /ea	80,000 Allowance				80,000
50	Landscaping Repair (club house)	1.00 ea					4,000.00 /ea	4,000 Allowance				4,000
	Landscaping & Irrigation							84,000				84,000
	1,470 Labor hours											

Standard Estimate Report

Palmetto Pointe LOU remov

Item	Description	Takeoff Qty	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Name	Amount	Amount	Amount
SITEWORK												
	2,328.470 Labor hours			0		0		226,341		0	0	226,341
3000.000 CONCRETE												
3310.210	Cone: Slabs On Grade											
c35	Remove Exsting Portions of Driveway & Dispose	10.00	ld	0.00	0	0.00	0	450.00 /ld	4,500	-	-	4,500
c37	Remove 18" soil - Muck & Fill for compaction	812.00	cy	0.00	0	0.00	0	50.00 /cy	30,600	-	-	30,600
c40	Labor to install new concrete	10,000.00	sf	0.00	0	0.00	0	3.00 /sf	30,000	-	-	30,000
c40	Fine Grade - prep for pour	10,000.00	sf	0.00	0	0.00	0	1.00 /sf	10,000	-	-	10,000
c40	Concrete - material	138.00	cy	0.00	0	130.00 /cy	17,680	-	-	-	-	17,680
c40	Control Joints - concrete driveway -included in labor					0.00	0	-	-	-	-	-
c40	Edge Form - concrete driveway	2,000.00	lf	4.00 /lf	8,000	2.50 /lf	5,000	-	-	-	-	13,000
	Cone: Slabs On Grade				8,000		22,680		75,100			105,780
	5,589.50 Labor hours											
CONCRETE												
	5,589.50 Labor hours			8,000		22,680		75,100		0	0	105,780
5000.000 METALS												
5505.010	Misc Steel											
10	Unit 1635 - Steel Shim repair	1.00	ea	150.00 /ea	150	50.00 /ea	50	-	-	-	-	200
	Misc Steel				150		50					200
	7,500 Labor hours											
METALS												
	7,500 Labor hours			150		50		0		0	0	200
6000.000 WOOD & PLASTICS												
6112.010	Framing: Studs 2x4 > 2x8											
120	Repair - Sheathing & Framing (20% Allowance)	15,600.00	sf	3.98 /sf	62,088	1.98 /sf	30,888	-	-	-	-	92,976
120	Repair - Roof Sheathing Replacement Allowance (10% Allowance)	1.00	ls	0.00	0	0.00	0	12,187.00 /ls	12,187	-	-	12,187
	Framing: Studs 2x4 > 2x8				62,088		30,888		12,187			105,183
	3,104.60 Labor hours											
6113.010	Framing: Ceiling Joists											
1	Porch Framing Repairs (underneath Seal-o-Flox) - Allowance	180.00	ea	538.00 /ea	85,760	400.00 /ea	64,000	-	-	-	-	149,760
1	-Includes 2 carp, 1 helper - 1 day per porch							-	-	-	-	
	Framing: Ceiling Joists				85,760		64,000					149,760
6160.010	Plywood: Subfloor											
80	Add missing subfloor screws (per unit) - 1carp/1help	40.00	ea	338,022 /ea	13,441	100.00 /ea	4,000	-	-	-	-	17,441
	Plywood: Subfloor				13,441		4,000					17,441
	672.043 Labor hours											
6430.010	Arch Wd Wks Interior Stair Railings											
20	Remove Int. Bottom Stair Post (& pickets)	40.00	ea	75.00 /ea	3,000	5.00 /ea	200	-	-	-	-	3,200
30	Remove Trim	640.00	lf	0.50 /lf	320	0.00	0	-	-	-	-	320
30	Install New Trim	640.00	lf	2.00 /lf	1,280	3.00 /lf	1,820	-	-	-	-	3,200
30	Install New Post & Pickets	320.00	lf	20.00 /lf	6,400	35.00 /lf	11,200	-	-	-	-	17,600

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Palmetto Pointe LOU remov

Item	Description	Takeoff Qty	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Name	Amount	Amount	Amount
6430.010	Arch Wd Wrk: Interior Stair Railings											
30	Clubhouse - handrail work to make continuous	12.00 lf	10.40 /lf	125	20.00 /lf	240	8.333 /lf	100				465
	Arch Wd Wrk: Interior Stair Railings			11,125		13,660		100				24,785
	556.24 Labor hours											
6430.020	Arch Wd Wrk: Exterior Railings											
10	Vinyl Railing - Porch Rails	4,821.00 lf	25.00 /lf	120,525	27.00 /lf	130,167						250,692
10	Vinyl Railing - Stair Run	1,670.00 lf	25.00 /lf	41,750	28.75 /lf	48,013						89,763
	Arch Wd Wrk: Exterior Railings			162,275		178,180						340,455
	8,113.75 Labor hours											
6440.020	Arch Wd Wrk: Wood Columns											
20	Replace - applied trim top & bottom	720.00 ea	20.00 /ea	14,400	10.00 /ea	7,200						21,600
	Arch Wd Wrk: Wood Columns			14,400		7,200						21,600
	720.00 Labor hours											
6450.010	Arch Wd Wrk: Wood Base											
2	Shoe Molding (where wood flooring removed)	6,195.00 lf	0.00	0	0.70 /lf	4,337	1.75 /lf	10,841				15,178
	Arch Wd Wrk: Wood Base					4,337		10,841				15,178
	774.36 Labor hours											
6452.010	Arch Wd Wrk: Interior Window Casing											
10	Interior Window Casings	8,694.00 lf	0.00	0	1.75 /lf	15,215	3.00 /lf	26,082				41,297
20	Interior Window Sool	400.00 ea	0.00	0	30.00 /ea	12,000	25.00 /ea	10,000				22,000
	Arch Wd Wrk: Interior Window Casing					27,215		36,082				63,297
	2,538.800 Labor hours											
6454.010	Arch Wd Wrk: Misc. Trim											
1	Units 1611 & 1651 Repair Cracks In Interior Trim	2.00 ea	0.00	0	0.00	0	2,000.00 /ea	4,000				4,000
	Arch Wd Wrk: Misc. Trim							4,000				4,000
	0.20 Labor hours											
6455.010	Arch Wd Wrk: Ext Trim											
1	1x8 - Hardi Trim	16,343.00 lf	1.63 /lf	26,839	1.73 /lf	28,273						54,912
2	1x4 - Hardi Trim @ Freeze	5,433.00 lf	1.63 /lf	8,856	0.84 /lf	4,564						13,420
2	1x4 - Hardi Trim @ Freeze (Club House)	200.00 lf	1.63 /lf	326	0.84 /lf	168						494
3	1x12 - Hardi Trim @ Freeze	5,433.00 lf	1.63 /lf	8,856	2.77 /lf	15,049						23,905
6	1x14 - Hardi Trim @ Freeze	5,433.00 lf	1.63 /lf	8,856	3.05 /lf	18,571						25,428
10	1x8 - Hardi Trim - corner boards	20,700.00 lf	1.63 /lf	33,741	1.32 /lf	27,324						61,065
10	1x10 - Hardi Trim - Beam Wrap	9,724.00 lf	1.63 /lf	15,850	2.28 /lf	22,171						38,021
10	1x8 - Hardi Trim - Beam Wrap	4,862.00 lf	1.63 /lf	7,925	1.74 /lf	8,460						16,385
10	1x6 - Hardi Trim - corner boards (Club House)	144.00 lf	1.63 /lf	235	1.32 /lf	190						425
	Arch Wd Wrk: Ext Trim			111,283		122,770						234,053
	58,995.843 Labor hours											
6455.010	Arch Wd Wrk: Soffit/Eave											
20	Soffit Panel	35,604.00 sf	2.28 /sf	81,177	0.97 /sf	34,536						115,713
20	Soffit Panel (Club House)	418.00 sf	2.28 /sf	948	0.97 /sf	404						1,352
40	1x4 - Hardi Eave Trim	11,968.00 lf	2.85 /lf	33,824	0.84 /lf	9,969						43,793
40	1x8 - Hardi Eave Trim	11,968.00 lf	2.85 /lf	33,824	1.74 /lf	20,650						54,474
40	1x4 - Hardi Eave Trim (Club House)	190.00 lf	2.85 /lf	542	0.84 /lf	160						701
40	1x8 - Hardi Eave Trim (Club House)	190.00 lf	2.85 /lf	542	1.74 /lf	331						872
	Arch Wd Wrk: Soffit/Eave			150,856		66,049						216,905
	14,494.89 Labor hours											
6460.010	Arch Wd Wrk: Door/Window											
130	Exterior Window & Door Trim	13,041.00 lf	1.63 /lf	21,257	0.84 /lf	10,954						32,211
130	Engr Sealant with Backrod @ Openings	13,041.00 lf	1.00 /lf	13,041	0.75 /lf	9,781						22,822
130	Engr Sealant with Backrod @ Openings (Club House)	300.00 lf	1.00 /lf	300	0.75 /lf	225						525
130	Exterior Window & Door Trim (Club House)	300.00 lf	1.63 /lf	489	0.84 /lf	252						741

Item	Description	Takeoff Qty	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Name	Amount	Other	Amount	Total
	Arch Wd Wrk: Door/Window 10,762.831 Labor hours			35,087		21,212							56,299
6471.010	Arch Wd Wrk: Porch Screening 10 Porches with Screening Arch Wd Wrk: Porch Screening 39.00 Labor hours	39.00 ea	672.00 /ea	26,208	450.00 /ea	17,550							43,758
				26,208		17,550							43,758
6491.010	Hardi - Sliding 10 6-1/4" Hardi - Sliding 10 Sliding Fasteners 10 Water Table (correct slope & flashing) 10 6-1/4" Hardi - Sliding @ Club House 10 Water Table (correct slope & flashing) @ Club House Hardi - Sliding	212,411.00 lf 175,000.00 ea 5,433.00 lf 2,828.00 lf 172.00 lf	0.81 /lf 0.00 1.63 /lf 0.81 /lf 1.63 /lf	183,294 0 8,856 2,664 280	0.48 /lf 0.04 /ea 2.50 /lf 0.48 /lf 2.50 /lf	101,957 7,000 13,583 1,405 430							295,251
													7,000
													22,438
													4,070
													710
				205,095		124,375							329,470
	WOOD & PLASTICS 100,772.37 Labor hours			877,617		681,335		63,210		0	0		1,622,163
7000.000	THERMAL & MOISTURE PROT												
7139.010	Waterproofing: Other 20 Tyvek Wrap 20 Tyvek Wrap @ Club House 30 Window & Door Wrap & Flashings 30 Window & Door Wrap & Flashings @ Club House Waterproofing: Other 1,484.251 Labor hours	69,625.00 sf 1,484.00 sf 13,041.00 lnft 248.00 lnft	0.18 /sf 0.18 /sf 1.00 /lnft 1.00 /lnft	10,133 264 13,041 248	0.30 /sf 0.30 /sf 0.65 /lnft 0.65 /lnft	26,888 439 8,477 161							43,020
													703
													21,518
													409
				28,685		35,965							65,650
7180.000	Porch & Deck Coatings 10 Seal-O-Flex Decks 20 - Flashings & Pans Porch & Deck Coatings	24,167.00 sf					16.00 /sf	386,672					386,672
								386,672					386,672
7310.010	Shingles: Several Types 10 Fiberglas Roof Shingles 10 Fiberglas Roof Shingles @ Club House 70 Hipp Shingles 90 Ridge Vent 90 Crane Rental - Stock Roof 90 Drip Edge 90 Drip Edge (Club House) Shingles: Several Types 7,757.60 Labor hours	976.00 sq 27.00 sq 4,533.00 lf 2,301.00 lf 20.00 ea 11,868.00 lf 190.00 lf	0.00 0.00 0.00 0.00 0.00 0.00	0 0 0 0 0 0	90.00 /sq 90.00 /sq 3.00 /lf 3.00 /lf 0.00 0.00	87,840 2,430 13,598 6,903 0 0	100.00 /sq 100.00 /sq 5.00 /lf 5.00 /lf 0.00 2.00 /lf	97,800 2,700 22,685 11,505 0 23,736		11,000			185,440
													5,130
													36,264
													18,408
													11,000
													23,736
													380
													280,358
7311.010	Shingles: Felt 30 Roofing Felt 30 lb. 30 Roofing Felt 30 lb. @ Club House Shingles: Felt 250.75 Labor hours	976.00 sq 27.00 sq	0.00	0	15.00 /sq 15.00 /sq	14,640 405	20.00 /sq 20.00 /sq	19,520 540					34,160
													945
													35,105
7312.010	Shingles: Nails 10 Roofing Nails Shingles: Nails	976.00 sq			10.00 /sq	9,760							9,760
						9,760							9,760
7600.010	Roof Counter Flashings 10 Coil Flashings by Roofer 10 Coil Flashings by Roofer @ Club House	976.00 sq 27.00 sq	0.00	0	0.00	0	30.00 /sq 30.00 /sq	29,280 810					29,280
													810

Item	Description	Takeoff Qty	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Name	Amount	Amount	Amount
	Roof Counter Flashings											
	100.30 Labor hours							30,090				30,090
7710.010	Roof Accessories											
10	Gutters	2,815.00 lf	0.00	0	0.00	0	12.00 /lf	31,380				31,380
110	Downspouts	3,939.00 lf	0.00	0	0.00	0	12.00 /lf	47,268				47,268
110	Diverters (4ea per Bldg)	80.00 ea					30.00 /ea	2,400				2,400
	Roof Accessories							81,048				81,048
	633.13 Labor hours											
7710.030	Aluminum/Vinyl Porch Ceilings											
10	Remove - porch ceilings	21,015.00 sf	0.50 /sf	10,508	0.00	0						10,508
20	Install New Poch Ceilings	24,167.00 sf	2.00 /sf	48,334	1.40 /sf	33,834						82,168
	Aluminum/Vinyl Porch Ceilings			58,842		33,834						92,675
	2,842.08 Labor hours											
7840.000	Applied Fireproofing											
60	Firespray Perimeter @ Fire Walls	2,243.00 lf	0.00	0			25.00 /lf	56,075				56,075
60	Firesprink Penetrations @ Fire Walls (40 Units)	40.00 ea	0.00	0			150.00 /ea	6,000				6,000
	Applied Fireproofing							62,075				62,075
	91.32 Labor hours											
	THERMAL & MOISTURE PROT			88,527		205,375		738,531		11,000	0	1,043,433
	13,259.421 Labor hours											
8000.000	DOORS & WINDOWS											
8550.010	Double Hung Windows											
10	Type 1 - Window	127.00 ea	267.00 /ea	33,909	975.00 /ea	123,825	10.00 /ea	1,270				159,004
20	Type 4 - Window	248.00 ea	267.00 /ea	66,816	1,081.00 /ea	265,828	10.00 /ea	2,480				334,068
30	Type 4a - Window	21.00 ea	267.00 /ea	5,607	1,185.00 /ea	24,885	10.00 /ea	210				30,723
40	Type 9 - Window	6.00 ea	400.00 /ea	2,400	2,278.00 /ea	13,668	10.00 /ea	60				16,128
	Double Hung Windows			107,598		428,325		4,000				539,923
	DOORS & WINDOWS			107,598		428,325		4,000		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 demo repair - allowance	40.00 ea	0.00	0	0.00	0	300.00 /ea	12,000				12,000
10	Units 1611 & 1651 Repair Sheetrock Cracks	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	Patch & Repair - Fire Walls	8,830.00 sf	0.00	0	0.50 /sf	4,315	2.00 /sf	17,260				21,575
30	Remove - Roof Sheathing - load sheetrock into space	40.00 ea	40.00 /ea	1,600	0.00	0						1,600
30	Reinstall Roof Sheathing	40.00 ea	60.00 /ea	2,400	75.00 /ea	3,000						5,400
40	Add furring & 2 layers of Type X - ceiling outside garage	8,254.00 sf	0.00	0	7.00 /sf	57,778						57,778
40	- paint ceiling outside garage	6,254.00 sf	0.00	0	0.00	0	2.00 /sf	10,508				16,508

