

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Ann and James Cavanaugh,

Plaintiff(s),

v.

Kiawah Development Partners, LLC;  
Knight Residential Group Charleston,  
LLC; H&J Services, LLC; Pro Roofers,  
Inc., Professional Roofers, Inc., and Pro  
Roofing Company; and Construction  
Applicators Charleston, LLC,

Defendant(s).

IN THE COURT OF COMMON PLEAS

Case No.: 2021-CP-10-000126

**ORDER ON MOTION TO INTERVENE**

**RECEIVED**  
**May 11 2022**  
**SC Court of Appeals**

This matter is before me on the February 9<sup>th</sup>, 2022, motion of Proposed Intervenor Privilege Underwriters Reciprocal Exchange (“PURE”) to intervene as a named Plaintiff in this case. Having considered the parties’ filings, and having conducted oral arguments on March 25<sup>th</sup>, 2022, I deny the motion, on the basis of the findings and conclusions set forth below.

In this action the Plaintiffs pursue construction defect and related claims against the developer, builder, and certain subcontractors involved in the construction and sale of their residence on Johns Island, South Carolina. One of the alleged defects, an improperly established water supply connection, is alleged to have caused a substantial loss at the property. As the Plaintiff’s homeowners insurance carrier, Pure asserts that, having paid \$290,668.74 to the Plaintiffs for the water loss under the homeowners policy, it possesses in that amount a subrogation interest in the Plaintiffs’ recovery in this action. I make no finding or ruling regarding the existence of a subrogation interest, its nature (whether equitable or contractual), or its amount.

PURE asks the Court to grant intervention of right under *SCRPC* Rule 24(a) and, in the alternative, permissive intervention under Rule 24(b). In ruling on this matter, my discretion is broad: reversal is appropriate only in the event of an error of law so opposed to this discretion as to amount to deprivation of the legal rights of the applicant. *See Ex parte Gov't Emps. Ins. Co.*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007). Seeking intervention of right under Rule 24(a)(2), PURE's burden is to: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). The Plaintiffs concede that PURE has timely applied to intervene and has therefore established element (1).

Regarding element (2), I find instructive our Supreme Court's ruling in *Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93, 847 S.E.2d 87 (2020), in which several insurance companies sought to intervene in a construction defect lawsuit "for the limited purpose of participating in the preparation of a special verdict form or a general verdict form accompanied by answers to interrogatories for submission to the jury during trial..." *Id.* at 98, 847 S.E.2d at 90. Noting that element (2) requires the insurance company seeking intervention to establish that it is the real party in interest, the Supreme Court ruled that "as our precedent makes clear, the Insurers are not 'real parties in interest' to the construction defect action and, thus, cannot satisfy the four-part test espoused in *Berkeley Electric*." *Id.* at 99, 847 S.E.2d 90; see also *Pringle v. Atl. Coast Line R. Co.*, 212 S.C. 303, 47 S.E.2d 722 (1948)(Holding that "where the loss exceeds the amount of the insurance paid...the Insurance Company is not the real party in interest" in a claim against the

tortfeasor). Although not a subrogation case, I find the central rationale in *Ex parte Builders* determinative in the matter at hand. Accordingly, I find that PURE has not met its burden of establishing the requisite interest—"direct, immediate, and significantly protectable, rather than remote or contingent"—necessary to carry its burden on element (2) for intervention of right.

As a further and independently sufficient ground for denial of intervention of right, I find that PURE has not met its burden of establishing element (3), which requires PURE to "demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest." Cognizant of my obligation to "consider the pragmatic consequences" of my ruling, and to "avoid setting up rigid applications" of Rule 24, I find that PURE has not met its burden of demonstrating impairment of its rights in the absence of intervention. In much the same way that the insurance companies' interest in *Ex parte Builders* was protected by their right to a coverage determination in a subsequent declaratory judgment action, PURE's subrogation interest is protected by PURE's access to judicial determination of its fair share of the Plaintiffs' recovery, via interpleader or declaratory judgment action.<sup>1</sup> South Carolina has long recognized the efficacy of declaratory judgment actions in similar contexts. *Id.* at 104, 847 S.E.2d at 93

As a further and independently sufficient ground for denial of intervention of right, I find that PURE has not met its burden of establishing element (4), which require PURE to "demonstrate that its interest is inadequately represented by other parties." PURE's argument on this point is limited to general assertions that each "party has separate goals and interests", that PURE's and the Plaintiffs' "interests [are] in conflict" and the like. (Motion, p. 6.) These assertions are

