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: 2013-001291

Harleysville Group Insurance, a Pennsylvania Corporation, Appellant/Respondent

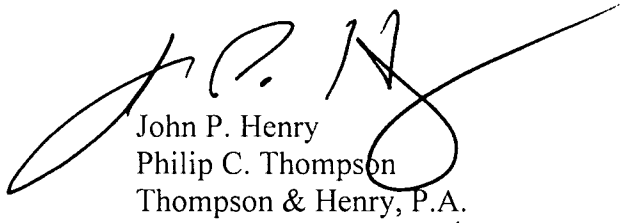
v.

Heritage Communities, Inc., A South Carolina Corporation; Heritage Riverwalk, A South Carolina Corporation; Buildstar Corporation, A South Carolina Corporation, Riverwalk at Arrowhead Country Club Horizontal Property Regime, Riverwalk at Arrowhead Property Owners Association, Inc., A South Carolina Corporation, National Surety Corp., and Tony L. Pope and Lynn Pope Individually and Representing as a Class All Unit Owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime, Defendants,

Of whom Heritage Communities, Inc., a South Carolina Corporation; Heritage Riverwalk, a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; National Surety Corp., And Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime are Respondents,

And Riverwalk at Arrowhead Country Club Horizontal Property Regime; Riverwalk at Arrowhead Country Club Property Owners Association, Inc. are Respondents/Appellants.

RESPONDENT'S/APPELLANT'S REPLY TO INITIAL RESPONSE BRIEF OF APPELLANT/RESPONDENT



John P. Henry
Philip C. Thompson
Thompson & Henry, P.A.
1300 Second Avenue, 3rd Floor
Post Office Box 1740 (zip: 29528)
Conway, South Carolina 29526
(843)248-5741

Attorneys for
Respondents/Appellants Riverwalk at Arrowhead Country Club Horizontal Property Regime and Riverwalk at Arrowhead Country Club Property Owners Association, Inc.

Table of Contents

Table of Authorities

CASES

OTHER AUTHORITY

RULES

Reply to Counter-Statement

Riverwalk at Arrowhead Country Club Horizontal Property Regime and Riverwalk at Arrowhead Country Club Property Owners Association, Inc. (collectively "P.O.A." or "Respondents/Appellants") would briefly reply to the "Clarification of the Facts" submitted by Harleysville.[1]

Harleysville's restatement (Brief, p. 1) that Harleysville "had neither the opportunity nor incentive" to intervene remains a baffling statement without explanation from Harleysville. Harleysville attended the trial with coverage counsel and had both the opportunity and incentive to seek intervention.[2] Harleysville was aware of the coverage issues for six (6) years, yet waited until after the general verdict to file this coverage action. During those six years Harleysville had the opportunity to intervene and seek a delay of the underlying trial so that coverage could be clarified by the institution of a declaratory judgment action. The incentive to intervene was the avoidance of the issues regarding allocation which have resulted in this litigation. Harleysville simply made a conscious decision not to intervene which has unnecessarily resulted in the present dilemma.[3] Instead of intervening, Harleysville could have simply informed their insureds, defense counsel

---

[1] Harleysville graciously points out two mistakes in dates contained in the P.O.A.'s Initial Brief. These dates will be corrected in the Final Brief.

[2] Harleysville cites numerous cases (Brief, p. 10) regarding the Court's (in various jurisdictions) adjudication of motions to intervene for the purpose of clarifying coverage in the underlying tort action. In these cases, the Courts gave various reasons for denying the motion to intervene. These cases are of no aid to Harleysville since Harleysville never filed a motion to intervene. Gleaning anything from these cases would therefore, of necessity be hypothetical. The Court does not decide hypothetical or abstract controversies. *Colleton County Taxpayers Association v. School District of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006)

[3] (Tr. December 13-14, 2010 p. 188) "Q:... and I believe you've agreed that you made a conscious decision not to intervene in these cases; is that correct? A: Correct..."

whom Harleysville hired and whom Harleysville met with during the litigation and trial, or the Court of the need for an allocated verdict and the consequences of failing to secure one.

