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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Appellate Case No. 2019-000238

Ex Parte:

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

In Re:

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

v.

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

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

v.

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

And

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

v.

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

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

REPLY BRIEF OF APPELLANT BUILDERS MUTUAL INSURANCE COMPANY TO AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA ASSOCIATION OF JUSTICE

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REPLY ARGUMENT

Appellant Builders Mutual Insurance Company ("Builders Mutual") submits the following reply to the Amicus Curiae Brief of The South Carolina Association of Justice (the "Association").

I. The Association's Overall Position is Based on a Flawed Legal Analysis of Insurance Coverage for a Construction Defect Case in South Carolina.

The Association's overall position is based on a fundamental misinterpretation and misapplication of liability insurance coverage law for a construction defect case in South Carolina. Thus, the Association's arguments and conclusions throughout its brief are built upon a flawed premise. The law in South Carolina is addressed in the following:

> Two years later, in Crossmann, the Court reaffirmed the result in Newman—that costs to repair faulty workmanship itself are not covered under a CGL policy but costs to repair resulting damage to otherwise non-defective components are covered—while clarifying that the relevant policy term in the insuring agreement is "property damage," rather than "occurrence." 395 S.C. at 48–50, 717 S.E.2d at 593–94 (explaining the use of the phrase "physical injury" in defining property damage suggests that such property was "not defective at the outset, but rather was initially proper and injured thereafter"). **We clarified that faulty workmanship was not covered because it did not constitute property damage—not because it did not meet the definition of "occurrence."** Id. (explaining the ongoing water penetration fell within the expanded definition of occurrence—namely, the "continuous or repeated exposure to substantially the same general harmful conditions"— and thus constituted the relevant occurrence). This Court further found the scope of an insurer's duty to indemnify was limited to damages accrued during the insurer's time on the risk, overruling earlier case law that held an insurer's liability was joint and several. Id. at 59–64, 717 S.E.2d at 599–01. (emphasis added).

Harleysville Grp. Ins. v. Heritage Communities, 420 S.C.321, 335, 803 S.E.2d 288, 296 (2017).[1]

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[1] "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." Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011).

The foregoing principle in Crossmann has been codified in effect in S.C. Code Ann. §38-61-70 (1976). Section 38-61-70(B)(2) states, (B) Commercial general liability insurance policies shall contain or be deemed to contain a definition of "occurrence" that includes: (2) property damage or bodily injury resulting from faulty workmanship, *exclusive of the faulty workmanship itself.* (emphasis added)

The reason faulty workmanship is not insured is because it is *not* "property damage". The Supreme Court based the reason for the lack of coverage for faulty workmanship on the insuring agreement section of a commercial general liability ("CGL") insurance policy.

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' [or] 'property damage' ... to which this insurance applies....
>
> a. This insurance applies only: (1) To 'bodily injury' or 'property damage': (a) That occurs during the policy period; and
>
> (b) That is caused by an 'occurrence'."

Heritage Communities, 420 S.C. at 333, 803 S.E.2d at 294.

Faulty workmanship is not "property damage" and is therefore not included or covered in the grant of coverage in a CGL insurance policy. Contrary to the Association's repeated assertions, an exclusion is not the reason that faulty workmanship is not insured in South Carolina. The principle articulated in Crossmann does not depend on the application of an exclusion in a CGL insurance policy. In fact, the parties in Crossmann stipulated not to raise exclusions in the case and so the Supreme Court did not address any policy exclusions. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. Based on a flawed premise, the Association repeatedly argues in error that Builders Mutual is trying to litigate its policy exclusions in the underlying action, trying to secretly shift the burden for such exclusions to the underlying action, and trying to make Palmetto Pointe present enough evidence or take on the burden to prove those exclusions.

The coverage analysis in Crossmann begins and ends with the established principle that repair and replacement of faulty workmanship is not insured because it is *not* "property damage." Heritage Communities, 420 S.C. at 335, 803 S.E.2d at 296. The Supreme Court has stated that the "threshold question in determining coverage under a CGL policy is whether the claim at issue is for 'property damage' caused by an 'occurrence' ...." Id. at 333, 803 S.E.2d at 295. Contrary to what the Association

has argued, South Carolina law does not require a litigant to look further than the insuring agreement section of a CGL insurance policy to analyze faulty workmanship (not covered) and property damage (covered). And, while it may be well established that an insurer has the burden of establishing an exclusion, it is equally well established that the burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract. Sunex Intern., Inc. v. Travelers Indem. Co. of Ill. 185 F.Supp.2d 614, 617 (D.S.C. 2001)(citing Gamble v. Travelers Ins. Co., 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968).

