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SC Court of Appeals

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. 2009-CP-26-11862; Appellate Case No. 2013-001281

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 Corp., a South Carolina corporation; Magnolia North Horizontal Property Regime; Magnolia North Property Owners Assoc., 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 Corp., a South Carolina corporation; and National Surety Corp. are..... Respondents,

And Magnolia North Horizontal Property Regime and Magnolia North Property Owners Assoc., Inc., a South Carolina corporation are..... Respondents/Appellants.

FINAL RESPONSE BRIEF OF APPELLANT/RESPONDENT

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Clarification of the Facts

Appellant/Respondent Harleysville Group Insurance ("Harleysville") submits a brief counter-statement to clarify or correct certain facts set out in the brief of the Respondents/Appellants Magnolia North Horizontal Property Regime and Magnolia North Property Owners Assoc., Inc. (collectively "the property owners' association," "the association," or "the underlying plaintiffs").[1]

First, the association in its brief misleadingly states that Harleysville made a conscious decision not to intervene. *See* Association's Brief at 5. Harleysville's absence as a party in the underlying suit was not the result of a unilateral decision. Rather, Harleysville had discussed the coverage issues with its insureds who agreed that these issues were best reserved for a subsequent coverage action. *See* Trial Tr. of Dec. 13-14, 2010 at 113, 182, 209; CR 358, 427, 454[2]. Even if the insured had wished for Harleysville to intervene, Harleysville had neither the opportunity nor the incentive to do so, and intervention would have been improper and prejudicial. Under the South Carolina Supreme Court's first opinion in *Auto Owners Ins. Co., Inc. v. Newman*, 2008 WL 648546 (S.C. March 10, 2008), withdrawn 385 S.C. 187, 684 S.E.2d 541 (2009), there was no need, much less obligation, for Harleysville to intervene and seek to allocate damages into categories that, at that time, were unnecessary and meaningless. In accordance with that case law, other South Carolina trial courts had denied motions

[1] Though not of substantive import, Harleysville notes for the sake of clarity that the association's brief is mistaken as to the dates of several procedural events. Specifically, the association's brief states that trial in this action was held on August 3, 2010. *See* Association's Brief at 2. In fact, the trial took place on December 13-14, 2010. Similarly, the association's Designation of Matter lists a "Trial Tr. dated April 19, 2013." *See* Association's Designation at 2. In actuality, the post-judgment hearing on the parties' motions to alter or amend was on April 9, 2013.

[2] References to the Consolidated Record on Appeal will be referenced as "CR."

to intervene in analogous cases. *See* Trial Tr., December 13-14, 2010, at 140, 206-08; CR 385, 451-53.

Second, the association states that "Harleysville candidly admits that there is no way now to determine how the jury allocated damages." *See* Association's Brief at 5. This is incorrect. Harleysville repeatedly requested an allocation which are covered and not covered by insurance from the Special Referee and explained how an allocation could and should be performed. *See* Harleysville's Pre-Trial Brief at 20-36; CR 2378-94; Trial Tr., December 13-14, 2010, at 235-53; CR 480-98; Harleysville's Motion for Judgment and Directed Verdict at 3; CR 2411; Harleysville's proposed Order at 23-30; CR 2437-44; Harleysville's Motion to Vacate, Alter, or Amend at 5; CR 2531. Similarly, Harleysville argues in its brief before this Court that an allocation of the underlying damages is possible and proper. *See* Harleysville's Initial Brief at 5-18. The fact that a lay witness, Harleysville's construction defect litigation manager, stated in a deposition that he was unsure how the underlying jury awarded damages hardly "concedes" this issue. *See Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 489, 560 S.E.2d 612, 618-19 (2002) (recognizing that lay persons such as insurance employees are not expected to understand or decide issues of abstract legal principles and trial strategy) (citing *Dauphin Cnty. Bar Ass'n v. Mazzacaro*, 351 A.2d 229, 233-34 (Pa. 1976)).

