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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC Court of Appeals

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

Case Nos. 2009-CP-26-10053 & 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 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; Heritage
Riverwalk, a South Carolina corporation; Buildstar
Corporation, a South Carolina corporation, and
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 Magnolia North Horizontal Property Regime,
Magnolia North Property Owners Assoc., Inc., a
South Carolina corporation and Riverwalk at
Arrowhead Country Club Horizontal Property
Regime; Riverwalk at Arrowhead Country Club
Property Owners Association, Inc. are Respondents/Appellants.

CONSOLIDATED RECORD ON APPEAL
VOLUME ONE

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Regime; and Riverwalk at Arrowhead
Country Club Property Owners
Association, Inc.

HARLEYSVILLE GROUP INS. V HERITAGE COMMUNITIES
Consolidated Case No. 2013-001281

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Certificate of Counsel

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Tony L. Pope and Lynn S. Pope,
Individually and Representing
As A Class All Unit Owners of
Riverwalk At Arrowhead Country
Club Horizontal Property Regime.

Plaintiffs.

vs.

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Buildstar Corporation

Defendants.

Riverwalk At Arrowhead Country
Club Property Owners' Association, Inc.

Plaintiff.

vs.

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Buildstar Corporation

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NOS. 05-CP-26-3289
03-CP-26-7169

**ORDER DENYING DEFENDANTS'
POST-TRIAL MOTIONS**

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CLERK OF COURT

The above actions were consolidated for trial and tried by this Court January 5-15, 2009.

The Riverwalk at Arrowhead Country Club Property Owners Association, Inc. ("Riverwalk POA Action") brought their construction defect lawsuit to recover for repair costs, and a class of homeowners (the "Pope Class Action") brought their lawsuit to recover loss of use of their units during the repair period. The trial resulted in a \$5,500,000.00 verdict in favor of the Plaintiffs against the Defendants, broken down as follows:

1. \$4,250,000.00 actual damages and \$250,000.00 punitive damages in the Riverwalk POA Action; and
2. \$250,000.00 actual damages and \$750,000.00 punitive damages in the Pope Class Action.

The Defendants timely moved for a New Trial – Thirteenth Juror Doctrine, or in the alternative, for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial Absolute, or in the alternative, for a New Trial *Nisi Remittitur*, or in the alternative and as a matter of right, for a Punitive Damages Review, and as a further matter of right, for Setoff.

After considering the motions, memoranda and accompanying law submitted by the parties, as well as the arguments of the parties at the February 24, 2009 hearing upon the post-trial motions, the Court denies the Defendants' Motion for New Trial under the Thirteenth Juror Doctrine. An abundance of the evidence to support the jury's verdict was provided by experts for both the Plaintiffs and the Defendants on the issue of actual damages for repair costs and loss of use. The jury's punitive damage award was also supported by the evidence which included testimony by the experts for both the Plaintiffs and the Defendants that the Defendants repeatedly violated Industry Standards and the Standard Building Code in the construction of the Riverwalk condominiums. This evidence was sufficient for a finding by the jury of gross negligence by the Defendants. Where a builder's actions are grossly negligent, punitive damages may be awarded. *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989). Therefore, the Court concludes that the jury's verdict was supported by the evidence.

The Court also denies the Defendants' Motion for Judgment Notwithstanding the Verdict. After reviewing the evidence and all reasonable inferences in the light most favorable to the

Plaintiffs, it is obvious that more than one inference could be drawn from the evidence and the case had to be submitted to the jury. As noted above, there was sufficient evidence to sustain the factual findings implicit in the jury's decision.

The Court also denies the Defendants' Motion for a New Trial Absolute. The amounts of the verdicts for actual damages were within the ranges provided by the parties' experts. The punitive damage award was appropriate under the Punitive Damages Review discussed below. The Defendants have failed to show that the verdicts were grossly excessive so as to shock the conscience of the Court. The verdicts clearly do not indicate the figures reached were the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive.

The Court also denies the Defendants' Motion for New Trial *Nisi Remittitur*. This Court evaluated the adequacy of the verdict in light of the evidence presented and has determined that the jury was not unduly liberal in determining damages, given the evidence of defective construction and the cost of repair and loss of use damages testimony provided by the parties' experts. The verdict was clearly within the damage evidence submitted to the jury.

The Court has also determined after a Punitive Damages Review pursuant to the factors provided by *Gumble v. Stevenson*, 305 S.C. 104; 406 S.E.2d 350 (1991) that the punitive damages award is proportionate to the severity of the offense. The testimony of the Plaintiffs' and the Defendants' experts and Gwyn Hardister provided clear and convincing evidence that the award of punitive damages was justified. In making this finding, this Court reviewed the *Gumble* factors:

- (1) Defendants' degree of culpability. The Defendants were the developers and general contractors of the condominiums. They admitted through their experts

that they repeatedly violated the Standard Building Code and Industry Standards in the construction of the condominiums. They also admitted that they placed defectively constructed condominiums into the stream of commerce both in the Riverwalk development that was the subject of these actions and other condominium projects they were involved in;

- (2) Duration of the conduct. The testimony showed that this conduct of building and selling defectively constructed condominiums in Horry and Georgetown Counties lasted over a period of several years;
- (3) Defendants' awareness or concealment. The Defendants admitted they were aware of the construction deficiencies and failed to disclose those construction deficiencies to the Plaintiffs;
- (4) The existence of similar past conduct. The Defendants admitted that they and other companies owned by the Defendants engaged in similar conduct in at least four other developments in Horry and Georgetown Counties;
- (5) Likelihood the award will deter the Defendants or others from like conduct. Although the Defendants are no longer in business, there is a strongly likelihood that the \$1,000,000.00 punitive damages award will deter others from building and selling defectively constructed condominiums;
- (6) Whether the award is reasonably related to the harm likely to result from such conduct. The \$1,000,000.00 punitive damages award is reasonably related to the costs and losses the homeowners' and homeowners' association will incur as a result of the Defendants' defective construction of the condominiums. The

testimony of actual damages ranged from \$2,391,000.00 to over \$9,000,000.00;

and

- (7) Defendants' ability to pay. The Defendants are no longer in business and have no assets to pay either the actual damages or the punitive damages. However, "[t]here is no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages." *Welch v. Epstein*, 342 S.C. 279, 308; 536 S.E.2d 408, 423 (Ct. App. 2000), citing *Norton v. Ewasco*, 241 S.C. 557, 565; 129 S.E.2d 517, 521 (1963). In fact, an award of punitive damages will have no economic effect on the Defendants since they are no longer in business and have no assets.

THEREFORE, IT IS

ORDERED, ADJUDGED AND DECREED, that Defendants' Motions for New Trial – Thirteenth Juror Doctrine, Judgment Notwithstanding the Verdict, New Trial Absolute and New Trial *Nisi Remittitur* are denied; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that after a Punitive Damages Review pursuant to *Gamble v. Stevenson*, 305 S.C. 104; 406 S.E.2d 350 (1991), that the punitive damages award is appropriate and proportionate to the severity of the offense and will accomplish society's goals of punishment and deterrence; and

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that a setoff of \$1,028,821.69 is granted against the \$5,500,000.00 verdict; and

Judgment is hereby entered against the Defendants in the amount of \$4,471,178.31.

IT IS SO ORDERED.

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SVI


CLIFTON NEWMAN, Presiding Judge
Multi-Week Trial Docket, 15th Judicial Circuit

 South Carolina
 2009

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Magnolia North Property Owners'
Association, Inc.

Plaintiffs

vs.

Heritage Communities, Inc., Heritage
Magnolia North, Inc. and BuildStar
Corporation,

Defendants,

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2003-CP-26-3203

05 cp 26-0044

ORDER DENYING DEFENDANTS'
POST TRIAL MOTIONS AND GRANTING
DEFENDANTS' MOTION FOR A SET OFF

DEC - 1 AM 10:46
COURT

This is a construction defects case. It was tried by a Jury beginning May 11, 2009 and resulted in a verdict for the Plaintiff in the amount of \$6,500,000 actual damages and \$2,000,000 punitive damages. The Defendants (hereinafter sometimes referred to collectively as "Heritage") timely filed post trial motions on various grounds seeking a new trial – Thirteenth Juror Doctrine, or in the alternative, for Judgment Notwithstanding the Verdict, or in the alternative A New Trial Absolute. Also, Defendants seek a new trial *NISI Remittitur* and also seek to have the punitive damages award set aside on numerous grounds. Defendants also seek a set off.

After considering the motions, memoranda and accompanying law submitted by the parties, as well as the arguments of the parties at the hearing on the post trial motions conducted on the 12th day of August, 2009, the Court denies the Defendants' motion on the Thirteenth Juror Doctrine, denies the Defendant's motion on the Judgment Notwithstanding the Verdict and on a New Trial Absolute. Further, the Court also denies the Defendants' motion seeking a new trial *NISI Remittitur* and also seeking to have the punitive damage award set aside on numerous grounds. The Court grants the Defendants' Motion for a Set Off.

The Defendants object to the Court's admission of evidence related to prior conduct of the Defendants. Under South Carolina law, one of the elements that the Jury can consider in the award of

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punitive damages is the existence of similar past conduct. Welch v. Epstein, 342, SC 279 536 SE 2d 408 (Ct. App. 2000). The Court finds no error in the admission of evidence of similar past conduct.

THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.

Defendants object to the Court's amalgamating the Defendants. The Court finds that there was sufficient evidence to find amalgamation between the Defendants. Kincaid vs. Landing Development Corporation et al., 289 S.C. 89, 344 S.E. 2d 869 (1986). **THEREFORE, DEFENDANTS' MOTION IS DENIED ON THIS GROUND.**

Defendants further object to the Court's finding that the statute of limitations was equitably tolled. The Court finds that the evidence was sufficient to find equitable estoppel and/or equitable tolling. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next object to the Court's directing a verdict on the implied warranty of workmanlike service and negligence. The Court finds that the testimony from both the Plaintiff and the Defendants warranted the Court's direction of a verdict. **THEREFORE, DEFENDANTS' MOTION IS DENIED ON THIS GROUND.**

Defendants next objects to the Court's direction of a verdict since there was no evidence that the materials used by Buildstar in the construction of Magnolia North were known to be defective materials at the time the buildings were constructed. The Court finds that there was sufficient evidence from the Plaintiff and from the Defendants of numerous code violations which was sufficient standing alone for the Court to direct a verdict of liability. **THEREFORE, DEFENDANTS' MOTION IS DENIED ON THIS GROUND.**

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Defendants next contend that the Plaintiff did not meet its burden of proof as to proximate cause and actual damages. There was sufficient evidence before the Jury to determine damages and the proximate cause of those damages. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next object to the Court's refusal to bifurcate the punitive damages and actual damages stages of the trial. Under Rule 42(b) *SCRCP*, a motion seeking bifurcation is addressed to the sound discretion of the trial Court. The Court believes that the evidence at trial did not warrant bifurcation of the punitive damages and actual damages. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next contend that the Plaintiff failed in its proof by not presenting evidence of the standard of care of a developer. The Court's determination that the Defendants were amalgamated is clearly supported by the evidence, therefore evidence of the standard of care of a developer was not required. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next object to the Court's refusal to allow a Jury view. Whether to allow a Jury view or to deny a Jury view is within the discretion of the trial judge. Testimony in this case and exhibits introduced were sufficient to allow the Jury to make their determination without a Jury view. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next contend that the Court erred by instructing the Jury that they must award damages for repair costs. The Court finds that there was sufficient evidence both from the Defendants and from the Plaintiff for this instruction. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

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Defendants next object to the submission to the Jury of punitive damages. Our Court has long held that where a builder's actions are grossly negligent, punitive damages may be sought and awarded. Kennedy vs. Columbia Lumber, 299 S.C. 335, 384 S.E. 2d 730 (1989). In the case at bar, Heritage admitted to the Jury that it was guilty of a violation of numerous codes. The Court finds that there was sufficient evidence to submit the issue of punitive damages to the Jury as to all Defendants.

Heritage claims that the award of \$2,000,000 in punitive damages was improper and violated Heritage's due process rights. In the recent case of Mitchell vs. Fortis Insurance Company, __ S.E. 2d __, 209 WL 2948558 (S.C.) (Sept. 14, 2009), The South Carolina Supreme court went through the history of the award of and reason for punitive damages in this state. Punitive damages have been awarded in this state from the principals of common law to deter the wrong doers and others from committing like offenses and to further the state's legitimate interest in punishing unlawful conduct and deterring its repetition. However, there are constitutional limits to the award of punitive damages and these limits have been espoused by the United States Supreme Court beginning with Pacific Mutual Life Insurance Company vs. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991). In State Farm vs. Campbell, 538 U.S. 408, 416, 123 S.Ct 1513, 155 L. Ed. 2d 585 (2003) the Court held that "to the extent an award is grossly excessive, it furthers no legitimate purposes and constitutes an arbitrary deprivation of property." Id. at 417. In BMW N. Am., Inc. vs. Gore, 517 U.S. 599, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996) (hereinafter "Gore") the Supreme Court enunciated three guideposts that indicate whether the due process requirements have been met. In determining the constitutionality of a punitive damage award, Gore directed that Courts consider:

- 1) The degree of reprehensibility of the Defendant's conduct;
- 2) The disparity between the actual and potential harm suffered by Plaintiff and the punitive damages award;
- 3) The difference between the punitive damages awarded by the Jury and the civil penalties authorized or imposed in comparable cases.