Despite Harleysville's assertions, it is not possible to allocate the general verdict in this case. Even Harleysville's construction litigation manager, Lee Wright, agreed that an allocation cannot now be made. (Tr. Wright Depo., p. 85)[4] See *Rekestraw v. Allstate Insurance Co.*, 238 S.C. 217, 119 S.E.2d 746 (1961) (Plaintiff is bound by testimony of his own witness, when Plaintiff did not prove facts to be other than such witness testified to them. *Id.* p. 228) There is neither evidence in the record, nor can any be produced of how the jury allocated damages. Harleysville has cited no case with facts similar to the case at bar allowing for speculation as to the jury's intent. Harleysville makes no attempt to distinguish the many cases decided by South Carolina Appellate Courts prohibiting speculation as to how the jury allocated damages.[5] This prohibition is especially apposite here since the dilemma is of Harleysville's own making.

There is testimony that Harleysville advised its insureds that if they intervened they would create a conflict of interest. However, Harleysville admittedly did not advise their insureds there was a conflict in defending them even if they did not intervene. When asked about this, Lee Wright, Harleysville's construction litigation manager stated:

> Q: Have you ever advised your insureds that you had a conflict of interest with them?

---

[4] Harleysville states in its brief at page 2 that "Harleysville's construction defect litigation manager stated in his deposition that he was unsure of how the underlying jury awarded damages." This is a clear misstatement of his testimony. (Wright depo., p. 85) In the deposition of Brian Tormey, Harleysville's construction defect litigation specialist, who was in charge of the Riverwalk litigation, he testified when asked if there was any way of knowing how the jury allocated damages that "there'd be no way to know that". (Tormey depo., p. 28)

[5] See Special Referee's Order, February 28, 2013, p. 31, listing South Carolina cases in which the Court refused to speculate on how a jury allocated damages or otherwise speculate about a general verdict.

A: We never did in the underlying action. (Tr. December 13-14, 2010, p. 182)

Had Harleysville properly advised of this conflict, and of the need for an allocated verdict, the insureds may well have requested independent counsel or taken other action to protect their interest such as seeking an allocated verdict or facilitating a settlement. This crucial information should have been communicated to the insureds by the Reservation-of-Rights letters, but was not.

Argument

Harleysville contends that the P.O.A. did not preserve for appeal its assignments of errors to the Special Referee's decision to apply the "Time-on-the-Risk" ("TOR") formula to determine Harleysville's coverage responsibility for the damages awarded in the underlying trial. Harleysville's basis for this assertion is that the P.O.A. never sought judgment on this basis. As discussed below, a motion for judgment is not required in a non-jury trial in order to preserve an issue for appeal.

TOR applies only to progressive damages. Harleysville has cited no case allowing the application of TOR to a general verdict which may contain progressive and non-progressive damages and results from various claims and causes of action.

There is no evidence in the record to reasonably support the Special Referee's finding that the end date for TOR is April 30, 2004.

I. The P.O.A.'s assignments of error are preserved for appellant review.

Harleysville contends that the P.O.A. failed to move for judgment *in re* the Special Referee's holding that TOR should be applied to the verdict and therefore, this issue is not preserved for Appellate review. Harleysville cites several cases supporting this position. The cases Harleysville cites are based upon the failure of a party in a jury trial to move for a directed verdict on an issue thereby not preserving the issue for appeal. However, a directed verdict motion under Rule 50, SCRCP, is appropriate only in a jury trial. *Hinton v. Designer Ensembles, Inc.*, 335 S.C. 305, 516 S.E.2d 665 (Ct. App. 1999), reversed on other grounds, 343 S.C. 236, 540 S.E.2d 94 (2000). Rule 41(b), SCRCP is applicable to non-jury trials and provides that a defendant may move for a dismissal on the ground that

under the facts and the law the Plaintiff has shown no right to recover. *Johnson v. J.P. Stevens & Co., Inc.*, 308 S.C. 116, 417 S.E.2d 527 (1992); *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (2007) (A motion for a directed verdict is appropriate only in jury trials.)