Standard Estimate Report

Palmetto Pointe LOU remov

Item	Description	Takeoff Qty	Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount	Name	Amount	Amount	Amount
	GWB: Fire Walls 1,406.231 Labor hours			4,000		65,093		33,768				102,861
9310.010	Title: Floor & Wall 200 Ceramic Floor Tile Title: Floor & Wall 371.55 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 Wood Flooring Flooring Wood 3,729.75 Labor hours	24,885.00 sf	0.00	0	0.00	0	8.00 /sf	198,920				198,920
								198,920				198,920
9680.010	Flooring Carpet 6 Carpet Complete with Pad Flooring Carpet 352.80 Labor hours	3,528.00 sy	0.00	0	0.00	0	25.00 /sy	88,200				88,200
								88,200				88,200
9910.020	Painting: Exterior & Interior 5 Painting 10 - Ext. Hardi Siding & Trim 10 - Ext. Soffits, Porch Wrap, Climbs 10 - Interior Sheetrock & Trim Painting: Exterior & Interior 0.10 Labor hours	1.00 ls	0.00	0	0.10 /ls	0	741,760.00 /ls	741,760				741,760
												741,760
								741,760				741,760
	FINISHES 45,651.43 Labor hours			4,000		65,093		1,324,445		0	0	1,393,538
15000.000	MECHANICAL											
15300.010	Sprinkler 10 Fire Protection - Attic Space 10 4" Water Service to each building 10 - Additional work to create a chase to attic space Sprinkler	1.00 ls 20.00 ea 20.00 ea	- - -	- - -	- - -	- - -	378,920.00 /ls 18,000.00 /ea 5,000.00 /ea	378,920 360,000 100,000	- Allowance Allowance	- - -	- - -	378,920 360,000 100,000
								838,920				838,920
15400.000	Plumbing 430 Remove & Reset Toilets for Floor Replacement Plumbing	120.00 ea	-	-	-	-	150.00 /ea	18,000				18,000
								18,000				18,000
15700.000	HVAC Systems 530 HVAC Repairs per Orbitals Report 530 Unit 1843 Repair Ductwork Straps 530 Undercut Doors per Orbital Report HVAC Systems	20.00 ea 1.00 ls 160.00 ea	- - -	- - -	- - -	- - -	101,308.00 /ea 250.00 /ls 25.00 /ea	2,026,120 250 4,000	- - -	- - -	- - -	2,028,120 250 4,000
								2,030,370				2,030,370
	MECHANICAL			0		0		2,887,290		0	0	2,887,290
16000.000	ELECTRICAL											
16500.010	Lighting 530 Lighting - Remove & Reinstall for Exterior Repairs 530 Power to each Sprinkler Riser per Bldg 530 Additional scope per Orbitals report Lighting	40.00 ea 20.00 ea 1.00 ls	- - -	- - -	- - -	- - -	400.00 /ea 900.00 /ea 271,440.00 /ls	16,000 18,000 271,440	Allowance Allowance	- - -	- - -	16,000 18,000 271,440
								305,440				305,440

Standard Estimate Report
Palmetto Pointe LOU remov

Item	Description	Takeoff Qty	Labor		Materials		Subcontract		Name	Equipment		Other	Total
			Unit Cost	Amount	Unit Cost	Amount	Unit Cost	Amount		Amount	Amount		Amount
	ELECTRICAL			0		0		305,440			0	0	305,440

Standard Estimate Report
Palmatio Pointe LOU remov

Estimate Totals

Description	Amount	Totals	Rate
Labor	2,051,052		
Material	1,495,038		
Subcontract	6,123,114		
Equipment	920,437		
Other			
	10,590,541	10,590,541	
Sales Tax	205,315		8.500 %
Taxes & Ins On Labor	759,222		37.000 %
ondables & Non Expendables	41,039		2.000 %
	1,005,576	11,596,117	
Engineering Fees	1,043,651		9.000 %
	1,043,651	12,639,768	
Overhead	884,784		7.000 %
Profit	1,352,455		10.000 %
	2,237,239	14,877,007	
Building Permit - Folly Beach	68,947		0.450 %
Plan Review Fee	37,193		0.250 %
Business License	22,888		0.150 %
	127,028	15,004,033	
Surety Bond	253,479		
Total		15,257,512	

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.

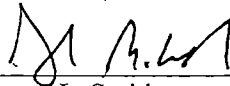
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-00955

NOTICE OF APPEARANCE

2018 DEC 17 PM 9:04
J. J. JARVIS
CLERK OF COURT
NINTH JUDICIAL CIRCUIT

YOU WILL PLEASE TAKE NOTICE, that the undersigned, Samuel M. Wheeler, and
the firm of Smith Closser, P.A, hereby make an appearance as additional counsel for Tri-County
Roofing, Inc.

SMITH | CLOSSER, P.A.



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Dec. 17, 2018
Charleston, South Carolina

17-310

AFFIDAVIT OF SERVICE

State of South Carolina

County of Charleston

Common Pleas Court

Case Number: 2015-CP-10-0955

Plaintiff:

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

vs.

Defendant:

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

For:

Joshua P. Cantwell, Esq.
Young Clement Rivers, LLP
25 Calhoun Street
P. O. Box 993
Charleston, SC 29402

FILED
2015 MAR 11 PM 4:28
JULIE J. AKINS IRONG
CLERK OF COURT
BY 

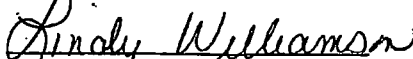
Received by PROCESS SERVICE, INC. to be served on TRI- COUNTY ROOFING, INC, 780 COLLEGE PARK RD., LADSON, SC 29456.

I, John R. Gamble, being duly sworn, depose and say that on the 26th day of February, 2015 at 8:00 am, I:

SERVED the within named CORPORATION by delivering a true copy of the COVER LETTER; CIVIL ACTION COVERSHEET; SUMMONS; COMPLAINT with the date and hour of service endorsed hereon by me to MARK A POYNER, OPERATIONS MANAGER for TRI- COUNTY ROOFING, INC at TRI COUNTY ROOFING, INC, 780 COLLEGE PARK RD., LADSON, SC 29456

I am over eighteen and have no interest in the above action.

Subscribed and Sworn to before me on the 27th day of February, 2015 by the affiant who is personally known to me.


NOTARY PUBLIC
Commission Expires: 5-6-19


John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: LEX-2015000477
Ref: 15491-20150066

RECEIVED

THE STATE OF SOUTH CAROLINA
In The Supreme Court

SEP 23 2009

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-04390

Auto-Owners Insurance Company, Inc., ... Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

PETITION FOR CLARIFICATION OR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, the Appellant, Auto-Owners Insurance Company, Inc. ("Auto-Owners"), hereby petitions this Court for clarification, or in the alternative, rehearing, in the above referenced matter. Because this Court has visited the primary issues in this matter twice, this rehearing petition does not go to the seminal issues involved in the Court's September 8, 2009 opinion. Rather, the petition is focused on a specific statement in this Court's opinion regarding an insurer's duty to take certain steps in proceedings between the insured and the third party. In this regard, the opinion in *Auto Owners Insurance Company, Inc. v. Newman and Trinity Construction*, Op. No. 26450 (S.C. Sup. Ct. filed September 8, 2009) (Shearouse Adv. Sh. No. 39 at 12) (hereinafter also as "Opinion") misapprehends matters of fact and law and conflicts with other opinions of this Court and with courts from across the country.

Introduction

This Court's September 8, 2009 Opinion contains the following statement :

[I]t 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.

Opinion at 22).

This statement is incorrect because of its context. The projection the Court seems to be making with this statement is that the insurer Auto-Owners had the opportunity, but failed to avail itself of that opportunity, to require an ascertainment of the type or character of damages suffered, and whether such damages were of a nature or type to fall within an exclusion, *in the arbitration between the owner and builder/insured*. In fact, whether it be via an arbitration or trial between the third party and the insured, the insurer has no such ability¹, as will be explained below. Rather, the insurer in a *declaratory judgment action* would have the opportunity to put in evidence showing the type or character of the damages suffered in order to prove the applicability of an exclusion, other condition or coverage defense. The *total amount of damages suffered by the third party* may not be re-litigated, of course, in the declaratory judgment action.

If this Court's true holding is that Auto-Owners failed, *in the declaratory judgment action*², to prove that certain damages suffered were of a type that were excluded from the policy, then such would be consistent with prior South Carolina law and with the law of other jurisdictions. As it stands however, the statement quoted

¹ In some instances the underlying action will be of such a nature that there will be no need for a declaratory judgment action to determine the applicability of insurance coverage.

² Auto-Owners admittedly made reference to the same evidence put forth in the arbitration proceeding in arguing its declaratory judgment arguments, so this Court's opinion could easily be clarified to remove the problems created by the quoted language above.

above by the Court is incorrect and respectfully should be corrected now, rather than in a future matter. Thus, this Court should clarify its Opinion by clarifying the statement or in the alternative grant rehearing in this matter on this issue.

Argument

I. Counsel for Trinity Construction at arbitration had a duty to defend and represent only Trinity, and not Auto-Owners.

Counsel for Trinity had no duty to present evidence as to categories of damages that may fall within our outside of policy exclusions, and Auto-Owners was not present at the arbitration to do so itself. In recognition of potentially divergent interests among insurers and insureds, the Rules of Professional Conduct, located in Rule 407, SCACR, mandate that counsel for Trinity owes a duty of loyalty only to Trinity, not Auto-Owners, 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 Auto-Owners retained counsel to defend Trinity under a reservation of rights against Ms. Newman in the underlying arbitration proceeding, that

counsel—Mr. Dean Best, Esquire, of Haynsworth Sinkler Boyd, P.A.—represented *only* Trinity's interests, and *not* Auto-Owner's interests³, with respect to any duty to present evidence as to categories of damages which may fall within a policy exclusion.

II. The existence of insurance is not to be injected into the proceeding between the insured and the third party.

This 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, Auto-Owners should not be made to intervene or otherwise inject itself into the underlying arbitration proceeding between Ms. Newman and Trinity for the purpose of showing that certain damages may fall within insurance policy exclusions. In *Crocker v. Weathers*, 240 S.C. 412, 126 S.E.2d 335 (1962) the Court set forth the following rule:

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.

See also, Dobson v. American Indemnity Co., 227 S.C. 307, 87 S.E.2d 869, 870 (1955).

As stated in *Crocker*, this 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

³ *See St. Paul Travelers v. Payne*, 444 F. Supp. 2d 519, 523 (D.S.C. 2006) (demonstrating that an insured's and insurer's interests can diverge and recognizing that an insurer is entitled to a trial on the issues even when the underlying suit settles favorably to the insured).

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 some one else will have to pay the verdict.”). Thus, not only was Attorney Best—hired by Auto-Owners to represent Trinity in its arbitration with Ms. Newman—representing only the interests of Trinity, Auto-Owners should not otherwise have been required to intervene or inject itself in those proceedings since such would have injected the issue of insurance into those proceedings.⁴

III. The insurer is entitled, in a declaratory judgment action, to prove all or part of the damages awarded against the insured are excluded under the policy, and may put in evidence to show this in the declaratory judgment action.

This Court's Opinion can be read in this regard to misconstrue the purpose of declaratory judgment actions and some may attempt to use the Opinion to prevent an insurer from offering proof as to categories of damages or otherwise proving that damages are excluded under an insurance policy. As a result, this Court should clarify its Opinion on this point as outlined herein.

The purpose of a declaratory judgment action is to assess the legal relationship and responsibilities of the parties. S.C. Code Ann. § 15-53-20 (Supp. 2009) (“Courts

⁴ Rule 411, SCRE (2008) does not mandate a different result, as there would be no reason, such as an issue regarding proof of ownership, agency, control, bias, or prejudice that would apply to make injecting insurance appropriate in this matter in the underlying arbitration action.

of record within their respective jurisdictions shall have power to declare rights, status and other legal relations.”); 26 C.J.S. *Declaratory Judgments* § 3 (2001) (“The object of a declaratory judgment is to enable a party whose rights, privileges, and powers are endangered, or uncertain, and to invoke the aid of the court to obtain a declaration of rights or legal relations.”); 26 CJS *Declaratory Judgments* § 66 (2001) (“A declaratory judgment may be invoked to adjudicate the construction and operation of liability or indemnity insurance policies regarding the rights and liabilities of the parties. Accordingly, a suit for a declaratory judgment may determine the extent of coverage, the insurer’s liability and duties, such as the duty to defend or to indemnify the insured against a claim on which the suit is brought.”). Declaratory judgments allow a court to determine the extent of an insurer’s liability due to the type or categorization of damages, but declaratory judgments do not establish the amount of damages, that is for the trier of fact. 22A *Declaratory Judgments* § 133 (2003) (“Declaratory suits to determine the scope of insurance coverage have often been brought independently of the underlying claims, even though the exact amount to which the insurer may be liable depends on the outcome of the underlying suits against the insured who seeks the declaratory judgment.”).

This Court has previously recognized the purpose of a declaratory judgment action in an insurance coverage matter. In *Sims v. Nationwide*, 247 S.C. 82, 84, 145 S.E.2d 523, 523 (1965) evidence indicated the insured intentionally caused a vehicle collision, and intentional acts were excluded from the insurance policy involved there. Nationwide refused to defend Sims in the underlying tort action. *Id.* In the subsequent indemnity case, Nationwide attempted to offer evidence Sims’ action was intentional

and therefore excluded from the policy. *Id.* at 84, 145 S.E.2d at 524. The trial court held Nationwide was precluded from entering this evidence since it did not do so in the underlying litigation between its insured and the third party. *Id.*

On appeal, this Court reversed the trial court's decision to preclude the insurer's ability to offer evidence as to the exclusion stating that the general rule—"where an insurance company has notice and opportunity to defend an action against its insured, the company is bound by pertinent material facts established against its insured, whether it appears in the defense of the action or not"—is inapplicable where the interests of the insured and insurer *diverge* in the underlying trial. *Id.* at 84-85, 145 S.E.2d at 524 (emphasis added). In recognizing that the interests of the insured and insurer can diverge, the *Sims* court stated:

It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance.