Consistent with Crossmann, the conceptual interrogatory pesented by Builders Mutual does not raise an exclusion in a CGL insurance policy, contrary to the Associations' assertion:

> 2. If you answer "Yes" to Interrogatory No. 1, list the physically injured tangible property on the lines provided below. To answer this Interrogatory, you may use descriptions of property described in exhibits or in witnesses' testimony. In addition, if you answered "Yes" to Interrogatory No. 1, write the dollar amount in the blank below for the costs to repair the physically injured tangible property excluding any costs to remove and replace Tri-County's work.

(R. p. 332.)

Builders Mutual submits that the Interrogatory fits squarely into the Supreme Court's legal analysis of faulty workmanship versus property damage " being part of the threshold question in determining coverage under a CGL insurance policy. The language in the interrogatory is also essentially the language pled by Palmetto Pointe in its Complaint or what Palmetto Pointe alleged it would prove at trial. (R. p. 29 - Complaint ¶¶ 22, 23 and 29.)

Another example of an allocation of damages by a jury is found in Heritage Communities. The allocation concerns loss-of-use damages. Palmetto Pointe sought loss-of-use damages in its Complaint. (R. p. 32.) Loss-of-use is a form of "property damage" and thus part of the threshold part of the insuring agreement. Crossmann Communities, 395 S.C. at 48, 717 S.E.2d at 593. In Heritage Communities, the

litigants allocated loss-of –use on the jury verdict forms. Heritage Communities, 420 S.C. at 331 , 803 S.E.2d at 294 ("the jury returned a verdict... $250,000.00 in favor of loss-of-use damages...."). Because the loss-of-use was allocated, the Special Referee was able to address the damages directly; and the Supreme Court issued an additional ruling which was to find that loss-of-use damages are allocated like progressive water damaged building components. Heritage Communities, 420 S.C.at 350, 803 S.E.2d at 304. Builders Mutual submitted the following conceptual interrogatory to the circuit court:

> 3. Do you award any loss of use damages against Tri-County Roofing? If you answer "yes", please write the dollar amount in the blank below:
>
> Yes ___; No ___
>
> Dollar Amount: _____

(R. p. 332.)

An allocation for loss-of-use was not done by either Palmetto Pointe or Tri-County Roofing. (R. PP. 13-16.)

II. Newman and Heritage Communities Compel Intervention and Allocation in the Underlying Action.

The Association ignores the findings in Auto Owners Ins. Co. v. Newman, 385 S.C.187, 198, 684 S.E.2d 541, 546 (2009) concerning the consequences of a general verdict for insurance coverage. Like the Special Referee in Heritage Communities, circuit court judges in South Carolina interpret Newman to require intervention and allocation:

> "The Supreme Court in Newman thus explained that a liability insurer – even though not a party to the underlying action – has a responsibility to seek an allocation of damages from the factfinder in the that underlying action or waive the ability to 'relitigate the issue of damages' in a subsequent declaratory judgment action. That was reiterated by the Court in [Heritage]. Those decisions, therefore, require an insurer to seek an allocation of damages for coverage purposes in the underlying action, which is what Selective is

attempting to accomplish with its intervention in this litigation." The Honorable William H. Seals, Jr. Michael Ingram v. Lauderdale Bay. (R. p. 191.)[2]

Based on Newman and Heritage Communities, Builders Mutual sought to intervene in the underlying action and advised the parties on the need to allocate the verdict:

> Builders Mutual submits that the Plaintiffs and Tri-County are proponents of insurance and must themselves have the jury allocate damages if any of these parties seeks insurance coverage for a verdict or judgment. In fact, to the extent these parties do not do so and oppose Builders Mutual doing so, such party should be estopped from later contending that Builders Mutual should be bound by a general verdict. The utilization of a special verdict form or answer to interrogatories will enable the jury to allocate damages with respect to damages that may be covered and damages that are not covered under the Builders Mutual policies - without having to know the ultimate purpose of the trial discovery. (R. p. 112.)