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<sup>1</sup> I note that the Plaintiffs are on notice of PURE's claimed subrogation interest, and that Plaintiff's counsel has confirmed, on the record and elsewhere, that he will comply with the requirement that sums recovered will be held in trust until a resolution of PURE's claim is consummated.

insufficient under these circumstances. Regardless of whether PURE is permitted to intervene, this case will consist of the prosecution of alleged construction deficiencies at the Plaintiffs' property, with PURE's sole interest therein being its claim to stand in Plaintiffs' shoes with respect to a portion of their construction defect claims. While the identity of Plaintiff's and PURE's interests may not be perfect, their interests are sufficiently aligned that PURE's showing on element (4) is insufficient under all of the circumstances. *See S.C. Tax Comm. V. Union City Treasurer*, 295 S.C. 257, 368 S.E.2d 72 (Ct. App. 1988)(“When an applicant for intervention and an existing party have the same interests or ultimate objective in the litigation a presumption arises that its interests are adequately represented...”).

In denying intervention of right, I am cognizant of the mandate both in Rule 24 and in the case law that I apply a pragmatic assessment. *See SCRPC Rule 24(a)*(requiring assessment of whether the intervenor is so situated that “as a practical matter” his interest will be impaired); *SCRPC Rule 24(b)*(“In exercising its discretion the court shall consider whether the intervention will unduly delay...adjudication of the rights of the original parties”); *Berkeley Electric Coop., supra*, (instructing trial judges to consider “the pragmatic consequences” of rulings on intervention). In this regard, I find additional support for denying intervention of right in the *Ex parte Builders* court's approving citation to the rationale set forth in *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984):

We are frank to admit that we are also influenced here by practical considerations that seem significant. A refusal to find a right under Rule 24(a) still leaves open the possibility in an appropriate case of permissive intervention by an insurer under Rule 24(b) for the purpose sought here, while a contrary holding would open the door wider to such intervention regardless of any unfortunate effect on the course of the main action. Moreover, a variety of factors properly bear on whether the type of intervention sought here should be allowed, and the trial judge's determination should ordinarily be accorded great weight. Application of subsection (b) of Rule 24 rather than subsection (a) recognizes these considerations, in view of the explicit emphasis in the former on undue delay or prejudice in the main action ....

I also deny PURE's request for permissive intervention under Rule 24(b). An intervenor seeking permissive intervention must: (1) establish timely application; (2) assert a claim or defense that has a question of law or fact in common with the underlying action; and (3) prove his participation in the underlying action will not delay or prejudice the adjudication of the rights of the original parties. *Ex parte Builders Mut. Ins. Co.*, 431 S.C. at 101, 847 S.E.2d at 91. Again, the Plaintiffs have conceded that PURE's application is timely. Nevertheless, under this framework, PURE has not met its burden.

As in *Ex parte Builders*, I find that intervention in this matter likely would delay or prejudice the adjudication of the existing claims. In that case the Supreme Court reasoned, in concluding that delay or prejudice would result from permitted intervention, that the more complicated verdict form that would be necessitated by the permitted intervention undercut the intervenors' efforts to carry their burden of demonstrating that intervention would not unduly delay, complicate or prejudice the existing parties and claims: "[W]ith the addition of special jury interrogatories and verdict forms, the Association—as the plaintiff, with the burden of proof — would have a heightened burden to itemize its damages...which the Association may not have intended to present to the jury." *Id.* Such interference with the trial strategy mapped out by Plaintiffs and their chosen counsel would be prejudicial to the Plaintiffs. Finally, I join the *Ex parte Builders* court's concern that the intervenor could force lengthy delay in the adjudication of the Plaintiffs' existing claims via appellate proceedings which are not in play as the case currently exists. On this as with all of these issues, PURE bears the burden. Under all of the circumstances, I find that PURE has not met its burden; accordingly, I deny PURE's motion for permissive joinder.

IT IS SO ORDERED.

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Hon. Clifton Newman  
Circuit Court Judge

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Date



Charleston Common Pleas

**Case Caption:** Ann Cavanaugh , plaintiff, et al VS Kiawah Development Partners  
Llc , defendant, et al  
**Case Number:** 2022CP1000126  
**Type:** Order/Intervene

So Ordered

s/ Clifton B. Newman, 2127