Id. at 86-87, 145 S.E.2d at 525 (quoting *Farm Bureau Mutual Auto Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949)).

In so holding, the *Sims* Court additionally relied on the Restatement of the Law of Judgment, section 107(a), Comment (g), which states, "it is stated that this rule is binding only as to issues relevant to the 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.” *Sims*, 247 S.C. at 87, 145 S.E.2d at 525. Accordingly, under *Sims*, when an insurer and an insured’s interests diverge in the underlying case, an insurer may introduce evidence supporting its interest in the declaratory judgment indemnity case. To hold otherwise would deprive the insurer of its day in court.

The rationale underlying *Sims* is supported by opinions from courts across the country. These cases, like *Sims*, show what proof can be offered in a declaratory judgment action. In *Bulger v. Indiana Insurance Co.*, 901, N.E.2d 1110 (Ind. Ct. App. 2009), a case with a nearly identical procedural history to the one at bar, the Indiana Court of Appeals reversed the trial court’s decision to grant summary judgment because the issue of which categories of damages were covered under the policy could not be discerned from the lump sum judgment awarded by the arbitrator. *Id.* at 1116. The underlying case between the insured and the third-party homeowner was submitted to arbitration. At the arbitration, the homeowner received an award for \$2,325,000 and the insured received an award of \$140,000. *Id.* The insured had a commercial general liability policy (CGL) with Indiana Insurance Company, and the insured and the insurer Indiana sought a declaration of whether the insured’s losses fell within the CGL policy. *Id.* at 1113. The trial court granted summary judgment to the insurer, holding the insured’s faulty workmanship and the design of the unit predominately caused the damages, and such causes were outside the coverage umbrella of the CGL policy. *Id.* at 1114.

However, on appeal the Indiana Court of Appeals observed:

The Mussmans and Bulger submitted their claims to arbitration. Presumably, the Mussmans submitted some documentary evidence of

their damages to the arbitrator, which may have included damage to property not belonging to Bulger; however, no such documentary evidence is included in the record on appeal. The arbitrator awarded a lump sum award to the Mussmans without breaking down the individual damage categories. Therefore, Bulger did not present any documentary evidence of a claim for property damages that might be covered under the policy.

Id. at 1116. The court then reversed the grant of summary judgment, finding a genuine issue of material fact regarding coverage for property damages existed due to affidavits submitted by the insured regarding the type of damages awarded, which type was not discernable from the lump sum award alone in the underlying action with the third-party homeowner. *Id.* Accordingly, the Indiana court held that evidence would be allowed in the declaratory judgment action to determine whether the type of damages awarded in the arbitration between insured and the third-party were covered under the CGL policy.

Similarly, in *Cincinnati Insurance Co. v. Tennessee Log Homes*, 2008 WL 2944914 (E.D. Tenn. 2008), an insurer brought a declaratory judgment action to determine coverage following an arbitration award. In the underlying action, the arbitrator awarded the third party home owners \$95,000 due to the “under-design” of the home. *Id.* at *5. During the declaratory judgment action, the insured attempted to revisit the design of the log home. *Id.* As the insured was a party to the underlying action, the federal court barred the insured from relitigating the design argument. *Id.* at 6. However, the court held this ban on re-litigating the design argument in no way prevented the insured from arguing whether the awarded damages are covered under the insurance policies. *Id.* at *7.

The same was true in *Acuity v. Burd & Smith Construction, Inc.*, 721 N.W.2d 33, 35 (N.D. 2006), where the court determined a damage award in an underlying case was only partially covered by a CGL policy. The court held, “the CGL policy does not provide coverage to repair or replace a defective roof . . . but does provide coverage for other property damage to the apartment building. *Id.* Thus, the North Dakota court, like the others cited herein and our Court in *Sims*, recognize that in a declaratory judgment action it is proper to examine the type of the damages awarded in the underlying action and to determine availability of coverage or whether an exclusion applies.

Also, in a declaratory judgment action to determine whether categories of damages awarded in an underlying action were insured, the District Court for the Southern District of Indiana stated:

In a case in which there has been no previous finding of liability, a declaratory judgment does not assign specific dollar values to damages that the insurer must cover; *the judgment may simply clarify which categories of damages the insurer may be responsible for indemnifying if the third party victim can prove in the underlying suit that the insured is liable for those damages.*

Selective Ins. Co. v. Cagnoni Dev., LLC, 2008 WL 126950, *5 (S.D. Ind. 2008) (emphasis added).⁵ This statement of the law is correct and demonstrates that the

⁵ Commentators have also addressed the tension between relitigation and allowing an insurer to be heard on coverage issues, and conclude that if the interests of the insured and insurer diverge on a particular matter, then an insurer should be permitted to present the evidence⁵ against the insured's interest at the subsequent indemnity action.

When the policyholder's liability arises out of a judgment entered against it in an underlying proceeding, courts evaluate the insurer's obligation to indemnify by comparing the policy language with the facts found by the court (or jury) in that proceeding. If the facts as determined by the trier of fact fall within the coverage of the policy, the insurer must indemnify the policyholder.

purpose of the declaratory judgment action in this context is to ascertain whether categories of damages will be covered under the insurance policy—not to relitigate the amount of total damages owed by the insured to the third party.

Auto-Owners does not attempt to change the law, it only requests that this Court correct the above-quoted statement and clarify that proof as to coverage and the issue of whether certain categories of damages are covered can in fact, and should, be offered in a declaratory judgment action.⁶ *Sims* correctly states the law on this issue and the opinions from the other jurisdiction support the holding in *Sims*. Auto-Owners respectfully submits that this Court should address this error in its opinion now to prevent further and prolonged litigation in this area of the law.

Where the conflict between insurer and policyholder centers on the basis of the policyholder's liability to the underlying claimant, the insurer may not be collaterally estopped from challenging those facts determined in the underlying action with respect to which the interests of policyholder and insurer diverge.

JOHN H. MATHIAS, JR., JOHN D. SHUGRUE, AND THOMAS A. MARRINSON, INSURANCE COVERAGE DISPUTES § 9.01[1] (2009). This statement is consistent with this Court's ruling in *Sims*.

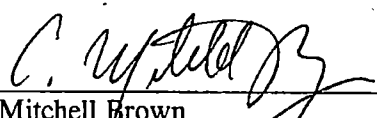
⁶ The Court also stated, "There is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco." Accordingly, the Court held that the entire award was payable by Auto Owners. The Arbitrator issued an itemized award (R. pg. 11). As one can see in the award, the arbitrator included fifteen (15) headings, e.g., SITE WORK. The arbitrator did not create the headings on his own, but adopted the headings used by Newman's arbitration expert in the expert's proposal for a cost to repair the house. To prove damages, Newman retained a general contractor, Robert Hedgepath, to prepare a proposal for a cost to repair the house. Hedgepath's proposal appears on pages 327 and 328 of the record. It contains the same headings as the award, e.g., SITE WORK; and the proposal has itemized, estimated amounts for each portion of the work. Further, the headings in Hedgepath's proposal contain more description of the work than does the award.

When one reads the award and proposal together, it is submitted that there is an adequate description of the direct and incidental costs to remove and replace the defective stucco. By way of example, Hedgepath estimated the direct cost to remove the stucco under the DEMOLITION heading and he estimated the direct cost to install a new stucco wall system under the INTERIOR & EXTERIOR FINISHES heading. To the extent the Court determines there is uncertainty, Auto Owners respectfully submits that the appropriate course of action is to reverse and remand the case to the lower court to have a judge make findings of fact consistent with the law determined by the Court herein.

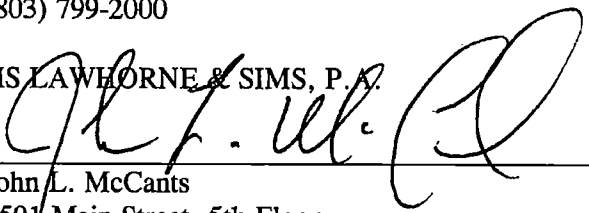
Conclusion

Petitioner therefore respectfully requests that this Court grant its petition consistent with its arguments stated herein.

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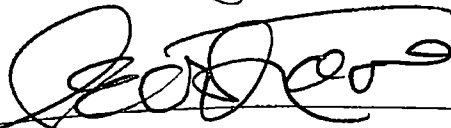
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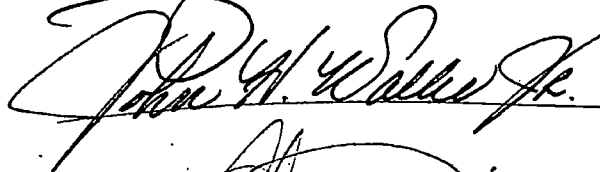
Columbia, South Carolina

September 23rd, 2009

Petition for rehearing ~~or reconsideration~~ is denied.



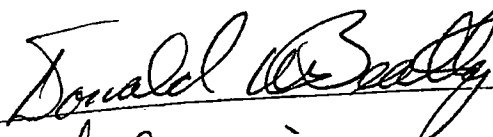
C.J.



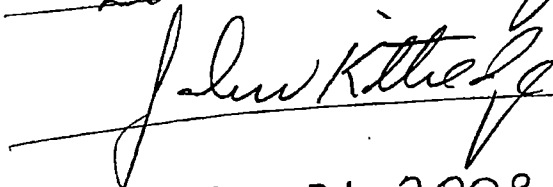
J.



J.



J.



J.

October 21, 2009

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

RECEIVED

MAY 24 2017

SC Court of Appeals

Ex Parte:

Nationwide Mutual Fire Insurance Company, ...Appellant,

In Re:

Beresford Commons Homeowners Association, Inc., ...Respondent,

v.

Superior Solution, LLC, ...Respondent.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Does 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 p. 21), require a liability insurer to intervene in the underlying action to establish liability against its insured if it seeks to establish the facts necessary to allocate between covered and non-covered damages?
- II. Did Harleysville constitute a change in law such as to require a liability insurer to intervene in the underlying action where such intervention was not previously required?
- III. Did the trial court err in refusing to hear Nationwide's Motion to Intervene?
- IV. What are the procedural and evidentiary rules going forward if intervention is required?

STATEMENT OF THE CASE

This is an appeal from two rulings by the Honorable Kristi Lea Harrington, Circuit Judge of the Ninth Judicial Circuit, that effectively denied Appellant Nationwide Mutual Fire Insurance Company's (hereinafter "Nationwide") Motion to Intervene due to a recent change in law governing insurance coverage litigation. By Form 4 Order filed January 31, 2017, the trial court ruled that Nationwide's Motion was not heard because it was filed after the pretrial deadline. On February 6, 2017, Nationwide's Motion for Reconsideration and/or to Alter or Amend was denied by a ruling from the bench at a pre-trial hearing.

This action was originally filed on or about January 23, 2013 as a construction defect action involving a residential development located in Berkeley County known as Beresford Commons. (Complaint.) The defendants were Portrait Homes-South Carolina, LLC, Portrait Homes-Beresford Commons, LLC, and Pasquinelli Homebuilding, LLC (hereinafter collectively "Portrait Homes") the developer / general contracting entities. The Complaint was subsequently added to name Superior Solution LLC (hereinafter "Superior Solution") as a defendant. (Amended Complaint.) Superior Solution was served on approximately August 30, 2013. (Affidavit of Service.)

The plaintiff in this action is Respondent Beresford Commons Homeowners Association, Inc. (hereinafter "the HOA"). A companion class action by the unit owners has been settled and dismissed. (See Seventh Amended Complaint, Joseph Costantini and Susan M. Costantini, on behalf of themselves and other similarly situated vs. Portrait Homes-South Carolina, LLC, et al., Civil Action No. 2013-CP-08-00180.)

The operative pleading when Nationwide moved to intervene was the HOA's Sixth Amended Complaint, which was filed on July 27, 2015. (Sixth Amended Complaint.)

Portrait Homes filed an Answer and Cross-claims against Superior Solution for indemnity. (Portrait Homes Answer and Cross-claims filed Aug. 10, 2015.) The HOA filed its Seventh Amended Complaint in this action on January 5, 2017. (Seventh Amended Complaint.)

The HOA alleged in their Seventh Amended Complaint that Superior Solution was responsible for installation of the siding during original construction of the Beresford Commons project. (Seventh Amended Complaint, ¶ 10.) Many other siding installer defendants were named in the lawsuit. The HOA asserted causes of action for negligence, breach of warranty, and unfair trade practices. (*Id.* at ¶¶ 9, 24-42.)

Nationwide retained Albert A. “Andy” Lacour of Clawson and Staubes, LLC to defend Superior Solution in this action. Lacour continues to represent Superior Solution up through the present time.

Nationwide filed a separate declaratory judgment action in federal court on February 10, 2016 to determine its coverage for any judgment or settlement awarded against its insureds. (See Complaint, Nationwide Mut. Fire Ins. Co. v. Superior Solution, LLC, et al., Case No. 2:16-cv-423-PMD (hereinafter “the coverage DJ”).) In the coverage DJ, Nationwide alleged it issued two policies of liability insurance to Superior Solution. (*Id.* at ¶¶ 11-12.) Nationwide requested declarations that, among other things, liability for defective work is not covered under its policies. (*Id.* at ¶¶ 34-36, 47-49.)

Due to an interlocutory appeal by the HOA, the coverage DJ was stayed until February 10, 2017. (Mandate.) During that time, the Supreme Court of South Carolina issued its opinion in Harleysville Group Insurance v. Heritage Communities, Inc., et al., 2017 WL 105021, Op. No. 27698 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh.

No. 2 at p. 21). Nationwide moved to intervene in this action based upon change in law on January 26, 2017. (Nationwide Motion to Intervene.)

When Nationwide moved to intervene, the HOA served written discovery requests on Nationwide and noticed Nationwide's deposition pursuant to Rule 30(b)(6), SCRCF. (See Nationwide's Motion for a Protective Order, Exh. A and B.) Nationwide moved for a protective order as to the HOA's requested discovery because Nationwide sought intervention only for the limited purpose of drafting and submitting a special verdict form or special interrogatories to the jury pertaining to certain coverage questions. (*Id.* at p. 3.)

Counsel for Nationwide raised both motions to the trial court at a hearing held on January 31, 2017. (Transcript of Record dated Jan. 31, 2017 at pp. 6-8.) The trial court refused to hear Nationwide's Motion to Intervene, finding it was not timely filed. (Form 4 Order filed Jan. 31, 2017.) The HOA withdrew its requests for discovery and a deposition of Nationwide after Nationwide's Motion to Intervene was not granted. (Transcript dated Jan. 31, 2017 at p. 8.)

Nationwide served its Motion for Reconsideration and/or to Alter or Amend on February 2, 2017 and filed it on February 6, 2017. (Nationwide Mot. for Reconsideration.) Counsel for Nationwide requested that the trial court advise as to whether its ruling on Nationwide's Motion to Intervene was final. (E-mail dated Feb. 2, 2017.) The HOA served a memorandum in response to Nationwide's Motion for Reconsideration on February 3, 2017 and filed it on February 7, 2017. (Pl's. Mem. in Opp'n.) Nationwide served its Reply Memorandum on February 3, 2017 and filed it on February 6, 2017. (Reply Mem.) The trial court scheduled a hearing on Nationwide's Motion for Reconsideration for February 6, 2017. (E-mail dated Feb. 4, 2017.)