The general verdict rule has been used as a shield to preclude allocating damages for insurance coverage. See Owners Ins. Co. v. Clayton, 364 S.C. 555, 560-61, 614 S.E.2d 611, 614 (2005). The Special Referee in Heritage Communities used the general verdict rule and cited Newman and no less than six South Carolina Supreme Court and South Carolina Court of Appeals decisions addressing the inability of a party in a collateral proceeding to parse a general verdict between what damages are covered and not covered under a CGL insurance policy. (R. p. 105.) The Supreme Court unquestionably recognized that the property owners association (judgment creditor) in Heritage Communities successfully utilized the general verdict to prevent Harleysville Grp. Ins. from an evaluation of the covered versus non-covered damages in the declaratory judgment action. Heritage Communities, 420 S.C. at 356, 803 S.E.2d at 308-09. The Supreme Court also recognized the additional finding of the Special Referee:

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[2] The ruling in Gov't Employee's Ins. Co. resulted in substantially different consequences to the insurer in that case. The Supreme Court very specifically stated that, "GEICO maintains the ability to protect any economic interest which may be affected by the family court action". Gov't Employee's Ins. Co., Ex parte, 373 S.C. 132, 644 S.E.2d 699, 702 (2007) In great contrast, the insurers in Newman and Heritage Communities did bear the financial consequences. Accordingly, Gov't Employee's Ins. Co cannot be understood as supporting the proposition that all insurers have only a peripheral interest not deserving of standing.

> Although the Special Referee found that the costs to remove and replace the faulty workmanship were not covered under the policies, the Special Referee concluded that it would be improper and purely speculative to attempt to allocate the juries' general verdicts between covered and non-covered damages. Accordingly, the Special Referee ordered the full amount of the actual damages in the construction-defect suits would be subject to Harleysville's duty to indemnify in proportion with its time on the risk.

Heritage Communities, 420 S.C. at 332, 803 S.E.2d at 294.

Given that a CGL insurance policy only insures "property damages" and not the removal and replacement of faulty workmanship, parties must obviously allocate the damages at some point. The issue, then, is whether the allocation must be performed in the underlying trial or whether it can be performed in a later declaratory judgment proceeding.

Builders Mutual submits that an allocation must be done in the underlying trial based on existing precedent in South Carolina. Newman makes clear that an allocation must be done in the underlying trial. Newman, 385 S.C. at 198, 684 S.E.2d at 547. In that case, Auto-Owners Ins. Co. bore the consequences for not doing so based on a finding that it controlled the defense of the insured. Newman, 385 S.C. at 198, 684 S.E.2d at 547. ("[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.").[3]

The control argument is discussed in Fifth Circuit Court of Appeals and Tenth Circuit Court of Appeals decisions cited in Heritage Communities. Heritage Communities, 420 S.C. at 341, 803 S.E.2d at 299. See Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491, 1498 (10th Cir. 1994) (citations omitted)

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[3] Builders Mutual has previously stated that intervention is not something insurers defending insureds in South Carolina requested or wanted. In the Newman appeal, Auto-Owners Ins. Co. argued against intervention and took the position that Sims counseled against intervention in favor of allocating faulty workmanship versus property damage in a declaratory judgment action. (R. P. 656-668.) In Heritage Communities, Harleysville Group Ins. advised insureds that there is a conflict and that matters of insurance coverage would be reserved for a declaratory judgment action. (R. P. 225.) In both actions, the insurer was forced to pay the general verdict because the courts applied the general verdict rule to prevent allocation.

("explaining '[i]f the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories' "); Duke, 483 F. 2d 973, 979 (5th Cir. 1972)("The consequence to the insureds of a nonallocated verdict is the catastrophic total loss of coverage. The risks to the insurer in requesting an allocated verdict are of no such magnitude, if of any consequence at all.").

The control argument is also addressed by the Supreme Court in Heritage Communities. Heritage Communities, 420 S.C. at 338, 803 S.E.2d at 297-98. ("[B]ecause an insurer typically has the right to control the litigation and is in the best position to see to it that the damages are allocated, courts have found that where an insurer defends under a reservation of rights, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus noncovered damages.")(citing see Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933). One simply cannot take away from these decisions that litigants can forgo an allocation in the underlying action and do so in a later declaratory judgment action. Builders Mutual submits that if Newman and the control argument are the precedent and legal principle for requiring an insurer to be involved in allocating damages, then the circuit court abused its discretion in not allowing Builders Mutual to intervene to do so. Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 475 (2014)(The Supreme Court is free to decide questions of law with no particular deference to the trial court).