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Our State Supreme Court has largely tracked the United States Supreme Court with its pronouncements beginning in Gamble vs. Stevenson, 305 S.C. 104, 406 S.E. 2d 350 (1991) in which it held that in order to ensure that punitive damages awards are proper that the Court conduct a post trial review and may consider the following:

- 1) Defendants degree of culpability;
- 2) Duration of the conduct;
- 3) Defendant's awareness or concealment;
- 4) The existence of similar past conduct;
- 5) Likelihood the award will deter the Defendants or others from like conduct;
- 6) Whether the award is reasonably related to the harm likely to result from such conduct;
- 7) Defendants ability to pay; and
- 8) Other factors deemed appropriate.

Our Supreme Court also required in Gamble, supra, that upon completing its review, dedicated to the postulate that no award be grossly disproportionate to the severity of the offense, that the trial Court set forth its findings on the record. However, the Court has also stated, that the amount of damages, actual or punitive, remains largely within the discretion of the Jury, as reviewed by the trial Judge. Fennell vs. Littlejohn, 240 S.C. 189 125 S.E. 2d 408 (1992).

The Court conducted a hearing on the Plaintiffs' post trial motions including arguments as to punitive damages. After listening to arguments of punitive damages and reviewing the testimony and evidence submitted to this Court, using the Gamble factors, the Court finds that the award of punitive damages is not grossly disproportionate to the severity of the offense and does not offend the due process rights of Heritage. In reviewing the "Gamble factors" the Court determines the following:

- 1) **Defendant's Degree of Culpability.** Heritage, in the construction of Magnolia North was required by Horry County to abide by the Southern Standard Building Code. The expert witness for Heritage, David Roady, who investigated the Plaintiff's claims against Heritage,

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(1996). Clearly the award of \$2,000,000 in punitive damages comports with the Gamble factors and does not violate Heritage's due process rights, and the Court so holds.

Our Supreme Court has also directed that trial courts not only review the award of punitive damages pursuant to the Gamble factors, but the Court has mandated that the trial Court review the ruling on punitive damages pursuant to Gore, supra. According to Gore, a trial Court shall review the constitutionality of the punitive damages award by determining whether the award was reasonable under the following guideposts:

- I. The degree of reprehensibility of the Defendants' conduct: Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award". Gore, 517 US at 565. In considering reprehensibility, the Supreme Court in Gamble, supra, directed the trial court to consider the following factors:
 - a) The harm caused was physical as opposed to economic. Although the harm caused by Heritage was economic as opposed to physical, Heritage's conduct placed the life and safety of the owners and/or residents of the Magnolia North condominiums in jeopardy. For example, Heritage failed to properly firestop condominiums giving the potential rise to a rapidly spreading fire; constructed inadequate walkways which rotted causing a safety hazard and constructed inadequate railings also resulting in a safety hazard.
 - b) The tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others. As set forth above, Heritage constructed the condominiums with little or no regard for the health and safety of the owners/residents of the condominiums. They failed to properly firestop the units and they improperly constructed walkways and railings all in violation of the Standard Building Code. These violations were not just sporadic but were found in practically every building.

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- c) The target of the conduct had financial vulnerability. The condominium units at Magnolia North were sold to many people in South Carolina and without the borders of South Carolina. The potential purchasers were given advertising touting the superior construction of the units while, at the same time, Heritage had knowledge of substantial and continuing construction deficiencies causing rot and water intrusion into the units. As Mr. McCartney, President of the Association Board testified, he put his life's savings into his condominium in Magnolia North. He was assured by Heritage on numerous occasions that the construction deficiencies in the units would be repaired which did not happen.
- d) The conduct involved repeated actions or was an isolated incident. Clearly, the conduct by Heritage was not isolated at or to Magnolia North. Heritage was building other units at the same time that they were building Magnolia North or had completed many units prior to building the units at Magnolia North. Many of these units had the same deficiencies that infected Magnolia North and Heritage was aware of that yet continued to repeat their conduct of building deficient and defective condominium units.
- e) The harm was the result of intentional malice, trickery or deceit rather than mere accident. Although there is little or no evidence of any intentional malice or trickery, there is evidence of deceit in that Heritage knew as indicated above, of the substantial deficiencies in these units yet continued to market them without any proactive program to inform potential purchasers that these substantial deficiencies existed.

II. Disparity between the actual or potential harm suffered by Plaintiff and the amount of punitive damages. The punitive damages award of \$2,000,000 represents less than one third (1/3) of the actual damages. Based upon the recent case of Mitchell vs. Fortis Insurance Company, supra, this award clearly meets constitutional scrutiny.

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III. Comparative Penalty Awards; what the Court has done in similar cases. An analysis of the cases set forth in Mitchell vs. Fortis Insurance Company, *supra*, leaves no doubt that the award of \$2,000,000 in punitive damages comports with due process and constitutional limitations, and the Court so finds. **DEFENDANT'S MOTION IS DENIED ON THESE GROUNDS.**

After its review under the Gamble and Gore factors and considering the recent holding in Mitchell, the Court finds that the punitive damages award was reasonable and comports with constitutional limitations.

The Defendants next contention is that the verdict of \$6,500,000.00 was not supported by the evidence. The Court finds that the evidence was sufficient for the Jury to find a verdict for the Plaintiff of \$6,500,000.00 actual damages. The Jury's verdict was clearly within the two estimates of damages by the Plaintiff and Defendants. See Burghardt v. Cromer, 272 S.C. 159, 249 S.E. 2d 898 (1978). (Where the amount of the verdict falls within the range of the damages testified to, verdict cannot be disturbed on the grounds of excessiveness). **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

The next and final ground for Defendants' post trial motions is there contention that the Plaintiff did not present evidence regarding the existence of similar past conduct because the conduct was not in the past, but was conduct concurrent with the construction of Magnolia North. The Court finds that there was evidence of past similar conduct and the admission of this evidence was proper. **DEFENDANTS' MOTION IS DENIED ON THIS GROUND.**

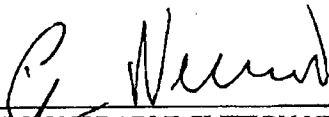
For the reasons hereinabove set forth, the Court respectfully denies Defendants' Post Trial Motions and hereby sustains the Jury's verdict.

9/10

Heritage has also moved for an Order granting Heritage a set-off for money previously paid to the Plaintiffs in the amount of \$1,531,063.15. The Court finds that Heritage is entitled to set-off for the full amount of \$1,531,063.15. Therefore the total verdict of \$8,500,000.00 is set-off by \$1,531,063.15 resulting in a verdict of \$6,968,936.85.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that judgment be entered for Plaintiff against the Defendants in the total sum of \$6,968,936.85.

AND IT IS SO ORDERED.



THE HONORABLE CLIFTON NEWMAN
PRESIDING JUDGE FOR THE 15TH JUDICIAL CIRCUIT

Charleston, South Carolina
November 16, 2009

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

HARLEYSVILLE GROUP INS.

☐ Plaintiff

v.

Heritage Communities, Inc, Magnolia North, Poa,
Inc., Riverwalk At Arrowhead Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-26-11862 & 09-CP-26-10053

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: ROBERT C. CALAMARI, Bar No. Address: PO BOX 1349 MYRTLE BEACH, SC 29578 phone: 843-248-5741 fax: 843-248-6396 e-mail: phenry@thompsonlaw.com other:		Defendant's Attorney: John P. Henry, Bar No. 03053 Address: P.O. Box 1740 CONWAY, S.C. 29578 phone: 843-248-5741 fax: 843-248-6396 e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: ORDER OF REFERENCE Estimated Time Needed: 15 MIN. Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. FILED CLERK OF COURT HARRIS COUNTY OCT 21 PM 3:25 October 18, 2010 Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$50.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: Date:	
CLERK'S VERIFICATION Collected by: Date Filed: ☐ MOTION FEE COLLECTED:			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

HARLEYSVILLE GROUP INSURANCE
GROUP, 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

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

HARLEYSVILLE GROUP INSURANCE
GROUP, A PENNSYLVANIA
CORPORATION

VS.

HERITAGE COMMUNITIES, INC, A
SOUTH CAROLINA CORPORATION;
HERITAGE RIVERWALK, A SOUTH
CAROLINA CORPORATION; BUILD-
STAR CORPORATION, A SOUTH
CAROLINA CORPORATION, RIVER-
WALK AT ARROWHEAD COUNTRY
CLUB HORIZONTAL PROPERTY

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

ORDER OF REFERENCE

CASE NO. 2009-CP-26-10053

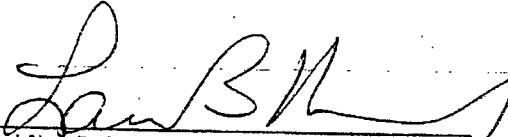
FILED
Horry County
2010 OCT 21 PM 3:25
KELANIE HUGGINS-WARD
CLERK OF COURT

REGIME, RIVERWALK AT ARROW-)
HEAD COUNTRY CLUB PROPERTY)
OWNERS ASSOCIATION, INC., A)
SOUTHCAROLINA CORPORATION,)
NATIONALSURETY 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)

By consent of the parties, and pursuant to provisions of Rule 53, *SCRCP*, the above captioned cases are hereby referred to the Honorable John M. Milling to take testimony and evidence and to issue an order disposing of these actions with finality, all rights to appeal are reserved.

SO ORDERED.


Presiding Judge of the Fifteenth Judicial Circuit

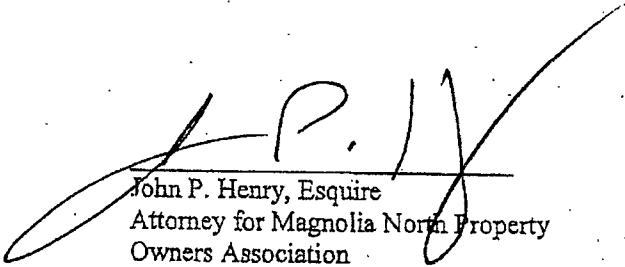
Larry B. Hyman, Jr.
Presiding Judge
15th Judicial Circuit

Conway, South Carolina
10.21, 2010

WE CONSENT:



Robert C. Calamari, Esquire
Attorney for Harleysville Insurance
Group, a Pennsylvania Corporation



John P. Henry, Esquire
Attorney for Magnolia North Property
Owners Association

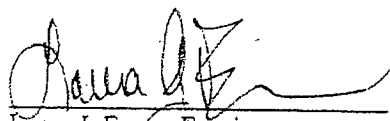
Laura J. Evans, Esquire
Attorney for National Surety Corp.

09-CP-26-11862 & 09-CP-26-10053

WE CONSENT:

Robert C. Calamari, Esquire
Attorney for Harleysville Insurance
Group, a Pennsylvania Corporation

John P. Henry, Esquire
Attorney for Magnolia North Property
Owners Association



Laura J. Evans, Esquire
Attorney for National Surety Corp.

09-CP-26-11862 & 09-CP-26-10053

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

Plaintiff,
VS.)

HERITAGE COMMUNITIES, INC, A)
SOUTH CAROLINA CORPORATION;)
HERITAGE RIVERWALK, A SOUTH)
CAROLINA CORPORATION; BUILD-)
STAR CORPORATION, A SOUTH)
CAROLINA CORPORATION, RIVER-)
WALK AT ARROWHEAD COUNTRY)
CLUB HORIZONTAL PROPERTY)
REGIME, RIVERWALK AT ARROW-)
HEAD COUNTRY CLUB 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)

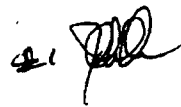
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-26-10053

ORDER

HORRY COUNTY
13 MAR -5 AM 8:58
MELANIE HUGGINS-WARD
CLERK OF COURT

This matter came to be before the Court pursuant to a Motion for Judgment as a Matter of Law and for a Directed Verdict filed by the Plaintiff in this action on September 12, 2012. This Motion is being made pursuant to Rule 50 of the South Carolina Rules of Civil Procedure.

This matter was submitted to the undersigned as Special Referee and was heard non-jury. This Court reads Rule 50 of the South Carolina Rules of Civil Procedure to apply to situations where a jury trial is being held. Inasmuch as this case was heard non-jury, then Rule 50 would



not apply. Further, all of the issues to be presented to the undersigned are set forth in the record, and have been considered by the Court. IT IS, THEREFORE,

ORDERED That the Motion by the Plaintiff for a Judgment as a Matter of Law and for a Directed Verdict, pursuant to Rule 50 of the South Carolina Rules of Civil Procedure be, and the same hereby is denied.

