

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM Horry COUNTY  
Court of Common Pleas  
John M. Milling, Special Referee

\_\_\_\_\_  
Case No. 2013-001281  
\_\_\_\_\_

RECEIVED

DEC 18 2013

SC Court of Appeals

Harleysville Group Insurance, a Pennsylvania  
Corporation, Appellant/Respondent

v.

Heritage Communities, Inc., a South Carolina Corporation;  
Heritage Magnolia North, Inc. a South Carolina Corporation;  
Buildstar Corporation, A South Carolina Corporation,  
Magnolia North Horizontal Property Regime, Magnolia North  
Property Owners Association, Inc., a South Carolina  
Corporation, and National Surety Corp., Defendants,

Of whom Heritage Communities, Inc., a South Carolina  
Corporation; Heritage Magnolia North, Inc., a South  
Carolina Corporation, Buildstar Corporation, a South Carolina  
Corporation and National Surety Corp. are Respondents,

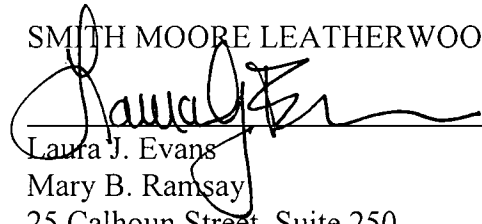
And Magnolia North Horizontal Property Regime,  
Magnolia North Property Owners Association, Inc.,  
a South Carolina Corporation are Respondents/Appellants.

\_\_\_\_\_  
NOTICE  
\_\_\_\_\_

Although listed as a Respondent/Appellant in the captions of various filings with this  
Court, National Surety Corporation ("National Surety") takes no position and is not implicated in  
this appeal. The trial court issued a separate Order (Exhibit A) dismissing National Surety and

preserved National Surety's rights to litigate its claims and defenses should appellate rulings or subsequent proceedings change and/or exceed the orders and judgments on appeal.

SMITH MOORE LEATHERWOOD, LLP



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Laura J. Evans

Mary B. Ramsay

25 Calhoun Street, Suite 250

Charleston, SC 29401

(843) 300-6634

Attorneys for National Surety

Charleston, South Carolina  
December 17, 2013

CERTIFICATE OF SERVICE

I certify that this 17 day of December, 2013, I served a true and correct copy of the foregoing Notice via electronic mail and/or U.S. First Class Mail, postage prepaid, upon counsel of record addressed as follows:

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PO Box 1740  
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[PHenry@thompsonlaw.com](mailto:PHenry@thompsonlaw.com)

Robert C. Calamari, Esquire  
McAngus Goudelock & Courie  
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DEC 18 2013  
**SC Court of Appeals**

*Tina Nestor*

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
 )  
HARLEYSVILLE GROUP INSURANCE, )  
A PENNSYLVANIA CORPORATION )

Plaintiff, )

VS. )

HERITAGE COMMUNITIES, INC, A )  
SOUTH CAROLINA CORPORATION; )  
HERITAGE MAGNOLIA NORTH, INC. )  
A SOUTH CAROLINA CORPORATION; )  
BUILDSTAR CORPORATION, A )  
SOUTH CAROLINA CORPORATION, )  
MAGNOLIA NORTH HORIZONTAL )  
PROPERTY REGIME, MAGNOLIA )  
NORTH PROPERTY OWNERS )  
ASSOCIATION, INC. A SOUTH )  
CAROLINA CORPORATION and )  
NATIONAL SURETY CORP. )

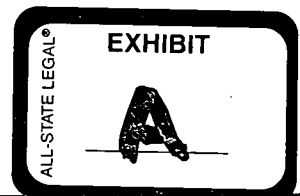
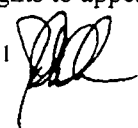
Defendants )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO. 2009-CP-26-11862