One can debate whether an insurer must intervene or not based on Heritage Communities. Regardless of how one views the issue, the Supreme Court did affirm the finding of the Special Referee that Harleysville Group Ins.'s reservation of rights was insufficient because the letter did not advise the insured of the need for an allocated verdict. Heritage Communities, 420 S.C. at 342, 803 S.E.2d at 299. If an insurer must advise the insured to allocate in the underlying trial, logically, the insured must then

allocate – or bear the consequences or loss of insurance. Duke, 468 F.2d at 977. ("[T]he burden of apportioning these damages is on the party seeking to recover from the insurer. . . Therefore, unless Duke [judgment creditor] is for some reason relieved of his burden of proof, [the insurer] must prevail."). Builders Mutual submits that it would be entirely confusing for the insured to be advised to allocate when no parties are required to allocate or are otherwise reserving allocation for another proceeding. One simply cannot take away from Heritage Communities that it is sufficient to advise an insured that it does not need to allocate damages in the underlying trial.

III. The Burden of Apportioning Damages is on the Party Seeking to Recover from the Insurer.

The Association's misinterpretation of South Carolina law discussed in the first section herein leads the Association to another flawed legal conclusion. The Association argues that the insurer has the burden of proof on allocation because the insurer is trying to prove an exclusion. Not only is this argument flawed, as discussed, but it is inconsistent with those judicial decisions that have directly addressed the burden of proof on allocation for damages for insurance coverage. The burden of apportioning damages is on the party seeking to recover from the insurer. Duke v. Hoch, 468 F.2d at 977. The Fifth Circuit in Duke cites Universal Underwriters Ins. Corp. v. Reynolds, 129 So.2d 689, 691 (Fla.Ct.App.1961) for the burden of proof on allocation. Duke, 468 F.2d at 977. The Court in Universal Underwriters states, "[t]he decision of Clark v. Globe Indemnity Co .... is illustrative of the majority rule in the United States, that where a judgment includes elements for which an insurer is liable and also elements beyond the coverage of the policy, the burden of apportioning these damages is on the party seeking to recover from the insurer." Id. at 691. Universal Underwriters Ins., 129 So.2d at 691.

The foregoing law on the burden for allocating fits squarely with an insured's burden of proof for the threshold question of coverage in South Carolina. Sunex Intern., 185 F.Supp.2d at 617. The law also

fits squarely within an insurer's requirement to advise the insured of the need to allocate damages in the underlying action. Heritage Communities, 420 S.C. at 342, 803 S.E.2d at 299. If an insurer must advise the insured to allocate, then an insured must in fact allocate. Otherwise, what damages are from "property damage" versus what damages are from removal and replacement of the faulty workmanship will be unknown.

Contrary to the Association's assertions, Builders Mutual does not misconstrue Duke; and Florida law does not change the essential findings or holding in Duke. There are at least two findings in Duke that guide the present appeal. First, Duke includes the principle that an insurer must advise the insured of the need to allocate damages in the underlying trial. Duke, 468 F.2d at 979. In this case, there is no dispute that Builders Mutual advised Tri-County Roofing on allocation. (R. p. 112.) Builders Mutual sent Tri-County Roofing a reservation of rights letter, and in response Tri-County Roofing retained additional counsel to advise on coverage and appear in the underlying action.[4] (Final Brief pg. 8, 12)(R. p. 654.) Further, Palmetto Pointe has stated, "[r]egardless of what Newman and Heritage Communities mean, at this point, [Builders Mutual's] 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." (R. p. 513.) Palmetto Pointe also stated:

> Having no means to force the trial court's hand (as to intervention or 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 rights to due process assure that its

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[4] Tri-County Roofing makes no contention in its Final Brief that it did not receive a reservation of rights letter or was not advised by Builders Mutual on allocation or coverage. The reservation of rights letter is otherwise a protected communication (work product) between the insurer and insured. See Rule 26(b)(3), SCRCP. The plain text of Rule 26(b)(3), SCRCP applies to insurers. A litigant is entitled to review the liability insurance policies, see Rule 26(b)(2), SCRCP, which were produced in response to a Request for Production in the underlying action. (R. P. 210.)