Darlington, South Carolina.

February 21, 2013.



JOHN M. MILLING, Special Referee



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

ORDER

HORRY COUNTY
13 MAR -5 AM 8:58
MELANIE HUGGINS-WARD
CLERK OF COURT

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This matter was submitted to the undersigned as Special Referee and was heard non-jury. This Court reads Rule 50 of the South Carolina Rules of Civil Procedure to apply to situations where a jury trial is being held. Inasmuch as this case was heard non-jury, then Rule 50 would not apply. Further, all of the issues to be presented to the undersigned are set forth in the record, and have been considered by the Court. IT IS, THEREFORE,

#1 

ORDERED That the Motion by the Plaintiff for a Judgment as a Matter of Law and for a Directed Verdict, pursuant to Rule 50 of the South Carolina Rules of Civil Procedure be, and the same hereby is denied.

Darlington, South Carolina.

February 28, 2013.


JOHN M. MILLING, Special Referee

#2 

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-26-10053

HARLEYSVILLE GROUP INSURANCE,)
A PENNSYLVANIA CORPORATION)

VS.)

HERITAGE COMMUNITIES, INC, A)
SOUTH CAROLINA CORPORATION;)
HERITAGE RIVERWALK, A SOUTH)
CAROLINA CORPORATION; BUILD-)
STAR CORPORATION, A SOUTH)
CAROLINA CORPORATION, RIVER-)
WALK AT ARROWHEAD COUNTRY)
CLUB HORIZONTAL PROPERTY)
REGIME, RIVERWALK AT ARROW-)
HEAD COUNTRY CLUB 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)

ORDER

HORRY COUNTY
13 MAR -5 AM 8:58
MELANIE HIGGINS-WARD
CLERK OF COURT

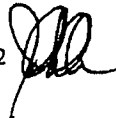
This is a declaratory judgment action to determine coverage under Commercial General Liability ("CGL") policies issued by the Plaintiff, Harleysville Group Insurance, a Pennsylvania Corporation ("Harleysville"). This Order addresses insurance coverage *in re* a construction defects action by the Riverwalk Property Owners Association, Inc. and a companion class action designated as the Pope Class Action. Because of the common parties, issues and policies, the Riverwalk actions were consolidated with the *Magnolia North Property Owners Association v.*

1 

Heritage Communities, et al. case for which a separate order will be issued. These cases were 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 these actions, with finality, with all rights to appeal reserved.

Although the judgments in the underlying cases are under appeal and have not finally concluded, there is a justiciable controversy and these cases are ripe. Auto-Owners Ins. Co. 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 holders" in this action stand 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 and now of Nelson Mullins Riley and Scarborough; the "judgment holders", Riverwalk at Arrowhead Country Club Property Owners Association 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 represented by John P. Henry, Esquire, and Philip C. Thompson, Esquire, of the firm of Thompson & Henry, P.A.; National Surety Corp. is represented by Laura Johnson Evans of the firm of Smith Moore Leatherwood, LLP and Karin McCarthy of the firm of Rivkin Radler, Attorneys at Law, of New York. Issues relating to National Surety are being addressed in a separate Order. "Harleysville's insureds", Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation did

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not answer or otherwise appear in this declaratory judgment action, although properly served. The Plaintiffs 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 judgment holders.

THE "UNDERLYING ACTIONS"

The first underlying action is styled Riverwalk at Arrowhead Country Club Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Riverwalk, Inc., and Buildstar Corporation (C/A No. 2003-CP-26-7169) ("Riverwalk POA action") filed on December 5, 2003. The second underlying action, a putative class action is styled Pope et. al. v. Heritage Communities, Inc., Heritage Riverwalk and Buildstar Corporation (C/A No. 2005-CP-26-3289) ("Pope class action") was filed on June 23, 2005. The Riverwalk POA action and the Pope class action were consolidated for trial. On January 15, 2009 the Riverwalk POA jury returned a general verdict against Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation on negligence and breach of fiduciary duty in the amount of \$4,250,000.00 actual damages and punitive damages in the amount of \$250,000.000. (Rec. Ex. 25). In the Pope class action, the jury returned a general verdict against the same insureds on breach of warranty of habitability and negligence in the amount of \$250,000.00 actual damages and \$750,000.00 punitive damages. (Rec. Ex. 26).¹

The Plaintiffs in the underlying actions all alleged and sought damages for faulty construction and consequential damages from water intrusion arising out of the construction and development of the condominiums. The Pope class sought damages for anticipated loss of use of

¹ A set-off of \$1,028,821.69 from the total of the two verdicts of \$5,500,000.00 was granted by the trial judge in his post trial motion order making the total verdict \$4,471,178.31 as of April 10, 2009.

the condominiums during repair. The allegations in the underlying actions were substantially the same. (Complaints, Rec. Ex. 9).

Prior to the jury trial the underlying Plaintiffs settled with numerous subcontractors. It is not contested that all of the construction at Riverwalk was done by subcontractors. Buildstar, the general contractor, oversaw the construction by the subcontractors at Riverwalk.

THE PROJECTS

The Riverwalk condominium project is located near Myrtle Beach, South Carolina. Harleysville's insureds developed, constructed, and sold the Riverwalk condominium units. The Riverwalk condominium project consists of 19 wood framed three-story structures with four units per floor for a total of 228 units. The Riverwalk buildings were constructed beginning in 1997 and completed in or about the end of 2000. Heritage Communities, Inc. was the overall developer; Heritage Riverwalk, Inc. was the site specific developer that owned the land and conveyed the individual condominium units; and Buildstar Corporation was the general contractor.

THE HARLEYSVILLE POLICIES

Harleysville issued numerous CGL primary policies and excess policies to the Harleysville insureds and a list of those policies with policy periods, policy amounts and the remaining amounts left on the policies has been marked as Rec. Ex. 17. Although there were numerous policies, all of the policies were standard 1996 ISO (Insurance Service Organization) CGL (Commercial General Liability) policies with the same pertinent language in each policy. (Rec. Ex. 12).

The primary policies issued by Harleysville to its insureds contain the standard ISO insuring agreement as follows:

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1. "Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
- (2) Our right and duty to defend will end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

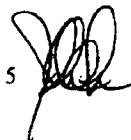
No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES AND B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The 'bodily injury' or 'property damage' is caused by an occurrence" that takes place in the "coverage territory"; and
- (2) The 'bodily injury' or 'property damage' occurs during the policy period."

All of the policies define "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Both the primary and excess policies provided completed operations coverage.

Harleysville also issued Commercial Umbrella Liability policies with substantially the same insuring agreement as the primary policy:

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1. "INSURING AGREEMENT

We will pay on behalf of the insured the "ultimate net loss" in excess of the "applicable underlying limit" which the insured becomes legally obligated to pay as damages because of:

- "a. 'Bodily injury' or 'property damage' covered by this policy and caused by an 'occurrence' which occurs during the policy period; or
- b. 'personal injury' or 'advertising injury' covered by this policy and caused by an 'offense' committed during the policy period.

This insurance applies anywhere in the world."

All of the excess policies also define "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The Exclusions in each of the Harleysville policies are the same.

FINDINGS OF FACTS²

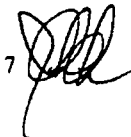
Based on the record before the Court, the Court makes the following findings of facts applicable to the underlying actions:

1. Riverwalk at Arrowhead Country Club Property Owners Association, Inc.
is a South Carolina Corporation which governs the Riverwalk condominiums in accordance with the South Carolina Horizontal Property Act.
2. The Pope Class Action was brought on behalf of all owners in the Riverwalk Horizontal Property Regime and the class sought loss of use damages. (Rec. Ex. 4).

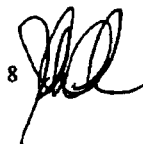
² Reference to the record is not to be considered all inclusive.

6 

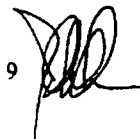
3. The Plaintiffs in the Riverwalk POA action sought compensation both for faulty workmanship and for negligent construction resulting in damage to other property from continuous and repeated water intrusion. (Rec. Ex. 4).
4. The Riverwalk Class sought loss of use damages resulting from the loss of the ability to use their condominiums as a result of their closure made necessary for repairs of the faulty construction and the resulting damages from continuous and repeated water intrusion. (Rec. Ex. 4).
5. The Harleysville insureds who were defendants in the Riverwalk POA action and Pope Class Action were Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation. Heritage Communities, Inc. was the overall developer but did not own the property upon which the condominiums were built. Heritage Riverwalk, Inc., was the site specific developer and owned the land upon which the Riverwalk condominiums were built and conveyed the condominium units to the individual owners. Buildstar Corporation was the general contractor which oversaw the subcontractors. The trial Court amalgamated the Harleysville insureds. (Rec. Tr. pp. 1640-41).
6. The buildings at Riverwalk are 19 multi-story buildings containing 228 condominiums.
7. In the Riverwalk project, the first building permit was issued June 30, 1997 and the last Certificate of Occupancy was issued December 30, 1999. (Rec. Ex. 5.)
8. Buildstar Corporation did not provide any construction. The construction was all performed by subcontractors. (Rec. Ex. 1, p. 1110).



9. Complete copies of all the policies issued by Harleysville to the Harleysville insureds are included in Rec. Ex. 12. A listing of the policies with the policy periods, face amount of the policies and amounts of available coverage remaining on each of the policies is set forth on Rec. Ex. 17.
10. The Harleysville CGL policies were basically the same policies for both primary and excess coverage and prototype forms are included in Lee Wright's deposition as Rec. Ex. 19.
11. The Harleysville policies listed on Rec. Ex. 17 provide sufficient coverage to indemnify the Harleysville insureds for the judgments rendered in the underlying actions should the Court find coverage, and, thus, the National Surety Corp. policies would not be triggered.
12. There are no endorsements to any of the Harleysville policies that would adversely affect coverage issues in this action. (Rec. Ex. 11, p. 12243).
13. For each building at Riverwalk, the construction began shortly after the building permit was issued and the buildings were completed at or about the time the Certificates of Occupancy were issued.
14. Harleysville insureds expected their subs to be reliable and skilled in their trade and did not expect their subcontractors to perform negligently. (Rec. Ex. 11, p. 954).
15. Harleysville Insureds relied on the skill of their subcontractors and expected and intended them to perform their work in a competent manner. (Rec. Ex. 11, p. 954).

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16. Heritage intended their buildings to be quality condominiums. (Rec. Ex. 11, p. 951).
17. There were numerous deficiencies in the subcontractor's work including but not limited to: 1) inappropriate installation of flashing or omission of flashing; 2) inappropriate application of sealants or omission of sealants; 3) installation of defective windows some of which leaked; 4) installation of a trim product that turned out to be defective allowing water intrusion; 5) inappropriate attachment of handrails which attachments (screws) accidentally penetrated the waterproofing on the decks at some locations allowing water intrusion and damage. All of these deficiencies allowed for continuous moisture intrusion resulting in substantial water damage to the condominiums exterior framing and sheathing which was previously undamaged. (Rec. Ex. 5, Buric Report).
18. The continuous moisture intrusion from the faulty workmanship also damaged the interior of the units including sheetrock, drapes and carpeting. (Rec. Ex. 5, Buric Report; Rec. Hearing pp. 13963-67).
19. The county inspected the buildings' components including the sheathing and issued a Certificate of Occupancy which required all the building components to meet code. (Rec. Ex. 1, pp. 1188-89).
20. The record contains no evidence that the sheathing, framing, insulation and interior finishes were defective when they were damaged by water seeping into the buildings and units.
21. The repair of the damage from water intrusion will require the removal and replacement of defective and non-defective building components.

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22. Progressive damages from water intrusion began to occur at each building thirty (30) days from the time the Certificate of Occupancy was issued and continued thereafter. (Rec. Hearing 12/09/11, p. 13986).
23. Some of the deficiencies were latent defects. (Rec. Ex. 5, Buric Report).
24. Not all buildings had the same defects or quantities of defects.
25. The Louisiana Pacific trim problems were discovered by a painter after the condominiums were turned over to the Homeowners Association. (Rec. Ex. 1, p. 0474).
26. There is no evidence in the record to indicate the Harleystown insureds realized that the Louisiana Pacific trim was a defective product. The defective and improperly installed trim allowed water intrusion which caused damage to other property. (Rec. Ex. 5, Buric Report; Rec. Ex. 1, p. 1114).
27. The Harleystown insureds neither expected nor intended that the work of the subcontractors be performed negligently nor did they expect or intend water intrusion or damage from the negligent construction.
28. The Harleystown insureds did not expect or intend that a defective product be installed on the buildings such as the Louisiana Pacific trim and did not expect or intend there to be water intrusion and damage from the defective product. (Rec. Ex. 1, pp. 951, 954).
29. The Harleystown insureds did not expect or intend the subcontractors to install defective windows in the buildings. Harleystown insureds intended its subcontractors to install non-defective windows and changed window manufacturers in an attempt to accomplish this. (Rec. Ex. 1, pp. 951, 954).

