

IN THE STATE OF SOUTH CAROLINA

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In the Supreme Court

JUN 17 2020

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 and Nationwide
Mutual Insurance CompanyAppellants,

In Re:

Palmetto Pointe at Peas Island Condominium Property
Owners Association, Inc. and Jack Lowe, 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 Building
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 Does 1-60, Defendants,

And

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 Lowe, individually, and
on behalf of all others similarly situated, Tri-County
Roofing, Inc., and WC Services, Inc., are Respondents,

**RETURN TO RESPONDENTS'
PETITION FOR REHEARING**

Pursuant to Rule 221(a), SCACR, Appellant Nationwide Mutual Insurance
Company (hereinafter "Nationwide") submits the following Return to Respondents'
Petition for Rehearing, which was filed on May 28, 2020.

Nationwide sees no indication that this Court overlooked or misapprehended any arguments raised to this Court in its May 13, 2020 Opinion. Nor does a hearing appear to be necessary for this Court to address the issues raised in the Petition for Rehearing. Accordingly, the Petition for Rehearing should be denied. Hicks v. Hicklin, 187 S.C. 355, 197 S.E. 390, 393 (1938) (holding that a petition for rehearing should be denied when the arguments on appeal were argued before the court and none of the arguments raised were overlooked or misapprehended).

Respondents Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated (hereinafter collectively “Palmetto Pointe”) seek clarification as to certain prescriptive guidelines as to how declaratory judgments addressing liability insurers’ duty to indemnify should be litigated in future cases. These questions, while interesting, were not raised to the trial court or to this Court on appeal.

Nevertheless, Nationwide recognizes that questions as to how evidentiary matters should be handled in subsequent (and currently pending) declaratory judgments were not reached by the trial court because of the posture in which this appeal arose. The immediate question is whether liability insurers are authorized to intervene into actions against their insureds to seek allocated verdicts for the purpose determining the amount of covered damages.

This Court’s well-written and illuminating opinion ably guides the bench and bar with respect to the issues before this Court. We now know that liability insurers are not required to intervene, and that they may litigate the allocation between covered and non-covered damages in separate declaratory judgment actions. This Court also provided

guidance as to the effect of the judgment in the tort action when allocation is considered in the coverage action.

Palmetto Pointe seeks clarification as to how broadly that guidance is to be interpreted. Nationwide submits that such clarification is speculative in the posture of this case and unnecessary because the answers to Palmetto Pointe's questions can be ascertained through existing law.

This Court's Opinion re-affirmed its holding in a prior case, Sims v. Nationwide Mutual Insurance Co., 247 S.C. 82, 145 S.E.2d 523 (1965). Sims was an appeal by a liability insurer from a ruling as to its coverage. Id. at 83, 145 S.E.2d at 523. The question on appeal was whether the trial court in the coverage action erred in refusing to admit certain evidence the insurer sought to introduce. Id. at 84, 145 S.E.2d at 524. Thus, the question as to the admissibility of evidence in the coverage action was properly before this Court in Sims.

In this appeal, the question of how evidence pertaining to allocation between covered and non-covered damages is to be presented to a court and litigated was at issue. Appellants argued that this Court's rulings in prior cases had seemingly denied insurers a forum for litigating those questions. See Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009); Harleysville Group Ins. v. Heritage Cmities., Inc., 420 S.C. 321, 803 S.E.2d 288 (2017). This Court answered that question in its Opinion in this appeal.

In Newman, which this Court modified in its Opinion in this case, the issue of relitigation was given as a reason for this Court's refusal to allocate. 385 S.C. at 198, 684 S.E.2d at 547. In modifying Newman, this Court properly addressed the question of how to balance Newman's concerns of relitigation against an insurer's right to seek an

allocation as to the amount of covered damages in a separate action. This Court provided a general framework as to how allocation is to be conducted and specified that the primary source of evidence in the coverage action should be the transcript of the merits hearing in the underlying tort action. Ex Parte: Builders Mut. Ins. Co., Op. No. 27970 (S.C. Sup. Ct. filed May 13, 2020) (Shearouse Adv. Sh. No. 19 at 48, 61).

Palmetto Pointe argued that in providing these guidelines, this Court unduly restricted the admissibility of evidence affecting coverage questions in coverage actions. Palmetto Pointe based its argument upon the following sentence: “In the discretion of the court, additional evidence may be presented that is relevant to the coverage dispute determination” Id.

Nationwide does not believe clarification is necessary. Nationwide reads the term “discretion” to refer to a trial court’s general discretion in determining the relevancy of evidence. See Horry Cty. v. Laychur, 315 S.C. 364, 369, 434 S.E.2d 259, 262 (1993) (holding that “the determination of relevance is largely within the discretion of the trial judge”). Thus, the requested clarification can be found by reference to governing law.

If this Court determines that clarification is needed, Nationwide submits that it should be limited to a statement that due to the posture of this case, this Court leaves for another day specific questions as to which evidence is admissible in coverage actions and the circumstances under which that evidence is admissible. Attempting to settle such questions in this case would take this Court far beyond the issues on appeal.

Moreover, Nationwide would show that Palmetto Pointe’s proffered replacement language goes too far. Palmetto Pointe seeks to have this Court opine that the evidentiary value of the transcript in the tort proceeding is limited to matters litigated therein.