In addition, the association in its brief incorrectly states that Harleysville did not advise its insureds that it had a conflict of interest and never discussed with them the ramifications of a general verdict or the need for a special verdict. *See* Association's Brief at 5-6. In fact, the undisputed testimony before the Special Referee was that

Harleysville *did* advise its insureds of the danger of a conflict of interest and the need to guard against that danger. *See* Trial Tr., December 13-14, 2010, at 182; CR 427. Furthermore, as explained above, at the time of trial there was no reason or option to seek a special verdict allocating damages.

Argument

In its brief, the property owners' association presents four issues, each of which assigns error to the Special Referee's decision to apply the "time on risk" formula to determine Harleysville's coverage responsibility for the damages awarded in the underlying trial. *See* Association's Brief at vi. As explained below, the association's arguments are not preserved because it never sought judgment on these bases before the Special Referee. Even if they were preserved for appeal, each of the association's arguments is incorrect as a matter of law. As to its first argument, "time on risk" is applicable to the verdict. The Special Referee ruled that *all* of the actual damages awarded by the underlying jury were "covered," and thus he applied "time on risk" to that sum. As to the association's second and third arguments, the application of "time on risk" is separate from the questions of whether the Special Referee should have allocated the underlying verdict into categories of covered and non-covered damages and whether Harleysville reserved its right to contest coverage. Finally, the date chosen by the Special Referee as the end of the underlying progressive damages was supported by the evidence and may not be disturbed on appeal.

I. The property owners' association's arguments are not preserved for appellate review.

When a party believes it is entitled to judgment as a matter of law on an issue but fails to move for judgment on that basis at trial, it cannot argue on appeal that the

trial court erred and the party was entitled to a different judgment. Such is the case here. The property owners' associations' arguments are thus not preserved.[3] *See Holly Woods Ass'n of Residence Owners v. Hiller,* 392 S.C. 172, 189, 708 S.E.2d 787, 796 (Ct. App. 2011) (holding appellants failed to preserve an issue of law for appellate review because they failed to move for a directed verdict on that basis); *Duncan v. Hampton Cnty. Sch. Dist. No. 2*, 335 S.C. 535, 545 n.6, 517 S.E.2d 449, 454 n.6 (Ct. App. 1999) ("This failure to explicitly move for a directed verdict on the issue [of whether expert testimony was required to establish standard of care] renders it not preserved.") (citation omitted); *Lites v. Taylor*, 284 S.C. 316, 319, 326 S.E.2d 173, 175 (Ct. Ap. 1985) (noting absence of a post-judgment motion and holding "that a question concerning the verdict must be raised at trial level, whether the judge sits alone or with a jury, to be preserved for review on appeal") (citation omitted).

Here, the property owners' association argues the Special Referee erred as a matter of law by applying "time on risk" and instead he should have granted judgment for the association for $6,968,936.85. *See* Association's Brief at 22.[4] However, the

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[3] In contrast, where a party in a bench trial disputes the *factual* issue of whether the evidence was sufficient to support the trial court's *findings of fact*, it may subsequently raise that issue even if it did not object to the findings or move for judgment. *See* Rule 52(b), SCRCP. Here the association's arguments on appeal raise *legal* questions and matters of law, not a factual question, and thus are not preserved. *But see Norell Forest Prods. v. H & S Lumber Co.*, 308 S.C. 95, 98-99, 417 S.E.2d 96, 99 (Ct. App. 1992), rev'd in part on other grounds by 310 S.C. 368, 426 S.E.2d 800 (1993) (apparently applying Rule 52(b) beyond its proper scope).

[4] The association seeks a ruling "that the entire verdict is covered by the Harleysville policies." *See* Association's Brief at 22. In the underlying trial, the jury awarded $6.5 million in actual damages and $2 million in punitive damages. *See* Magnolia North Order at 3; CR 77. After set off, the underlying verdict totaled $6,968,936.85. *Id.*

association never moved for judgment as a matter of law on this or any other argument at any time, either orally or in writing.

Although the association raised the issue of "time on risk" in its post-judgment motion to alter or amend, that is insufficient to preserve the issue. Where a party should have moved for judgment on an issue but failed to do so, that failure to preserve the issue cannot be remedied by a post-judgment motion to alter or amend. *See Chapman v. Upstate RV & Marine*, 364 S.C. 82, 87-88, 610 S.E.2d 852, 855-56 (Ct. App. 2005) (holding issue was not preserved for appellate review where defendant raised the issue in its post-judgment motion to alter or amend, but had failed to raise the issue in its directed verdict motion); *see also Poch v. Bayshore Concrete Prods., Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) ("A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.") (citations omitted).

