

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
THIRD DISTRICT**

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APPEAL CASE NO.: 3D2024-0284  
L.T. COURT CASE NO.: 23-CA-44 M

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HAWKS NEST CONDOMINIUM, INC.,

*Appellant,*

v.

WESTCHESTER SURPLUS LINES INSURANCE COMPANY, CRC  
INSURANCE SERVICES, LLC, AND INSURANCE OFFICE OF  
AMERICA, INC.

*Appellees.*

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**APPELLANT'S INITIAL BRIEF**

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REVIEW OF AN ORDER ENTERED IN THE CIRCUIT ENTERED IN THE CIRCUIT COURT OF  
THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

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## **INTRODUCTION**

The event giving rise to this appeal is the February 13, 2024 Order (“Order”) entered by the Circuit Court in and for Monroe County, Florida, which resulted in the severance of the Petitioner’s claim against Westchester Surplus Lines Insurance Company (“Westchester”) and its claims against CRC Insurance Services, LLC (“CRC”) and Insurance Office of American, Inc. (“IOA”) (collectively CRC and IOA will be referred as the “Brokers”) into two separate lawsuits for all purposes, including separate trials. (A. 4-5).

## **STATEMENT OF THE CASE AND FACTS**

Hawks Nest owned property located at 1 Kyle Way South, Marathon, Florida (the “Property”). (A. 7, ¶6). Hawks Nest engaged the Brokers to procure and renew various types of insurance, including property insurance for the Property. (A. 7, ¶7). Through the Brokers, Hawks Nest procured a policy of insurance with Westchester to insure the Property. (A. 8, ¶10). The named insured on the policy is “Hawk’s Nest Condominium Association Inc.” and the limit of the policy was \$5,143,073. (A. 29).

On September 10, 2017, Hurricane Irma made landfall, causing the Property to be a total loss. (A. 7, ¶9). Hawks Nest submitted its proof of losses<sup>1</sup> to Westchester, seeking the policy limits as its damages exceed the limits. (A. 9, ¶23). However, Westchester never responded to the proof of losses, despite the policy requiring it to do so. (A. 10, ¶25). Hawks Nest filed a petition to compel appraisal. (A. 10, ¶¶26, 27). Westchester failed to respond to the petition and a default judgment was entered. (A 10, ¶30). Hawks Nest also filed a Civil Remedy Notice of Insurer Violation, notifying Westchester of its mishandling of the claim. (A. 11, ¶38). Eventually, Westchester responded and the matter proceeded to appraisal where Hawks Nest was awarded damages in the amount of \$7,291,136.88 - significantly higher than Westchester's policy limits. (A. 20, ¶40).

Following resolution of the appraisal proceeding, Hawks Nest filed a separate action against Westchester for statutory violations of §624.155, Florida Statutes, for failure to settle and against the Brokers for negligence. (A. 6).

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<sup>1</sup> Hawks Nest submitted two proof of losses. One for the debris removal coverage (A. 113) and one for the building and personal property coverage (A. 112).

As its Third Affirmative Defense, CRC asserted the following:

107. The Westchester Policy was issued for Hawks Nest Condominium Association, Inc., which is a separate legal entity from Plaintiff. The quotation for the Westchester policy CRC provided to IOA at IOA's request was also for Hawks Nest Condominium Association, Inc., not Plaintiff. *See* Exhibit "A." Consequently, Plaintiff does not have a legally cognizable interest that would be affected by a judgment being entered against CRC nor does Plaintiff have a direct and articulable interest in a lawsuit against CRC. Accordingly, Plaintiff lacks the standing to sue CRC.

(A. 124, ¶107).

Westchester filed an answer and affirmative defenses but seeks to amend its affirmative defenses to state the following:

**First Affirmative Defense**

Florida Statute § 624.155(3) requires a plaintiff file and serve the insurer and the Department of Financial Services with a Civil Remedy Notice of Insurer Violation ("CRN"). Plaintiff did not file a CRN. Instead, the CRN attached to the complaint was filed by a different entity called The Hawks Nest Condominium Association, Inc. This is a failure to satisfy a condition precedent.

(A. 395)

**Second Affirmative Defense**

The Civil Remedy Notice of Insurer Violation attached to the complaint does not comply with the requirements of Florida Statute § 624.155(3) and so it is invalid. The CRN does not comply with the requirements of the statute because the CRN:

- Incorrectly identifies the insured as The Hawks Nest Condominium Association, Inc.