At the hearing, the trial court ruled from the bench that Nationwide's Motion to Intervene was denied. (Transcript of Hearing dated Feb. 6, 2017 at pp. 16-17.) Nationwide filed and served its Notice of Appeal on the same date. (Notice of Appeal.)

STANDARD OF REVIEW

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

ARGUMENT

This appeal concerns legal questions regarding intervention by a liability insurance carrier into an underlying tort action pursuant to Rule 24, SCRPC. The specific issue on appeal is whether Nationwide's motion to intervene was timely due to a recent change in law. However, the larger issues concern whether intervention by a liability carrier into an underlying tort action is required or permitted, and if so, upon what basis, to what extent, and by what procedure.

In this case, the HOA's tort claims pertaining to alleged construction defects and Nationwide's contractual coverage questions were proceeding in two separate actions. However, Nationwide was forced to intervene in this action in order to protect its due process rights when the Supreme Court issued its opinion in Harleysville, 2017 WL 105021.

I. The trial judge erred in ruling that Nationwide's motion to intervene was untimely because intervention was mandated by a change in law.

Nationwide moved to intervene in this action based upon a fundamental change in South Carolina law that appears to require intervention by a liability insurer where no such intervention was previously required. (Motion to Intervene at ¶ 11-19.) The trial judge ruled that Nationwide's motion was not timely because it was filed after the pretrial

deadline. (Order filed Jan. 31, 2017.) Therefore, the question presented in this appeal is whether the Harleysville opinion constituted a change in law such that the trial court erred in refusing to hear Nationwide's motion to intervene.¹

A. State law prior to Harleysville

Liability insurance generally provides counsel to defend the insured and indemnification of the insured defendant for any judgment awarded against the defendant.

Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820

(1977). The Fourth Circuit has aptly summarized the tripartite relationship between the plaintiff in a tort action, the defendant in the tort action, and the defendant's liability insurer. In Twin City Fire Insurance Company v. Ben Arnold-Sunbelt Beverage Company of South Carolina, LP, the court explained:

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

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

When coverage issues exist, there are two separate disputes: (1) the underlying action brought by the plaintiff to establish liability against the insured defendant, which

¹ Nationwide recognizes that Harleysville is not a final decision. Nevertheless, the filing of the Harleysville opinion could not be ignored because the court based its holding on implied waiver. The Supreme Court held that Harleysville waived its coverage position based upon deficiencies the court found in reservation of rights letters dated 2003 and 2004 and Harleysville's failure to seek an allocated verdict in the underlying case. Harleysville, 2017 WL 105021 at *6-7 and n.11. The change in the law required Nationwide to move to intervene in order to avoid an implied waiver.

generally sounds in tort (hereinafter “the tort action”), and (2) the question of liability coverage for the claims against the defendant.

The plaintiff’s tort claims against the defendant contractor in a construction defect action depend upon a finding that the contractor violated applicable building codes, deviated from industry standards, or constructed housing that the builder knew or should have known posed a serious risk of physical harm. Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989). On the other hand, coverage issues turn on interpretation of the insurance contract between the contractor and the insurer. B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Whereas underlying tort actions are factually driven, interpretation of insurance contracts is an issue of law for the court. Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013).

There is an inherent tension between a liability insurer’s duties to its insured and its protection of its rights under the insurance contract. Liability insurers owe a duty of good faith and fair dealing in defending their insureds in the underlying tort action. Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933). However, liability insurers also “have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition.” B.L.G., 334 S.C. at 535, 514 S.E.2d at 330. A contrary holding would result in a total disregard for the policy language and would expose insurers to unlimited liability which, in turn, would result in unaffordable premium rates.

In construction defect cases, coverage disputes are almost unavoidable. This is because of the nature of the insurance contract and applicable statutes. Standard form

liability insurance policies (absent exclusions) cover property damage caused by an accident, but they do not cover defective work. Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1994), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996).² When water intrusion caused by construction defects is alleged, the accident is the unforeseen water intrusion. Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc., 835 F. Supp. 2d 104, 107 (D.S.C. 2011). Coverage exists for otherwise non-defective building components that are damaged as a result of accidental water-intrusion caused by defective work, but not for the defective work itself. Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011).

This distinction is not only mandated by the policy language and governing case law, it is also codified by statute. S.C. Code Ann. § 38-61-70(B)(2). The construction industry, which lobbied for the enactment of this statute, should not be heard to demand that it be disregarded.

Therefore, the scope of liability coverage is limited in most construction defect cases. As a matter of law, coverage exists for those otherwise non-defective components within the insured contractor's work that were damaged by accidental water intrusion, but not for the defective work itself. In many policies, exclusions also apply.

Different states have developed different methods of dealing with this inherent tension in liability coverage relationships. Some states disregard policy provisions that allow insurers to control the defense and permit insureds to retain independent counsel at the liability carrier's expense when coverage issues arise. See Twin City, 433 F.3d at 371.

² Nationwide's policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Nationwide policies, Form ACP-0007 (11-04) at p. 12, attached to Mot. to Intervene.)

These states destroy an insurer's ability to control defense costs and reduce insurers to little more than a funding source. Other states allow insurers to control the defense, but require insurers to instruct defense counsel to request special interrogatories or a special verdict at trial to clarify coverage questions. Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491, 1498 (10th Cir. 1994). These states intermingle insurance issues with the underlying tort case. South Carolina courts developed another means of addressing coverage questions—one that was consistent with other applicable law and that provided a workable solution.

1. Insurers' "control" of the defense

Under prior South Carolina law, when an insurer reserved its rights as to coverage issues, it retained defense counsel whose loyalty was solely to the insured. Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP, 336 F. Supp. 2d 610, 615-16 (D.S.C. 2004). The liability insurer then retained separate coverage counsel to represent the insurer's interest in protecting its coverage position. This method avoided creating a conflict of interest for counsel retained to defend the insured. Defense counsel had no conflict because insurance coverage was addressed in separate litigation.

2. Separation of coverage issues from underlying tort issues

Under longstanding South Carolina law, insurance coverage issues are separated from tort issues. Under the common law, liability insurers may not be joined as parties in tort actions with their insured defendants. Major v. Nat'l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976); Trancik v. USAA Ins. Co., 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003). Plaintiffs in underlying tort actions have no rights of direct action against defendants' liability carriers, and any such right must be created by the

legislature. Major, 267 S.C. at 520, 229 S.E.2d at 850; Swinton v. Chubb & Son, Inc., 283 S.C. 11, 14, 320 S.E.2d 495, 496 (Ct. App. 1984). Moreover, insurance issues must be kept from the jury to avoid prejudicing the verdict. Bartell v. Willis Constr. Co., 259 S.C. 20, 24, 190 S.E.2d 461, 463 (1972); Rule 411, SCRE.

Coverage issues are often resolved as part of the settlement of the underlying construction defect actions. But when coverage is contested, liability carriers allow retained defense counsel to defend the insured contractor without regard to any coverage defenses. Insurers retain separate coverage counsel to represent them in coverage disputes. In order to protect the integrity of the underlying tort proceeding and to prevent conflicts of interests for defense counsel, insurance coverage issues are usually litigated in separate declaratory judgment actions.

B. The Harleysville opinion and its change in the law

On January 11, 2017, the Supreme Court issued an opinion that re-wrote the law governing insurance coverage disputes. The court affirmed on most issues the ruling of a special referee, John A. Milling. The special referee's order ignored and disregarded prior South Carolina law on numerous points, and instead followed a patchwork of inapposite precedent from other jurisdictions. The special referee ignored longstanding black letter law that insurance coverage cannot be created by waiver or estoppel. Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Illinois, 338 S.C. 43, 53, 524 S.E.2d 847, 852 (Ct. App. 1999). Additionally, the special referee ruled that a liability carrier may not "re-litigate damages" in a separate coverage action. Harleysville Group Ins. v. Heritage Cmities., Inc., 2013 WL 8482326 at *14 (S.C. Com. Pl. filed Feb. 28, 2013), aff'd, 2017 WL 105021 at *7 n.11 (petition for rehearing pending).

The Supreme Court, affirming the reasoning of the special referee, held that a liability insurer waives coverage defenses by failing to include in its reservation of rights letters notice that a conflict of interest exists and that an allocation of damages between covered and non-covered losses is needed. Harleysville, 2017 WL 105021 at *7. These actions would have been meaningless and counterproductive under prior South Carolina law because they are based upon conflicting law from other jurisdictions that merge insurance issues with tort issues.

Some jurisdictions place the burden of proving the precise portion of the unallocated verdict that is covered on the plaintiff in the underlying tort action. Duke v. Hoch, 468 F.2d 973, 977 (5th Cir. 1972). This concept was foreign to South Carolina law, which allowed the parties to the underlying action to produce evidence of covered damages in a separate coverage action. See Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989) (allocating covered versus non-covered damages in a coverage action based upon damages awarded in a separate liability action). Because South Carolina courts have allowed contractual allocation of covered versus non-covered damages to occur in a separate coverage action, there was no reason to advise the insured of the need for such an allocation in the underlying tort action under prior law.

The circumstances under which Duke and its progeny arose are very different from the facts of this case. The policy in Duke covered negligence but not intentional misconduct. Id. at 975. The plaintiff's claim against the insured accountants included claims for negligence and intentional acts. Id. Generally, the claims involved negligent failure to keep proper books and records and intentional commingling of funds. Id.

No one requested an allocated verdict at trial. Duke, 468 F.2d at 975. The jury returned an unapportioned verdict. Id.

The plaintiff then brought suit to recover on the defendants' liability policy. Duke, 468 F.2d at 977. Under Florida law, if the insurer established that the underlying judgment was for both covered and non-covered damages, the burden shifted to the plaintiff to prove the precise portion of the unallocated verdict that was covered. Duke, 468 F.2d at 977. The insurer argued that due to the lack of an allocated verdict, the plaintiff failed to meet his burden and therefore he was not entitled to recovery under the policy for the judgment. Id.

The court held that permitting the insurer to make this argument placed the plaintiff in an unfair position. It was impossible for the plaintiff to recover because the insurer, in control of the defense, could avoid coverage simply by failing to obtain an allocated verdict. Duke, 468 F.2d at 979. The court relieved the plaintiff of an impossible burden of proof by holding that the insurer waived this coverage defense by failing to notify its insured of the conflict of interest and the need to obtain an allocated verdict. Id. at 979-80.

Duke addressed a legal scenario in which (a) governing law did not permit an allocation of the underlying verdict; and (b) the insurer argued that the plaintiff could not meet his burden of proving the extent of covered damages due to the lack of an allocated verdict. Duke, 468 F.2d at 977. Duke and its progeny do not stand for the proposition that an insurer forfeits all coverage defenses merely by failing to instruct defense counsel to obtain an allocated verdict. Rather, these cases hold that an insurer cannot use its failure to obtain an allocated verdict as an excuse to deny coverage. See Duke, 468 F.2d at 977; Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co., 819 N.W.2d 602, 610 (Minn.

2012). Furthermore, Duke was decided in a state that permitted an insurer to intermingle coverage issues with tort issues in the underlying tort action by instructing retained defense counsel to request an allocated verdict.

In contrast, courts applying South Carolina law have held that defense counsel retained by a liability insurer does not have an inherent conflict of interest because defense counsel's loyalty is solely to the insured contractor. Twin City, 336 F. Supp. 2d at 615-16, aff'd, 433 F.3d at 373-74. Because defense counsel is ethically bound to the insured contractor, there was no reason to advise the insured of a conflict of interest. It would have created a conflict of interest where none existed for an insurer to advise defense counsel to seek an allocation of covered versus non-covered damages in the underlying action because neither the plaintiff nor the insured contractor has an interest in such an allocation in the underlying action.

Furthermore, the special referee in Harleysville merged coverage issues with the defense by ruling that a general verdict cannot be "re-litigated" in a separate coverage action. Harleysville, 2013 WL 8482326 at *14-17. This concept was incongruous with South Carolina jurisprudence, which up to that time had always allowed coverage issues to be litigated in separate actions. See Auto Owners Ins. Co. v. Personal Touch Med Spa, LLC, 763 F. Supp. 2d 769, 775-76 (D.S.C. 2011) (holding that a federal district court may decide coverage issues without becoming entangled in underlying tort issues); Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co., No. 4:09-CV-1379-RBH, 2013 WL 5437712 (D.S.C. filed Sept. 27, 2013) (making findings of fact and drawing legal conclusions in allocating covered versus non-covered damages in a separate coverage action in federal court).

All of these rulings are based on paradigm shift away from former South Carolina law. The court's reasoning in Harleysville makes sense only if the liability insurer is viewed as a litigant in the underlying tort action. This concept, however is inconsistent with prior law in this state that separated coverage issues from underlying tort issues.

C. Prior cases did not require an insurer to intervene.

The two cases cited in Harleysville did not forecast that the general rule that coverage issues may be litigated in a separate action had been abandoned. See Harleysville, 2017 WL 105021 at *7 n.11. The Supreme Court cited two cases in support of its holding that Harleysville waived its right to contest coverage issues by failing to seek an allocated verdict. See id. (citing Auto Owners Insurance Company v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009); Owners Ins. Co. v. Clayton, 364 S.C. 555, 614 S.E.2d 611 (2005)).

1. Newman did not require intervention

In Newman, the court held that Auto-Owners could not relitigate the issue of damages because it “represented [its insured] in binding arbitration, made mandatory by the terms of the insurance contract.” Newman, 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5. The court held that Auto-Owners “had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator” Id. at 198, 684 S.E.2d at 547.

This language indicated that Newman addressed a special situation. First, insurance companies cannot “represent” their insureds before courts of record. Renaissance Enters., Inc. v. Summit Teleservs., Inc., 334 S.C. 649, 515 S.E.2d 257 (1999). Second, it is unusual for a liability insurer to invoke an arbitration provision in its policy in the underlying construction defect action. Typically, it is the builder who moves to compel arbitration. See Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 254-56, 743 S.E.2d 868, 870-71

(Ct. App. 2013) (indicating that the developer moved to compel arbitration based upon an arbitration provision in their purchase agreement).

Furthermore, the court found that the insurer “had an opportunity to raise this matter” in the underlying tort action. Insurers are not technically parties to underlying lawsuits simply because they provide a defense. 2 Allan D. Windt, Ins. Claims & Disputes § 6:22 (6th ed. Mar. 2017 Update). Liability insurers may not be joined as parties in tort actions with their insured defendants, nor may insurance issues be raised in those proceedings. Major v. Nat’l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976); Trancik v. USAA Ins. Co., 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003); Rule 411, SCRE. The Supreme Court has squarely held that insurers may not intervene in underlying actions that affect their interest. Ex Parte Gov’t Emp’s. Ins. Co., 373 S.C. 132, 137, 644 S.E.2d 699, 702 (2007).