> rights are protected as to any matters, where its and its insured's interests were not identical at trial – neither Newman and [sic] Heritage Communities could possibly say otherwise. (R. p. 514.)

Second, Duke includes the principle that allocation is a liability insurance coverage matter that can and should be done in the underlying trial. Duke, 468 F.2d at 979. Duke does not support the proposition that allocation can and should be done as a matter of law in the declaratory judgment or garnishment proceeding. A fundamental proposition of Duke is that if the insured is advised to allocate in the underlying trial, the insured bears the consequences for not doing so. Duke 468 F.2d at 977-98.

IV. The Policy Reasons Argued by the Association Do Not Support Allocating in a Declaratory Judgement Action.

Notwithstanding Newman and Heritage Communities, are there policy reasons why an allocation cannot or should not have to take place in the underlying construction defect trial? The Association contends two policy reasons support disregarding Supreme Court precedent. First, an irreconcilable conflict of interest exists between the insured and insurer. Second, evidence of faulty workmanship and property damage may not be in the record and, therefore, it is wrong to require a litigant to have to prove such information for the record. In making these arguments, the Association again argues the flawed premise that Builders Mutual is using the underlying trial to decide policy exclusions.

The conflict argument is likely the most often cited reason by those opposing allocation in the underlying trial. Parties cite Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965) for precedent supporting an insurer circumnavigating the general verdict rule and allocating in a collateral proceeding after the general verdict.[5] Following Sims is precisely what Harleysville Grp. Ins. chose to

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[5] The Association argues that Harleysville Group Ins. in Heritage Communities was not estopped from offering evidence and testimony in support of a claim for intentional torts and punitive damages. The reason, of course, is that Sims is directly on point for coverage defenses concerning intentional torts. In contrast, there is no irreconcilable conflict when doing an allocation regarding what damages are covered under a CGL insurance policy.

do in Heritage Communities and failed. (R. p. 225.)("Harleysville advised its insureds that if Harleysville intervened it would 'create' a conflict of interest so they would wait until after the verdict to litigate coverage.")[6]

In Sims, the Supreme Court permitted a second trial because there was an irreconcilable conflict. Sims, 247 S.C. at 85, 145 S.E.2d at 524. A defense counsel cannot try a case for his/her client and set up a defense to coverage for an intentional tort, before a jury, that prejudices his/her client. Id. Further, there is no practical way to remedy this conflict in an underlying jury trial without disclosing insurance to the jury. In contrast to the situation in Sims, there is no conflict with an insured developing evidence and allocating damages that go to insurance coverage. Unlike setting up evidence for an intentional tort, identifying and allocating property damage poses no same conflict at all. An allocation as part of a verdict is not defeating coverage; an allocation is simply determining what part of the damages that comprise the verdict are covered under a CGL insurance policy. The insured is simply doing what it must do to have insurance coverage.

Allocating a verdict in the underlying trial simply does not create the irreconcilable conflict presented in Sims. The rule in Sims is an exeption to the rule that matters concerning insurance coverage should be resolved in the underlying trial. See Duke, 468 F.2d at 982 ("Requiring the insurer to disclose to its insured the benefits of an unallocated verdict [to the insurer] comports with the thrust of Coblentz and Hare – that coverage problems capable of resolution at the main trial should be resolved."). In this case, Tri-County Roofing retained additional counsel with no connection to Builders Mutual. (R. p. 64.). There would be no conflict for that counsel to request an allocation. Palmetto Pointe does not have a conflict and Builders Mutual submits that, under Sentry Select Ins. Co. v. Maybank Law Firm, 426

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[6] See also (R. P. 245.) – "Harleysville made the decision not to file a motion to intervene or otherwise seek an allocated verdict as it could have done under Rule 24 and 49, SCRCP."

S.C. 154, 826 S.E.2d 270 (2019), retained counsel does not have an irreconcilable conflict. See Sentry, 426 S.C. at 157, 826 S.E.2d at 271 ("[T]he attorney owes the client – not the insurer – a fiduciary duty").