(*Id.*)

In addition to its Answer and Affirmative Defenses, Westchester filed a Motion to Sever, seeking to sever the count (Count I) against it from the counts (Counts II and III) against the Brokers. (A. 172). CRC filed a Joinder of Westchester's Motion to Sever and also sought an alternative relief to sever the claims for separate trials. (A. 309).

The trial court heard argument on Westchester's Motion to Sever. Counsel for Westchester argued that severance was appropriate because: 1) the claims against the Brokers and Westchester are not inextricably intertwined (A. 413:14 – 414:14-7:10), and 2) that Westchester had a right to “remove” to federal court. (A. 418:18 - 419:5).

Counsel for Hawks Nest argued that severance: 1 ) would risk inconsistent outcome, 2) would be inefficient and prejudicial to Hawks Nest, and 3) that the claims are intertwined, or in the alternative, severance was improper because Westchester had yet to produce any documents responsive to Hawks Nest's request for production<sup>2</sup> and thus it was unclear as to the intertwinement of the

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<sup>2</sup> Hawks Nest served its Request for Production on June 26, 2023. (A. 338). Westchester served its Responses and Objections on July 26, 2023, but produced no documents. (A. 347). After many conferrals and agreement on a confidentiality order (A. 356-383), Westchester

claims. (A. 422:3-16).

To this point, Hawks Nest asserted that CRC's affirmative defenses and Westchester's amended affirmative defenses related to what the correct named entity is – pointing out that the Civil Remedy Notice and Westchester's policy asserts the entity as "The Hawks Nest Condominium Association, Inc.", whereas the legal entity organized under the State of Florida is "Hawk's Nest Condominium, Inc." (A. 423:13 – 424:7). A finding on this issue could significantly impact Hawks Nest's claims against Westchester and the Brokers, which would need to be bound to such finding or otherwise risk inconsistent outcomes.

However, the trial court granted Westchester's motion to sever, severing the count against Westchester from the Brokers' counts, stating that claims against Westchester and claims against the Brokers were too annotated. (A. 440:4 – 441:6).

This appeal followed. Subsequently, Westchester has improperly removed the lawsuit to federal court.

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still did not produce a single responsive document and Hawks Nest filed a motion to compel the same. (A. 327). To date, Westchester still has not produced any documents. (A. 436:8-15).

## **SUMMARY OF THE ARGUMENT**

The trial court erred in severing Hawks Nest's claims against Westchester and the Brokers for three reasons. **First**, Hawks Nest's claims against Westchester and the Brokers arise from the same set of core facts. To be sure, the claims against Westchester and the Brokers concern: (1) the same damaged real property, (2) the same weather events giving rise to the claims at issue here, and (3) the same fact witness testimony concerning that what entity was insured under the policy. Indeed, the parties will likely rely on identical or similar evidence as to the claims at issue.

**Second**, severance creates the risk of inconsistent outcomes and findings. Westchester's First and Second Affirmative Defenses are based on Westchester's assertion that the Civil Remedy Notice was filed by a different entity than the one that brought suit. (A. 395). CRC similarly asserts in one of its affirmative defenses that the Westchester Policy was issued to a different entity than the entity that brought suit. The severance order creates the likelihood that a jury could find that the Civil Remedy Notice filed against Westchester

identified the wrong entity yet a jury in the claim against CRC could find that the correct identity filed the Civil Remedy Notice.

**Third**, severance does not promote judicial economy. Hawks Nest would have to conduct to separate trials, deposing two separate sets of fact and expert witness depositions, engaging in separate courses of pre-trial written discovery and motion practice, etc. (together with the attendant funding of those costs associated with these duplicative tasks).

### **STANDARD OF REVIEW**

The trial court's decision on a motion to sever is subject to review for an abuse of discretion. *Rimmer v. State*, 59 So. 3d 763, 788 (Fla. 2010).<sup>3</sup>

### **ARGUMENT**

#### **I. THE TRIAL COURT'S ORDER SEVERING HAWKS NEST'S CLAIMS AGAINST WESTCHESTER AND THE BROKERS CREATES A RISK OF INCONSISTENT VERDICTS BECAUSE THE CLAIMS CENTER ON THE SAME CORE SET OF INEXTRICABLY INTERWOVEN FACTS.**

The trial court created a heightened risk of inconsistent outcomes of Hawks Nest's claims against Westchester and the

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<sup>3</sup> Hawks Nest is concurrently filing its petition for writ of certiorari should this Court find that certiorari review appropriate. This brief and petition are substantially similar.