HORRY COUNTY  
13 MAR -5 AM 8:51  
MELANIE HUGHES - BARD  
CLERK OF COURTS

**ORDER DISMISSING CLAIM  
AGAINST NATIONAL SURETY CORP.  
AND ITS COUNTERCLAIMS AND  
CROSS-CLAIMS**

This is a declaratory judgment action to determine coverage under Commercial General Liability ("CGL") policies issued by the Plaintiff, Harleysville Group Insurance, a Pennsylvania Corporation ("Harleysville", as well as coverage under the excess policy issued by National Surety Corp. This case arises out of a construction defect action ("underlying action") which was tried to a jury verdict. Because of the common parties, issues and policies, this case was consolidated with the *Riverwalk at Arrowhead Country Club Property Owners' Assoc., Inc. vs. Heritage Communities, Inc. et al* and the *Tony L. Pope, et al vs. Heritage Communities, Inc., et al* cases for which a separate order will be issued. This case was referred to me as Special Referee by the Honorable Larry B. Hyman, Jr., Presiding Judge, Fifteenth Circuit by Order dated October 21, 2010. The Order directs that I take testimony and evidence and issue an Order disposing of this action, with finality, with all rights to appeal reserved.




Although the judgment in the underlying case is under appeal and has not finally concluded, there is a justifiable controversy and this case is ripe. Owners v. Rhodes, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009); Owners Ins. Co. v. Clayton, 364 S.C. 555, 557, 614 S.E.2d 611, 612-13 (2005). The Court would note that the “judgment holder” in this action stands in the shoes of the Harleysville insureds. Lee v. Gulf Ins. Co., 248 S.C. 296, 149 S.E.2d 639 (1966)(“an injured party who brings suit against a liability carrier in order to collect on a judgment previously acquired against an insured is possessed of all rights of the insured and subject to all defenses that exist as between the insured and the insurance carrier”).

Harleysville is represented by Robert C. Calamari, Esquire, formerly of the firm of McAngus, Goudelock & Courie, LLC, now of Nelson Mullins Riley and Scarborough; the “judgment holder”, Magnolia North Property Owners Association, Inc. is represented by John P. Henry, Esquire, and Philip C. Thompson, Esquire, of the firm of Thompson & Henry, P.A. National Surety Corporation is represented by Laura Johnson Evans of the firm of Smith, Moore, Leatherwood, LLP and Karin McCarthy of the firm of Rivkin Redler, Attorneys at Law of New York. “Harleysville’s insureds”, Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation did not answer or otherwise appear in this declaratory judgment action, although properly served. The Plaintiff in the underlying cases have stepped into the shoes of the insureds and while the default of the insureds prohibits them, individually, from relitigating any issues involved in these cases, the same does not affect the rights of the Plaintiff’s judgment holders.

#### THE “UNDERLYING ACTION”

The underlying action is styled Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Magnolia North, Inc. and Buildstar Corporation (C/A No. 2003-CP-26-3203) (“Magnolia North POA action”) and was originally filed on May 28, 2003.

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After trial by jury on May 20, 2009, the jury returned a general verdict against Heritage Communities, Inc., Heritage Magnolia North and Buildstar Corporation on negligence, breach of warranty and breach of fiduciary duty and awarded \$6,500,000.00 in actual damages and \$2,000,000.00 in punitive damages. (Rec. Ex. 27).<sup>1</sup>

The Plaintiff in the underlying action alleged and sought damages for faulty construction and consequential damages from water intrusion arising out of the construction and development of the condominiums. (Rec. Ex. 9).

Prior to the jury trial the underlying Plaintiff settled with numerous subcontractors. It is not contested that all of the work on the project was done by subcontractors. Buildstar, the general contractor, oversaw the construction by the subcontractors on the project.

#### THE PROJECT

The Magnolia North condominium project is located near Myrtle Beach, South Carolina and is composed of 21 three-story buildings containing 12, 13 or 15 units per building. The Magnolia North buildings were constructed beginning in 1997 and completed in late 2000. Heritage Communities, Inc. was the overall developer; Heritage Magnolia North, Inc. was the site specific developer that owned the land and conveyed the condominium units; and Buildstar Corporation was the general contractor.