In addition, the property owners' association failed to preserve its alternative argument that, even if "time on risk" applies here, the Special Referee selected the wrong "end date" for the underlying progressive damages. *See* Association's Brief at 20, 22. The association now argues that the end date should be September 9, 2002. Association's Brief at 20, 22. The association never moved for or sought judgment on this issue. Further, the association's only motion to mention this argument—its post-judgment motion to alter or amend—raises a slightly different argument, asserting that the end date of damages should be September 13, 2002. *See* Association's Motion to Alter or Amend at 2-3; CR 2528-29. Where a party argues one thing in its post-trial motion and another thing on appeal, its new angle on the issue is not preserved. *See*,

e.g., *State v. Taylor*, 399 S.C. 51, 63-64, 731 S.E.2d 596, 603 (Ct. App. 2012). In sum, because the property owners' association never sought judgment from the Special Referee on the legal issues it now argues on appeal, the issues are not preserved for appellate review.

II. The Special Referee correctly determined that "time on risk" should apply to all covered damages.

The property owners' association's first argument on appeal is that the Special Referee erred by applying a "time on risk" analysis to the underlying general verdict. *See* Association's Brief at 8. The property owners' association argues that to do so, the Special Referee was required to speculate what amount of the damages awarded by the jury arose from progressive physical damages. *Id.* As explained below, the Special Referee correctly determined that "time on risk" applied to all covered damages. The special Referee ruled that the entire underlying actual verdict was covered, and he thus applied "time on risk" to that entire amount.

In *Crossmann*, the South Carolina Supreme Court adopted the "time on risk" analysis to determine an insurer's coverage responsibility. *See Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50-52, 717 S.E.2d 589, 594-95 (2011). This analysis applies when the physical injury occurred over a period of time, and the insurer's policy was in force for only a portion of that time. *Id.* at 64-65, 717 S.E.2d at 601-02. Here, the Special Referee applied the "time on risk" calculation to the actual damages awarded in the underlying trials. (*See* Magnolia North Order at 41-44; CR 115-18.) The property owners' association argues this required impermissible speculation because the underlying verdict was a general verdict. *See* Association's

Brief at 8 ("The amount of progressive damages in the underlying POA verdict is impossible to determine.").

The effect of the property owners' association's argument is audacious. In essence, it argues a plaintiff may entirely circumvent the rule of *Crossmann* by simply including an item of non-progressive damages in its claim and seeking a general verdict (which is oft times favored by trial judges for its simplicity). The South Carolina Supreme Court adopted the "time on risk" formula as a safeguard to fairly and justly allocate responsibility between insurers and, in some instances, between insurers and the insured. The property owners' association's argument, if adopted, would stymie that rule by giving plaintiffs a simple method to prevent its application.[5]

In addition, the property owners' association is mistaken in its assertion that Harleysville failed to seek application of "time on risk" to the entire underlying verdict. *See* Association's Brief at 10 ("Nowhere in its pleadings did Harleysville ask the Court to apply TOR to the entire general verdict."); *id.* at 11. In its declaratory judgment Complaint, Harleysville sought application of "time on risk" to all the damages the

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[5] The Special Referee should have made an allocation determination. *See, e.g., Home Ins. Co. v. Certain Underwriters at Lloyd's London*, 729 F.2d 1132 (7th Cir. 1984) (remanding for determination of insurer's pro rata coverage obligation where an unallocated settlement including covered and uncovered claims placed the case "in the same posture as if a general verdict had been returned"). Assuming *arguendo* such could not be done, courts of some other jurisdictions have applied "time on risk" to an underlying unallocated amount that includes both covered and uncovered claims. *See, e.g., City of Sterling Heights v. United Nat'l Ins. Co.*, 319 Fed. Appx. 357 (6th Cir. 2009) (affirming use of "time on risk" formula to determine insurer's coverage liability for an underlying, unallocated settlement of both covered and uncovered claims where it was "impossible" to determine what portion of the settlement was attributable to the covered claims); *Fed. Ins. Co. v. Binney & Smith, Inc.*, 913 N.E.2d 43 (Ill. Ct. App. 2009) (same); *see also Penn. Nat'l Mut. Cas. Ins. Co. v. Roberts*, 668 F.3d 106 (4th Cir. 2012) (applying "time on risk" to determine insurer's coverage responsibility for underlying verdict that included claims of negligence and unfair trade practices).