Brokers because these claims involve interrelated factual issues as to the affirmative defenses raised by Westchester and CRC. Thus, the trial court erred in granting the motion to sever.

Hawks Nest acknowledges that “[i]n appropriate circumstances, the trial court has discretion to order a separate trial of any claim, cross-claim, counterclaim, or third-party claim”. See FLA. R. CIV. P. 1.270(b); *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 710 So. 2d 1022, 1024 (Fla. 1st DCA 1998). “Although the matter of separation of the issue to be tried rests in the trial court’s discretion, “a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and the courts have emphasized that separate trial should not be ordered unless such disposition is clearly necessary, and then only in the furtherance of justice.” *Id.*; see also *Vander Car v. Pitts*, 166 So. 2d 837, 839 (Fla. 2d DCA 1964). However, it is well-settled that Florida law prohibits severing claims that are inextricably interwoven based on the risk of inconsistent verdicts. *Choi v. Auto-Owners Ins. Co.*, 224 So. 3d 882, 884 (Fla. 2d DCA 2017); *Martinique Condominiums, Inc. v. Short*, 237 So. 3d 1268, 1270 (Fla. 5th DCA 2017); *Kavouras v. Mario City Restaurant Corp.*, 88 So. 3d 213, 214

(Fla. 3d DCA 2011); *Rocket Group, LLC v. Jatib*, 174 So. 3d 398, 576 (Fla. 4th DCA 2013); *Minty v. Meister Financialgroup, Inc.*, 97 So. 3d 926, 931 (Fla. 4th DCA 2012); *Bethany Evangelical Covenant Church of Miami, Fla., Inc. v. Calandra*, 994 So. 2d 478, 479 (Fla. 3d DCA 2008).

**First**, the Order severing Hawk Nest's claims against the Brokers from its claim against Westchester was in error because the causes of action against Westchester and the Brokers are inextricably interwoven.

Hawks Nest's Complaint allegations unequivocally demonstrate that its claims against both Westchester and the Brokers arise from the same set of core facts: (1) the claim against each involves the same claimant, (2) the same damaged real property, (3) the same weather events giving rise to the claims at issue here, and (4) the same fact witness testimony concerning that what entity was insured under the policy. Indeed, the parties may likely rely on identical or similar evidence as to the legal entity issue raised by Westchester and CRC. This alone precludes severance. *See Martinique Condos.*, 230 So. 3d at 1270; *see also Variety Children's Hosp. v. Mt. Sinai Hosp. of*

*Greater Miami, Inc.*, 448 So. 2d 546, 548 (Fla. 3d DCA 1984) (noting that three actions were all predicated on same transaction and same facts and same evidence would serve as basis for proof although different theories for recovery were advanced).

**Second**, and most importantly, severance could produce different findings, risking inconsistent verdicts because the claims are inextricably interwoven. (A. 423:16:1 – 424:7).

*Choi v. Auto-Owners Ins. Co.*, 224 So. 3d 882 (Fla. 2d DCA 2017), is illustrative of this point. In *Choi*, Ms. Choi was injured in an automobile accident by an intoxicated tortfeasor. Choi sued the tortfeasor for compensatory and punitive damages. *Choi*, 224 So. 3d at 883. In that same action, however, Choi sued her own uninsured motorist's insurance carrier for damages that exceeded the tortfeasor's available liability insurance coverage ("UM Claim"). *Id.* During the course of the proceedings, the uninsured motorist carrier moved to sever the UM Claim from the tort claims under Fla. R. Civ. P. 1.270(b) on grounds that severance would avoid prejudice from the jury's discovery that Choi had insurance coverage and that the

tortfeasor was intoxicated at the time the accident. *Id.* The trial court granted the motion and Choi filed a petition for writ of certiorari. *Id.*

In granting the petition for certiorari and quashing the severance order, the Second District concluded that the trial court departed from the essential requirements of the law by granting the motion to sever three inextricably interwoven claims. *Id.* at 884. In quashing the trial court's order, the court opined "...it is well-settled that it is a departure from the essential requirements of the law to sever claims that are inextricably interwoven based on the risk of inconsistent verdicts". *Id.* (citations omitted).