#### THE NATIONAL SURETY CORP. POLICY

On or about November 29, 1999, the Defendant, National Surety Corporation issued Umbrella and Excess Liability Insurance Policy XYZ-000-8397-6811 to Defendant, Heritage Communities, Inc. with a policy period from November 29, 1999, to July 9, 2000. (TRIAL 00013344, TRIAL 00013448, and Ex. 16). National Surety Corp. has filed various Counterclaims and Cross-Claims against the other parties to this action. By separate Order, the

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<sup>1</sup> A set-off of \$1,531,063.15 from the total verdict of \$8,500,000.00 was granted by the trial judge in his post trial motion order making the total verdict \$6,968,936.85 as of November 16, 2009.


undersigned has found that the Plaintiff, Harleysville Group Insurance Group, a Pennsylvania Corporation, is liable for the payment of the judgments obtained by the Plaintiffs in the underlying action and that there is sufficient coverage under the Harleysville policies to pay said judgments. Accordingly, any excess coverage that may be provided under the policy issued by National Surety Corp. is not triggered and the claims against it are dismissed. The Counterclaims and Cross-Claims asserted by National Surety Corp. are now rendered moot. By Order dated November 29, 2010, the undersigned had provided that National Surety's Counterclaims against Harleysville would be bifurcated from the claims by Harleysville against the Defendants, but that National Surety's Cross-Claims against its various co-defendants would remain in place and that National Surety Corp. would participate in the trial of the Declaratory Judgment action on coverage issues raised in Harleysville's main claims and its own Cross-Claims. Because of the determination that the claims against National Surety Corp. are dismissed, there will be no need for an additional trial between Harleysville and National Surety Corp. In the event there is, at some point, a final judgment that would trigger coverage under National Surety Corps.' excess policy, then they can assert their claims at that time.

**IT IS THEREFORE,**

**ORDERED** that the claims against National Surety Corp, as well as its Counterclaims and Cross-Claims be and hereby are **DISMISSED**.

February 28, 2013.  
Darlington, South Carolina.

  
JOHN M. MILLING, Special Referee

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# SMITH MOORE LEATHERWOOD

December 17, 2013

**RECEIVED**

DEC 18 2013

**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbott Kitchings  
The South Carolina Court of Appeals Clerk of Court  
1015 Sumter Street  
Columbia, South Carolina 29201

**SC Court of Appeals**

Re: Harleysville Group Insurance, a Pennsylvania Corporation v. Heritage  
Communities; et al. (Magnolia North)  
Appellate Case No. 2013-001281  
Harleysville Group Insurance, a Pennsylvania Corporation v. Heritage  
Communities; et al. (Riverwalk)  
Appellate Case No. 2013-001291  
SML No. 00027254.2354

Dear Ms. Kitchings:

Please find enclosed an original and one (1) copy each of National Surety's Notice taking no position in the appeals regarding the above-referenced matters. I would appreciate you filing one copy with your Court and returning to me a time stamped copy in the enclosed self-addressed stamped envelope provided.

With kindest regards, I am

Sincerely yours,  
SMITH MOORE LEATHERWOOD LLP

Christina B. Nestor  
Paralegal to Laura J. Evans

CBN

Enclosures

cc: John P. Henry, Esquire  
Robert Curt Calamari, Esquire

CHARLESTON 36781

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From: (843) 300-6641  
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Origin ID: CHSA



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BILL SENDER

The Honorable Jenny Kitchings  
South Carolina Court of Appeals  
1015 SUMTER ST

COLUMBIA, SC 29201

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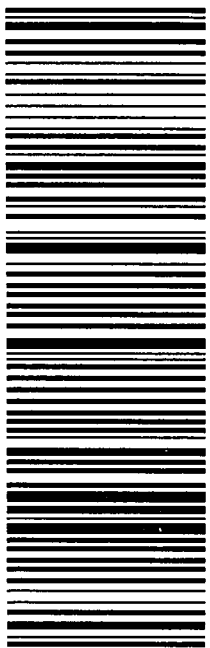
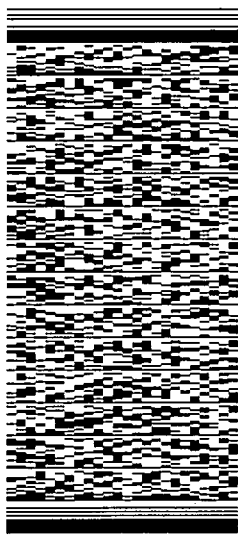
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