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30. The Harleysville insureds did not expect or intend that the walkway railings would be installed by its subcontractors so as to cause a breach of the waterproofing membrane exposing the framing, sheathing and units to continuous and repeated exposure to water intrusion and rot. (Rec. Ex. 1, pp. 951, 954).
31. The Harleysville insureds did not expect or intend the continuous and repeated water intrusion and deterioration of the buildings due to the negligent construction or the application of defective windows and Louisiana Pacific Trim installed by the subcontractors. (Rec. Ex. 1, pp. 951, 954).
32. Some of the construction defects were latent defects and the record does not provide any evidence that the Harleysville insureds were even aware of some of the defects or that some of the defects were exposing the buildings to continuous and repeated water intrusion causing rot and deterioration of the buildings.
33. The Harleysville insureds did not expect or intend the negligent installation of or omission of building components by its subcontractors or expect or intend the buildings would be exposed to repeated and continuous moisture intrusion causing property damage. (Rec. Ex. 1, pp. 951, 954).
34. The Harleysville insureds expected the condominiums to meet the performance criteria of the warranty manual. (Rec. Ex. 1, p. 951).
35. Viewing the evidence from the standpoint of the insureds, the continuous moisture intrusion into the condominium buildings and resulting damage was an unexpected happening or event not intended by the Harleysville insureds, in

other words an "accident" involving continuous or repeated exposure to the same general harmful conditions. (Rec. Ex. 1, pp. 951, 954).

36. Harleysville issued reservation of rights letters to some of its insureds.
37. Harleysville evidently inadvertently omitted issuing a reservation of rights letter to the Harleysville insureds in connection with the Pope Class Action in the underlying action and, thus, such letter was not a part of Exhibit 15.
38. Harleysville employed defense counsel for the Harleysville insureds and controlled the defense of the insureds in the underlying action. (Rec. Hearing 12/13/10, p. 186).
39. Harleysville's Reservation of Rights letters were general in nature and simply set out the provisions of the policies Harleysville thought may affect coverage. Coverage was questioned but not denied. (Rec. Ex. 15, Rec. pp. 1386-87).
40. The Reservation of Rights letters did not advise Harleysville's insureds of the conflict of interest or the need for an allocated verdict. (Rec. Ex. 15).
41. Harleysville orally advised the insureds that there was no coverage because the claims did not meet the definition of "occurrence" as opposed to coverage being excluded by one of the policy exclusions. (Rec. Hearing 12/13/10, pp. 13829-31).
42. After the reservation of rights letters were sent, Harleysville never modified them but continued advising their insureds there appeared to be no coverage because there was no "occurrence" (Rec. Hearing 12/13/10, pp. 13758 & 13829).



43. Harleysville advised its insureds that if Harleysville intervened it would "create" a conflict of interest so they would wait until after the verdict to litigate coverage. (Rec. Hearing 12/13/10, p. 13829).
44. Harleysville did not detail to its insureds which exclusion if any would preclude coverage because Harleysville did not believe there was an "occurrence" so there was no need to discuss exclusions. (Rec. Hearing 12/13/10 pp. 13829-31).
45. Harleysville advised the insureds and its personal counsel that there was likely not going to be coverage for a "grand majority" of these damages. (Rec. Hearing 12/13/10, p. 13758).
46. Harleysville advised its insureds that the decision on coverage would be made after the verdict. (Rec. Hearing 12/13/10, p. 13832).
47. Harleysville's representatives including Harleysville's personal counsel attended the trial of the underlying action and discussed the progress of the case with defense counsel. (Rec. Hearing 12/13/10, p. 13836)
48. Harleysville was aware of the coverage issues but, based on its understanding of the law and the facts, chose not to discuss the need for an allocated verdict with its insureds and the consequences that an unallocated verdict may cause. (Rec. Hearing 12/13/10, p. 13835).
49. Harleysville made a conscious decision not to intervene in the underlying action and took no action to seek an allocated verdict by informing the trial Court of the need for an allocated verdict or by submitting special interrogatories for the Court's consideration for submission to the jury. (Rec. Hearing 12/13/10, pp. 13829, 13835, 13856).

LEGAL ISSUES TO BE RESOLVED

In this declaratory judgment action the court has before it for resolution the following issues:

1. The threshold question to be resolved is: was there an "occurrence(s)" with resulting "property damage" that occurred during the policy period and triggered coverage under the Harleysville policies?
2. If there was an "occurrence(s)" causing "property damage" that triggered coverage, do any of the exclusions advanced by Harleysville preclude indemnification of the Harleysville insureds?
3. In these two actions the jury reached general verdicts after submission to them of more than one cause of action and numerous claims. If the Court determines that covered claims and non-covered claims were submitted to the jury, can the Court look behind the general verdicts and attempt an allocation of damages between covered and non-covered claims?
4. Is it possible for the Court to perform a "time on the risk" analysis or do the general verdicts preclude such an analysis?
5. Is the award of punitive damages in each of the underlying actions covered and not excluded by the Harleysville policies?
6. Did Harleysville reserve its rights to contest coverage?

DISCUSSIONS AND FINDINGS OF LAW

OCCURRENCE.

Harleysville argues that the judgments in the underlying actions are not covered by their CGL policy. Specifically, Harleysville argues that the subcontractor's negligent application of

building components did not cause an "accident" constituting an "occurrence" subject to coverage under the policy. As in Newman, infra, and Crossmann, infra, the Harleysville policies are standard CGL Insurance Services Office (ISO) policies used since 1996. (Rec. Ex.'s 12 and 19). These policies provide that Harleysville will "pay those sums which the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies". The policy also requires that the "bodily injury" or "property damage" be caused by an "occurrence". It defines "occurrence" as an "accident" "including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" is defined as "physical injury to tangible property including all resulting loss of use of that property." The policy does not define "accident".

The pleadings below alleged both negligent construction and use of defective products and alleged damage to parts of the buildings caused by water seeping into the buildings as the result of the negligent construction. (Rec. Ex. 4). The complaint was not simply a claim for faulty workmanship seeking damages for the repair and replacement of defective construction itself, but rather was as claim for "property damage" resulting from the negligent construction. The Court finds that the underlying Complaint properly alleged negligent construction that resulted in an "occurrence" rather than an occurrence of alleged negligent construction. Here, the record reveals there was "property damage" beyond that of the work product itself caused by a subcontractor and therefore I find that the homeowners' claims are not merely for faulty workmanship typically excluded under a CGL policy.³

The two recent cases of Auto Owners v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), ("Newman"), and Crossmann Communities of North Carolina, Inc. v. Beazer Homes Investment

³ According to the testimony of the experts hired by the POA and Harleysville insureds, the subcontractors' application of flashing, sealants, windows, decks and trim did not meet code or industry standards and resulted in water seeping into the buildings causing rot and deterioration of building components.

Corp., et al., 395 S.C. 40, 717 S.E.2d 589 (2011), ("Crossmann"), resolved the long standing and much litigated issue of what constitutes an "occurrence" that would trigger coverage in the context of construction defect litigation under the 1996 ISO CGL policy. The Court in Crossmann held that the expanded definition of "occurrence" to include "continuous or repeated exposure to substantially the same general harmful conditions" leaves the Court with an ambiguity which must be construed against the insurer and in favor of the insured. As in Crossmann, this Court finds that there were allegations of negligent construction causing continuous and repeated exposure to moisture intrusion resulting in "property damage" as defined by the Harleysville policy. Although the subcontractors' negligence in installing the various components of the building does not on its own constitute an "occurrence", the Court finds that the continuous moisture intrusion resulting from the subcontractors' negligence is an "occurrence" and is "property damage" as those terms are defined by the Harleysville policies.⁴ As the Court will discuss below, I find that the continuous moisture intrusion into the condominium buildings was an "unexpected happening or event" not intended by the Harleysville insureds, in other words "an accident" – involving "continuous or repeated exposure to substantially the same general harmful conditions." Accordingly, I find that the subcontractors' negligence resulted in an "occurrence" falling within the Harleysville policies' initial grant of coverage for the resulting "property damage" to the non-defective sheathing, insulation, framing, interior finishes and other non defective building components of the condominiums, unless excluded as discussed below. Newman, Crossmann.

The Court in Crossmann analyzed the coverage issue not only from the "occurrence" standpoint as it did in Newman, but also from the standpoint of "property damage" as that term is

⁴ High Country Associates v. New Hampshire Ins. Co., 139 N.H. 39, 648 A. 2d 474 (1994)("Occurrence has a broader meaning than 'accident' because occurrence includes an injurious exposure to continuing conditions as well as a discreet event." Citation Omitted). Id. at p. 44.

defined in the policy. The Court said that the term "property damage" required "physical injury" which suggests that the property was not defective at the outset. Therefore, the Crossmann Court held that a claim for the costs of repairing or removing defective work, which is not a claim for "property damage" is not covered by the CGL policy while a claim for the costs of repairing damage caused by the defective work is a claim for "property damage" which may be covered by the CGL policy, unless excluded.⁵

Harleysville contends that because of the numerous and repeated defects in this project, there was no "accident" and coverage is precluded. Harleysville does not define "accident" in its policy. Our Court has, however, defined "accident" as "[a]n unexpected happening or event which occurs by chance, and usually suddenly with harmful results, not intended or designed by the person suffering the harm or hurt." Newman, Id. at p. 192. [*Emphasis supplied*]. Our Courts have made it clear that an accident does not require a sudden happening. Boggs v. Aetna Cas. & Surety Co., 272 S.C. 460, 252 S.E.2d 565 (1979) ("The phrase "injurious exposure to conditions" incorporated in the policy definition of "occurrence" indicates that an occurrence need not be sudden but may be produced over a period of time").

From the evidence presented, the Court finds that the continuous moisture intrusion into the Riverwalk buildings was an unexpected happening or event causing "property damage", in other words an "accident"- involving "continuous or repeated exposure to substantially the same harmful conditions" which triggered coverage under the Harleysville policies.

Based on the record, I find that the non-defective building components damaged by the continuous and repeated water intrusion constitutes "property damage" which was caused by an "occurrence" and falls within the initial grant of coverage under the Harleysville policies. I

⁵ The Court in Crossmann did not discuss exclusions since the parties stipulated that policy exclusions would not be raised.

further find that the negligently installed building components themselves would fall outside the grant of coverage by the Harleysville policies. Also, I find that the costs to remove defective building components to access the water damage would not be covered under the Harleysville policies. However, as discussed below, since there were covered claims and non-covered claims submitted to the jury and a general verdict was rendered, Harleysville must indemnify its insureds for the full amount of the final judgments reduced by "time-on-the-risk" analysis as discussed, *infra*, unless the court finds that the covered claims are excluded.

EXCLUSIONS

Insurance policy exclusions are construed most strongly against the insurance company, which also has the burden of establishing the exclusion's applicability. Owners Insurance Co., v. Clayton, 364 SC 555, 614 S.E.2d 611 (2005). Since the jury in the underlying action returned a general verdict, a finding that a claim submitted to the jury is covered and not excluded answers the coverage question, *i.e.*, the entire verdict is covered. Owners, supra. (Discussed *infra*).

Harleysville through its answers to interrogatories (Rec. Ex. 14), its pre-trial brief, and through the testimony of Lee Wright, Harleysville's construction litigation specialist, advances a number of policy exclusions it contends apply to exclude coverage. The following are exclusions advanced by Harleysville which will be discussed below:⁶

Exclusion "a" Expected or Intended Injury;

Exclusion "J-1" Property Damage to Property You Own, Rent or Occupy;

Exclusion "J-5" Performing Operations;

Exclusion "J-6" Your Work Incorrectly Performed;

Exclusion "k" Damage to Your Product;

Exclusion "m" Impaired Property.

⁶ The numbering or lettering of the exclusions may vary among the various policies.

A. Exclusion "a"- Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured.⁷ This exclusion does not apply to the "bodily injury" resulting from the use of reasonable force to protect persons or property.

As noted above, the Harleysville insureds did not perform any of the construction. Their function was to oversee the subcontractors that were performing the construction. In Newman, the homeowner sued the contractor ("Trinity") alleging that the application of stucco to their home violated the building code and industry standards and these anomalies caused water to seep into the home and damage the home's exterior sheathing and framing. The stucco work was done by a subcontractor and the alleged defects were similar or identical to the defective work alleged in the underlying case here. Auto Owners claimed that the "expected or intended" exclusion precluded coverage because "a construction professional would expect substantial moisture intrusion from defective stucco to result in these type damages." *Id.* at p. 197. In rejecting this contention, the court stated:

"In our opinion, and in the absence of any evidence otherwise, it is unreasonable to believe that Trinity expected or intended its subcontractor to perform negligently. Therefore Trinity could not have expected or intended the resulting property damage. CF. Lamar Homes v. Mid-Continent Cas. Co., 242 SW3d 1, 8 (Tx. 2007)('But a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly') *Id.* at p. 197.