In its Opinion, this Court denied the insurers' motions to intervene. Consequently, *no* coverage issues will hereafter be litigated in tort proceedings against the insureds. Palmetto Pointe's proposed language would create a loophole through which the factual basis for the judgment may be relitigated in subsequent coverage actions by parties seeking coverage, even though they were parties to the underlying tort action. The judgment creditor would then be able to re-cast facts that were actually litigated and decided in the tort action in ways that would increase the amount of covered damages in the coverage action. Contra Catawba Indian Nation v. State, 407 S.C. 526, 537, 756 S.E.2d 900, 906 (2014) (defining the scope of issue preclusion).

This concern finds some support in the language of footnote 9 of this Court's Opinion. Ex Parte: Builders Mut. Ins. Co., Op. No. 27970 (Shearouse Adv. Sh. No. 19 at 61 n.9). This Court seemingly approved of the procedure the insurer followed in Harleysville. In that case, the trial court denied the insurer's proffer of expert testimony as to the amount of covered damages. Harleysville Group Ins. v. Heritage Cmities., Inc., No. 2009-CP-26-11862, 2013 WL 8482326 at *14 (S.C. Ct. Comm. Pl., Horry County filed Feb. 28, 2013); Harleysville Group Ins. v. Heritage Cmities., Inc., No. 2009-CP-26-10053, 2013 WL 8482339 at *15 (S.C. Ct. Comm. Pl., Horry County filed Feb. 28, 2013).

The Special Referee denied the insurer's proffer in Harleysville for two reasons. One of those grounds—the interpretation of Newman to prohibit allocation of general verdicts—has now been overruled. However, the second ground could have supported the denial of the proffer even without reliance upon Newman.

Harleysville proffered the testimony of an expert who had nothing to do with the underlying case. Harleysville's expert admitted that his estimate did not correlate or

correspond with the underlying jury award. Order, 2013 WL 8482326 at *14; Order 2013 WL 8482339 at *15. In briefing the appeal, the homeowners argued that Harleysville's expert did "a complete new estimate of damages" for allocation purposes in the coverage action. (Appellant's Final Br. of Resp'ts/Appellants Magnolia North HPR and POA filed May 8, 2014, p. 6, Harleysville Group Ins. v. Heritage Cmties., Inc., Appellate Case No. 2013-001281.) Harleysville's expert never reviewed the estimates submitted to the jury at the underlying trial. (Id.) The homeowners argued Harleysville's approach would require them to produce yet another repair cost estimate to relitigate the same issue in the coverage action. (Resp't's Final Brief of Respondent/Appellant Magnolia North HPR and POA filed May 8, 2014, pp. 12-13, Appellate Case No. 2013-001281.) In other words, the insurer in Harleysville ignored the expert reports prepared by the homeowners in the tort action, hired an expert to conduct his own independent investigation, and then sought to base its valuation of the amount of covered damages on that independent report.

In this case, the Court held that additional evidence submitted in the coverage action "must be narrowly tailored to the coverage dispute question." Ex Parte: Builders Mut. Ins. Co., Op. No. 27970 (Shearouse Adv. Sh. No. 19 at p. 61). The Special Referee's ruling in Harleysville is consistent with the view that it found the expert report was *not* narrowly tailored to the coverage question. On the other hand, this Court appears to approve of the procedure used in Harleysville footnote 9. Thus, the intent of footnote 9 of this Court's Opinion could be construed as ambiguous.

This Court correctly sought to remind the bench and bar that the coverage action concerns indemnification. Thus, if this Court determines that clarification is needed, it should direct the parties to the coverage action to follow existing law. Coverage issues

that are intertwined with the underlying tort action cannot be determined on a clean slate unless a conflict of interest exists between the insurer and the insured. Sims, 247 S.C. at 88, 145 S.E.2d at 526. On issues upon which the interests of the insurer and the insured are aligned, the focus is on the findings and evidence considered by factfinder in the underlying case. Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992) (“Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.”). Questions that are not intertwined with issues decided in the underlying tort action are determined according to the terms of the indemnity contract. Rock Hill Tel. Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (“Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties.”).

As a final matter, the undersigned is aware of questions and confusion as to which “trial judge” is to make the allocation for coverage purposes. After citing Duke v. Hoch, 468 F.2d 937 (5th Cir. 1972), this Court opined that “[t]he trial judge, as trier of fact, will be in the position of establishing as best he can the allocation which the jury would have made had it been tendered the opportunity to do so.” Ex Parte: Builders Mut. Ins. Co., Op. No. 27970 (Shearouse Adv. Sh. No. 19 at p. 62). Nationwide understands this trial judge to be the trial judge in the coverage action based upon the first sentence in the paragraph. Id. at p. 61 (“The primary source of evidence in the declaratory judgment action . . .”). However, some have taken the referenced “trial judge” to be the trial judge in the underlying tort action. If this Court determines clarification is warranted, it may wish to consider clarification of that sentence.

CONCLUSION

Palmetto Point's Petition for Rehearing should be denied because no arguments on appeal were overlooked or misapprehended in this Court's well-reasoned Opinion. Furthermore, Nationwide would submit that clarification is unnecessary when this Court's Opinion is read in context with existing controlling law.

However, if this Court determines clarification is warranted, the Court should reject Palmetto Pointe's proposed language. Instead, this Court should clarify that its opinion is intended to provide general guidelines to fill the vacuum potentially left by its modification of Newman. This Court properly reminded the parties to coverage disputes that the focus of indemnification is upon the damages awarded in the underlying tort action, and that the best evidence of the factfinding is the transcript of the merits hearing in the tort action. However, disputes as to the admissibility of evidence in the coverage action are beyond the scope of this appeal, and they should be determined by reference to existing controlling law.

Respectfully submitted,

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