THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2019-001053

Ex Parte: Hartford Fire Insurance Company, Hartford Casualty Insurance Company, American Empire Surplus Lines Insurance Company, BITCO General Insurance Corporation, Clarendon National Insurance Company, Harleysville Insurance Company n/k/a Nationwide Insurance Company, Selective Insurance Company, Crum & Forster Specialty Insurance Company, and First Mercury Insurance Company, ... Appellants

In Re:

The Havens Condominium Association, ... Plaintiff,

v.

Centex Homes, et al., ... Defendants,

The River Crossing Condominium Association, and Vincent J. Tamburro, on behalf of himself and others similarly situated ..... Plaintiffs

v.

Centex Homes, et al., ... Defendants,

The Tanglewood Condominium Association ..... Plaintiff,

v.

Centex Homes, a Nevada General Partnership, et al., ... Defendants,

The Woodlands Condominium Association ..... Plaintiff,

v.

Centex Homes, a Nevada General Partnership, et al., ... Defendants,

Of Which, The Havens Condominium Association, The River Crossing Condominium Association, Vincent J. Tamburro, The Tanglewood Condominium Association, The Woodlands Condominium Association, and Centex Homes, a Nevada General Partnership, are the ..... Respondents.

Final Reply Brief by Appellants American Empire Surplus Lines Insurance Company, BITCO General Insurance Corporation, Clarendon National Insurance Company, Harleysville Insurance Company n/k/a Nationwide Insurance Company, Selective Insurance Company, Crum & Forster Specialty Insurance Company, and First Mercury Insurance Company

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I. Reading *Harleysville* in light of *Newman* leads to the conclusion that intervention is required to preserve the right of an insurer to allocate damages.

Respondents both concede that *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) and *Harleysville Grp. Ins. v. Heritage Communities, Inc*., 420 S.C. 321, 803 S.E.2d 288 (2017) can be read to require intervention to avoid facing a waiver of the right to later contest allocation of damages. The Condominium Associations recognize this explicitly:

> Though one may read between the lines of the opinion and draw different conclusions, *Harleysville* seemed to confirm *Newman*'s deviation from *Sims*, to further suggest that the safest way to protect an insurer's interest and ability to contest coverage was to properly reserve specific rights, advise its insured of a conflict of interests and need for an allocated verdict, and, to be abundantly cautious, intervene and seek the allocation itself.

(*See* Condominium Assoc. Br. at 10.)

Respondent Centex is not so explicit in its concession that *Newman* and *Harleysville* can be read to require intervention. Yet Centex does implicitly concede the point: "*Sims*, *Newman* and *Harleysville* teach that allocation of the verdict, even one general in nature, is possible so long as, *potentially among other things*, an insurer sufficiently reserves its rights and establishes a satisfactory record in the declaratory judgment action." (Centex Br. at 19 (emphasis added).) In this statement, Centex recognizes that insurers in South Carolina must do more than just reserve their right to later contest coverage issues, including the allocation of a general verdict in a later declaratory judgment action. That Centex classified this as only a potentiality emphasizes the point the Insurers raise in their opening brief: The uncertainty generated by *Newman* and *Harleysville* requires prudent insurers to seek intervention to avoid even the possibility of waiving their right to allocation.

To distance itself from the Insurers' argument that *Newman* and *Harleysville* require intervention, Centex suggests that *Newman* is limited to arbitration cases. (Centex Br. at 10.) This is a distinction without a difference. The Court in *Harleysville* cites *Newman* when explaining that the "insufficient evidence in the record" about "which costs were solely attributable to the non-covered faulty workmanship," as grounds upon which the special referee properly refused to allow allocation. *Harleysville*, 420 S.C. at 343 n.11, 803 S.E.2d at 301 n.11 (citing *Newman*, 385 S.C. at 198, 684 S.E.2d at 547). In this regard, *Harleysville* is an extension of *Newman*, even though *Harleysville* did not involve an arbitration.[1]

Newman is potentially distinguishable because the insurer there may have played an actual role in the underlying arbitration. *See Newman*, 385 S.C. at 198 n.5, 684 S.E.2d at 547 n.5 ("Auto-Owners represented Trinity in binding arbitration . . . . When the arbitrator determined damages, Auto–Owners did not seek review of or otherwise contest the damages award."). This statement would generally be incorrect—South Carolina insurers do not represent their insured in underlying defect actions, whether litigated or arbitrated. They instead retain independent counsel to represent the insured. *See Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 426 S.C. 154, 160, 826 S.E.2d 270, 273 (2019). Had the insurer been actively involved in the litigation, issues the insurer actually litigated in *Newman* could have later limited its options in the coverage litigation. The degree of any involvement, however, is not available in the record. As a result, the Insurers here could not forgo the chance to seek intervention by relying on such a passing reference. Doing so could have left them trying to distinguish *Newman* in a subsequent declaratory judgment action at the risk of losing their right to seek allocation.