Special Referee determined to be covered, expressly stating—in its cause of action titled "Time On Risk"—that "even if damages are found to be covered by the policies, only that portion of the damages occurring during the policy period would be covered." (*See* Harleysville's Dec. J. Compl. at ¶ 23; CR 181.) Similarly, the property owners' association is simply incorrect in its assertion that "Harleysville concedes it is now impossible to determine how the jury allocated the damages." *See* Association's Brief at 10. Harleysville makes no such concession. In contrast, Harleysville repeatedly raised the issue of an allocation to the Special Referee and explained how such an allocation could accurately be made and continues to argue before this Court that an allocation could and should have been made. *See*, *e.g.*, Harleysville's Pre-Trial Brief at 20-36; CR 2378-94; Harleysville's Motion for Judgment and Directed Verdict at 3; CR 2411; Harleysville's proposed Order at 23-30; CR 2437-44; Harleysville's Motion to Vacate, Alter, or Amend at 5; CR 2531; Harleysville's Brief at 4-18. The fact that a lay witness stated in a deposition that he was unsure how the underlying jury awarded damages is hardly a concession of this issue of law and legal theory. *See Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 489, 560 S.E.2d 612, 618-19 (2002) (recognizing that lay persons like insurance employees are not expected to understand or decide issues of abstract legal principles or trial strategy) (citing *Dauphin Cnty. Bar Ass'n v. Mazzacaro*, 351 A.2d 229, 233-34 (Pa. 1976)).

In sum, the Special Referee did not err in applying "time on risk" to the underlying actual damages verdict, which he determined was covered by the policies at issue.

III. The Special Referee correctly determined that the application of "time on risk" was separate from the question of whether to allocate the underlying verdict into categories of covered and non-covered damages.

The property owners' association's second argument on appeal is that the Special Referee erred by applying a "time on risk" analysis to the underlying verdict while refusing to allocate that verdict into categories of covered and non-covered damages. *See* Association's Brief at 13. Much of its argument is devoted to the association's mistaken belief that a trial court in a coverage action cannot allocate an underlying verdict to determine which portions of it are covered—a belief thoroughly discussed and rebutted in Harleysville's brief. *See* Harleysville's Initial Brief at 4-18.

The property owners' association argues that the trial court in a coverage action may not allocate the underlying verdict into categories of covered and uncovered damages if the insurer did not intervene in the underlying action and request a special verdict. As an initial matter, the association has waived this argument by admitting that "Harleysville had an agreement with its insureds that coverage issues would be decided in a subsequent action." *See* Association's Brief at 4; *see also* Trial Tr. of Dec. 13-14, 2010 at 111-13, 182, 209 (testimony that Harleysville's insureds agreed to defer resolution of coverage disputes for a later action); CR 356-58, 427, 454. This concession is binding on the property owners' association. *See* Rule 208(b)(1)(C), SCACR ("Any matters stated or alleged in appellant's statement shall be binding on appellant."). Having conceded that Harleysville and its insureds discussed coverage issues and agreed to resolve them in a subsequent action, the association should be barred from arguing to the contrary.