In this case, the P.O.A. vociferously argued against application of TOR to the general verdict at the trial level (Tr. December 9, 2011, pp. 5-8); the judge ruled on the issue (Tr. December 9, 2011, p. 74); and in post-trial motions, the P.O.A. again argued this issue (Tr. April 9, 2013, pp. 65-73). In order for an issue to be preserved for Appellate review, it must have been raised to and ruled upon by the Circuit Court. *RRR, Inc. v. Toggas*, 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008). The losing party on an issue must first try to convince the lower Court that it has ruled wrongly, and get a ruling from the Court before the Appellate Court will review those issues and arguments. This is the long established preservation of issues requirement. *I'ON, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)

Harleysville does not dispute that the P.O.A. objected to any testimony regarding TOR and the judge ruled that he was going to allow the testimony and then determine its admissibility. (Tr. December 9, 2011, pp. 8-11) At the end of the testimony, the P.O.A. made a motion to strike any testimony related to TOR which was denied by the Special Referee. (Tr. December 9, 2011, p. 74)

In the P.O.A.'s Motion to Alter or Amend, every issue including the application of TOR to the general verdict for which the P.O.A. seeks review was raised before the Special Referee. (Order, March 20, 2013) The cases cited by Harleysville again deal with jury trials and the failure to make a directed verdict motion on the issue.

Harleysville contends that the P.O.A. never moved for a judgment on the ending TOR date. Again, it is not necessary to move for judgment in a non-jury trial in order to preserve an issue.

In the discussion with counsel during the Trial, the Special Referee did not rule on any date for ending TOR. In the P.O.A.'s Motion to Alter or Amend dated March 20, 2013, the P.O.A. asked that the ending date correspond with the date of the breach of fiduciary duty, stated to be May 29, 2002. The record in the underlying trial is clear that the common elements were turned over to the P.O.A. on May 29, 2002 and the breach of fiduciary duty had to occur on that date. (Un. Trial Tr. p. 430) In the post-trial motion hearing, the P.O.A. argued that if the Judge were going to apply TOR, the ending date should be the date of the breach of fiduciary duty, May 29, 2002. (Tr. April 9, 2013, p. 70) Of course this argument was subject to the P.O.A.'s contention that TOR was not applicable. (Tr. April 9, 2013, p. 70)

II. The Special Referee erred in applying TOR.

In its Complaint, Harleysville asks the Court to parse the verdict into covered and non-covered damages, i.e., determine what part of the verdict was resulting damage from defective work (progressive damages) (covered), and what part was repairing defective work (non-progressive damages) (not covered) and then apply TOR to the progressive (covered) damages; a clear recognition that TOR can only apply to progressive damages. (Harleysville's Complaint, p. 10) The Special Referee acknowledged that only progressive damages would be covered and acknowledged that unlike *Crossman*[6], the parties to this

[6] *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company*, 395 S.C. 40, 717 S.E.2d 589 (2011) ("*Crossman*")

case had not stipulated that the entire verdict was progressive damages. (Tr. December 9, 2011, pp. 84-85)

Harleysville argues that the P.O.A.'s assertion that TOR cannot apply to a general verdict that contains covered and non-covered damages is "audacious" because a plaintiff could circumvent *Crossman* by simply including an item of non-progressive damages in the claim and seek a general verdict. (Harleysville's Brief, p. 7) This assessment is incorrect.

Generally, the burden of proof is upon the insured to bring his claim within the coverage of the policy. *Rekestraw*, *supra*. However, Harleysville has recognized that the burden has shifted to them because they controlled the defense and therefore had the duty to seek an allocated verdict, which they failed to do. *Duke v. Hoch*, 468 F.2d 973 (C.A. 5, Fla. 1972) (where insurer controlled defense and failed to seek or advise its insured of the need for an allocated verdict, burden to allocate the verdict shifts to the insurer); see also 2 Insurance Claims and Disputes 5th §6:27 (where insurer fails to seek an allocated verdict or advise its insured of the need for an allocated verdict, the burden shifts to the insurer to allocate the general verdict. The insured who is entitled to a complete defense, should not be penalized because the insurer, by reserving its right to deny coverage, has created a conflict of interest); *Nimetz v. Cappadona*, 596 A.2d 603 (D.C. 1991) (where the insurer fails to seek an allocated verdict they cannot take advantage of their failure).