[1] Other courts have extended *Newman* and *Harleysville* further still. *See Stoneledge at Lake Keowee Owners Ass'n, Inc. v. Cincinnati Ins. Co.*, No. 8:14-CV-01906-BHH, 2019 WL 3945518, at *6 (D.S.C. Aug. 21, 2019) (extending *Newman* and *Harleysville* to declaratory judgment action following settlement).

Centex and the Condominium Associations also argue that *Harleysville* does not require or permit intervention because the Court based its decision in *Harleysville* only on the question of whether the insurer had sufficiently reserved its right to contest coverage. (Centex Br. at 11–12; Condominium Assoc. Br. at 9–10.) This argument ignores the practical effect of the Court affirming the special referee's additional ruling that Harleysville had failed to "establish a basis upon which to make a logical assessment" of the jury's general verdict. *Harleysville*, 420 S.C. at 343 n.11, 803 S.E.2d 288, 301 n.11 (citing *Newman*, 385 S.C. at 198, 684 S.E.2d at 547).

The Court's recent opinion in *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 426 S.C. 154, 160, 826 S.E.2d 270, 273 (2019) possibly limits the viability of *Newman* and *Harleysville*. *Sentry Select* made abundantly clear that retained defense counsel represents the insured, and only the insured, when the interests of the insured and insurer differ. *Id.* Such a distinction destroys any ability of an insurer to control the defense on the allocation issue because an insured and its insurer fundamentally disagree on requesting allocation to determine coverage. *Id.*; *see also Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006) (confirming that agency relationship ends when agent and principle's interests conflict). In construction defect actions, an insurer wants an itemized verdict so it can allocate damages later, while its insured wants a general verdict so it can argue that allocation is impossible under Newman and *Harleysville*.[2] Due to this conflict, the privity between the insurer and the retained defense counsel is destroyed, limiting the non-mutual preclusive effect that any judgment in the underlying tort action would have against the insurer. *See Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 87, 145 S.E.2d 523, 525 (1965). Again, though, "the

[2] Without adopting the burden-shifting rule from *Duke v. Hoch*, 468 F.2d 973, 977 (5th Cir. 1972), the conflict paralyzes the retained defense counsel over the itemized verdict. To alleviate this paralysis, the Court should place the burden of allocation on the insured in the underlying action if a proper reservation of rights letter is provided.

safest way to protect an insurer's interest and ability to contest coverage" is, out of an abundance of caution, "to intervene and seek the allocation itself." (Condominium Assoc. Br. at 10.)

The prospect of intervening in every construction defect action involving an insured is not ideal. That does not mean that the Insurers are willing to take the gamble given the differing interpretations—even differing interpretations among the courts—about whether *Newman* and *Harleysville* require intervention. This is especially true when the potential result of failing to intervene could be a waiver of the Insurers' allocation rights altogether. The Court can help the parties on both sides avoid the unnecessary time and expense of motions to intervene by clarifying *Newman* and *Harleysville* and returning to *Sims*.[3]

II. The Insurers' motions to intervene were procedurally proper.

Respondents challenge the Insurers' standing to intervene and the timeliness of their motions. Their standing argument ignores the effect of failing to intervene on the Insurers' right to contest allocation of damages. Their timeliness argument ignores South Carolina cases establishing that the Insurers' motions were timely filed (and even timely decided). The Court should, therefore, reject Respondents' procedural arguments.

A. The motions to intervene were timely filed.

Motions to intervene in South Carolina may be granted "[u]pon timely application" of the intervening party. Rule 24, SCRCP. The rule does not establish what is a timely application, but this Court has articulated a four-factor test for timeliness:

[3] The Condominium Associations seek to confirm that allocation is permitted so long as "the insurer at issue has properly reserved its rights via specific correspondence to that effect and provided a defense to its insured." (Condominium Assoc. Br. at 11.) This is similar to the request made here by the Insurers; however, the Insurers wish to clarify that providing a defense is not a prerequisite to later allocating damages. Indeed, that would contradict *Sims*. There, the insurer provided no defense to the purported insured. *Sims*, 247 S.C. at 84, 145 S.E.2d at 523.