Thus, Newman’s holding was based upon a factual determination that Auto-Owners was a party to the underlying arbitration proceeding. Whether Auto-Owners was actually a party to the underlying action is irrelevant. The Court’s holding found as a matter of fact that Auto-Owners was a party to the underlying litigation, and that finding was apparently never challenged. Because Newman was itself decided in the context of a coverage action that was separate from the underlying proceeding, and the particular holding at issue was based upon the specific facts of that case, there was nothing to indicate that it was intended to create a categorical rule that insurance issues cannot be decided in separate coverage actions.

Harleysville focuses on the “right to control the litigation.” Harleysville, 2017 WL 105021 at *6. This is inconsistent with prior law because, as discussed above, insurers

retain defense attorneys whose loyalty is solely to the insured. Twin City, 336 F. Supp. 2d at 615-16, aff'd, 433 F.3d at 373-74. Consequently, insurers cannot instruct defense counsel to inject coverage issues into the underlying tort action.

2. Clayton did not require intervention.

The other case cited in Harleysville does not deal with coverage for construction defects. In Clayton, the Court held that coverage existed because one of two theories of liability was covered. Id. at 560, 614 S.E.2d at 614.

Clayton addressed substantively different policy language. The policy at issue in Clayton covered certain causes of action, including defamation. Id. at 560, 614 S.E.2d at 614. There was no qualifying language in that policy provision limiting coverage for defamation claims to certain types of injuries or damage. Thus, a finding that one of the causes of action was covered “answer[ed] the coverage question.” Id. at 561, 614 S.E.2d at 614. Clayton avoids the issue addressed in Duke by preventing the insurer from arguing that only a portion of the verdict was covered. See 468 F.2d at 975-76.

Coverage for construction defects does not follow the same analysis because, under the policy language and longstanding law, coverage exists for only a portion of the damages awarded for negligent construction—those damages awarded for accidental water damage, as opposed to defective construction. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594; see also C.D. Walters Constr. Co., Inc. v. Fireman’s Ins. Co. of Newark, N.J., 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (holding that “the comprehensive general liability policy does not cover faulty workmanship, but rather faulty workmanship which causes an accident”). This distinction is not merely required by the policy language and case law, it is mandated by statute. S.C. Code Ann. § 38-61-70(B). Courts must presume that statutes

are not futile acts, but were intended to accomplish something. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964).

Thus, the fact that a general verdict was rendered in the underlying construction defect case does not “answer the coverage question” as it does with defamation claims. See Clayton, 364 S.C. at 560, 614 S.E.2d at 614. The question is not whether one of the causes of action is covered, but how much of the damages awarded on the otherwise covered cause of action (*i.e.*, negligence) is for repair of accidental water damage. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. The policy language and South Carolina law require a separate allocation to determine how much of the damages awarded in the underlying case are covered under the insurance contract.

D. “Relitigation” of coverage issues was permitted under prior law.

Harleysville’s application of Clayton ignored a large body of prior law. Generally, an insurer is bound by the underlying judgment only when it was given full opportunity to control the defense. 2 Ins. Claims & Disputes § 6:22. An insurer is not collaterally estopped as to facts that were not adjudicated in the underlying lawsuit against the insured. Id. Moreover, an insurer is not collaterally estopped when the interests of the insurer conflict with those of the insured. Id. South Carolina has adopted this legal framework, and none of these factors weigh in favor of precluding an insurer from litigating coverage issues in separate proceedings.

1. Opportunity to control the defense

First, liability insurers do not have “full opportunity to control the defense” under South Carolina law. Instead, they provide defense counsel whose sole loyalty is to the insured. Twin City, 433 F.3d at 373-74. Heretofore, liability insurers addressed coverage

issues in separate actions through separate counsel. Therefore, liability carriers in South Carolina do not “control the defense” to the extent that they could be held to have waived coverage defenses in the underlying case.

2. Rules of collateral estoppel

Second, collateral estoppel generally does not apply in the context of coverage disputes involving construction defect litigation. This is so for two reasons. First, the interests of liability insurers generally conflict with those of their insureds with respect to the amount of covered damages. Second, the factual determinations affecting the coverage issues are not adjudicated in the underlying tort actions.

In South Carolina Property and Casualty Insurance Guaranty Association v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991), the Supreme Court adopted the Restatement (Second) of Judgments rule for the use of offensive collateral estoppel. Id. at 213, 403 S.E.2d at 627. Under this rule, only a party to a prior action or a one in privity with a party to a prior action can be precluded from relitigating an issue by collateral estoppel. Carrigg v. Cannon, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001). Privity exists when one party is “so identified in interest with another that he represents the same legal right.” Id. “Privity deals with a person’s relationship to the subject matter of the previous litigation, not to the relationships between the entities.” Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998). “To be in privity, a party’s legal interests must have been litigated in the prior proceeding.” Id. Although liability insurers provide a defense, they are not in privity with their insureds with respect to coverage issues.

a. Conflict of interest

Under the Restatement rule, an indemnitor may be precluded from relitigating an issue if the indemnitor defended or should have defended the indemnitee. Restatement (Second) of Judgments § 57(1) (1982). However, when there is a conflict of interest between the indemnitor and the indemnitee, the indemnitor is not bound. Restatement (Second) of Judgments § 57(2) (1982).

Under prior South Carolina law, an insurer was not bound by the findings of fact in the underlying judgment when its interests conflicted with those of its insured. Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). In Harleysville, the court held that the insurer waived its right to contest coverage by failing to advise of a potential conflict of interest. Harleysville, 2017 WL 105021.³ Reservation of rights letters advise the insured of a conflict as to an insurer's duty to indemnify. Id. at *5. Nevertheless, after finding a conflict of interest, the court ignored its own precedent in holding that Harleysville was bound by the underlying judgment. See Sims, 247 S.C. at 86, 145 S.E.2d at 525. This abrupt reversal could not have been forecasted prior to Harleysville.

b. Coverage issues differ from tort issues

Furthermore, coverage questions, although they relate to the settlement or judgment that may be awarded against the insured contractor in the underlying tort action, are generally separate and distinct from the question of proximately caused damages in the tort action. See Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Cmities., Inc., 397 S.C.

³ As discussed above, this conflict generally does not affect the defense of the underlying action under South Carolina's system because insurers reserve their rights to adjudicate coverage disputes in separate actions. The conflict of interest is limited to the amount of covered damages for purposes of the insurer's duty to indemnify.

348, 363-64, 725 S.E.2d 112, 120-21 (Ct. App. 2012). The issue in the coverage action is not whether the tort plaintiff was damaged and to what extent, but rather how much of the damages awarded in the underlying case are covered under the insurance contract. S.C. Code Ann. § 38-61-70; Crossmann, 395 S.C. at 50, 717 S.E.2d at 594; Auto Owners, 763 F. Supp. 2d at 775-76. The parties to the underlying case have no incentive to present evidence and arguments as to the quantum of the plaintiff's damages that is for resulting water damage as opposed to faulty work. See Rule 49(b), SCRPC (providing that special interrogatories must be "necessary to a verdict").

The Supreme Court has also held that the binding effect of a judgment against an insured does not extend to matters outside the scope of an insurance contract. Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 86, 145 S.E.2d 523, 525 (1965). "To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court" Id. For this reason, insurers are allowed to reserve their defenses for a subsequent suit. Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793, 800 (4th Cir. 1949).

3. Due Process requirements

Harleysville assumed that insurers must address coverage issues in the underlying tort actions without providing any mechanism for coverage issues to be heard and ruled upon. Insurance carriers, which have the same access to the courts as any other jural persons, are entitled to seek declaratory relief as to meritorious coverage issues. Greene v. Dunham Life Ins. Co., 287 S.C. 197, 199, 336 S.E.2d 478, 479-80 (1985) (holding that insurers should not be penalized for litigating a meritorious issue); Sims, 247 S.C. at 86,

145 S.E.2d at 525 (holding that insurers may not be deprived of their day of court through the actions of others).

Collateral estoppel only applies if the party to be estopped had a full and fair opportunity to litigate the issue in the first action. Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984). This rule is imposed to protect the constitutional due process rights of the party to be estopped. Richburg v. Baughman, 290 S.C. 431, 435, 351 S.E.2d 164, 434 (1986).

Due process requires that liability insurers be provided a proper forum for resolving coverage disputes. Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998) (holding that due process requires notice and an opportunity to be heard). Due process cannot countenance a ruling that, on the one hand, insurers must sacrifice their interests to those of the insured in defending the underlying tort action, while at the same time, insurers waive any rights to assert coverage issues by failing to assert them in that same proceeding. See Harleysville, 2017 WL 105021 at *5-6

E. The effect of Harleysville

Accordingly, the Harleysville opinion, if it becomes final, will bring about a profound change in the legal landscape upon which insurance issues are to be decided. It amounted to a wholesale refashioning of the law on a scale normally reserved for the legislature. See Swinton v. Chubb & Son, Inc., 283 S.C. 11, 14, 320 S.E.2d 495, 496 (Ct. App. 1984) (holding that a right of direct action must be created by the legislature). Harleysville held, for the first time, that coverage can be created by waiver or estoppel, and that insurers waive coverage defenses by failing to take actions that were totally inconsistent with prior law. Harleysville also ignored the distinction between South

Carolina jurisprudence and conceptual frameworks followed by other jurisdictions that merge liability insurance issues with underlying tort issues. As Acting Justice Pleicones recognized in his dissent, “there is no suggestion as to 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.” Harleysville, 2017 WL 105012 at *17 (Pleicones, A.J., dissenting).

F. Harleysville requires an insurer to move to intervene.

As discussed above, the effect of Harleysville is that it places liability insurers in a position in which they must move to intervene in the underlying case or they waive all rights under their contracts of insurance. Under prior law, it was doubtful that insurers even had standing to intervene. 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)). At a minimum, an insurer could not be said to have waived all coverage defenses when a separate declaratory action had been filed to determine coverage issues. By merging coverage with tort issues and holding that insurers waive all rights by not asserting them in the underlying tort case, Harleysville forces insurers to move to intervene to seek an allocated verdict. Nationwide properly moved to intervene based upon a change in law. For this reason, Nationwide’s motion to intervene was timely.

G. The trial court erred in ruling that Nationwide’s Motion to Intervene was untimely.

As discussed above, Harleysville represents a significant change in South Carolina law. Because the opinion appears to hold that insurers are barred from litigating factual

issues that are intertwined with the underlying tort litigation in separate coverage actions, liability insurers now have no choice but to move to intervene in the underlying tort litigation. A holding that insurers lack standing to intervene would deny insurers a forum in which to litigate such coverage issues, thus violating due process.

Accordingly, Nationwide moved to intervene in this action shortly after the Harleysville opinion was released. The scope of the requested intervention was limited. Nationwide sought only to participate in the drafting of a special verdict form or submission of special interrogatories to the jury regarding the amount of any damages award that is for defective work as opposed to resulting damage to building components outside Superior Solution's scope of work. (See Motion to Intervene.)

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

Nationwide's motion to intervene was timely. As discussed above, grounds did not exist for seeking intervention until the Harleysville opinion was released on January 11, 2017. Nationwide's motion was filed approximately two weeks later—a short time period that was barely sufficient for counsel to digest the significance of the Harleysville decision and prepare briefing on the matter. The remaining elements were also satisfied.

H. Other requisite elements for intervention

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.

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 has held that if intervention is not sought, an insurer waives its right to seek an allocation as to the amount of covered damages. Harleysville, 2017 WL 105021 at *7 n.11; Newman, 385 S.C. at 198, 684 S.E.2d at 547.

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 plaintiff and Superior Solution 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.

Accordingly, Nationwide 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 a court's discretion. The trial court therefore erred in refusing to allow Nationwide to intervene.

In the alternative, Nationwide also moved 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.

Nationwide's motion to intervene was 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).

The granting of Nationwide's motion to intervene would not have unduly delayed or prejudiced the adjudication of the rights of the original parties because intervention was sought only for the limited purpose of determining the form of the verdict to be submitted to the jury, and the proposed intervention not have impacted the ability of the original parties to present their claims and/or defenses at trial. The remaining issues could be addressed in the pending coverage actions.

Nationwide properly moved 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 motion was timely because it was filed shortly after a Supreme Court opinion was issued holding that insurers waive their rights by failing to take this action. Therefore, the trial court erred in refusing to grant Nationwide's motion to intervene.

II. If Nationwide's Motion to Intervene is granted, guidance is needed as to the scope of the intervention and associated procedural matters.

Even if Nationwide prevails on its motion to intervene, it is placed at a severe disadvantage. Under the Harleysville formulation, an insurer must request special interrogatories or a special verdict form to be presented to the jury. Harleysville, 2017 WL 105021 at *6. However, no discovery has been conducted on the issue of covered versus non-covered damages in this action, and no evidence or arguments on this issue will be presented to the jury. The jury is asked to render a verdict upon an entirely extraneous issue in an apparent violation of Rule 49(b), SCRCP (providing that special interrogatories must be "necessary to a verdict").

When Nationwide moved to intervene in this action, it was immediately met with requests by the HOA for written discovery and a deposition of Nationwide representatives. The proposed topics for the deposition were wide-ranging and included issues currently being litigated in two separate coverage actions. (See Motion for a Protective Order at pp. 4-5 and Exh. B.) The HOA argued to the trial court that an insurer is not permitted to intervene on a limited basis. (Transcript of Record at p. 57.) The HOA took the position that upon a motion to intervene it is entitled to develop evidence of liability insurance to be used for purposes other than negligence such as bias of a witness. See Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001); Rule 411, SCRE. At a status conference, Nationwide argued that if such discovery is permitted, Nationwide should also be allowed

to retain its own expert for the purpose of directly establishing the amount of covered versus non-covered damages in the underlying construction defect action, as opposed to being forced to rely on the factfinding in a separate action.

The trial court did not have the opportunity to rule on these issues because Nationwide's Motion to Intervene was not granted. However, if the trial court's ruling is reversed on appeal, these issues will immediately present themselves. They are novel issues that come into play only as a result of the Harleysville decision. Therefore, in the interest of judicial economy, Nationwide requests guidance as to how the bench and bar are to proceed.

CONCLUSION

Nationwide's position is that this action is not a proper forum for litigating coverage issues. However, if the Harleysville opinion becomes final, due process requires that Nationwide be provided a forum for developing evidence and a receiving a meaningful hearing as to allocation between covered versus non-covered damages. In order to avoid a waiver, Nationwide's only choice was to move to intervene in this action for the limited purpose of drafting and submitting special interrogatories or a special verdict form. Nationwide's motion was timely because it was filed approximately two weeks after the Harleysville decision was handed down. The other requirements for intervention are all met. Therefore, the trial court erred in refusing to grant Nationwide's motion.

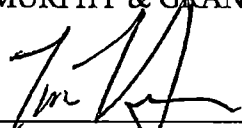
In the interest of judicial economy, Nationwide also requests guidance as to how to proceed under the new framework created by Harleysville. The combining of liability insurance issues with underlying tort issues creates numerous questions for which there is currently no governing law. Questions regarding scope of the intervention, proper

procedure, permitted discovery, permissible use of evidence developed in this case, and effect of this case on other pending coverage actions related to this case have already been raised. The trial court has no governing law upon which to base any ruling on these disputed matters.

