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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 on behalf of all others similarly situated, and Tri-County Roofing, Inc., Stanley's Vinyl Fence Designs, and WC Services, Inc., ...Respondents.

RESPONDENTS' CONSOLIDATED REPLY TO APPELLANTS' RETURNS AND IN FURTHER SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

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REPLY IN FURTHER SUPPORT OF PETITION FOR REHEARING

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules ("SCACR"), Respondents respectfully reply to Appellants Builders Mutual Insurance Company's ("BMI") and Nationwide Mutual Insurance Company's ("Nationwide") Returns to Respondents' Petition for Rehearing, which was filed on May 28, 2020 ("Petition for Rehearing"). Respondents' Petition, which is fully incorporated herein, requests a limited Rehearing of this Court's Opinion filed May 13, 2020. Ex Parte: Builders Mutual Ins. Co. and Nationwide Mutual Ins. Co., Op. No. 27970 (S.C. Sup. Ct. filed May 13, 2020) (Shearhouse Adv. Sh. No. 19 at 48) ("Opinion").

STANDARD OF REVIEW

Rule 221, SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E.2d 234 (1933). "The purpose of such a petition is to aid the court in deciding correctly a case heard by it," and a properly drawn rehearing petition must state "the points … overlooked or misapprehended by the court." *Id.* at 172-73; *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

ARGUMENT

I. Appellants' Varying Returns Underscore the Need for Clarification of This Court's Opinion

Before this Court are two (2) *very* distinctive Returns from two (2) insurance carriers in response to Respondents' Petition for Rehearing (Clarification) of this Court's recent Order, which addresses the ability of a liability insurer to intervene into an underlying construction defect trial in order to parse out covered versus uncovered damages. No Party has contested or requested rehearing of this Court's Opinion on intervention itself, and neither Appellant is seeking rehearing.

However, Appellants' Returns to Respondents' Petition are so wildly different that the end result is the same: clarification is necessary.

Both Nationwide and BMI have a common interest: understanding how an insurance carrier is to pursue its right to contest and/or evaluate coverage in a subsequent declaratory judgment action. Respondents do not dispute this right. Rather, Respondents seek clarification on the "default framework" adopted by the Court and the role of the underlying trial transcript in a subsequent declaratory judgment action. (*See* Pet. at 1).

As an initial matter, BMI and Nationwide do not appear to agree on the binding nature of Section VI of the Court's Opinion regarding "how a subsequent declaratory judgment action should be tried," which details the framework for allocation, the primacy of the underlying trial transcript, and the admissibility of additional relevant evidence. (*See* Opinion at 61) ("[W]e set forth a default approach that shall serve as the framework for use in declaratory judgment actions for allocating covered and non-covered damages."). Nationwide repeatedly refers to the Court's allocation framework as "guidelines," a "guide," or "guidance." (Nationwide Return at 3, 4, 5, 9). Further, Nationwide contends that the issue of how evidentiary matters should be handled in declaratory judgment actions "[was] not raised to the trial court or to this Court on appeal" and is settled by existing law. (Nationwide Return at 3). Nationwide suggests that if any clarification is necessary, it could be accomplished with a statement such as: "[T]his 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." (Nationwide Return at 5). Conversely, BMI's Return speaks to the default procedures adopted by the Court, and it does not contest that the issue was ripe for decision. (*See generally* BMI Return at 1-2). Instead, BMI argues that the Court's Opinion is sufficiently clear and does not need rehearing.

Respondents understood the question of how to "fairly allocate covered damages and non-covered damages" in a declaratory judgment action to be properly before the Court, and they took seriously the Court's calling the same question the "biggest challenge to resolve." (Opinion at 61). Respondents also disagree that existing law resolves the question of how to fairly allocate covered versus uncovered damages in a subsequent coverage action, because, logically, if existing law did resolve the issue, then why did this Court spend its time addressing the question? If two insurers, with nearly identical interests (both as it relates to the instant case and future cases), interpret the Opinion's effect on an insurer's rights so differently, Respondents respectfully suggest that clarification has become necessary.