The P.O.A.'s argument is not "audacious", it is correct. The Plaintiff cannot simply throw an item of non-progressive damage in the case, get a general verdict and escape application of TOR if the carrier has fulfilled its obligation to the insured by seeking to intervene or by informing the insured, the insured's counsel or the Court of the need for an

allocated verdict and the consequences of not seeking one. *Automax Hyundia South, L.L.C. v. Zwich American Insurance Co.*, 720 Fed. 3d 798 (C.A. 10, Okla. 2013) ("... given that the insured generally bears the burden of allocation, the insurer can prevent that burden from being shifted back to itself by informing the insured that it would be in the insured's best interest to request a special verdict." *Id.* p. 808). *Camden-Clark Memorial Hospital Association v. St. Paul Fire and Marine Insurance Co.*, 224 W. Va. 228, 682 S.E.2d 566 (2009) (where insurer undertakes the defense of its insured it is held to a high standard of conduct. Where covered and uncovered claims are asserted one of the duties is not to prejudice the rights of the insured by failing to seek an allocated verdict or advising the insured of the need for one. If the insurer fails in this duty, the burden of persuasion should be placed on the insurer. *Id.* p. 576)

The cases Harleysville cites in its brief (Brief, p. 7 FN 4) for the proposition that general verdicts are subject to allocation to fairly and justly allocate responsibilities between insurers are not apposite to the present case. The first case cited, *Home Insurance Company v. Certain Underwriters at Lloyd's London*, 729 F.2d 1132 (C.A. 7th Cir. Ill. 1984) was a contribution action between insurers involving an unallocated settlement. The Court pointed out that there was no method to divide the settlement into different claims. The Court said that it could treat the settlement as a general verdict and require Home, a co-insurer to pay the entire verdict or treat the insurers as co-insurers and apportion the settlement in accordance with the "other insurance" provisions of the policies. This case supports the P.O.A.'s position that since the verdict is a general verdict which may include covered claims, Harleysville must pay the entire award.

The next case Harleysville cites is *City of Sterling Heights Mich. v. United National Insurance Company*, 319 Fed. Appx. 357 (C.A. 6th Cir. Mich. 2009). This case involved an unallocated settlement and was a contest between insurers as to the fair allocation of the settlement which did not differentiate what was allocated to the various claims. The insurer sought to relitigate damages. The Court said that the proposal of a full blown trial would defeat the purpose of a settlement and would place an insurmountable burden of proof on the insured because damages are indivisible. In other words, the Court would not allow the carriers to relitigate damages. The Court said the time to separate damages would have been when the settlement was made. This case also supports the P.O.A.'s position.

Harleysville also cites *Federal Ins. Co. v. Binney & Smith Inc.*, 913 N.E. 2d 43 (Ill. Ct. App. 2009) which involved the settlement of a class action. Since it was possible to determine when each class member was damaged, the settlement could be allocated.

The final case cited by Harleysville is *Pennsylvania National Mut. Cas. Ins. Co. v. Roberts*, 668 Fed. 3d 106 (C.A. 4, Md. 2012). This case involved the pro-rata apportionment of a verdict that was admittedly covered by the policy. It did not involve either a general verdict or a settlement which was claimed to contain uncovered claims. Contrary to Harleysville's implication, there was no contest as to whether there were uncovered claims contained in the verdict.

Harleysville is unable to cite one case in which the carrier represented the insured; did not seek an allocated verdict; did not advise its insureds, defense counsel or the Court of the need for an allocated verdict; and was still allowed to put the Court and the insured through additional litigation to do the impossible, i.e., determine how the jury allocated damages to covered and non-covered claims in a general verdict.

Application of TOR to an unallocated verdict necessarily requires speculation which could be devastating to the insured by loss of coverage for which he has paid, or prejudicial to the insurer by providing coverage for which the insurer was not paid. No Court has allowed this and ergo, Harleysville cites no case analogous to this case to support its position.