In the event the Harleysville opinion is reversed on rehearing, this appeal may become moot. However, if Harleysville becomes final in its present form, the trial court's denial of Nationwide's Motion to Intervene was in error and should be reversed. In the interest of judicial economy, Nationwide also requests guidance as to how to proceed in light of the issues that have been raised in this case if it is allowed to intervene.

Respectfully submitted,

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Columbia, South Carolina
May 27, 2016

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

RECEIVED

MAY 24 2017

SC Court of Appeals

Ex Parte:

Nationwide Mutual Fire Insurance Company, ...Appellant,

In Re:

Beresford Commons Homeowners Association, Inc., ...Respondent,

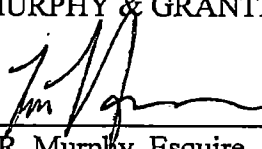
v.

Superior Solution, LLC, ...Respondent.

CERTIFICATE

I, Timothy J. Newton, Esquire, attorney for Appellant, certify that the Appellant's Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 30 2018

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Clifton B. Newman, Circuit Court Judge

Trial Court Case No. 2014CP2607634
Appellate Case No. 2017-02146

Ex Parte:

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company, Appellants,

In Re:

The Harbour Cove Condominium Association, Plaintiff,

v.

Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc., Defendants,

Of Whom the Harbour Cove Condominium Association is the Respondent.

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court properly held that South Carolina law does not permit a liability insurer to intervene in a tort action to protect its rights to contest coverage.
- II. Whether appeal of a Circuit Court's denial of a Motion to Intervene is interlocutory and impermissible.

STATEMENT OF THE CASE

Harbour Cove Condominium Association (hereinafter "Harbour Cove") filed this construction defect action on November 13, 2014 against the contractors who constructed the condominium buildings known as Harbour Cove. Appellant insurers Bitco General Insurance Corporation, Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, National Fire & Marine Insurance Company, Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, and Selective Insurance Company of South Carolina (hereinafter collectively "Appellant Insurers" or "Appellants") have defended various contractors since the inception of this action and moved to intervene barely two (2) months before the trial of this matter was set to commence on October 16, 2017. All insurers moved 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 that jury that addresses factual issues related to the indemnity coverage" (R. pp. 41-45).

The Circuit Court held hearings on the motions to intervene on September 28, 2017 (R. pp. 315-501) and denied all insurers' motions to intervene on October 12, 2017 for several reasons, including that the insurers did not have standing to intervene, the insurers could protect their interest in a separate action, and the recent *Harleysville* case did not mandate a right to intervention. (R. pp. 1-5). On October 13, 2017, Appellant Insurers filed their Notices of Appeal (R. pp. 111-240). Harbour Cove filed a Motion to Dismiss Appeal on October 17, 2017, which was denied on January 24, 2018 (R. pp. 12-16).

On October 25, 2017, the Court of Appeals ordered the consolidation of the Harbour Cove appeals and the appeals stemming from denial of identical motions in another ongoing construction defect action, *Beach Villas at Ocean Keyes Property Owners Association, Inc. v.*

Ocean Keyes Development, LLC, et al., Civil Action No. 2014-CP-26-06573. On February 1, 2018, this Court granted certification under Rule 204(b), SCACR.

FACTS

Harbour Cove is a condominium community in North Myrtle Beach, South Carolina, that consists primarily of five (5) residential buildings, each containing eighteen (18) condominium units. Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc. and Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC (hereinafter collectively referred to as "Centex") developed and constructed the Harbour Cove Community (R. pp. 244-246).

Plaintiff filed this construction-defect action against Centex and its subcontractors as a result of an engineer's investigation of the Harbour Cove community, which revealed significant construction defects throughout the community (R. pp. 621-768). Among the defects identified at the Harbour Cove condominiums are improper installation of stucco façade and related flashings (R. pp. 624-700) by Coastal Plaster Systems, Inc., insured by Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, and National Fire & Marine Insurance Company, (R. p. 253) as well as improper installation of brick veneer and related flashings (R. pp. 707-755) by Martin Masonry Inc., insured by Bitco General Insurance Corporation, Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company, and Selective Insurance Company of South Carolina (R. p. 249).

Harbour Cove's expert Russell T. Mease, P.E. of RTM Engineering, LLC has opined that the subcontractors hired by Centex violated applicable building codes, industry standards, and manufacturers' instructions in the installation of the stucco and brick cladding present at Harbour Cove, and that defective installation has led to water intrusion and damage to the underlying cladding and framing components of the condominium buildings (R. pp. 624-700, 707-755).

Namely, the installation of stucco and brick abutted to window units without proper sealant joints, lack of appropriate weeps required by industry standards, omission of control joints, and improper installation and integration of through-wall flashings are among the major defects identified by Mr. Mease (*Id.*). The cost to repair the entirety of the defects present at Harbour Cove totals nearly seven (7) million dollars, which includes complete removal of the existing cladding elements, inspection and evaluation of the moisture damage underneath, and replacement and reinstallation of cladding (R. pp. 769-774).

As a result of the violations of the building codes, pertinent industry standards, and manufacturers' installation instructions by the various subcontractors, Harbour Cove has suffered actual, incidental, consequential, and special damage and the expense of having to hire experts to investigate the causes of the water intrusion and construction defects and failure set forth above and having to spend substantial sums of money in order to renovate, correct, repair, and restore the condominiums and buildings at issue to make them safe and habitable (R. p. 263). Harbour Cove has also been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that intruded and continues to intrude into the subject condominiums and buildings causing and resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the condominiums and buildings (*Id.*).

STANDARD OF REVIEW

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

ARGUMENTS

I. SOUTH CAROLINA LAW DOES NOT PERMIT A LIABILITY INSURER TO INTERVENE IN A TORT ACTION TO PROTECT ITS RIGHTS TO CONTEST COVERAGE.

The trial court in this matter denied Appellant Insurers' Motions to Intervene on five (5) grounds: (1) the insurers did not have standing to intervene under South Carolina Rule of Civil Procedure 24; (2) they can protect their interests in a separate declaratory action; (3) the recent *Harleysville* case does not give authority for intervention; (4) intervention would create an impermissible conflict of interest; and (5) intervention would be confusing to the jury and may unfairly prejudice the current parties (R. pp. 3-4).

This Court should affirm the ruling of the trial court as Appellant Insurers' intervention in this construction defect matter would be inappropriate and in violation of South Carolina law for several reasons. First, the *Harleysville* case does not support insurer intervention in this context, and consequently, Appellant Insurers have no other standing to intervene. Further, state law requires the insurers in this case to litigate their coverage defenses in a separate action to avoid an impermissible conflict of interest. Finally, intervention and the imposition of insurance questions on an already complex construction defect jury trial would confuse the jury and violate Respondent Harbour Cove's Due Process rights.

A. South Carolina jurisprudence does not mandate intervention by insurers in construction defect actions.

As this Court is aware, in recent years, South Carolina law has sought to clarify an insurer's responsibilities for damages caused by its insured in construction defect actions. In 2009, this Court in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) examined policy language regarding covered damages in the context of a tort action involving the improper installation of stucco and resulting damage. In *Newman*, insurance company Auto

Owners filed a declaratory judgment action against a homeowner who had been awarded damages at arbitration for defective installation of stucco by Auto Owners's insured. *Id.* at 187, 684 S.E.2d at 541. Auto Owners sought a determination of whether its policy covered the damages awarded to the homeowner under various policy provisions, including under its definition of "occurrence" and exclusion for "intended or expected" property damage. *Id.*

Though this Court affirmed the trial court's findings that the negligent installation of stucco resulted in an "occurrence" that caused "property damage" covered under the applicable insurance policy, Auto Owners contended the damages related to the removal of the defective stucco itself were not covered by the policy. *Id.* at 197, 684 S.E.2d at 546. On that count, the *Newman* court sided with Auto Owners, holding that the terms of the policy "unambiguously" prohibited recovery for the cost of removing the insured's work itself, stating 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." *Id.* at 198, 684 S.E.2d at 546. *Newman* effectively put liability insurers on alert that they had the ability to contest coverage of at least part of an award in a construction defect action, which is the foundation of the instant appeal.

B. *Harleysville Group Ins. v. Heritage Cmtys, Inc.* does not give authority for intervention.

The recent case of *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017), is touted by Appellants in this matter as the primary authority for their intervention in this construction defect action; however, it does not actually support intervention. *Harleysville* involved directed verdicts rendered in favor of plaintiff property owners' associations, as well as trials on the appropriate amount of damages where juries returned general verdicts in actual damages and punitive damages. *Harleysville* at 331, 803 S.E.2d at 293. After the jury verdicts, *Harleysville* filed a declaratory judgment action seeking partition of the

general verdicts into damages for the removal of the defective work itself (which it contended were not covered under its liability policies) and removal and repair of materials damaged as a result of the improper work (covered damages). *Id.* The Special Referee deciding the matter found the costs to remove the defective work itself were not covered under Harleysville's policies, but would not speculate as to how much of the general verdicts were covered, and thus concluded Harleysville was responsible for the full amount of damages. *Id.* at 332, 803 S.E.2d at 294.

Though Appellants and insurers across the state read *Harleysville* as carte blanche authority for intervention in a tort action to protect their interests, with respect to contesting coverage, the *Harleysville* opinion focused solely on whether the insurer's reservations of rights were sufficient for the insurers to even have the ability to contest coverage. This Court in *Harleysville* concluded that "generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method) [was] not sufficient" to put the insured on notice that the insurer intended to raise defenses to coverage or pursue a declaratory judgment on coverage issues. *Harleysville* at 338, 803 S.E.2d at 297. Essentially, this Court clearly delineated that an insurer's reservation of rights must be sufficiently specific as to put the insured on notice that the insurer "intend[s] to litigate the issues of whether any damages resulted from acts meeting the definition of occurrence, whether any damages occurred during the applicable policy periods, . . . what damages were attributable to non-covered faulty workmanship," and that a potential conflict of interest exists such that the insured should seek an allocated verdict. *Id.* at 342-3, 803 S.E.2d at 300. Rather than require an insurer to intervene in a tort trial to protect its rights to contest coverage, this Court in *Harleysville* merely stated that a generic "we may contest coverage at a later date" on the part of

an insurer is insufficient to put the insured on notice that it may need to seek an allocated verdict for any damages to be covered under its policy.

Further, footnote 11 of the *Harleysville* opinion discusses the refusal of the Special Referee to allocate the juries' general verdicts, citing to *Newman*, 385 S.C. at 198, 684 S.E.2d at 547, and the idea that an award cannot be allocated without sufficient evidence to support that allocation. *Harleysville* at 343, 803 S.E.2d 300 n. 11. Appellants and, presumably, countless insurers in the state use this footnote to further bolster their position that the *Harleysville* opinion requires their intervention because an allocated verdict (and the presentation of evidence to support it) is the only way to determine whether a jury award falls within coverage limits. This conclusion is clearly misplaced as nowhere in footnote 11 does this Court indicate that allocating a verdict is the only way for an insurer to contest coverage, and other South Carolina law discussed below provides that evidence as to potential coverage may be presented in a subsequent action.

In the context of reservations of the right to contest coverage, the *Harleysville* opinion stands for the premise that a generic reservation of rights by an insurer is insufficient to actually reserve any rights. The reservation must be specific enough to put an insured on notice of the specific policy provisions under which its insurer may contest coverage; it must specifically lay out the coverage defenses the insurer may present in a subsequent action; and must advise the insured of a potential conflict of interest. Without a sufficient reservation of rights, the insurer cannot contest coverage. Nowhere does the *Harleysville* opinion support the presumption that an insurer must intervene in a tort action to protect its rights. In fact, the word "intervene" is never used by the majority opinion and appears only once when the dissent mentions *Harleysville* could not possibly have intervened without an impermissible conflict of interest. *Harleysville* at

363, 903 S.E.2d at 311 (Pleicones, J., dissenting). Contrary to Appellants' positions, one may reasonably conclude that *Harleysville* provides that if an insurer has properly reserved its rights, there is no need for intervention because the insured may then litigate coverage in a separate declaratory action. Regardless, no reading of *Harleysville* supports the position that an insurer can or must intervene in a tort trial to contest coverage. Respondent Harbour Cove seeks a ruling that *Harleysville* neither requires nor gives authority for intervention, or in the alternative, a finding that Appellants have made no showing of sufficient reservations of rights to contest coverage so the question of intervention is moot for the instant appeal.

C. Appellants lack standing to intervene under *Ex Parte GEICO* and South Carolina Rule of Civil Procedure 24.

Regardless of *Harleysville*, binding law demonstrates that Appellants are required to have standing to intervene in an ongoing tort action, and here, that standing is lacking. Rules of Civil Procedure 24(a) and 24(b) discuss intervention of right and permissive intervention, respectively. Rule 24, SCRPC. Rule 24(a) provides that "anyone shall be permitted to intervene" when he has an interest in the property or transaction at issue in the lawsuit, those interests may be impeded by the disposition of the action, and his interests are not protected by existing parties to the action. *Id.* Alternatively, subsection (b) of Rule 24 allows intervention when an applicant's claim or defense has a question or law of fact in common with the subject matter of the action. *Id.* As detailed below, and discussed in *Ex Parte Gov't Empl's. Ins. Co. v. Goethe*, 373 S.C. 132, 644 S.E.2d 699 (2007) ("*GEICO*"), Appellants meet the requirements for neither type of intervention.

1. Contrary to Appellants' positions, they must have standing to intervene.

Appellants seek a reading of the Rules and case law that suggests they are not required to have standing to intervene, as they seek to intervene in a limited capacity rather than as parties to

the instant litigation.¹ Neither the courts in this state nor the rules of procedure make any distinction between standing to intervene as a party versus standing to intervene for limited purposes, and this Court has routinely held a party seeking to intervene must have standing. *GEICO* at 138, 644 S.E.2d at 702 (citing *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). Additionally, *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991), the only binding case to which Appellant Nationwide cites in support of its proposition that South Carolina courts have previously held no standing is required for limited intervention, is significantly distinguishable from the current posture of this action.

Davis involved a property action that was settled and dismissed, and a newspaper's attempt to intervene to object to the sealing of the record after the action was completed. This Court held that because the newspaper sought to intervene for the limited purpose of challenging the seal of the record, no showing of standing was required. *Davis* at 504, 405 S.E.2d at 603. *Davis* is significantly distinguishable from the instant action on several grounds, namely that the holding was specifically limited to Rule 24's applicability to third-party challenge of protective orders and did not declare that all limited interventions were absolved of a standing requirement. *Id.* Further, the newspaper company moved to intervene *after* the action had been settled and dismissed with prejudice, which is contrary to the procedural posture of this ongoing construction defect action. *Id.* at 503, 405 S.E.2d at 602. Had the newspaper company in *Davis* sought to intervene for some limited purpose in the early stages of the litigation, this Court would have been evaluating significantly different facts and would likely have reached another conclusion. This Court, when evaluating the timeliness of the newspaper's intervention, cited to

¹ Initial Brief of Appellant Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company at 8.

a First Circuit Court of Appeals decision providing that if “desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the parties.” *Id.* at 505, 405 S.E.2d at 603 (citing *Public Citizen*, 858 F.2d at 786). The citation to and discussion of this language from the *Public Citizen* case indicates that the fact that the action had concluded was central to this Court’s reasoning as to why intervention in that limited capacity should be permitted and why the newspaper’s motion was not untimely. South Carolina courts have made it clear they do not rule by implication, and the holding that an intervenor must not show standing when it seeks to challenge a protective order in the context of a case that had already been dismissed from the court system cannot be extrapolated to provide that no hopeful intervenor must have standing when it seeks to intervene in a limited capacity. Despite the reliance on *Davis*, Appellants in this matter must have standing to intervene.