(1) the time that has passed since the applicant knew or should have known of his or her interest in the suit;

(2) the reason for the delay;

(3) the stage to which the litigation has progressed; and

(4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial.

See Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (citing *Mokhiber v. Davis*, 537 A.2d 1100, 1104 (D.C. App. 1988)).

The motions to intervene filed here were timely whether the Court measures the timeliness from the date the motions were filed or decided. Though the Condominium Associations filed the underlying construction defect actions in 2015, the first of the four cases did not proceed to trial until February 2020. (*See* Agreement and Stipulation Regarding the Record on Appeal ¶ 1; R. at 850.) The first of the motions to intervene was filed in December 2017, more than two years *before* trial. (*Id.* ¶ 2; R. at 850; *see also* Mot. Intervene; R. at 653–854.)[4] The next trial out of the remaining three cases is scheduled for April 2020, meaning that the motions to intervene would have been filed almost 25 months before trial.[5]

If the Court instead measures the timeliness from the date the trial court ruled on the motions to intervene, the motions are still timely. The trial court issued its order almost eight months before the first of the cases went to trial. (Order Denying Intervention; R. at 1–8.)

Regardless of the number of months before trial the motions were filed or decided, the remaining parties are not prejudiced by intervention from a timeliness prospective. Respondents would have had plenty of time to determine how to litigate the construction defect actions with

[4] This was just a few short months after the Court issued its refiled opinion in *Harleysville* at the end of July 2017.

[5] This, of course, assumes that jury trials in South Carolina may proceed by that date. *See In Re: Operation of the Trial Courts During the Coronavirus Emergency*, Admin. Order No. 2020-04-03-01 (April 3, 2020).

(or despite) the Insurers' involvement. First, Respondents had more than eight months to consider how the potential special verdict form or special interrogatories would impact their presentation of the four underlying cases to the jury. This could have included negotiating the language used in the verdict form or special interrogatories, or a pretrial hearing for the Court to determine how it would proceed. Eight months provides the parties, regardless of the number, sufficient time to try to reach a compromise on the language to be used.

Second, the limited nature of the intervention undermines Respondents' argument that the presence of other parties would cause confusion to the jury. The Insurers sought limited intervention as has been done in other cases. *See, e.g., Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 602–03 (1991) ("Newspaper's motion is distinguished from those in which party-litigant status is sought; rather, its motion is for the sole and limited purpose of challenging a protective order."); *Stoney v. Stoney*, 425 S.C. 47, 64, 819 S.E.2d 201, 210 (Ct. App. 2018) (recognizing that a court should limit an intervenor's involvement in the case to the matters in which it has a personal stake); *Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1327–28 (S.D. Ala. 2003) (permitting intervention requested "for the limited purpose of submitting special jury interrogatories and/or a special verdict form for the Court's consideration and requesting submission of same to the jury."); *cf. Restor-A-Dent Dental Labs, Inc., v. Certified Alloy Products, Inc.*, 725 F.2d 871, 877 (2d Cir. 1984) ("[I]n view of the economy of time and effort inherent in the use of interrogatories in this situation, it would likewise not have been an abuse of discretion had the trial judge permitted the insurer to intervene under Rule 24(b)(2) for the limited purpose of proposing interrogatories to the court for submission to the jury.").

Limited intervention would have an added benefit. It eliminates any claim of prejudice related to the timeliness of intervention after any discovery has been completed in the underlying

matters. *Davis*, 304 S.C. at 505, 405 S.E.2d at 603 (requiring courts to "ask why a would be intervenor seeks to participate, for if the 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."). Because the Insurers seek only to intervene to propose a special verdict form or special interrogatories, they have no need to participate in the discovery process. The Insurers do not seek to turn the underlying trial into coverage litigation, but only to preserve factual findings regarding how much of any verdict may be allocated. They do so to allow a subsequent jury to properly determine the extent of coverage consistent with *Newman* and *Harleysville*.

By contrast, the prejudice caused to the Insurers by denying intervention is great. *See Davis*, 304 S.C. at 504, 405 S.E.2d at 603 (requiring court to weigh "the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial."). As explained above, the trial court's failure to permit the Insurers to intervene means they may lose the ability to seek allocation of damages in a later declaratory judgment action. *Harleysville*, 420 S.C. at 343 n.11, 803 S.E.2d at 301 n.11; *Newman*, 385 S.C. at 198, 684 S.E.2d at 547. That prejudice is great because it deprives the Insurers of any ability to enforce the limits of their contractual obligations with an insured.