Additionally, as explained in Harleysville's Initial Brief, Harleysville was unable to intervene in the underlying trial. *See* Harleysville's Initial Brief at 10-11. Under the law in force at the time of the underlying action, every dollar of construction defect damages triggered indemnity obligations under a standard CGL policy. Thus there was no possibility, much less an obligation, for Harleysville to intervene and demand a special verdict form to allocate damages into categories that, at that time, were unnecessary and meaningless. *Id.*

Similarly, intervention would have been futile and prejudicial. *See id.* at 11-13. The courts of other jurisdictions acknowledge the impracticability of an insurer intervening in an underlying suit and have held that coverage issues are best reserved for subsequent litigation. *See Restor-A-Dent v. Certified Alloy*, 725 F.2d 871 (2d Cir. 1984); *Davila v. Arlasky*, 141 F.R.D. 68 (N.D. Ill. 1991); *Allstate Ins. Co. v. Keltner*, 842 N.E.2d 879 (Ind. Ct. App. 2006); *Emp. Ins. of Wausau v. Lavender*, 506 So.2d 1166 (Fla. Ct. App. 1987); *U.S. Fid. & Guar. Co. v. Adams*, 485 So. 2d 720 (Ala. 1986); *Donna C. v. Kalamaras*, 485 A.2d 222, 224 (Me. 1984); *Hunter v. Peters*, No. 423946, 2001 Conn. Super. Lexis 3761 (Conn. Super. Ct. Dec. 13, 2001); *see also* Christopher McIlwain, *Clear as Mud: An Insurer's Rights and Duties Where Coverage Under a Liability Policy is Questionable*, 27 Cumb. L. Rev. 31 (1997).

The cases mentioning allocation on which the property owners' association relies are distinguishable from the situation presented here. In *Auto Owners v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), for example, the Court recognized the usefulness and propriety of allocation but concluded that *under the facts of that case*, (namely, the absence of Record evidence), it was unable to determine what portion of

the underlying arbitration award was to compensate for non-covered injuries. Here, in contrast, there ***is*** Record evidence regarding what portion of damages relates to covered and non-covered damages. *See*, *e.g.*, Trial Tr., December 13-14, 2010, at 216-17, 235-53; CR 461-62, 480-98. In addition, *Newman* provides very limited guidance because the issue of allocation of the underlying award was never raised or argued to the appellate court in the appellate court briefs and because the underlying award in that case was in arbitration, not a jury trial.

Similarly, the property owner's association relies on the distinguishable case of *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005) in support of its argument that an underlying general verdict resolves the subsequent coverage issue. *See* Association's Brief at 15. In the underlying suit giving rise to *Clayton*, the insured hotel and its owner had fired an employee for theft and embezzlement and had subsequently informed two people why the former employee had been fired. The former employee sued the hotel and its owner, alleging malicious prosecution, slander, and negligence. Before that trial began, the insurer brought a declaratory judgment action to determine the applicability of certain policy exclusions. Specifically, the insurance policy expressly covered slander, libel, and malicious prosecution, but its Employment Related Practices ("ERP") exclusion excluded defamation related to employment.

The underlying jury in *Clayton* returned a general verdict, finding the insured had defamed and maliciously prosecuted the plaintiff, and awarded $1.25 million. In the coverage action, the trial court granted summary judgment for the insured, finding the exclusion did not preclude coverage. On appeal of the coverage action, the South Carolina Supreme Court affirmed, holding that the underlying defamation did not fall

within the exclusion. The Court held that because the policy covered one of the claims underlying the general verdict, there was no need to consider whether the other underlying claim was covered, and insurer must indemnify the insured for the entire underlying general verdict. *Clayton*, 364 S.C. at 562, 614 S.E.2d at 615 ("Our holding that the exclusion does not apply to the defamation claim means that Owners must indemnify [the insured] for the Clayton general verdict. [] Accordingly, we need not address whether the malicious prosecution claim is within the ERP exclusion.") (citing *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (2004)).

Clayton, however, is neither dispositive of nor informative to the question presented here. First, in *Clayton*, there was no question that the insurance policy covered the types of claims that made up the underlying verdict. *See Clayton*, 364 S.C. at 559, 614 S.E.2d at 613 (quoting the policy's coverage provision, which covered injuries arising from malicious prosecution and defamation). The issue before the *Clayton* Court was merely whether a particular policy exclusion applied. An insurer shoulders the burden of proof respecting an exclusion. Here, in contrast, the issues involve the more fundamental question of whether there was an "occurrence" giving rise to coverage, whether any "property damage" covered by the policy has occurred, and, if so, in what amount. Because *Clayton* involved a different issue, it is not applicable. Second, and importantly, in *Clayton* each separate claim independently supported the entirety of the verdict. Thus, where the insurer failed to prove that one claim was excluded, that non-excluded claim could support the entire verdict as covered. Here, in contrast, all agree—including the Special Referee—that the verdict

includes both covered and non-covered damages. (*See* Post-Trial Hearing Tr. of April 9, 2013 at 89; CR 729.)