2. Appellants do not have standing to intervene as of right.

The Appellants in this action have no standing to intervene as of right under Rule of Civil Procedure 24(a) because they do not have sufficient interests at stake in this construction defect litigation. *GEICO* involved an insurer’s attempt to intervene in a family court declaratory judgment action that sought to establish a common law marriage for stacking purposes. *GEICO*, 373 S.C. at 134, 644 S.E.2d at 700. This Court in *GEICO* affirmed the lower court’s refusal to permit the insurer’s intervention by concluding that the insurer had no standing to intervene as of right under Rule 24(a)(2). *Id.* at 138, 644 S.E.2d at 702. In reaching its decision, this Court began by discussing the proposition that even though the rules of intervention should be applied liberally in the interests of judicial economy, intervention still requires standing under the rules. *Id.* (citing *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327). A party has standing to intervene if it has

a “personal stake” in the subject matter of a lawsuit and is a real party in interest with real, actual, material, or substantial interest in the subject matter of the action - an interest which is merely “peripheral and not the real interest at stake” does not warrant intervention. *Id.* In affirming the lower court’s ruling, this Court reasoned that the insurer’s interest was merely in the effects of the family court’s decision and concluded that “the subject matter of the family court action in the instant case is the validity of a common law marriage, which does not involve a determination of insurance benefits.” *Id.* at 139, 644 S.E.2d at 703.

The holding and opinions of this Court in *GEICO* are easily applied to the facts of the instant appeal in that Appellants do not have standing to intervene under Rule 24(a) because they are not real parties in interest. Certain Appellants argue that *GEICO* “does not preclude the possibility that the court intended to require intervention”² though the fact that the *GEICO* opinion completely fails to even utter the word is clear evidence this Court did not intend its ruling to be taken as license to grant insurer intervention in a tort action. *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.”).

² Initial Brief of Appellants Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company at 13.

The only interest Appellants have in the subject matter of the litigation is whether or not any award entered against their insureds is covered under their insurance policies, which is purely financial. Though certain Appellants may claim they have an interest in essentially protecting the record of the trial of the tort action to preserve information that may be used in a subsequent action³, the *Sims* case provides that insurers may present additional evidence in a separate coverage action and need not protect the trial record. *See infra* Section D. Appellants have no interest in the subject matter of the construction defect action, and to paraphrase this Court in *GEICO* – the subject matter of this action is the validity of the Respondent Harbour Cove Condominium Association’s construction defect claims, which does not involve a determination of insurance benefits. Accordingly, Appellants do not have standing to intervene as of right under Rule 24(a).

3. Appellants do not have standing to intervene under the permissive intervention rules.

Rule 24(b) permits intervention when a potential intervenor’s claim or defense has questions of law or fact in common with those at stake in the ongoing action. Rule 24(b)(2), SCRPC. A trial court has complete discretion to allow or deny permissive intervention, and the decision will only be reserved upon a showing of abuse of discretion. *S.C. Tax Com. V. Union County Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988). “A reversal of a denial of permissive intervention has been termed ‘so unusual as to be almost unique.’” *Id.* at 262, 368 S.E.2d at 75 (citing *New Orleans Public Service, Inc. v. United Gas Pipeline Co.*, 732 F. (2d) 45 (5th Cir. 1984), *cert denied*; *Morial v. United Gas Pipe Line Co.*, 469 U.S. 1019, 105 S. Ct. 434, 83 L. Ed. (2d) 360 (1984).). In *S.C. Tax Com.*, the Court of Appeals addressed whether the South

³ Initial Brief of Bitco General Insurance Corporation at 12-3.

Carolina Tax Commission could intervene to determine whether a tax exemption applied to a company that had sued the Union County Treasurer to collect taxes paid under protest. *S.C. Tax Com.* at 258, 368 S.E.2d at 73. The Tax Commission had sought to intervene under both Rule 24(a) and 24(b) and the Court of Appeals affirmed the lower court's denial of intervention on both counts. *Id.* In evaluating whether the Tax Commission could permissively intervene, the Court analyzed Rule 24(b)(2) and opined that permissive intervention is premised on the theory that when claims or defenses share common questions of law or fact, judicial economy supports the disposition of all of them in one action via intervention. *Id.* at 263, 368 S.E.2d at 75. The Court further stated that "[t]he typical situation for which the Rule was designed is one where the prospective intervenor might institute or be called upon to defend a separate proceeding that would *substantially duplicate* the one in question." *Id.* at 263, 368 S.E.2d at 75-6 (emphasis added).

The Court of Appeals made it clear in *S.C. Tax Com.* that permissive intervention is only practical when it would effectively eliminate the need for a duplicative proceeding. Applying the conclusions reached by the Court in that case to the facts at issue here, permissive intervention is entirely improper for the appellants in this case. First, Appellants have shown no abuse of discretion on the part of the trial court, and therefore, no reversal is warranted here. *See S.C. Tax Com.* at 262, 368 S.E.2d at 75. Further, permitting Appellants to use the permissive intervention rules has no bearing on judicial economy here because there is already a separate coverage action pending,⁴ and because the allocated verdict Appellants seek merely establishes the basis for Appellants' defenses to coverage that must be litigated in a subsequent coverage

⁴ *Centex Homes, a Nevada General Partnership v. The Cypress Bend Condominium Association, et al.*, No. 2016-CP-26-6670 (filed October 29, 2016).

action⁵. Even if this Court determined judicial economy was served by permitting intervention, the Appellants have no questions of law or fact in common with the parties in this tort action, and any subsequent declaratory action would not “substantially duplicate” this construction defect lawsuit. The questions of law and fact at issue in the construction defect action involve whether certain contractors and subcontractors violated building codes, industry standards, and manufacturers’ instructions in the construction of the Harbour Cove condominium buildings; yet, the questions raised in a declaratory judgment action about insurance coverage wholly relate to the insurers’ policy provisions and their applicability to any award. An action centered around the appropriate installation of stucco is not substantially duplicated in an action surrounding an insurance policy’s definition of “occurrence.” There is no commonality among the claims of Appellant insurers and the tort issues in this construction defect action for purposes of Rule 24(b).

Rule 24(b) also requires this Court to consider whether permissive intervention will unduly delay or prejudice the adjudication of the rights of the existing parties. Rule 24(b), SCRCF. The insurers seeking to intervene have been defending this matter since its inception in 2014 and moved to intervene in the months immediately prior to the trial date set by the trial court, so any intervention will not be timely. Further, permitting their intervention will prejudice the parties by inserting improper questions of insurance into the trial of this matter and infringe upon the Respondent Harbour Cove Condominium Association’s Due Process rights. *See infra* Section E.

⁵ Initial Brief of Appellant Nationwide Mutual Insurance Company f/k/a Harleysville Insurance Company at 12.

4. Courts in other jurisdictions have affirmed denials of limited intervention under identical circumstances.

In *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2nd Cir. 1984), an insurer moved to intervene to submit proposed interrogatories regarding damages to the jury in the event that they returned a verdict for Plaintiff. *Restor-A-Dent* at 873. The insurer retained counsel for the insured and provided a defense but informed the insured that it did not have any duty to indemnify for intangible losses. *Id.* The insurer argued "that a general verdict would make difficult, if not impossible, a precise determination as to the allocation of the jury's award and alleged that its intervention would not delay or impede the action." *Id.* The plaintiff in that matter opposed the motion, arguing that the insurer knew of the lawsuit almost from inception since it was defending the Defendant, yet had remained silent until all discovery was completed and the pre-trial order submitted. *Id.* The plaintiff also claimed "that it would be 'grossly' prejudiced if intervention were permitted since if special interrogatories are added to the list of items that the jury must address ... the burden to reach a just verdict will become excessive, falling entirely on the shoulders of the plaintiff." *Id.*

The insurer in *Restor-A-Dent* sought both Intervention of Right and Permissive Intervention under the Federal Rules of Civil Procedure. *Id.* The court denied the insurer's intervention of right because the insurer did not have an interest relating to the property or transaction that was the subject matter of the action. *Id.* at 875. The insurer's "interest, on the other hand, is in the amount it will have to pay [Defendant] if [Plaintiff] wins. Accordingly, [the insurer] does not have an interest in the subject matter of the action between [Plaintiff] and [Defendant]." *Id.* The Court further reasoned that any potential interest asserted by the insurer depended upon two contingencies: a jury verdict for plaintiff and a finding in a litigation not yet commenced between insurer and insured that insurer is not responsible for certain losses under

the policy terms. *Id.* The court denied the permissive intervention motion because Plaintiff "should not be burdened at this late stage in the litigation with the responsibility of introducing the evidence that will settle the potential differences between "the insurer and Defendant. *Id.* at 876 (internal quotation marks omitted). The Second Circuit Court of Appeals held the trial court properly denied the motion for additional reasons, including: (1) that the insurer had no great need for the relief it sought; (2) that there was no assurance that the main action would not be delayed; and (3) that the intervention by an insurer who supplied the insured's attorney could deter a settlement or could create a conflict of interest. *Id.* at 877.

High Plains Coop. Ass'n v. Mel Jarvis Constr. Co., Inc., 137 F.R.D. 285 (D. Neb. 1991) was a nearly identical situation. A defendant's insurer sought permissive intervention to submit special interrogatories to the jury on the issue of damages. In denying the insurer's request to intervene, the court noted: "There is ... precedent for the proposition that courts may deny intervention by insurers for even the limited purposes sought here." *Id.* at 288. The insurer "did not have any 'great need for the relief sought' because the trial judge would likely require a separate verdict for each of the three causes of action brought by the plaintiff." *Id.* There "was no assurance that the intervention would not unduly delay the main action, and an appeal of the court's failure to submit the requested interrogatories as framed by the insurer may likely complicate an appeal of the main action." *Id.* Defendant "was being represented by counsel provided by the insurer/intervenor which 'may well exacerbate a potential conflict of interest for the attorney furnished by [the insurer] to represent [the defendant],' and could deter settlement as well." *Id.* The court hesitated to allow an insurer to intervene in an action simply on the basis of an assertion in its brief that the policy at issue excludes coverage for the negligent acts of the insured. *Id.* at 290.

In *Universal Underwriters Ins. Co. v. E. Cent. Alabama Ford-Mercury, Inc.*, 574 So. 2d 716 (Ala. 1990), a defendant's insurer sought to intervene for the sole purpose of submitting special interrogatories or a special verdict form to the jury, attempting to resolve any coverage questions that might be involved in the case without making its presence known to the jury. The insurer argued its interest would not be adequately protected unless it was allowed to intervene for the limited purposes, and asserted it had an "interest relating to the subject matter of the action that, under the rules of fairness and equity, gave it a right to intervention, or, in the alternative, that permissive intervention should be allowed." *Universal* at 718-9.

In affirming the trial court's denial of the motion to intervene, the Court reasoned "when an insurer refuses to defend or defends under a reservation of rights, the insurer is not precluded from determining the coverage issue in a declaratory judgment action either before or after the resolution of the underlying action." *Id.* at 722. The "insureds would be prejudiced by further delay if [the insurer] were allowed to intervene at such a late date in the proceedings." *Id.* "This Court has held that an insurer does not have an interest when that interest is contingent upon the recovery in another action." *Id.* at 723. The court held the insurer did not have a "direct, substantial, and protectable interest," and thus had no right to intervene. *Id.* In assessing the trial court's denial of the motion to intervene under the permissive intervention rules, the court held that permissive intervention is within the broad discretion of the trial judge and found no abuse of discretion. *Id.*

In *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Bakker*, 917 F.2d 22, 1990 U.S. App. LEXIS 18390 (4th Cir. 1990) (Unpublished Disposition), the insurer sought to intervene for the limited purpose of submitting special interrogatories, verdicts, and/or instructions to the jury to resolve a potential coverage question. The insurer wanted a jury finding which would distinguish

whether any award entered was based on Defendants' dishonesty or negligence, and argued acts brought about by or contributed to by dishonesty were excluded from coverage. The district judge denied the motion, observing that the motion was filed only two months before the commencement of trial. "In addition to the complicating impact on the continuing litigation, with which the district judge was obviously concerned, if [the insurer] were allowed to intervene in the underlying action in which its insureds are parties, we would be concerned with its intolerable position in the litigation that is potentially hostile to its own insureds." *Bakker* at 22. If the insurer's "motion to intervene were denied, its interest to resolve insurance coverage issues would not be prejudiced, because open issues, if any, could be litigated at a later time." *Id.*

D. State law requires a separate action to avoid an impermissible conflict of interest.

South Carolina case law is clear that when an insurer undertakes the indemnity and defense of its insured in a liability action, it cannot raise its own defenses to coverage in the same action without creating a catastrophic conflict of interest. Insurers can and must raise their own defenses and litigate coverage in separate actions.

1. An insurer cannot defend its insured and its own interests in same action.

South Carolina law is clear that an insurer cannot defend its insured and assert its own defenses to coverage in the same action. *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 85, 145 S.E.2d 523, 524 (1965). *Sims* involved an insurer that refused to defend its insured on the grounds that the car accident at issue had been caused by an intentional act, which was not covered under the policy, and the insurer's attempt in a subsequent action to introduce evidence of intent. *Id.* at 84, 145 S.E.2d at 523. In its discussion of the insurer's options, this Court opined that it was "perfectly obvious" that the insurer could not defend the insured in the tort action and

assert its defenses to coverage in the same action without creating a “clear conflict of interests between insurer and insured.” *Id.* at 85, 145 S.E.2d at 524. Further, this Court in *Sims* quoted *Farm Bureau Mutual Ins. Co. v. Hammer et al.*, 4th C.C.A. 177 F. (2d) 793 (4th Cir. 1949) and its discussion of Section 107 of the Restatement of the Law of Judgments, which has now been replaced by Section 58 of the Restatement (Second) of the Law of Judgments. *Id.* Section 58 provides that in an indemnitee/indemnitor setting, a conflict of interest “exists when the injured person’s claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor’s obligation to indemnify and another of which is not.” Restatement (Second) of Judgments § 58 (1982).

In this action the insurers seek to distinguish, one way or another, between covered and non-covered damages. Specifically, they seek a determination of what portion of a potential jury award is for the removal of defective work versus repair of components damaged by defective work, with the assumption that costs for removal of defective work itself are not covered by their policies. The insured has great interest in establishing that the entirety of any damage award be covered by its policy, and the insurer obviously has an interest in showing the damages are not covered. As the insurers in this case have agreed to defend and indemnify their insureds in the trial of this action, counsel supplied by the insurers to their insureds would presumably orient their case at trial towards a finding that any potential damages are covered. Applying the logic of *Sims* and the Restatement (2d) of Judgments, the insurers in this case cannot represent the interests of their insureds while presenting their own defenses to coverage in the same action.