III. The Special Referee was correct in prohibiting Harleysville's attempt to relitigate damages.

Harleysville's assertion that the P.O.A. waived its right to contest the application of TOR to the general verdict because the P.O.A. concedes that Harleysville had an agreement to litigate coverage in a subsequent proceeding misses the mark. Harleysville controlled the defense and defended in the name of the insured. Its agreement with the insureds to litigate coverage in a subsequent proceeding obligated Harleysville neither to take action, nor fail to take action, which would prejudice its insureds in the subsequent coverage litigation. *Wilkie v. Home Security Life Ins. Co.*, 514 F. Supp. 896 (D. C. S. C. 1981) (Because the insured gives up his rights under the policy to defend or settle his case, and there is a conflict that occurs between the interests of the insurer and the insured, Courts hold insurers to a high duty of good faith in protecting the interests of the insured.) This would include seeking a verdict that would be subject to allocation without putting its insureds and the Courts in a position requiring relitigation of damages. This principle was clearly enunciated by the Court in *Auto-Owners v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) ("*Newman*"). [7] The arbitrator in *Newman* issued a general award which was the result (as here) of covered claims and non-covered claims. Auto-Owners employed

[7] Although Auto-Owners is the named Plaintiff, in fact, Harleysville took over the case and paid for the appeal. (Wright depo., pp. 27-28)

attorneys to represent its insureds as it was required to do under the terms of its policy. The Court held that even though the award may include non-covered damages, Auto-Owners must pay the entire award because: a) When damages were determined Auto-Owners sat silent; b) The Court will not allow Auto-Owners to relitigate damages; c) Auto-Owners represented the insured as required by its policy; d) Auto-Owners did so with a reservation of rights; e) Auto-Owners had an understanding with their insureds that coverage issues would be reserved for judicial consideration in a separate proceeding; and f) when the arbitrator determined damages Auto-Owners did not seek review of or otherwise contest the damages award. This is a clear enunciation by the Court that the carrier's high duty of good faith requires it to seek a verdict/award subject to allocation so that its insured will not be thrown into additional litigation and required to meet an impossible burden of allocating a general verdict. The only difference in *Newman* and the present case is that *Newman* was an arbitration and the P.O.A. case was a jury trial. A difference without a distinction.

Harleysville cites the case of *Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010) ("*AnMed*") to support its position that the South Carolina Courts allow parsing of a general verdict. Harleysville mis-reads *AnMed*. In fact, *AnMed* is another pronouncement by the Court that a general verdict provides no information and cannot be inquired into. *AnMed*, a charitable organization, was sued for medical negligence. The jury returned a verdict for Chastain of $2,200,000.00. However, the verdict was subject to the statutory cap of $300,000.00 for each occurrence. The Plaintiff contended her injuries were the result of more than one "occurrence" and therefore, the statutory cap of $300,000.00 would apply to each occurrence. The trial judge ruled that only one occurrence could be

found and reduced the verdict to $300,000.00. The Supreme Court affirmed. The Court held that the Plaintiff alleged more than one occurrence, but since the jury rendered a general verdict not susceptible to determination of the number of occurrences, she would be limited to one occurrence.

Harleysville has not contested that it has the burden to prove that the general verdict is not covered. Harleysville concedes that there were covered claims submitted to the jury.[8] Harleysville's witnesses also conceded the obvious; that there is no way to determine how the jury allocated damages. [9] The Special Referee has found as matters of fact that claims were submitted to the jury that are not excluded by the Harleysville policies. Because of the general verdict, Harleysville cannot meet its burden to prove that the general verdict is excluded from coverage. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005) ("Clayton") ("... since the Clayton jury returned a general verdict, a finding that any of the three claims submitted to the jury is not excluded answers the coverage question." *Id.* pp. 560-561) The *Clayton* Court went on to hold that Owners was required to indemnify Clayton for the entire general verdict since one of the claims submitted to the jury was covered and a general verdict rendered. Likewise, in this case it is conceded that covered claims were submitted to the jury which answers the coverage question. The Special Referee was correct in not allowing Harleysville to attempt to relitigate damages.

IV. The Special Referee's application of TOR to the general verdict after a finding that Harleysville failed to reserve its rights to contest coverage was error.