For these reasons, the motions to intervene were timely and would not have prejudiced Respondents, so the trial court erred in denying intervention.

B. The Insurers have standing to intervene because *Newman* and *Harleysville* require intervention.

The Insurers have standing to intervene because, absent intervention, they would be deprived of the right to seek allocation under *Newman* and *Harleysville*. To challenge this argument, Respondents argue that the Insurers have only a "peripheral" interest, relying in large

part on *Ex parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 138–39, 644 S.E.2d 699, 702 (2007). (Centex Br. at 17; Condominium Assoc. Br. at 14–15.) *Ex parte GEICO* is distinguishable here.

Ex Parte GEICO involved an insurer's attempt to intervene in inherently personal litigation about the marital relationship between an insured and a third party. *Ex parte GEICO*, 373 S.C. at 134, 644 S.E.2d at 700. Unlike the insurer in *Ex parte GEICO*, which had an alternate remedy available to it, the opposite is true here. *Id*. at 137, 644 S.E.2d at 702 ("GEICO maintains the ability to protect any economic interest which may be affected by the family court action."). Without intervention, the Insurers lose their remedy of allocation. *See Harleysville*, 420 S.C. at 343 n.11, 803 S.E.2d at 301 n.11. Thus, the Insurers have standing because they otherwise would not have a forum in which a general jury verdict could be allocated between covered and non-covered damages.[6]

The reality that Respondents do not represent the Insurers' interests in the underlying action bolsters the Insurers' standing to intervene. *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (1990) (requiring intervenor to "show that the representation of his interests 'may be' inadequate.") (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972)). The question of "adequacy of representation cases generally fall into one of three categories." *In re Horry Cty. State Bank*, 361 S.C. 503, 509, 604 S.E.2d 723, 726 (Ct. App. 2004) (citing 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1909, at 318–49 (2d ed. 1986)). The first is where "the interest of the absentee is not represented at all" or where "all existing parties are adverse to him." *Id*. In these situations, the Court should almost always allow intervention because the lack of adequate representation virtually ensures that the representation of the intervenor's interests by the

[6] The Insurers concede that if *Newman* and *Harleysville* do not require intervention, then they do not meet the test for standing under *Ex parte GEICO*, 373 S.C. at 138–39, 644 S.E.2d at 702.

remaining parties "*may* be inadequate." *Berkeley Elec. Co-op.*, 302 S.C. at 191, 394 S.E.2d at 715 (emphasis added). That is not necessarily the case in the two remaining categories, those where "the interest of the absentee is identical with that of one of the existing parties" and those where "the interests of the absentee, and of the party thought to represent him, are different, though perhaps similar." *In re Horry Cty. State Bank*, 361 S.C. at 509–10, 604 S.E.2d at 726 (quoting Wright & Miller, *Federal Practice and Procedure* § 1909, at 318–49).

This case falls into the first category. Centex concedes that its interests diverge from the Insurers. (Centex Br. at 20.) The interest of the Condominium Associations, which seek to maximize their total recovery, are also opposed to the Insurers' interests. Thus, Respondents would benefit from a general verdict under the Court's current precedent while the Insurers would be prejudiced by that same general verdict. Given this reality, the Insurers cannot rely on the remaining parties to the action to protect their interests by preserving a record of the jury's itemization of the damages sufficient to permit allocation in a subsequent declaratory judgment action. This is especially true here because the Court did not adopt the burden-shifting approach under Florida law when it relied on *Duke v. Hoch*, 468 F.2d 973, 979 (5th Cir. 1972) in *Harleysville*. *See* 420 S.C. at 343, 803 S.E.2d at 300.

Because *Newman* and *Harleysville* require intervention to protect the record for an allocated verdict, the Insurers have standing to intervene.

Conclusion

Newman and *Harleysville* require intervention and, in turn, provide the Insurers with the standing to intervene as a matter of right. When the trial court refused to allow the Insurers to intervene, it abused its discretion by misinterpreting *Newman* and *Harleysville*. Because of this error of law, the trial court should be reversed. When issuing its opinion, the Court should

modify its opinions in *Newman* and *Harleysville* to resolve their conflict with *Sims*. The Insurers request that the Court allow future allocation issues to be resolved in the separate declaratory judgment action in the first instance, returning to, as the Condominium Associations put it, the "safety of *Sims*." (Condominium Assoc. Br. at 5.)

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