Further, because of the insured’s interest in having the majority of a jury award covered by its insurance policy, the defense strategy of the insured’s counsel has now transitioned from “the defendant violated no standards of care, and if he did it caused no damage” to “the

defendant did violate the standard of care and it caused significant damage” or “the defendant violated no standards of care but somehow proximately caused significant consequential damages.” This shift in position is a prime example of the conflict of interest created by intervention of an indemnitor in a tort action, as the insurer’s intervention now prevents the insurer from fulfilling its duty to indemnify its insured. Rather, the insurer is now forcing the counsel it hired to defend its insured to concede liability on some front to keep the insured from being personally liable for a potential verdict in the millions of dollars. The result is a clear conflict of interest, which should not exist.

2. A separate declaratory judgment action is sufficient to protect an insurer’s interests even without an allocated verdict.

Contrary to Appellants’ positions that they cannot contest coverage without an allocated verdict, *Sims* and the Restatement (2d) of Judgments also provide that a subsequent declaratory action is sufficient to protect an insurer’s interest without an allocation. Appellants lean heavily on the presumption that if they are to contest coverage in a separate declaratory action, a verdict allocating any award between costs to remove faulty work and costs to repair the consequential damages of faulty work is absolutely necessary for a coverage determination. This is not the case.

When analyzing the *Farm Bureau* case, this Court in *Sims* quoted that court’s “unassailable logic” that the notion that an indemnitor is bound by facts established against an indemnitee when the indemnitor has notice and opportunity to defend and indemnify the indemnitee functions only when the indemnitee and indemnitor have identical interests. *Sims* at 86-7, 145 S.E.2d at 525. The *Farm Bureau* court further supported that position by its reference to Section 107 of the Restatement of the Law of Judgments, which provided that an indemnitor and indemnitee are bound by the existence and extent of liability of the indemnitee, but a

“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.” *Sims* at 87, 145 S.E.2d at 525 (quoting *Farm Bureau*, 4th C.C.A., 177 F. (2d) 793 (citing Restatement of Judgments § 107(a) (1942))). The current version of Restatement Section cited by the *Farm Bureau* court, Restatement of Judgments (2d) Section 58, clarifies this premise, stating “[t]he indemnitor is precluded from relitigating those issues determined in the action against the indemnitee *as to which there was no conflict of interest* between the indemnitor and the indemnitee.” Restatement (2d) of Judgments, §58 (1)(b) (1982) (emphasis added). Put more simply, an indemnitor with interests adverse to those of its indemnitee is not bound by the material facts established against the indemnitee when contesting coverage in a subsequent action. Essentially, when an insurer has a conflict of interest with its insured such that it cannot protect its own interests while indemnifying its insured, South Carolina law permits the insurer to introduce additional facts in a declaratory action to defend its coverage positions. Simply put, the insurers here can contest coverage in a declaratory action without an allocated verdict and thus, without intervention.

E. The injection of insurance issues in a construction defect trial would confuse the jury and add to Harbour Cove’s burden of proof.

If Appellants are permitted to intervene, even in a limited capacity, the confusion to the jury and undue burden on the existing parties would outweigh any benefit derived from an allocated verdict. Appellants seek to partially intervene for the limited purpose of submitting interrogatories and/or a special verdict form to the jury allocating any award between damages to remove faulty work and damages to repair components damaged by faulty work. Despite Appellants’ contentions that this limited involvement would do nothing to alert the jury to the

insurers' presence or further complicate the trial of this construction defect action, the submission of special verdict forms and interrogatories to the jury requires the proffer of additional evidence and places an undue burden on the current parties to the action.

In addition to the relatively straightforward issue of allocating any award between consequential damages and repair of defective work, there are a myriad of other directly related policy provisions both in the main policies and various endorsements that potentially would necessarily have to be examined in addition to the larger coverage issues. It is expected that in a typical construction defect action with multiple defendants, each party may have multiple policy variations from year to year and quite often different insurance carriers year to year with drastically different policy provisions and endorsements. The complexity of these potential insurance questions to be answered multiplies when, as in this case, there could potentially be multiple parties involved in an action and which would result in an inordinate number of determinations necessary for a fair and just determination of the more basic coverage issues. With multiple parties, insurance carriers, policies, and endorsements at play, any interrogatories or special verdict form submitted to a jury could likely require many pages to adequately address these complex matters.

The submission of special interrogatories and special verdict forms requires the parties to a tort action to proffer evidence they may not normally submit, as the jury needs information and instruction to be able to answer the interrogatories and complete the verdict form. The need to establish what damages may be consequential versus which are related to correcting defective work is unduly burdensome on both the plaintiff and defendants in this action and prejudicially adds to the plaintiff's burden of proof. Now, not only must Harbour Cove show that the defendants breached the standard of care and proximately caused damage to the condominium

buildings at issue, the injection of insurance coverage issues requires Harbour Cove to make potentially a number of other showings with regard to the damages claimed. Further, Appellant Insurers have offered no suggestions as to how they propose the parties to this construction defect action present evidence to sufficiently equip a jury with the information necessary to answer special interrogatories or a special verdict form. The Appellants want certain questions answered, but apparently seek to have counsel for Plaintiff and Defendants figure out for themselves the best way to present their cases with insurance coverage questions in mind. At the trial court level, the grant of a motion to intervene shortly before trial, as was the case here, introduces sudden insurance questions which inherently complicate the presentation of the case by all parties and as such are prejudicial, to the Plaintiff but also to the insureds. This complication changes the presentation of evidence and conduct of the entire trial of the action and has the potential to confuse the jury to such extent that they cannot render a competent verdict.

As stated by the Circuit Court in its Order denying the insurers' Motions to Intervene, the interrogatories and verdict forms sought 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 there may not be any evidence in the record to support the special interrogatories and/or special verdict forms" (R. p. 4). The insurers' intervention would place an undue burden on parties to an already complicated construction defect action.

Notably, Appellants rely on the Fifth Circuit Court of Appeals case *Duke v. Hoch*, 468 F.2d 973, 1972 U.S. App. LEXIS 7288 (5th Cir. 1972) and its discussion of allocated verdicts to support their apparent position that the interrogatories and verdict form they would have imposed

upon the jury are relatively routine and “workable.”⁶ Though referenced and discussed in *Harleysville, Duke* is a federal case from the Fifth Circuit and is neither binding on this Court nor relevant to the instant analysis. Nonetheless, the underlying issues are readily distinguishable. The matters addressed in *Duke* appear to be much less complicated and more easily determined than those in a typical multifamily construction defect case. The additional burdens on the parties in the cited matter would seem slight. Here, given the overlay of very complicated coverage determinations of very complicated liability determinations in a multi-party matter is a horse of a different color entirely.

F. Intervention would infringe upon Harbour Cove’s Due Process Rights.

Appellants’ intervention for the limited purpose of submitting a special verdict form and interrogatories to the jurors would infringe upon Harbour Cove’s Procedural Due Process rights to present evidence and cross-examine witnesses. South Carolina has adopted the requirements set forth by the United States Supreme Court that the rights to introduce evidence and confront and cross-examine witnesses are required elements for the satisfaction of procedural Due Process. *Vora v. Lexington Med. Ctr.*, 354 S.C. 590, 582 S.E.2d 413,416 (2003). This Court has also held that “where important decisions turn on questions of fact, Due Process requires an opportunity to confront and cross-examine adverse witnesses.” *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1001, 5 L.Ed. 287 (1970). Due Process is flexible and calls for procedural protections the particular situation demands. *Olson v. S.C. Dep’t of Health & Envl. Control*, 379 S.C. 57, 69,

⁶ Initial Brief of Appellants Hartford Fire Insurance Company, Hartford Casualty Insurance Company, and Hartford Underwriters Insurance Company at 19.

663 S.E.2d 497, 503 (Ct. App. 2008) citing *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 C.S. 452, 485 636 S.E.2d 598, 615 (2006).

Respondent Harbour Cove's procedural Due Process rights require that it be permitted to present evidence at the trial of this matter to support its positions as to how the jury should answer any interrogatories or complete any special verdict form in the event insurers intervene. *Olson* at 69. At that point, Harbour Cove should be entitled to conduct some discovery on all potential insurance coverage positions raised by Appellants under South Carolina Rule of Civil Procedure 26(b)(1), as those issues have now become relevant in this tort action. Rule 26(b)(1), SCRCF. As Due Process is flexible and may be tailored to specific situations, Harbour Cove's presentation of evidence may even potentially necessitate calling representatives of insurers to examine them regarding the insurance policies at issue, as coverage issues will have been injected into this construction defect action. As addressed above regarding additional coverage matters beyond the basic consequential damages analysis, the applicability of certain other policy provisions during limited time periods may need to be presented in a constitutionally-sufficient context for a jury to properly render a meaningful verdict. Additionally, Harbour Cove's Due Process rights would require Appellants' full intervention as parties to the construction defect action rather than limited intervention so Harbour Cove may conduct typical discovery to prepare its case for trial. Permitting the insurers to intervene and proceed immediately to trial prohibits Harbour Cove from conducting discovery that has only now become relevant and as such deprives Harbour Cove of its Due Process rights. Alternatively, insurer intervention even with a prescribed discovery period unfairly prejudices Harbour Cove in this action, as it would extend the length of this action that has been pending since 2014.

II. APPEAL OF A CIRCUIT COURT'S DENIAL OF A MOTION TO INTERVENE IS INTERLOCUTORY AND IMPERMISSIBLE.

A. Denial of Motion to Intervene does not determine the action.

An order is immediately appealable when it affects a substantial right and “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.” S.C. Code Ann. § 14-3-330(2) (1962). Section 14-3-330(2) must be “narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed.” *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 302-3, 705 S.E.2d 475, 478 (Ct. App. 2011) citing *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). The Court of Appeals in *Thornton* interpreted that narrow construction to require any appealability analysis to focus on the nature and effect of an order rather than its official title or label. *Id.* at 303. Further, in the context of the Appellate Court Rule providing only an aggrieved party may appeal an order (Rule 201(b), SCACR), this Court has interpreted an “aggrieved” party as one “substantially” aggrieved by a judgment that bears directly on its interest. *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970).

Under *Harleysville* and the reasons heretofore stated, an order denying an insurer’s motion to partially intervene in the trial of a tort action to protect its defenses to coverage neither substantially aggrieves the insurer nor bears directly on its interests, as it can satisfactorily protect those interests in a subsequent declaratory action. *See supra* Section I.B. *Harleysville* bestows no right or ability on an insurer to intervene, so prohibiting that intervention has no effects on an insurer’s rights. Looking at the instant situation in light of *Thornton*’s focus on the effects of an order, the insurers here – and any insurer seeking to intervene in an action against its insured for these same purposes – suffer no effects as a result of the frustration of their intervention attempts. By narrowly construing the order denying the motions to intervene, one

arrives at the conclusion that the denial of intervention merely prevents the insurers from interfering with a complex construction defect trial to burden the parties and the jury with additional responsibilities rather than eliminating the ability to have coverage determined via a separate action. The denial of Appellants' Motions to Intervene does not sufficiently determine the action such that it is immediately appealable.

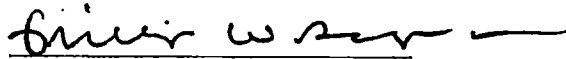
B. Appellants have no standing to appeal.

Additionally, Appellant is not a party to the instant action and as such has no standing to appeal. "Rule 201(b), SCACR, provides that 'only a *party* aggrieved by an order, judgment, or sentence may appeal.'" *Ex Parte Condon*, 354 S.C. 634, 583 S.E.2d 430 (2003). A party has standing to intervene in a case when it has a personal stake in its subject matter and is a real party in interest. *GEICO* at 139, 644 S.E.2d at 703. A real party in interest is one who has a real, actual, material interest or substantial interest in the subject matter of the action, rather than only a formal or technical interest. *Id.* Appellant has no standing to appeal the denial of its motion to intervene and had no standing to intervene in the first place. Regarding its standing to appeal, Appellant is not a party to this case and did not seek to intervene as one. Appellant merely sought to submit certain special interrogatories to a potential jury in an effort to allocate damages awarded by a jury verdict. Appellant is not a party and does not have standing to appeal any ruling made by the Court in this case.

CONCLUSION

At this point in evolving South Carolina tort law, insurers and litigants alike are faced with a need for confirmation and clarification of the steps an insurer must take to protect its interests. With regard to the instant case, the Court should confirm that *Harleysville* does not stand for the proposition that insurers may intervene in tort actions at will and affirm the Circuit Court's

ruling that a subsequent declaratory action is sufficient to determine coverage issues and protect insurers' interests. The Court should also find that judicial economy supports the premise that denial of motions to intervene by insurers seeking to protect coverage defenses are not immediately appealable.



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Trial Court Case No. 2014-CP-26-07634
Appellate Case No. 2017-02146

RECEIVED

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S.C. SUPREME COURT

Ex Parte:

Hartford Fire Insurance Company, Hartford Casualty Insurance Company, National Fire & Marine Insurance Company, Bitco General Insurance Corporation, Selective Insurance Company of South Carolina, and Nationwide Mutual Insurance Company, Appellants,

In Re:

The Harbour Cove Condominium Association, Plaintiff,

v.

Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., South Carolina State Plastering, LLC, Georgia State Plastering, LLC, Florida State Plastering, LLC, Coastal Drywall, Inc., d/b/a Coastal Plaster Systems, Lundy Dowell d/b/a Coastal Plaster Systems, Martin Masonry, Inc., Roof Doctor of the Carolinas, Inc., Richard Blackwell d/b/a Synthetic Designs, Ferst Plastering, Inc., a/k/a Ferst Exteriors, Inc., Coastal Tinting, Inc., BR Brick & Masonry, Inc., Model Home Interiors, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Steven Bosch d/b/a The Roofer Man, Frank Harris d/b/a Frank Harris Construction, Carl Williamson d/b/a Williamson Construction & Waterproofing, Stock Building Supply, LLC, f/k/a Stock Building Supply, Inc., and Morningstar Consultants, Inc., Defendants,

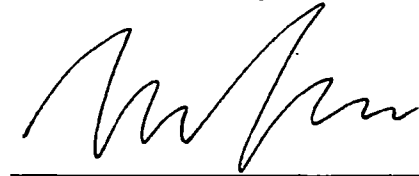
Of Whom the Harbour Cove Condominium Association is the Respondent.

CERTIFICATE OF COUNSEL

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

July 27, 2018

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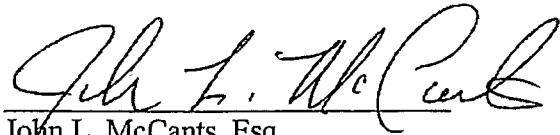
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Certificate of Counsel

The undersigned hereby certifies pursuant to Rule 210(g), SCACR that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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