The Court then must examine the record to determine if the Harleysville insureds "expected or intended" its subcontractors to perform negligently and expected or intended the resulting property damage.

⁷ Note that the exclusion expressly provides that it is the injury or damage which must not be intended.

South Carolina applies a two pronged subjective test in determining the applicability of this exclusion. First, the act causing the damage must be expected or intended by the insured and second, the resulting damage must be expected or intended from the standpoint of the insured. Vermont Mutual Insurance Co., v. Singleton By and Through Singleton, 316 S.C. 5, 446 S.E.2d 417 (1994); Manufacturers and Merchants Mutual Inc. Co. v. Harvey, 330 S.C. 152 498 S.E.2d 222 (S.C. App. 1998). In South Carolina Farm Bureau Mut. Ins. Co. v. Dawsey, 371 S.C. 353 638 S.E.2d 103 (S.C. App. 2006)(Certiorari Denied), the Court pointed out that the terms "intend" and "expect" are often defined synonymously.

The question then before the Court is did Harleysville's insureds not only expect or intend their subcontractor to perform negligently which caused the damage complained of, but did they also expect or intend the resulting damages to the condominiums? Harleysville's construction litigation manager, Lee Wright, explained the proof he believed necessary for exclusion "a" to be applicable:

"On the, on, on the exclusion, you have to prove that – well, intent is, is, difficult to prove in any, in any sense. It's a more subjective argument, that you'd have to climb inside somebody's head and prove that, you know, that there is a reason to believe that they either expected or intended or intended this."⁸
(Rec. p. 1372, ll 6-19).

Mr. Wright also testified that he had no evidence that the insureds "consciously intended to create a situation that water damage would occur, I don't have that." (Rec. Tr. p. 13839). The record is replete with numerous deficiencies that were repeated but this is tempered by the fact that there were 19 buildings and 228 units. However, for exclusion "a" to apply there must be evidence viewed from the standpoint of the insured that the insured subjectively intended its subcontractors to perform negligently and subjectively intended the resulting damages. The

⁸ This is clearly in accord with South Carolina law.

evidence in this record does not support such a finding. In neither the underlying actions nor this action was Roger Van Wie called as a witness. Mr. Van Wie, a principal in all the insureds, was intimately involved in the construction. However, officers of the Harleysville insureds were called to testify in the underlying action..

Gwyn Hardister, Chief Operating Officer of Heritage Communities, Inc., the overall developer, testified in the Riverwalk cases. Mr. Hardister testified that Heritage did not knowingly put defective condominiums into the stream of commerce. (Rec. Tr. pp. 943-44). Further, Heritage had the expectation that their subcontractors would be reliable and skilled in their trade. (Rec. Tr. p. 957). He also testified that they were addressing construction concerns and were not knowingly putting defective condominiums in the marketplace. "There was nothing done intentionally or maliciously." (Rec. Tr. p. 957). Lynn Anderson, President of Buildstar, Corp., the general contractor, also testified. Mrs. Anderson testified that Buildstar was strictly management and they relied on their subcontractors. (Rec. Tr. p. 1110).

Harleysville emphasizes the leaking window issues as negating the existence of an accident. During construction Heritage claimed the Betterbilt windows were defective and leaked. Betterbilt claimed the method of installation caused the leaks. James Graham, a Betterbilt representative, testified by deposition (Rec. Ex. 24) that he warned Heritage they were installing the windows in a defective manner. The subcontractor continued installing the windows the same way because Harleysville insureds believed the window itself was defective and the source of the leaking and changed to another manufacturer. This was clearly a dispute between the builder and the manufacturer as to the source of the problem. Post construction tests revealed that leaks occurred both from defective windows and the method of installation. City of Johnstown, N.Y. v. Bankers Standard Ins. Co., 877 Fed.2d., 1146, 1150, 1151 (2nd Cir.

N.Y. 1989)(It is not enough that an insured was warned that damages might ensue from its actions or that an insured decided to take a calculated risk. It is only when the insured knew that damages would flow from his acts that coverage is precluded because the damages are not accidental). It is clear from the record that Heritage was attempting to find the source of the leaks and stop them.

The record reveals defects and installation of defective products with no proof showing that the Heritage insureds were even aware of, such as the defective Louisiana Pacific trim which caused extensive damages to the buildings.⁹ The fact that there were numerous defects is not determinative. It is the intent, not the foreseeability that determines the application of exclusion "a". Continental Western Ins. Co. v. Toal, 309 Minn. 169 244 N.W.2d 121 (Minn. 1976)(defining expected injury as a foreseeable injury would have the effect of unduly limiting coverage because foreseeability is an essential element of negligence and therefore would exclude injuries even from simple negligence). This "foreseeability" test was rejected in Newman and the Court will not apply it here.

Harleysville contends that the award of punitive damages is strong evidence that their insureds intended to cause damages. This same position was advanced by the insurance company in Pennsylvania Thresherman & Farmer's Mutual Casualty Ins. Co. v. Thornton, 244 F.2d 823 (C.A. 4 1957).¹⁰ Applying South Carolina law, the court rejected the carrier's position holding that:

"Negligent conduct may be so gross so as to merit characterization as willful and wanton in the sense of the rule for punitive damages, yet fall far short of an assault and battery which would distinguish it from an accidental event and withdraw it from the coverage of the policy...to

⁹ Acceptance Ins. Co. v. American Safety Risk Retention Group, Inc., 2011 WL 3475305 (S.D. Cal. 2011)(In determining what the knowledge of the insured was, construction defects must be analyzed separately).

¹⁰ This case is cited in Carroway v. Johnson, *supra*.

allow the appellant's argument would lead to the illogical and indefensible result that....the more extreme the recklessness the more likely the insurer would be to escape liability." *Id.* at p. 827.

The Court went on to hold that no matter how reckless the respondent's conduct, there was nothing in the record to establish the insured intended to injure the plaintiff. Likewise in the case at bar there is nothing in the record that indicates the insureds intended to injure the plaintiffs or intended its subcontractors to perform negligently.

In addition, two causes of action were submitted to the jury, negligence and breach of fiduciary duty, both of which would support punitive damages. Unfortunately, Harleysville chose not to attempt to intervene and special interrogatories were not submitted to determine the basis upon which the jury awarded exemplary damages. The Court cannot now speculate. The Court would also note that a finding of intent to harm is not required for an award of punitive damages. Anderson v. Atlantic Coast Line R. Co., 179 S.C. 367, 184 S.E. 164 (1936)(to authorize recovery of punitive damages, an intentional act with a purpose to do wrong to a person is not necessary; reckless disregard of the rights of others is sufficient to authorize such damages. It is not necessary for punitive damages that the Defendant had a specific intent to injure Plaintiff); Hicks v. McCandlish, 221 S.C. 410, 70 S.E.2d 629 (1952)(punitive damages allowed when wrongdoer does not actually realize that he is invading the rights of another). The Court finds this argument unpersuasive. ¹¹

This Court finds as a matter of law that there is insufficient evidence to conclude that the Harleysville insureds expected or intended their subcontractors to perform negligently and expected or intended the property damage that resulted from the negligent construction. The

¹¹ American Family Mutual Inc. Co. v. Pacchetti, 808 SW2d. 369 (Mo. 1991)(Finding that insured acted recklessly does not compel a finding that injury was intentional. If coverage were to turn on jury's finding whether insured acted negligently or recklessly, insurance would be of scant value); Koch Engineering Co., Inc. Gilbralter Cas. Co., Inc., 78 F. 3rd 1291 (C.A. 8 Mo. 1996)(Finding recklessness is not the equivalent of a finding that insured intended the conduct. This case involved a failure to properly design a filtration system).

Court finds as a matter of law Harleysville did not meet its burden of proof that exclusion "a" precludes coverage.

B. Exclusion "J-1" – Property You Own, Rent or Occupy

This exclusion is intended to carve out coverage that would normally be afforded under a property policy. Bruner & O'Connor Construction Law 11:96 (2010); C.O. Falter, Inc. v. Crum and Forster Ins. Companies, 79 Misc. 2d 981, 361 N.Y.S. 2d 968 (N.Y. Sup. 1974)(this exclusion did not preclude coverage where insured contractor relinquished key to building upon completion of work); Mid-Continent Cas. Co. v. JPH Development, Inc., 557 F.3d 207 (5th Cir. Tex. 2009). (Exclusion "J" does not apply to damage that occurs after construction is completed).

In a 1979 publication by the Insurance Services Office (ISO), the drafter of exclusion "J", explained the ISO's intent for this exclusion as follows:

"It is intended that property manufactured or purchased by the insureds and constructed or installed at premises not owned by the insured shall be considered property owned by the insured until the construction or installation is accepted by the owner. (Insurance Services Office, Inc., Circular No. General Liability GL 79-12, (Broad form property damage coverage explained) January 29, 1979).
[Emphasis Supplied].

Although it is apparent that some damage from water intrusion (although unspecified) may have begun while construction was being performed, it is also clear damages were occurring after the units were completed and conveyed to the owners. There is no quantification of these damages in the record, nor can there be since there was a general verdict and Harleysville did not seek an allocation of damages. The Court finds as a matter of law that the evidence does not support the application of exclusion "J(1)" and even if it did, the



exclusion would be a partial exclusion and thus would not aid Harleystown because of the general verdict. Owners, supra.

C. Exclusion "J(5)"

That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations if the "property damage" arises out of those operations.

This exclusion, known as the "Performing Operations Exclusion" only applies to the work that is being actively worked on at the instant the property damage occurs. Assurance Co. of America v. Admiral Ins. Co., 2011 WL 1897589, (S.D. Ala. 2011)(Exclusion "J(5)" applies only to the property damage that occurs while the contractor and/or subcontractor is performing work); Thomas v. Nautilus Ins. Co., 2011 WL 4369519 (D. Mon. 2011)(This "J(5)" exclusion only applies to bar coverage to property on which the insured or any subcontractors "are performing operations").

Again, there is no quantification of damages occurring during the time Buildstar's subcontractors were performing work ("Operations") at the projects. Even if there were such proof it would exclude only a portion, if any, of the damages which would not aid Harleystown because of the general verdict. I find as a matter of law, that Harleystown has not met its burden of proof that exclusion "J(5)" applies to exclude coverage of the judgments in underlying actions.

D. Exclusion "J(6)"

That particular part of any property that must be restored, repaired or replaced because of "your work" was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to the "property damage" included in the products completed operations hazard.

This exclusion is one of the "business risk" exclusions and may apply to exclude Plaintiff's claims except for the last paragraph providing that "J(6)" does not apply to property included in the products completed operations hazard.¹²

The Harleysville policies provide completed operations hazard coverage. Since the Harleysville Insureds had completed operations hazard coverage, exclusion "J(6)" cannot apply to damage occurring after the insureds work is completed. Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002); Exclusion "J6" applies to damages that occur during construction due to faulty workmanship. Mid-Continent Cas. Co. v. JPH Development, Inc., *supra*.

Harleysville has failed to discharge its burden of proof as to this exclusion's applicability and I find as a matter of law Exclusion "J(6)" does not apply.

E. Exclusion "k" - Damage to Your Product

"Property damage to "your product" arising out of it or any part of it".

This exclusion cannot apply because the policy defines "your product" as "a. any goods or products other than real property manufactured, sold and/or distributed or disposed of by you..." Since "your product" does not include real property, the exclusion cannot apply to the condominiums at Riverwalk. In addition, "goods or products" do not include services, such as the work of contractors and developers. Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 654 (9th Cir. Or. 1988); Scottsdale Ins. Co. v. Tri-State Ins. Co. of MN., 302 F. Supp. 2d. 1100 (D.N.D 2004)("Real Property" was deleted from the definition of "Product"

¹² The policies define "Products-Completed Operations Hazard" "a. Includes all...property damage occurring away from the premises you own or rent and arising out of...'your work' except;...(2) work that has not been completed or abandoned.

in the 1996 CGL policy "clarifying that work on homes, buildings, or other structures is not considered to be the insured's "product") [citation omitted]. The Court concludes as a matter of law that exclusion "k" does not apply.

F. Exclusion "m" - Damage to Impaired Property or Property not Physically Injured

"Property Damage" to "impaired property" or property that has not been physically injured arising out of:

- (1) a defect, deficiency, inadequacy or dangerous condition in "your product" or "your work; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of a sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

"Impaired property" means tangible property, other than "your product" or your work, that cannot be used or is less useful because:

- a. It incorporates "your product" or your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;
 - if such property can be restored to use by:
 - a. The repair, replacement, adjustment or removal of "your product" or your work; or
 - b. Your fulfilling the terms of the contract or agreement.

[Emphasis Supplied.]