The Association argues a "slippery slope" will lead ultimately to some worse case scenario. However, intervention and allocation is a workable civil procedure in the underlying trial and should not be disregarded simply because a case may be complex. The Honorable William H. Seals, Jr. succintly lays out the procedure in a construction defect case where his honor granted a motion to intervene:

> Selective does not seek to actively participate in the trial of this action, that is, with the limited exception of making a motion, if necessary, at the appropriate stages of the trial to submit special interrogatories and/or special interrogatories to the jury. Selective is not seeking to participate in discovery.... Selective is not seeking declaratory relief from this court and is not asking this court to determine coverage issues. The jury will not be informed that Selective has intervened or is represented in the courtroom. Selective's motion for the submission of special interrogatories or a special verdict will occur entirely outside the presence of the jury. The Honorable William H. Seals, Jr. - Michael Ingram v. Lauderdale Bay. (R. p. 183.)

The Court should proceed on the premise that Rules 24 and 49, SCRCP are procedures, along with other applicable court rules, that can work as noted by the Fifth Circuit in Duke in the following:

> The consequences to the insureds of a non-allocated verdict is the catastrophic total loss of coverage. The risks to the insurer in requesting an allocated verdict are of no such magnitude, if of any consequence at all. A request for identification of the two types of damages reveals neither the presence of insurance nor the amount of coverage. Assuming as we must that the jury will follow instructions and make a correct allocation, the insurance company loses no benefit to which it is validly entitled from having the jury earmark the losses. Arguably the jury might, while complying with instructions, at its option throw damages into that category which it will speculate is insured. This is too tenuous to deserve more than mention. There may, however, be some awkwardness in argument to the jury, but this is nominal when balanced against the consequences to the insureds.

Duke, 468 F.2d at 979.

Builders Mutual also submits that confusion for the jury will not ensue. The arguments made by the Association are basically the ones made by litigants in response to Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989). In Kennedy, the Supreme Court reiterated that

privity of contract was not a legal defense in a construction defect case. Kennedy, 299 S.C. at 345, 335, 384 S.E.2d at 736. Further, the Supreme Court held that a negligence cause of action against a residential contractor may exist for a violation of a building code or breach of an industry standard. Kennedy, 299 S.C. at 347, 384 S.E.2d at 738. Kennedy generated a large amount of construction defect cases in South Carolina thereafter, and continuing today, by owners suing numerous parties and effectively requiring proof concerning multiple and different building code and industry standards in a single civil action. The present underlying action initially involved no less than thirty defendants varying from the developer, general contractor, first and second tier subcontractors (of several different trades) and manufacturers/suppliers of different construction products. In the end, the jury was asked to consider building codes and industry standards for different parts of the construction of the twenty buildings involving the entire buildings (general contractor), roofing, siding and deck waterproofing (Tri-County Roofing) and fire codes (WC Services). Adding one more step, that of determing what damages are attributable to "property damages" and what damages are attributable to faulty workmanship, is not a much more greater burden. Additionally, the Fifth Circuit discussed the importance of having the confidence in jurors to fulfill their service and rightly do an allocation during the main trial. Duke, 468 F.2d at 979.

In sum, the Association trusts jurors to award a general verdict but not to allocate what damages within that general verdict may be covered under a CGL insurance policy.

CONCLUSION

The Supreme Court should reverse the circuit court and permit intervention by Builders Mutual. In the alternative, the Supreme Court should hold that the burden of allocating damages during trial was on Palmetto Pointe and Tri-County Roofing. The consequences of failing to do so are on them too.

Additionally, the Supreme Court should reverse the circuit court because the circuit court lacked jurisdiction to lift the automatic appeal stay and proceed to trial.

Respectfully Submitted,

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March 2, 2020

THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

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Appellate Case No. 2019-000238

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

v.

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

And

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

v.

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

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

APPELLANT BUILDERS MUTUAL INSURANCE COMPANY'S PROOF OF SERVICE OF REPLY BRIEF TO THE AMICUS CURIAE BRIEF OF SOUTH CAROLINA ASSOCIATION FOR JUSTICE

I certify that I have served Appellant Builders Mutual Insurance Company's Reply Brief to the Amicus Curiae Brief of South Carolina Association for Justice by depositing a copy of it in the United States Mail, postage prepaid, on **March 2, 2020** addressed to their attorneys of record, listed as follows:

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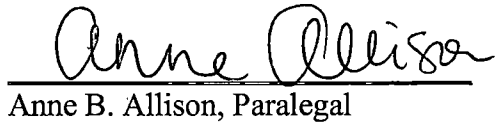

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