[8] This is the very reason Harleysville sought to have the verdict parsed into covered and non-covered damages. Harleysville has not argued or contended in its Brief that covered claims were not submitted to the jury. Harleysville argued that there were both covered and non-covered claims that resulted in the general verdict. (Tr. April 9, 2013, pp. 11, 12, 36)

[9] Harleysville's construction litigation specialist candidly admitted there was no way to determine how the jury allocated damages. (Wright depo., p. 85)

Harleysville asserts that the P.O.A. waived its argument on this issue because the P.O.A. conceded that Harleysville had an agreement with its insureds to litigate coverage in a subsequent proceeding. This assertion is incorrect. Even assuming that Harleysville sent proper reservation-of-rights letters to their insureds, and had an agreement to litigate coverage issues in subsequent litigation does not ameliorate Harleysville's duty to its insureds to procure a verdict that is susceptible to allocation. *Wilkie, supra*. This was the precise holding in *Newman, supra*. The *Newman* Court pointed out that Auto-Owners sent ROR letters to its insureds and had an agreement to litigate coverage in a subsequent proceeding yet, when damages were assessed, Auto-Owners sat silent and allowed an award that was not susceptible to allocation. Thus, the Court said, Auto-Owners must pay the entire award. *Id.* p. 198, FN5[10]

V. The Special Referee erred in choosing the end date for purposes of applying the TOR formula.

TOR necessarily requires knowledge of upon what claims and what causes of action the jury based its verdict. None of this is known. *Thomasko v. Poole*, 349 S.C. 7, 561 S.E.2d 597 (2002) (trying to draw conclusions about a general verdict is mere speculation. *Id.* p. 17). Any date applied would necessarily be based on mere speculation.

The P.O.A. argued that if the Court were going to apply TOR to the general verdict, why not apply the date of the breach of fiduciary duty which occurred, May 29, 2002. (Tr. April 9, 2013, p. 70) [11] Even though the P.O.A. recognizes that in the breach of fiduciary

---

[10] Although Harleysville testified they had an agreement with their insured, they never advised their insureds of the need for an allocated verdict. (Tr. August 3, 2010, pp. 188-189)

[11] After the Special Referee reopened the case in light of the *Crossman* decision, the Special Referee indicated that the end date for purposes of TOR may be the date of the verdict or may be 2003 when Mr. Brown's report was done. (Tr. December 9, 2011, pp. 82-83) The Special Referee acknowledged that

duty by a developer the damages continue to accrue after the breach, if we are going to speculate on the jury's allocation and time period of damages, why not speculate that the jury ended their assessment of damages when the developer turned the common elements over to the P.O.A. and breached their fiduciary duty. At least this speculation may have some merit since the Trial Judge charged the jury on the P.O.A.'s duty to mitigate damages. There is no evidence in the record to reasonably support the Special Referee's finding of an end date of April 30, 2004. (Order, February 28, 2013, p. 45) The basis that the Special Referee used was that someone went out to the property in reference to the Buric Report on that date. Drew Brown testified he did a repair cost estimate based on his 2003 report and the cost estimator used this 2003 report to do his cost analysis. (Tr. December 9, 2011, p. 64) Drew Brown went out to the property in 2003 and substantial repairs had been done by the Association to stop the water damage. (Tr. December 9, 2011, pp. 64-65) The jury had before it a damage estimate based upon a 2003 scope of repair. The jury had nothing to base an award of damages on after 2003. (Tr. December 9, 2011, p. 64) There is simply no evidence in the record to support an ending date of April 30, 2004 for the TOR ending date. [12]

---

damages were assessed in the underlying Trial as of 2003. (Tr. December 9, 2011, p. 62) The Special Referee's finding of an ending date of April 30, 2004 was neither discussed nor raised by the parties or by the Court. In the P.O.A.'s Motion to Alter or Amend, the P.O.A. contended the date would be the date of the breach of fiduciary duty which is May 29, 2002. At the hearing on the Motion to Alter or Amend, the P.O.A. also argued the date of May 29, 2002. (Tr. April 9, 2013, p. 70) Harleysville has confused this case with Magnolia North.

[12] Harleysville refers to the transcript of December 9, 2011, pp. 66-67 to support the end date of April 30, 2004. Nowhere on these pages is the date April 30, 2004 mentioned. The expert's report was dated May 28, 2004 but the scope of work was based upon when the work for the report was done, i.e. 2003. (Tr. December 9, 2011, pp. 66-68) In fact, the cost estimator based his estimate on a 2003 scope of repair. (Tr. December 9, 2011, pp. 64-68) There is no testimony that the report or 2003 scope of work incorporated a cost estimate made in 2006 or 2008. The 2008 testimony relates to the conclusion of window testing but this did not alter the 2003 scope of repair. Additionally, these costs of previous repairs had nothing to do with the 2003 scope of repair upon which the 2003 estimate submitted to the jury was based.