This exclusion is commonly called the "impaired property" exclusion. Our courts have not addressed the impaired property exclusion under the facts and circumstances present in this action. The exclusion contains numerous terms that are defined in the CGL policies and the policy definitions must be applied when determining the applicability of exclusion "m". The



exclusion is complex and difficult to understand. It has been found to be ambiguous. Serigne v. Wildey, 612 So.2d 155 (LA. App. 5th Cir. 1992).

In broad terms, the "impaired property" exclusion is tailored for loss of use damages. If the loss involves damage by work performed by the insured or its subcontractors (and, thus falls outside of the definition of "impaired property") or involves physical injury to tangible property, the exclusion will often be found not to apply..." *Bruner & O'Connor Construction Law*, Sec. 11:106, p. 4. The definition of "impaired property" requires that the tangible property whose use has been lost cannot be "your product" or "your work". Thus damage to "your product" or "your work" cannot qualify. *Insurance Coverage of Construction Disputes*, 2nd Edition, Sec. 26:7.

In these cases, the condominiums are not "impaired property" because they are the work of the Harleysville insureds and are therefore "your work" which falls outside of the policy definition of "impaired property". Therefore, exclusion "m" cannot apply. C.J.S.U.B., Inc. v. U.S. Fire Ins. Co., 906 So.2d 303, 311 (Fla. App. 2 Dist. 2005)("impaired property" exclusion does not apply because defective homes are undeniably the builder's work as "your work" is defined in the C.G.L. policy.")(Decision approved 979 So.2d 871 (Fla. 2007); Auto Owners Ins. Co. v. NewMech Companies, Inc., 78 N.W.2d 477 (Minn. App. 2004)(work was performed on behalf of the developer and is thus "your work" which does not come within the definition of "impaired property"); Durbrow v. Mike Check Builders, Inc., 442 F. Supp. 2d. 676, 684 (E.D. Wis. 2006)(the only damage at issue is damage caused by the insured's builder's work, which does not come within the definition of "impaired property" since it is the builder's work). Accordingly, "m(1)" of the impaired property exclusion does not apply.

The second part of exclusion "m" includes failure to perform a contract in accordance with its terms. This exclusion by its terms excludes contract claims. In this case, the allegations and proof were in tort in that the insureds violated applicable building codes and industry standards. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989)(violation of a building code violates a legal duty for which a builder can be held liable in tort).

The Court finds as a matter of law that exclusion "m" does not exclude coverage for the final underlying judgment.

As a result of the Court's findings that there was an "occurrence(s)" causing "property damage", and none of the exclusions advanced by Harleysville excluded all coverage, the Court finds as a matter of law that there were covered claims submitted to the jury in the underlying actions and since there was a general verdict, that answers the coverage question, *i.e.*, Harleysville must indemnify the Harleysville Insureds for the entire final judgments rendered in the underlying actions, reduced by time-on-the-risk discussed *infra*. Owners, supra.

GENERAL VERDICT

The Court has determined as discussed above that both covered claims and non-covered claims and various causes of action were submitted to the jury which reached a general verdict. Harleysville offered evidence in an attempt to allocate the general verdict between covered and non-covered claims. The judgment holders objected on two grounds:

1. Since there was a general verdict any attempt at allocation would be speculative and;
2. The testimony would be irrelevant under Rules 401 & 402, *SCRE*.

Although I sustained the objection, I allowed Harleysville to proffer the testimony. Harleysville offered F.E. Baiden, a general contractor, to proffer evidence of an estimate that he performed to completely repair Riverwalk buildings. He then segregated that portion of his estimate which constituted cost to repair damage from water intrusion which under Newman and Crossmann would constitute "covered damages". He then took the percentage of the covered damages contained in his estimate and multiplied it by the jury's verdict to arrive at an amount representing damages from water intrusion. Mr. Baiden admitted that his estimate did not correlate or correspond with the evidence presented to the jury. (Rec. Tr. p. 13909). His estimate was based on labor rates and material costs current in 2010. (Rec. Tr. p. 13901). Plaintiff's estimate at trial was dated May 2003. His testimony would be irrelevant and speculative under Rule 401 & 402 *SCRE*, and therefore inadmissible even if the Court allowed Harleysville to attempt an allocation of the general verdict. This attempt at a re-litigation of damages was addressed in Newman.

Newman was a declaratory judgment action to determine if an arbitration award was covered under a CGL policy. Both covered claims and non-covered claims had been submitted to the arbitrator. The arbitrator issued a general award and did not allocate damages between covered and non-covered claims. The Court held that because the arbitrator did not allocate damages, Auto Owners would be liable for the entire award. Strikingly, the Court had this to say:

Nevertheless, it is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter [allocation of damages between covered and non-covered damages] when the issue of

damages was litigated before the arbitrator, who issued a final, binding award on the merits. FN5 (citation omitted).
Id. at p. 198.

FN5. Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.
Id. at p. 198.

The Court refused to allow Auto Owners to re-litigate damages as have other courts.¹³ This Court likewise will not allow Harleysville to re-litigate the damages for to do so would be a clear invasion of the province of the jury. Lorick & Lowrance, Inc. v. Julius H. Walsh, Co., 153 S.C. 309, 319, 150 S.E. 789 792(1929)(“The law rather forbids this Court assuming to take upon itself the powers, duties, rights and privileges of a jury”). Anderson v. Aetna Cas. Sur. Co., 175 S.C. 254, 282, 178 S.E.819, 829 (1934)(“Obviously, the absolute power to change or modify the findings of the jury upon an issue of fact properly submitted to them would when exercised, amount to the substitution of the trial judge’s findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury.”) Id. at p. 283 As the Court said in S.C. State Hwy. Dept. v. Miller, 237 S.C. 386, 117 S.E.2d 561 (1960) “A verdict is the product of the minds of twelve men, and to a certain extent...frequently represents a result which no individual member of the panel would have reached in the first instance if free to follow his own judgment.” Id. at p. 395.

In the underlying action, Harleysville undertook the defense of its insureds and hired attorneys to defend its insureds as it was required to do under the terms of its policies.

¹³ Herrera v. American Standard Ins. Co., 203 Neb. 477, 279 N.W.2d 140 (1979)(Where numerous types of damages were submitted and defendant did not request an allocated verdict, the defendant at this late date will not be allowed to re-litigate damages).

Harleysville represented some of the insureds under a reservation of rights with an understanding that coverage issues would be reserved for judicial consideration in a separate proceeding. (Rec. Tr. pp. 13832, 13835-36). Harleysville's representatives and its legal counsel attended the trial (Rec. Tr. p. 13836) and were in contact both pre-trial and at trial with the trial counsel Harleysville employed to represent its insureds. (Rec. Tr. p. 13834). Harleysville made the decision not file a motion to intervene or otherwise seek an allocated verdict as it could have done under Rules 24 and 49, *SCRCP*. (Rec. Tr. p. 13835). Harleysville never explained to its insureds the need for an allocated verdict and the potentially devastating consequences of an unallocated verdict. (Rec. Tr. pp. 13835-36). Nor did Harleysville explain to its insureds the divergence of interest (conflict) between it and its insureds. (Rec. Tr. p. 13839). Harleysville's representatives conceded at trial that it is now impossible to determine how the jury allocated damages. (Rec. Ex. 11, p. 12245 Wright deposition; Rec. Ex. 11 Tormey deposition, p. 12254). The Court will not engage in speculation.¹⁴

Harleysville contends, in part, that it made the decision not to intervene because at the time of the trials the law on CGL coverage was in a state of flux and an intervention would have

¹⁴ Jenkins v. Few, 391 S.C. 209, 705 S.E.2d 457 (S.C. App. 2010)(Defendant contributed to drafting general verdict form and general verdict makes it impossible to determine how the jury allocated damages. The Court will not speculate on how the jury allocated damages.);

Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (S.C. App. 2004)("since the jury returned a general verdict and appellant did not request the trial court to submit a special verdict form to determine the type of damages rendered by the jury, the Court cannot speculate as to what portion of the award the jury attributed to lost profits as opposed to other tort damages");

Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (2005)(the jury's verdict was declared a general verdict by the trial Court and because the verdict was a general verdict we cannot now speculate as to how the jury allocated damages");

Pearson v. Bridges, 344 S.C. 366, 544 S.E.2d 617 (2001)(since the jury returned a general verdict and the Defendant never requested a special verdict form separating the elements of damage, there is no way of knowing now how the jury allocated damages);

Harry L. Hussmann Refrigerator & Supply Co. v. Cash & Carry Grocer, 134 S.C. 191, 132 S.E.173 (1926)(since the Defendant's counsel made no attempt to find out what the jury intended, the Court cannot now clarify the jury's verdict).

Owners Ins. Co. v. Clayton, 364 SC 555, 614 S.E.2d 611 (2005)(Where covered claims were submitted to the jury which reached a general verdict, a finding that any of the three claims submitted to the jury is not excluded answers the coverage question, i.e., the carrier must pay the entire general verdict).

put Harleysville in a direct conflict with its insureds. Harleysville had advised its insureds that the claims in the underlying actions were not covered because the cases said there was no "occurrence". (Rec. Tr. pp. 13827-28). Harleysville relied on its assessment and sat silent when the forms of the verdict were being drafted and submitted to the jury. Harleysville cannot now use its own miscalculation to prejudice the rights of the insureds. Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 498, 473 S.E.2d 52 (1996)("There is an implied covenant of good faith and fair dealing that neither party, insurer or insured, will do anything to impair the other's rights to receive benefits under the contract"). Our Courts have long recognized that when the insurer undertakes to represent its insured, it must subordinate its interests to those of its insureds. Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933) is apposite. In Tyger River, *supra*, the Court rejected the Kentucky rule that an insurance company in processing a claim may look to its own interest as well as interests of the insured stating that:

We especially dissent from the language of the [Kentucky] opinion which we have italicized. The very thing which the appellant in the case which we have before us for determination undertook to do was to hold the respondent harmless in the disposition of Chesser's claim. If, in the effort to do this, its own interest conflicted with those of respondent, it was bound, under its contract of indemnity, and in good faith, *to sacrifice its interest in favor of those of the respondent*. If the Kentucky rule is the law, then a policy of indemnity such as is before us becomes a delusion and a snare. In the nature of things when there is a conflict of interests – as is inevitably the case in all such matters-the company will give the preference to its own. [*Emphasis by the Court*].

For the protection of its interests the casualty company especially reserved the right to control and direct the matter of negotiations for settlement and compromise, and of the defense of the action if litigation ensued. The plaintiff was directly deprived of a voice or part in such negotiations and defense. If the rule of the Kentucky case shall prevail, the indemnity companies may well felicitate themselves, for they are in a position to say to the insured, 'Heads I win, tails you lose.'"

Id. at p. 348.

As the Court said in Newman, it is the insurer's responsibility, who is in control of the litigation, to make sure there is an allocated verdict. Harleysville must sacrifice its interests in favor of the insureds. Courts throughout the country have determined likewise.

The following, taken from the case of Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491 (10th Cir. Ok. 1994), is worth quoting:

As an initial matter, we note that an insurer who undertakes the defense of a suit against its insured must meet a high standard of conduct. Duke v. Hoch, 468 F.2d 973, 978, (5th Cir. 1972); Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co., 550 F. Supp. 710, 714-16 (W.D.Okla.1981). The right to control the litigation carries with it certain duties. Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 627 (10th Cir.1942). One of these is the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages. See Gay & Taylor, 550 F.Supp. at 716. The reason for this is that when grounds of liability are asserted, some of which are covered by insurance and some of which are not, a conflict of interest arises between the insurer and the insured. If the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories. Duke, 468 F.2d at 979. The insurer is in the best position to see to it that the damages are allocated; therefore, it should be given the incentive to do so. Id. at. pp. 1498-1499.

Harleysville's failure to attempt to intervene or otherwise seek an allocated verdict cannot now be used to prejudice the rights of its insureds or the rights of the claimants who step into the shoes of the insureds. As the court said in Buckley v. Orem, 112 Idaho 117, 123, 730 P.2d 1037 (Idaho App. 1986):

"...when the insurer sought to limit its liability to the coverage provided by the contract, the insurer was required to show that it had faithfully and fully performed its responsibilities to its insured by disclosing the need for an allocated verdict. The application of this principle has consequences in the secondary action where the

injured party was directly pursuing insurance proceeds through garnishment or other post-trial litigation involving the insurer. This carry over effect occurred because at this secondary stage of the litigation the injured party stands in the shoes of the insured party. Accordingly, the injured party would be able to assert rights the insured would have had against the insurer and the insurer would be able to rely on any defenses which it could have asserted against its insured." *Id.* at p. 124 [*Emphasis Supplied*].

