

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Ocean Breeze Beach Vacations n/k/a Ocean Breeze Beach Vacations, Inc., Matt Becker and Associates, Inc., Matt Becker and Karen Becker,

Plaintiffs,

vs.

Sands Ocean Club Homeowners Association, Inc., Lee Rawcliffe, Eddie Williams, Resort Association Management, Inc. and Island Resort Company, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2016-CP-26-6859

[PROPOSED] ORDER

RECEIVED

May 29 2020

SC Court of Appeals

This matter comes before the Court on AmTrust International Underwriters Limited’s (“AmTrust”) motion to intervene for the limited purpose of protecting its interests under a commercial general liability policy issued to the named insured and defendant “Sands Ocean Club HOA, Inc.” (“Sands Ocean”) in connection with the above-captioned action pursuant to South Carolina Rule of Civil Procedure 24 and the opinion issued by the South Carolina Supreme Court in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017). The Court heard argument from Janice Holmes, Esq., of the law firm Gallivan, White & Boyd, P.A., counsel for Non-party AmTrust and David Cooper Cleveland, Esq., of the law firm Clawson & Staubes, LLC, counsel for Defendants Sands Ocean Club Homeowners Association, Inc., Lee Rawcliffe, Eddie Williams, and Resort Association Management, Inc. (collectively “Defendants”), and Randall K. Mullins, Esq., of the Mullins Law Firm, PA, counsel for Plaintiffs, Ocean Breeze Beach Vacations n/k/a Ocean Breeze Beach Vacations, Inc., Matt Becker and Associates, Inc., Matt Becker and Karen Becker (collectively “Plaintiffs”), was also present at the hearing. After

considering the pleadings, the motion, the memoranda, the arguments at the hearing, and the relevant legal authority, the Court hereby denies AmTrust's Motion.

STANDARD

South Carolina Rule of Civil Procedure 24(1) provides that an applicant can intervene as a matter of right if "the applicant claims an interest related to the property or transaction which is the subject of the action and [it] is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 24(a)(2), SCRPC. Rule 24 also provides for permissive intervention and provides that an applicant can intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24(b)(2), SCRPC.

BACKGROUND

In this action, Plaintiffs seek damages for certain injuries and damages they allegedly sustained as the result of certain actions allegedly taken by the defendants involving Plaintiffs' business. In their Complaint, Plaintiffs include the following causes of action: 1) Tortious Interference with Contractual Relations; 2) Slander *Per Se*; 3) Unfair Trade Practices Pursuant to §§ 39-5-10, *et seq.*, South Carolina Code Annotated; and 4) Temporary Injunction/Permanent Injunction.

AmTrust issued a commercial general liability policy to the named insured "Sands Ocean Club HOA, Inc.". The policy insures insureds under the policy for certain risks under the insuring agreement and excludes certain risks through policy exclusions. AmTrust has agreed to participate in the defense of Defendants subject to a full and complete reservation of rights under the policy. AmTrust specifically reserved its right to disclaim indemnity coverage for damages awarded against Defendants under the policy if those damages are not covered by the terms and conditions of the policy.

The reservation of rights specifically sets forth in detail the various grounds upon which AmTrust may deny indemnity coverage to Defendants. The contents of the reservation of rights also inform Defendants that the claims for tortious interference with a contract, unfair trade practices, and for injunctive relief are not claims for “bodily injury” or “property damage” caused by an accident or “occurrence” or “personal and advertising injury.” Further, the contents of the reservation of rights inform Defendants that the policy does not afford coverage for “bodily injury” or “property damage” if such damage or injury was intended or expected by an insured and did not result from the use of reasonable force to protect persons or property. In addition, Defendants were informed that the policy does not afford coverage for “personal and advertising injury” caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict “personal and advertising injury” or that arises out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity. And, in light of the pending trial date, AmTrust advised Defendants, in writing, that they should take steps to allocate the verdict as to covered and non-covered claims and/or damages.

Notwithstanding that AmTrust specifically advised Defendants concerning the coverage issues and the potential that some or all damages awarded against them may not be covered, in light of the Supreme Court’s decision in *Harleysville*, AmTrust is concerned that it could be prohibited from enforcing the terms of the policy if a jury awards damages in a general, unallocated verdict. Therefore, AmTrust has sought 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 Defendants.

Defendants have objected to AmTrust's Motion. Defense counsel has acknowledged that his only duty is to the Defendants in this case. Further, defense counsel has no objection to counsel for AmTrust attending trial and making requests to Defendants during the course of trial.

CONCLUSIONS OF LAW

The opinion in *Harleysville* has created uncertainty surrounding this issue, even though case law indicates that the burden is on the insured to establish coverage in the first instance. *See Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968); *see also Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass'n Inc.*, 834 F. Supp.2d 437, 443 (D.S.C. 2011). In fact, while AmTrust has filed this Motion, it continues to maintain that it is the insured's burden to establish "covered" damages in order to establish any right to indemnity under the policy of insurance. *See UFP Eastern Div., Inc. v. Selective Ins. Co.*, Civil Action No. 4:15-2801-RMG, 2017 U.S. Dist. LEXIS 17082, *14 (D.S.C. Feb. 6, 2017) (holding that at the trial of the separately filed declaratory judgment action the insured "must prove its claim for indemnity falls within the scope of insurance – i.e., prove consequential damages resulting from work performed by [the insured's subcontract].").

The Court has considered AmTrust's request to intervene in this lawsuit for the purpose of presenting interrogatories to the jury in the event that the jury returns a verdict against Defendants and in favor of Plaintiffs. The Court has concerns about allowing AmTrust to intervene for this purpose. First, the Court finds that allowing AmTrust to intervene in the trial of this matter for the purpose of submitting special interrogatories to the jury may cause confusion to the jury. In addition, allowing intervention may create a conflict of interest between defense counsel, retained and hired by AmTrust, and the insureds. Defense counsel may be torn between representing a client (the insured) knowing that he or she also has to represent the

insurance carrier on the issues of what is covered and what is not covered. Essentially, defense counsel will be forced to decide between representing the insured (the client) and the insurer.

While the Court denies AmTrust the requested relief to intervene in the trial of this matter to submit interrogatories to the jury, the Court finds that by filing this Motion, AmTrust has complied with the obligation announced by the South Carolina Supreme Court in *Harleysville* such that AmTrust's interests are protected with regard to any obligation that it may have to afford coverage under the policy to Defendants.

Therefore, the Court DENIES AmTrust's Motion to Intervene.

IT IS SO ORDERED.

The Honorable Benjamin H. Culbertson
Presiding Judge

April ___, 2020



Horry Common Pleas

Case Caption: Ocean Breeze Beach Vacations , plaintiff, et al VS Sands Ocean Club Homeowners Association Inc , defendant, et al

Case Number: 2016CP2606859

Type: Order/Intervene

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Ocean Breeze Beach Vacations et al
PLAINTIFF(S)

Sands Ocean Club Homeowners Association Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Motion to Alter or Amend Judgment filed by Amtrust International Underwriters Limited on 4/17/2020 is DENIED.

PURSUANT to South Carolina Supreme Court Order 2020-04-22-01(c)(4), this motion is decided without oral arguments.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/28/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Ocean Breeze Beach Vacations , plaintiff, et al VS Sands Ocean Club Homeowners Association Inc , defendant, et al

Case Number: 2016CP2606859

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148