Conclusion

The Court should reverse the Special Referee's application of TOR to the general verdict and require Harleysville to indemnify its insureds and the P.O.A. for the full amount of the general verdict, costs and post-judgment interest.

THOMPSON & HENRY, P.A.

By: _____

John P. Henry
Philip C. Thompson
Thompson & Henry, P.A.
1300 Second Avenue, 3rd Floor
Post Office Box 1740 (zip: 29528)
Conway, South Carolina 29526
(843)248-5741

Attorneys for Respondents/Appellants Riverwalk at Arrowhead Country Club Horizontal Property Regime and Riverwalk at Arrowhead Country Club Property Owners Association, Inc.

Conway, South Carolina

January 16, 2014

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: 2013-001291

Harleysville Group Insurance, a Pennsylvania Corporation, Appellant/Respondent

v.

Heritage Communities, Inc., A South Carolina Corporation; Heritage Riverwalk, A South Carolina Corporation; Buildstar Corporation, A South Carolina Corporation, Riverwalk at Arrowhead Country Club Horizontal Property Regime, Riverwalk at Arrowhead Property Owners Association, Inc., A South Carolina Corporation, National Surety Corp., and Tony L. Pope and Lynn Pope Individually and Representing as a Class All Unit Owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime, Defendants,

Of whom Heritage Communities, Inc., a South Carolina Corporation; Heritage Riverwalk, a South Carolina Corporation; Buildstar Corporation, a South Carolina Corporation; National Surety Corp., And Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime are Respondents,

And Riverwalk at Arrowhead Country Club Horizontal Property Regime; Riverwalk at Arrowhead Country Club Property Owners Association, Inc. are Respondents/Appellants.

PROOF OF SERVICE

I, Stephanie Hall, an employee for Thompson & Henry, P.A., attorneys for the Respondents/Appellants, Riverwalk at Arrowhead Country Club Horizontal Property Regime and Riverwalk at Arrowhead Country Club Property Owners Association, Inc. in the above-captioned action and/or actions, certify that I have this 16th day of January, 2014 mailed a copy and/or copies of the following:

1. **RESPONDENT'S/APPELLANT'S REPLY TO INITIAL RESPONSE BRIEF OF APPELLANT/RESPONDENT**

to the undersigned at his/her/their address(es) of record, with sufficient postage attached thereto, as follows:

Counsel Served:

C. Mitchell Brown
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

Robert C. Calamari
Nelson Mullins Riley & Scarborough, LLP
3751 Robert M. Grissom Parkway, Suite 300
Myrtle Beach, SC 29577-3165

Laura Johnson Evans
Smith Moore Leatherwood, LLP
25 Calhoun Street, Suite 250
Charleston, SC 29401

Stephanie Hall

Conway, South Carolina

THOMPSON
& HENRY, P.A.
ATTORNEYS AT LAW
1300 SECOND AVENUE, THIRD FLOOR
POST OFFICE BOX 1740
CONWAY, SOUTH CAROLINA 2952

TELEPHONE
(843) 248-5741
FACSIMILE
(843) 248-6396

JOHN P. HENRY
phenry@thompsonlaw.com

January 16, 2014

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629 (29211)
1015 Sumter Street
Columbia, SC 29201

RE: *Harleysville Group Insurance, Inc. v. Riverwalk at Arrowhead Country Club Property Owners Association, Inc. et al.*
Appellate Case No.:2013-001291

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Respondent's/Appellant's Reply to Initial Response Brief of Appellant/Respondent. Please file the original and return a copy to me in the return envelope enclosed.

In lieu of filing an additional Designation of Matter to be Included in the Record on Appeal, Respondents/Appellants would rely on the following:

a) Designation filed August 14, 2013;
b) Designation filed December 16, 2013; and
c) Underlying Trial Transcript, p. 430 and Exhibit 8.

Should there be any problem with the above, please notify me immediately.

With kindest regards, I am

Sincerely,
THOMPSON & HENRY, P.A.

John P. Henry

PCT/sbh
cc: C. Mitchell Brown, Esquire
Robert C. Calamari, Esquire
Laura J. Evans, Esquire
Enclosures as noted.