Harleysville relies on Duke v. Hoch, 468 F.2d 973 (C.A.5 1973) for the proposition that the Court should allow it to estimate what part of the unallocated verdicts constitute non-covered claims. In Duke, because the Court directed a verdict on one issue, the insurance carrier was able to carry its burden of showing that the jury allocated damages to a non-covered claim. Duke clearly holds that a post verdict allocation of damages in the coverage context should not even be considered unless and until the insurer meets its burden of showing that the general verdict includes damages for non-covered acts. In the case at bar, that is simply not possible. Here, the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict, and the Court will not engage in unguided speculation with respect to this issue, particularly when the dilemma now confronting Harleysville is of its own making.¹⁵

The Court concludes as a matter of law that because there were covered claims submitted to the jury which were not excluded and the jury rendered a general verdict, Harleysville is precluded from now re-litigating damages. Harleysville must indemnify its insureds for the entire amount of the final judgments in the underlying cases.

¹⁵ McCloud v. Roy Riegels Chemicals, 20 Cal. App. 3d 928, 97 Cal. Repr. 910 (Cal. App. 3d Dist. 1971)(parties should have one chance (by request for special verdict forms) to have the jury's verdict pinpointed. They should not be permitted to drag out litigation by turning their backs on the safeguards provided by the legislature. Where a general verdict was rendered where a special verdict could have been used, it puts the courts in a guessing game as to how the jury traveled to reach its verdict).

POPE CLASS ACTION – LOSS OF USE

In the Pope Class Action, the class alleged that as a result of the defective construction and resulting water intrusion damage, they will suffer loss of use of their condominiums during the repair. The jury awarded \$250,000 actual damages and \$750,000 punitive damages. For the reasons hereinafter set forth, the Court finds as a matter of law that damages for loss of use are covered by the Harleysville policies.

As noted above, the policies provide coverage for damages “because of...’property damage’ to which this insurance applies.” The policy defines property damage as:

15. “Property damage” means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;

or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the ‘occurrence’ that caused it.” [*Emphasis Supplied*].

I have already determined that under Newman & Crossmann, there was an occurrence(s) causing “property damage” as defined in the Harleysville policies, being the continuous moisture intrusion resulting from the subcontractors’ negligence. The claim for the costs of repairing damage to non-defective building component and to units caused by water intrusion from defective work is a claim for property damage. Since there is “property damage” caused by an “occurrence” as defined under the applicable Harleysville policies, the “property damage” would include the loss of use claimed by the class. Geham Homes, Ltd. v. Employers Mutual Cas. Co., 146 S.W.3d. 833 (Tex. App. 2004)(Where homeowners alleged defective construction resulting in need for temporary housing, claim for loss of use came within terms of the CGL policy); Woodfin Equities Corp. v. Harford Mutual Ins. Co., 110 Md. App. 616, 678 A.2d. 116 (1996)(Where HVAC was defective, the HVAC would not be covered under the

CGL policy. However, the property damage (loss of use of hotel suites) to a third party (hotel suites owner) would not be excluded.); Jacob v. Russo Builders, 224 Wis. 2d 436, 592 N.W.2d. 271 (1999)(Where defective construction of a new residence caused such damages as relocation costs, temporary repairs, loss of use and enjoyment of the residence and repair of interior of residence these are tort damages to "other property" and are covered under the CGL policy).

The "impaired property" exclusion as noted above is tailored for loss of use damages and is the only exclusion that deserves special note here. Since the condominiums do not fall within the definition of "impaired property" the exclusion cannot apply. Impaired property does not include "your work" and the condominiums are the work of the Harleysville insureds and therefore this exclusion does not apply to exclude the loss of use damages awarded to the Pope Class. North American Treatment Systems, Inc. v. Scottsdale Inc. Co., 943 So.2d. 429 (La. App. 1st Cir. 2006)("Impaired property" exclusion does not apply since "impaired property" does not include "your work" and the house is the work of the insured). The policies provide that loss of use is deemed to occur at the time of the damage causing it which in this case would be during the policy periods.

Since the Court has found that the "property damage" causing the loss of use triggers coverage under the Harleysville policies, and is not excluded, the Court also finds as a matter of law that the final judgment for the loss of use claim by the Pope Class is covered by the Harleysville policies.

PUNITIVE DAMAGES

Harleysville denies that its CGL policies provide coverage for punitive damages "because they are uninsurable as damages under the policies." (Harleysville's Amended Answers to

Interrogatories). The Court disagrees. Our Courts have long held that a builder who is grossly negligent in the construction of a building is subject to punitive damages. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989).

Some Courts have found that the "all sums" and "damages" language in the CGL policy is ambiguous which requires the ambiguity to be construed against the insurer and in favor of coverage. United Services Auto Ass'n. v. Webb, 235 Va. 655, 369 S.E.2d 196 (1988). Other Courts such as South Carolina have found punitive damages recoverable under the plain language of the CGL policy. Carroway v. Johnson, 245 S.C. 200, 205, 139 S.E.2d 908, 910 (1965)(stated by the Court to be the majority rule); S.C. State Budget & Control Board Division of General Services v. Prince, 304 S.C. 241, 403 S.E.2d 643 (1991)(the term "all sums" requires the construction of the policy to include coverage for punitive damages).

In Carroway v. Johnson, *supra*, the Court was faced with the coverage of punitive damages under the identical language contained in the Harleysville policies. The insuring agreement in the Carroway policy provided that the carrier agreed:

"to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of"
Id. at p. 202.

The Court held that the average insured would contemplate punitive damages would be covered under the CGL policy, stating: "with this view the majority of Courts have agreed, and have imposed liability upon the insurer even though the recovery was based upon willful or wanton conduct..." Id. at p. 205. The Court concluded the language in the policy was broad enough to include liability for punitive damages.¹⁶

¹⁶ Harleysville's representative Lee Wright testified that if the claim met the requirements of the insuring agreement there is nothing in the policy that says Harleysville will not pay punitive damages. "There is not a punitive damages exclusion in the policy". (Rec. Ex. 11, Lee Wright depo. p. 12245).

The Supreme Court examined this same issue in South Carolina State Budget and Control Board v. Prince, *supra*, wherein the court was once again faced with the identical language contained in the Harleysville policies:

“The fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages.” *Id.* at p. 648. (Citing Carroway, *supra*.) [*Emphasis Supplied*].

The Court pointed out that the policy does not define “damages” and does not limit recovery to “actual damages”. The Court held that this broad language must be interpreted to include punitive damages.¹⁷

Harleysville agreed to indemnify its insureds for “all sums” its insureds become legally obligated to pay. Punitive damages are not excluded by the language of the policy. If insurers intend to preclude coverage of an item, it is incumbent upon them to include clear language accomplishing that result. Crossmann, *supra*. Harleysville could have simply added the word “compensatory” before the word “damages” if it had intended to exclude punitive damages. United Services Automobile Assn. v. Webb, *Id.* at p. 204. (“The insurance carrier could have inserted the word ‘compensatory’ before the word ‘damages’, or specifically excluded liability for punitive damages elsewhere in the policy, and resolved the ambiguity but it did not. Therefore we construe the ambiguity against the insurance company and in favor of coverage”).

Harleysville advances the position that the jury’s award of punitive damages is tantamount to a finding of intentional conduct which would exclude coverage for punitive

¹⁷ Fluke Corp. v. Hartford Acc. & Indemnity Co., 102 Wash. App. 237, 7 P.3d. 825 (2000) (Trial Court was in error in interpreting the policy to include only “compensatory” damages. We elect to follow the majority rule that the terms of the policy “all sums that the insured becomes legally obligated to pay as damages” will be interpreted to provide coverage for punitive damages). [Citing among other cases South Carolina State Budget and Control Board v. Prince, *supra*.]

damages. This same position was advanced by the insurance company in Pennsylvania Thresherman & Farmer's Mutual Casualty Ins. Co. v. Thornton, 244 F.2d 823 (C.A. 4 1957).¹⁸

Applying South Carolina law, the court rejected the carrier's position holding that:

"Negligent conduct may be so gross so as to merit characterization as willful and wanton in the sense of the rule for punitive damages, yet fall far short of an assault and battery which would distinguish it from an accidental event and withdraw it from the coverage of the policy...to allow the appellant's argument would lead to the illogical and indefensible result that...the more extreme the recklessness the more likely the insurer would be to escape liability." Id. at p. 827.

The Court went on to hold that no matter how reckless the respondent's conduct, there was nothing in the record that the insured intended to injure the plaintiff.

Likewise in the case at bar there is nothing in the record that the insureds intended to injure the underlying claimants.

Despite the contrary arguments by Harleysville, the Court concludes that punitive damages are covered under the Harleysville policies and Harleysville must indemnify its insureds for any punitive damages in the final judgments.

RESERVATION OF RIGHTS

Riverwalk POA and the Pope Class contend that Harleysville did not issue a reservation of rights letter ("R/R/L") to Buildstar, the general contractor. Riverwalk also contends that the R/R/Ls issued to Heritage Communities, Inc. and Heritage Riverwalk, Inc. were insufficient to reserve its rights to contest coverage. This issue was raised by the parties in both the pleadings and discovery and was thoroughly explored in the testimony at trial.

A. FAILURE TO ISSUE R/R/L TO BUILDSTAR.

Lee Wright, construction Litigation Specialist for Harleysville, testified that none of the reservation of rights letters mentioned the Pope Class Action. (Rec. Tr. p. 13746). Harleysville

¹⁸ This case is cited in Carroway v. Johnson, *supra*.

produced no copy of the letter or other proof that one had been sent. While it may have been an inadvertent oversight, the Court concludes that Harleysville never sent a letter reserving its rights, either as to the Pope Class or as to Buildstar.

Harleysville, however contends that its discussions with principles of its insureds were sufficient to reserve its rights because the same principals were in all three of its insureds and Harleysville's representatives had conversations with the principals and their attorney about coverage issues, ergo., their insureds understood and agreed that coverage issues would be reserved post litigation. The Court disagrees.

As noted in the findings of facts, Harleysville issued general reservation of rights letters to Heritage Communities and Heritage Riverwalk and never supplemented them to advise their insureds of their specific policy defenses even though Harleysville recognized that facts arise during litigation that may or may not affect coverage. (Rec. Tr. p. 12234). In fact, although Harleysville set forth practically all of its policy exclusions, Harleysville advised its insureds that it was relying on their interpretation of the law that there was no "occurrence" as that term is defined under the policy and therefore there was no need to even consider exclusions. (Rec. Tr. pp. 13829-31). Now that there is a judgment against its insureds, Harleysville has decided that there are exclusions that may be applicable. (See Harleysville's Amended Answers to Interrogatories dated Oct. 15, 2010, interrogatory No. 37.). There is no South Carolina law that details what a properly written R/R/L must contain. However, several commentators have discussed the purpose of a R/R/L and the minimum such a letter should contain.

PURPOSE

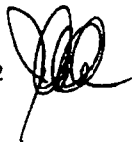
1. "[t]he purpose of reservation of rights letters is to enable insureds to make informed decisions as to whether they should because of the existence of conflicts of interest between themselves and their insurers, take some action in order to

protect their interests.” Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies & Insureds* § 2.14 (5th ed.2007).

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2. “The insurer must avoid ambiguity, since any ambiguity in the reservation of rights will be resolved against the insurer.” Goodman & Jacobs § 8.9. To avoid ambiguity, certain elements should be included in a reservation of rights letter, including (i) specific identification of the policy at issue; (ii) a description of the claims or allegations in the complaint, including details of the facts known at that time (iii) citation and quotation of each policy provision forming the basis of the insurer’s coverage defenses, including an explanation of why each provision could cause denial of coverage; (iv) a specific reservation of the insurer’s right to change its coverage position and to assert defenses based on any of the policy provisions, even if not specifically set forth in the letter; (v) a detailed explanation of the claim investigation that will be undertaken to determine the insurer’s ultimate coverage decision and when that decision should be expected; and (vi) an advisement of any issues that actually or potentially give rise to a conflict of interest between the insurer and insured. See Peter Kalis, et al., *Policyholder’s Guide to the Law of Insurance Coverage* § 24.04 (1998 & Supp.2007); Jerold Oshinsky & Theodore A. Howard, *Practitioner’s Guide to the Law of Insurance Coverage* § 205 (2nd ed.1998 & Supp.2007); Goodman & Jacobs § 8.9.

As to the timing of a reservation of rights letter, once the insurer determines that it has a duty to defend, it should send the letter “prior to assuming the insured’s defense, or within a reasonable time thereafter.” Windt § 2.14; see Oshinsky & Howard § 205 (“there are two basic requirements for reservations of rights and disclaimers of coverage: (1) they must be given in a timely fashion; and (2) they must be made with specificity”). Sometimes an insurer may need additional time to analyze the existence of coverage and thus it may send a general reservation of rights letter; however, the insurer must then supplement the reservation of rights letter as soon as it learns of its specific defenses, Windt § 2.14.



The Harleysville R/R/Ls fall far short of these requirements. The R/R/L does not explain why each provision or exclusion would cause a denial of coverage; does not contain a detailed explanation of the claim investigation that will be undertaken to determine the insurer's ultimate coverage decision and when that decision could be expected; and does not set forth issues that actually or potentially could give rise to a conflict of interest. Harleysville's R/R/Ls fail in specificity and Harleysville never supplemented its letters to detail their specific defenses and importantly, Harleysville never advised its insureds of the need for an allocated verdict and the devastating consequences a general verdict may cause.