In addition, the association argues there are no instances "in the annals of South Carolina jurisprudence where the appellant [sic] court allowed the post trial dissection of a general verdict." *See* Association's Brief at 13. However, our appellate courts *have* affirmed a trial court's "dissection," *i.e.*, analysis and reduction, of a general verdict. *See, e.g., Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010) (affirming trial court's post-verdict ruling that, because it was impossible to determine from the general verdict how many occurrences of negligence the jury had found, the damages award should be reduced to the amount appropriate for one occurrence); *Parr v. Gaines*, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992) (affirming trial court's nisi remittitur reduction of a general verdict). Similarly, the courts of other jurisdictions permit an insurer in a coverage action to allocate a general verdict from an underlying suit into categories of covered and non-covered damages. *See, e.g., Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972); *Allstate Ins. Co. v. Keltner*, 842 N.E.2d 879, 883 (Ind. Ct. App. 2006); *MedMarc v. Forest Healthcare*, 199 S.W.3d 58 (Ark. 2004); *Donna C. v. Kalamaras*, 485 A.2d 222, 224 (Me. 1984). Hence, the association's arguments should be rejected.

IV. The Special Referee correctly determined that the application of "time on risk" was separate from the question of whether Harleysville reserved its rights to assert policy defenses.

In its third argument on appeal, the property owners' association argues that the Special Referee erred by applying "time on risk" after ruling that Harleysville failed to reserve its right to dispute coverage. *See* Association's Brief at 19. As an initial matter,

to the extent the association's argument is premised on Harleysville's supposed failure to reserve its right to contest coverage, the association has effectively waived this argument by admitting that "Harleysville had an agreement with its insureds that coverage issues would be decided in a subsequent action." *See* Association's Brief at 4; *see also* Trial Tr. of Dec. 13-14, 2010 at 111-13, 182, 209 (testimony that Harleysville discussed its coverage concerns with its insureds who agreed to defer resolution of those disputes for a later action); CR 356-58, 427, 454.[6] The association is bound by this concession. *See* Rule 208(b)(1)(C), SCACR.

Even assuming *arguendo* that Harleysville's reservation of rights letters were insufficient, that determination has no bearing on the separate question of whether "time on risk" should apply. The purpose and nature of a reservation of rights letter is to inform the insured that the insurer may deny coverage pursuant to the policy's definitions, exclusions, or other terms. In contrast, "time on risk" is not a policy defense and has nothing to do with the question of whether there is coverage. Rather, it is a judicially adopted rule of law that is used to divide responsibility for progressive damages among insurers and the insured for any periods of no insurance. Because the issue of "time on risk" is not a policy defense, a letter reserving the right to contest coverage need not discuss it.

Furthermore, even if an insurer is somehow *now* obligated to discuss "time on risk" in a reservation of rights letter, there was no such obligation when Harleysville

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[6] Furthermore, as explained in Harleysville's brief, the insurer sent the insureds letters reserving its right to contest coverage and thus was not precluded from asserting coverage defenses such as the absence of an occurrence or the applicability of policy exclusions. *See* Harleysville's initial brief at 64-78; *see also* Trial Tr. of Dec. 13-14, 2010 at 96-98, 101, 181-82; CR 341-43, 346, 426-27.

sent the letters at issue here. At the time Harleysville sent its reservation of rights letters to its insured, "time on risk" was not yet the law of this state and thus there was no reason to mention it or to reserve the right to assert that doctrine. The South Carolina Supreme Court adopted "time on risk" long after Harleysville's letters had been sent and the underlying action was concluded. It would be unjust to penalize Harleysville for failing to reserve the right to raise a legal issue that, at that time, did not exist in this state. Thus the Special Referee did not err by applying "time on risk" despite his ruling that Harleysville failed to reserve its rights to raise other policy defenses.