II. Additional Evidence/Testimony Beyond the Underlying Transcript

As Respondents briefed in their Petition, and will not belabor again here, the Court's insertion of "discretion" into the ability of the parties to a coverage action to introduce additional evidence (1) seemingly conflicts with other portions of the Opinion; and (2) creates an indirect requirement that the parties force their coverage evidence into the trial of the underlying litigation to make sure it is part of the "primary evidence," rather than taking the risk that the subsequent court's discretion will be favorable. (*See* Pet. at 2). Respondents agree that the transcript of the merits hearing should be primary (and binding) as to the matters fully and fairly litigated therein, such as liability and amount of damages, and should otherwise simply provide a contextual background for the insurance coverage litigation.

Respondents also agree with Appellant BMI when it says that "[…] both insureds and judgment creditors standing in the shoes of insureds have the **right** to adduce additional evidence regarding coverage […]." (BMI Return at 4)(emphasis added). Respondents do not necessarily agree, though, that the Court's Opinion is consistent on that point, which is why Respondents seek clarification. Respondents also agree with BMI's point that the transcript should be primary as to

"those facts which were litigated and decided in the underlying action […]" (BMI Return at 3), but should *not* be primary, or binding, as to those facts which were not. (*See* Pet. at 5). Although that second, corollary point may seem axiomatic to BMI (who will not be appearing in the construction defect trial), failing to do so could effectively handcuff tort litigants in the underlying case.

Notably, Appellant Nationwide argues that these "specific questions as to which evidence is admissible in coverage actions and the circumstances under which that evidence is admissible" should not be addressed by the Court and should instead be left for "another day." (Nationwide Return at 5). Again, the divergence of understanding among the Parties as to what the Court called the "biggest challenge to resolve" supports Respondents' push for clarification.

III. "Recasting" Relevant Facts in Subsequent Coverage Action

One term that Nationwide used, which was then recycled by BMI, is "recast." (*See* Nationwide Return at 6; BMI Return at 3). Both Appellants are concerned that Respondents are arguing for the ability to "recast" facts that were already litigated and decided in the underlying action for a second time in the coverage action. (*See id.*). Neither Appellant offers a practical example of this concern. More importantly, neither Appellant offers an example of how this concern remains viable even though Respondents argued that "[t]he transcript of the merits hearing should be primary (and binding) as to the matters fully and fairly litigated therein." (Pet. at 2). Nationwide is concerned that Respondents' are asking this Court to opine that "the evidentiary value of the transcript in the tort proceeding is limited to matters litigated therein." (Nationwide Return at 5). Respondents *are* asking as much of this Court, because to hold otherwise would run contrary to the well-established legal principles of collateral estoppel and issue preclusion. (*See* Pet. at 4-5). BMI, on the other hand, seems to agree that only matters "litigated and decided" in

the underlying action should bind litigants in a subsequent declaratory judgment action. (BMI Return at 3). Again, confusion abounds.

This Court has already decided that litigants in the underlying action are not required to present their cases through the lens of insurance coverage. (Opinion at 55-6). Many, if not most, facts relevant to the question of coverage are wholly irrelevant to the underlying tort trial. This is especially the case in a multi-party construction defect action. Nationwide argued similarly in its initial brief. (*See* Initial Brief of Appellant Nationwide at 14) ("None of the parties to the tort case have an interest in developing a record and seeking findings to support an allocation between covered and non-covered damages."). Parties to a coverage action are entitled to "recast" (or "cast") all relevant facts with an eye towards the insurance contract; indeed, that is the entire purpose of a coverage action. What is not allowed, as this Court has already settled, is a re-litigation of the jury or trier of fact's determination of liability and award of damages. (Opinion at 60).

CONCLUSION

Appellants' varied Returns to Respondents' Petition for Rehearing emphasize Respondents' belief that clarification is necessary. Indeed, if two (2) insurers are not aligned in their perception of the binding nature of this Court's Opinion, then this appeal will not be the last this Court will receive on the subject.

Respondent respectfully requests that the Court modify its holding as follows:

> The transcript of the merits hearing will be the primary source of evidence *concerning matters litigated therein*; it will *not* be primary as to issues not litigated in and not necessary to the resolution of the underlying trial, e.g., policy interpretation, proof of consequential damages, and questions of coverage, and additional evidence will typically be admitted on these latter issues.

Making this clarification, which is in accord with South Carolina jurisprudence, will reduce future confusion in trial courts.

Respectfully submitted,

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