*Choi* is applicable here. Westchester's First and Second Affirmative Defenses are based on Westchester's assertion that the Civil Remedy Notice was filed by a different entity than the one that brought sought. (A. 395). CRC similarly asserts in one of its affirmative defenses that the Westchester Policy was issued to a different entity than the entity that brought this lawsuit. (A. 142, ¶107).

Not only are Appellees' affirmative defenses likely based on similar facts, severance of Westchester's count from the Brokers'

counts risk inconsistent findings. For example, there could be a finding that the incorrect entity was named on the Civil Remedy Notice and therefore, Hawks Nest's claim against Westchester fails. *Id.* In opposite, there could be a separate finding that the Brokers named the correct entity on the policy, and the claims against the Brokers fail. *Id.* Under both hypothetical, Hawks Nest is left without a remedy. *Id.* Neither Westchester nor the Brokers would be bound to this finding if severed and Hawks Nest is left with an unjust result.

Moreover, there may be additional issues for risk of inconsistent findings once discovery is produced and the issues are fully developed. However, since Westchester has not produced any documents for over seven months, Hawks Nest has not yet had the opportunity to do so. (A. 436:8-15). All Hawks Nest needs to show is that there is a potential risk of inconsistent verdicts, which it has. *Choi*, 224 So. 3d at 884.

**Third**, the Order serving Hawks Nest's claims against the Brokers from its claims against Westchester does not support equity or judicial economy. This Court considered additional equities and judicial economy concerns raised in *Carbonell v. American*

*International Pictures, Inc.*, 313 So. 2d 417 (Fla. 3d DCA 1975), which provide further support for Hawks Nest’s joinder of its individual cause of action against Westchester and the Brokers into a single lawsuit. (A. 424:24 – 425:12). In *Carbonell*, nine separate corporations sued a theater (and its manager and proprietor, Carbonell) for the theater’s alleged breach of contract and fraud; those claims centered upon those separate gross receipt percentages allegedly due to each of the corporations under separate franchise agreements. *Carbonell*, 313 So. 2d at 417. Significantly, and notwithstanding that the claim involved nine plaintiffs and multiple franchise contracts, this Court rejected the theater’s motion to dismiss on grounds of “misjoinder”:

The licensing agreements entered into by the plaintiffs with the identical defendant are the same type of contract which provided for a percentage of the gross admission receipts as the consideration therefor. All of the counts in the complaint relate to the identical time period and a single auditor conducted the audit of the defendants’ records which gave rise to this cause of action. Clearly the parties plaintiffs have a common interest in the subject matter of the litigation and issues presented therein. It is equally apparent that the matters or causes joined in the complaint are not completely distinct or disconnected.

*Id.* In issuing its holding, the *Carbonell* Court noted that if joinder

were not permitted, “...the probable result would be nine separate complaints being filed, defendants’ records being audited nine separate times, and nine jury trials being held to determine basically the same legal issues”, and, further, that “ [i]t cannot be said that the ends of justice would be served best thereby”. *Id.* at 419.

Indeed, this Court has stated “a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and ... separate trial[s] should not be ordered unless such disposition is clearly necessary, and then only in the furtherance of justice.” *Glover v. Vasallo*, 314 So. 3d 447, 449 (Fla. 3d DCA 2020)(citing *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 710 So. 2d 1022, 1024 (Fla. 1st DCA 1998) (quoting *Vander Car v. Pitts*, 166 So. 2d 837, 839 (Fla. 2d DCA 1964)).

With severance and in the absence of joinder, Hawks Nest faces the grim prospect of having to shoulder the burden of conducting two separate trials, deposing two separate sets of fact and expert witness depositions, engaging in separate courses of pre-trial written discovery and motion practice, etc. (together with the attendant

funding of those costs associated with these duplicative tasks).  
*Carbonell*, 313 So. 2d at 419.

### **CONCLUSION**

Based on the above argument and authority, Appellant Hawks Nest Condominium, Inc. respectfully requests that this Court reverse the ordering severing its claims against the Brokers and Westchester and remand for further proceedings consistent with such an opinion.

Dated: March 13, 2024

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with font requirements, it is typed in Bookman Old Style 14 point font, and is proportionately spaced type and complies with the word count limit requirements as it contains 2,584 words.

By: /s/ Molly Chafe Brockmeyer  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the eDCA Portal on March 13, 2024 and as listed below.

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