V. The Special Referee chose an appropriate "end date" for the underlying progressive damages when he applied the "time on risk" analysis.

In its fourth argument on appeal, the property owners' association argues the Special Referee erred in his selection of a date representing the end of the progressive property damage when he calculated Harleysville's "time on risk." As explained below, the association's argument is incorrect. Although Harleysville appeals other aspects of the Special Referee's "time on risk" calculation, *see* Harleysville's Initial Brief at 14-18, the "end date" chosen by the Special Referee was supported by the evidence and may not be disturbed on appeal.

The association argues that the Special Referee should have chosen a much earlier date because the underlying jury's award may have been based on the alleged breach of fiduciary duty that supposedly occurred on September 9, 2002. *See* Association's Brief at 20.[7] This argument is self-defeating, however, because the

[7] As noted in Part I, *supra*, the property owners' association never argued to the Special Referee that the end date for calculating "time on risk" should be September 9, 2002.

association recognizes that the insureds' breach of fiduciary duty would render them liable "for the continued deterioration of the areas." *Id.* (citing *Concerned Dunes West Residents v. Georgia Pac. Corp.*, 349 S.C. 251, 562 S.E.2d 633 (2002)); *see also id.* at 12 (conceding that damages flowing from a breach of fiduciary duty are "tantamount to 'progressive damages.'").

In addition, because there was evidence to support the Special Referee's finding of the date on which the progressive physical damages ended, that choice may not be disturbed on appeal. *Dargan v. Tankersley*, 380 S.C. 480, 483, 671 S.E.2d 73, 74 (2008) ("In a case tried by a judge without a jury, the factual findings of the judge will not be reversed on appeal unless found to be without evidence that reasonably supports the judge's findings.") (citation omitted). The South Carolina Supreme Court has expressly given trial courts discretion in determining start and end dates when applying "time on risk." *See Crossmann*, 395 S.C. at 66, 717 S.E.2d at 602 (leaving it to "the sound discretion of the trial court" to determine the starting dates used to calculate "time on risk"). Here, the Special Referee concluded that the "end date" for damages was May 5, 2004, the final date on which the underlying plaintiffs' expert visited the site to analyze and estimate damages. *See* Magnolia North Order at 42; CR 116. This finding was amply supported by the evidence. *See* Hearing Tr. of Dec. 9, 2011 at 66-67 (discussing fact that the underlying plaintiffs' expert's damages estimate was dated May 28, 2004 and incorporated a cost estimate made in 2006), CR 311-12; Magnolia North Underlying Trial Tr. at 447 (testimony of the association's expert that his report

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The closest it came was in its post-judgment motion to alter or amend, where it requested an end date of September 13, 2002. *See* Association's Motion to Alter or Amend at 2-3; CR 2522-23. Accordingly, this argument is not preserved.

was issued in 2004 and included repair invoices from as late as April of 2004), CR 1130; *id.* at 558 (testimony of association's expert regarding "the 2004 report as well as additional information that was gained since our review of the project in 2004" and which was included in a request for bids to repair the condominium complex); CR 1131.

In sum, the association's argument regarding the "end date" selected by the Special Referee is not preserved and is incorrect based on the underlying claims and alleged injuries. In any event, the end date chosen by the Special Referee is supported by ample evidence and may not be disturbed on appeal.

Conclusion

For the foregoing reasons, Harleysville respectfully requests this Court affirm the aspect of the Special Referee's ruling that it is appropriate to apply a "time on risk" calculation to all covered damages.

[*SIGNATURE PAGE ATTACHED*]

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Columbia, South Carolina
June 6, 2014

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SC Court of Appeals

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. 2009-CP-26-11862; Appellate Case No. 2013-001281

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 Corp., a South Carolina corporation; Magnolia North Horizontal Property Regime; Magnolia North Property Owners Assoc., 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 Corp., a South Carolina corporation; and National Surety Corp. are ..... Respondents,

And Magnolia North Horizontal Property Regime and Magnolia North Property Owners Assoc., Inc., a South Carolina corporation are ..... Respondents/Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Response Brief of Appellant/Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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Final Response Brief of Appellant/Respondent

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