Although the Court could find no legal precedent in South Carolina for an oral reservation of rights, it is generally frowned upon because it can lend itself to ambiguity and is at odds with the very purpose behind a R/R/L – that is, to inform the insured in a timely manner specifically what the policy defenses are so that the insureds can take appropriate action to protect their own interest due to a conflict of interest with the insurer. Oshinsky & Howard § 205; Windt § 2.14; Goodman & Jacobs § 8.9. An oral reservation is likely to generate a dispute as to what was said and lead to exactly the kind of expensive and protracted litigation Riverwalk is now experiencing. Even if an oral reservation is allowed under South Carolina jurisprudence, when viewing the facts in the light most favorable to Harleysville, the oral communications by Lee Wright fall short of the specificity and are ambiguous at best. On the one hand he was advising the insureds Harleysville did not believe anything was covered (Rec. Tr. p. 13827), and on the other hand he was advising them that the “grand majority” of the claims were not covered. This exemplifies the need for a written and specific reservation of rights.

Providing timely and specific policy defenses and disclosing actual or potential conflicts are important fiduciary duties of the insurer especially when, as here, Harleysville is controlling the defense of its insured.

The Court concludes as a matter of law that Harleysville failed to properly reserve its rights to dispute coverage not only as to Buildstar, but also as to Heritage Communities, Inc. and Heritage Riverwalk, Inc. The Court further finds that this action clearly prejudiced the Harleysville insureds and can be raised by Riverwalk. Lee, supra. The Court further finds that Harleysville's actions constitute an implied waiver of Harleysville's right to contest coverage in this action. Lyles v. MBI, Inc., 292 S.C 153, 355 S.E.2d 282 (S.C. App. 1987) (Implied waiver results from acts and conduct of party against whom doctrine is invoked from which an intentional relinquishment of right is reasonably inferable).

Although the Court has already concluded that Harleysville has a duty to indemnify the insureds, this issue was fully litigated and the Court felt it appropriate to address the issue.

TIME ON THE RISK

Harleysville has asked this Court to apply a time-on-the risk analysis to the damages if the Court finds that there are damages covered by the Harleysville policies. As noted above, I have held that the entire judgments in the Riverwalk POA case and the Pope Class Action are covered by the Harleysville policies. However, I find as a matter of law that the "time-on-the-risk" analysis recently adopted by the Supreme Court in Crossmann, supra, should be applied to the verdict in the Riverwalk POA action, but not the Pope Class Action. The "time-on-the-risk" analysis would be applied to the \$4,471,178.31 (verdict with set-off) less the punitive damages of \$250,000 awarded in the Riverwalk POA action and less the \$1,000,000 actual and punitive

damages awarded in the class action all as set forth below. I find that it would be inappropriate to apply the "time-on-the-risk" analysis to the class action award or to punitive damages.

In Crossmann, *supra*, the court had before it the question of how to equitably allocate damages among successive insurance policies when the damages were "progressive" damages that occurred over several policy periods or uninsured periods. The parties in Crossmann stipulated that the damages resulted from water intrusion (and were all progressive damages) and the time the damages began and progressed. The parties in Crossmann also stipulated that either "time-on-the-risk" analysis or "joint-and-several" analysis would apply to those progressive damages. The Supreme Court adopted a time-on-the-risk analysis. The Court instructed that in cases where progressive damages have occurred over a number of successive policy periods so that it is impossible both scientifically and administratively to determine the amount of damages occurring in each policy period, a default method is to be employed. The default method would require the total amount of progressive damage to be divided by the number of policy periods to determine the approximate amount of damages in each policy period. If there were periods in which the insured did not provide insurance the insured would absorb the amount of damages occurring during the uninsured periods. I find that it is appropriate for the Court to apply a time-on-the-risk analysis to the general verdict pursuant to Crossmann, *supra*. In order to accomplish this I must determine when damages began to occur and an ending date of those damages for the purpose of this analysis.

Drew Brown, expert for the underlying Plaintiffs testified that damages began 30 days following the Certificate of Occupancy. The first Certificate of Occupancy was issued October 25, 1997 so the damages began on November 27, 1997. The final site visit that was in connection with the Buric Report was on April 30, 2004. I find that the damages were advanced

enough that they needed repair and/or replacement and that the passage of additional time, while it may have made something even less sound, it did not change the point in time that they needed repair and/or replacement. Accordingly, I find that there were 2,347 days in which these damages occurred and had reached a point where all of the repairs and/or replacements would have needed to be made. The Court is not going to attempt to compute damages using a per building Certificate of Occupancy date. The verdict rendered in this case was a general verdict and, thus, made no award based on damages for a particular building, but awarded damages as to the whole project. Using a per building Certificate of Occupancy would, in essence, require the Court to allocate damages and would be speculative, at best. The Court concludes that in applying "Time-on-the-Risk" to these facts, the most equitable way to proceed is by comparing the total number of days in which damage occurred to the entire project to the total number of days of coverage under the Harleysville policies.

Harleysville had coverage on November 27, 1997 and I find that this coverage for Riverwalk continued until June 18, 2001 which are the dates of coverage put into evidence in the 2010 hearing and in the 2011 hearing. Harleysville filed a Motion to Amend or Reopen the Record and, thus, change the contents of an Exhibit previously submitted. This Motion is premised upon Harleysville finding, after the close of the testimony, two (2) internal documents showing that certain policies covering Heritage Riverwalk were cancelled for non-payment, thus changing coverage from June 18, 2001, to June 18, 2000. The fact that Harleysville has these documents is not conclusive evidence that all notices were timely given and that the policies were effectively cancelled. The Court is going to decline to change the record in this case based on the Harleysville's documents found after this matter had been pending before the Court for over a year or to reopen the case for additional testimony. Harleysville has submitted evidence

in this case as to matters that were exclusively under its control. The Court will not allow it. It is bound by the evidence it submitted. Therefore, the Motion to Amend or Reopen the Record is denied. I find that Harleysville therefore had coverage for Riverwalk for a period of 1300 days. In using the numerator and denominator in the Crossmann case, this creates a multiplier of .5538 which is used to multiply the general verdict. Using this multiplier, Harleysville will be responsible for only a part of the general verdict as follows:

RIVERWALK PROPERTY OWNERS ASSOCIATION

\$3,228,678.36 actual damages after set-off and less punitive damages and loss of use
damages

x .5538 multiplier as determined above

\$1,794,499.43 actual damages after applying "time-on-the-risk"

+ 250,000 punitive damages

\$2,044,499.43 amount covered by Harleysville policies

LOSS OF USE JUDGMENT

I find that it would be inappropriate to apply the time-on-the risk analysis to the loss of use judgment (\$250,000 actual damages and \$750,000 punitive damages) awarded in the class action. In reference to loss of use, the Harleysville policies provide "lose of use shall be deemed to occur at the time of the physical injury that caused it..." Therefore I find that the judgment awarded to the homeowners in the Pope Class Action is within the policy terms and the entire amount is therefore covered. The loss of use judgment in the amount of \$250,000 actual damages and \$750,000 punitive damages is covered by the Harleysville policies.



CONCLUSION

IT IS HEREBY ORDERED AS FOLLOWS:

- A. I find and conclude that there were "occurrences" with resulting "property damage" which occurred during the policy period and which triggered coverage for the claims made by the underlying Plaintiffs for actual and punitive damages;
- B. I find and conclude that the exclusions advanced by Harleysville do not exclude coverage for the claims made in the underlying cases by both the Association and the Class;
- C. I find and conclude that the general verdicts rendered in the underlying actions preclude the Court from looking behind the general verdicts in an attempt to allocate damages between covered and non-covered damages. I further find and conclude that covered claims and non-covered claims were submitted to the jury and since there was a general verdict, the entire amounts awarded by the jury in the underlying actions are covered by the Harleysville policies;
- D. I find and conclude that it is appropriate to perform a time-on-the-risk analysis to the actual damages in the underlying association action but that it would not be appropriate to apply the time-on-the-risk analysis to the loss of use claim or the punitive damages awarded in both the association action and the class action. Applying the time-on-the-risk analysis to the actual damages returned in the Association action, Harleysville would have coverage for actual damages awarded the Association in the amount of One Million Seven

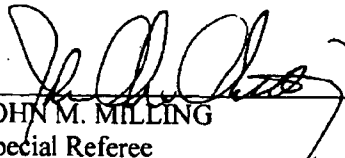
Hundred Ninety-Four Thousand Four Hundred Ninety-Nine and 43/100 (\$ 1,794,499.43) Dollars as calculated on page forty-seven (47) above.

Harleysville would also have coverage for punitive damages awarded the Association in the amount of Two Hundred Fifty and 00/100 (\$ 250,000.00) Dollars and coverage for actual damages awarded to the class in the amount of Two Hundred Fifty and 00/100 (\$ 250,000.00) Dollars and punitive damages in the amount of Seven Hundred Fifty Thousand and 00/100 (\$ 750,000.00) Dollars.

- E. I find and conclude that punitive damages are not excluded from the Harleysville policies and are covered under the terms of the Harleysville policies;
- F. I find and conclude that Harleysville did not properly reserve its right to contest coverage for the claims made by the underlying Plaintiffs;
- G. I find and conclude that the Association is entitled to judgment against Harleysville for actual damages in the amount of One Million Seven Hundred Ninety-Four Thousand Four Hundred Ninety-Nine and 43/100 (\$ 1,794,499.43) Dollars and punitive damages in the amount of Two Hundred Fifty and 00/100 (\$ 250,000.00) Dollars;
- H. I find and conclude that the class is entitled to judgment against Harleysville for actual damages in the amount of Two Hundred Fifty and 00/100 (\$ 250,000.00) Dollars and judgment for punitive damages in the amount of Seven Hundred Fifty Thousand and 00/100 (\$ 750,000.00) Dollars;

- I. I find and conclude that Harleysville's policies here under consideration specifically provide coverage for post-judgment interest and the underlying Plaintiffs are entitled to judgment for statutory post-judgment interest on the amounts found covered from the date of the order for judgment in the underlying actions;
- J. The Motion by Harleysville to amend or reopen the record is denied;
- K. As noted above, the underlying actions are under appeal. The provisions of this Order are subject to modification if warranted by the final judgment in the underlying actions and this order is without prejudice to the parties to move pursuant to Rule 60, SCRCPP, for the correction of the amount to be indemnified.

AND IT IS SO ORDERED.


JOHN M. MILLING
Special Referee

Darlington, South Carolina.
February 28, 2013.



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 8:58
HELAINE JUDGINS-WARD
CLERK OF COURT

ORDER

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"). 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. Issues relating to this party are being addressed in a separate Order. "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. 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).¹

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.

¹ 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.

THE HARLEYSVILLE POLICIES

Harleysville issued numerous CGL primary policies and excess policies to the Harleysville insureds and a list of those policies with policy periods, policy amounts and the remaining amounts left on the policies has been marked as Rec. Ex. 17. Although there were numerous policies, all of the policies were standard "ISO" Insurance Service Organization and Commercial General Liability ("CGL") policies with the same pertinent language in each policy. (Rec. Ex. 12).

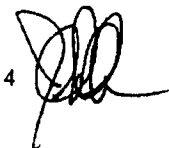
The primary policies issued by Harleysville to its insureds contain the standard ISO insuring agreement as follows:

1. "Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may at our discretion, investigate any 'occurrence' and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES AND B.

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b. This insurance applies to 'bodily injury' and 'property damage' only if:

- (1) The 'bodily injury' or 'property damage' is caused by an "occurrence" that takes place in the "coverage territory"; and
- (2) The 'bodily injury' or 'property damage' occurs during the policy period."

All of the policies define "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Both the primary and excess policies provided completed operations coverage.

Harleysville also issued Commercial Umbrella Liability policies with substantially the same insuring agreement as the primary policy:

1. "INSURING AGREEMENT

We will pay on behalf of the insured the 'ultimate net loss' in excess of the 'applicable underlying limit' which the insured becomes legally obligated to pay as damages because of:

- "a. 'Bodily injury' or 'property damage' covered by this policy and caused by an 'occurrence' which occurs during the policy period: or
- b. 'personal injury' or 'advertising injury' covered by this policy and caused by an 'offense' committed during the policy period.

This insurance applies anywhere in the world."

All of the excess policies also define "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The Exclusions in each of the Harleysville policies are the same.

FINDINGS OF FACTS²

Based on the record before the Court, the Court makes the following findings of facts applicable to the underlying action:

² References to the Record are not intended to be all inclusive.

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1. Magnolia North Property Owners Association, Inc. is a South Carolina Corporation which governs the Magnolia North condominiums in accordance with the South Carolina Horizontal Property Act.
2. The Harleysville insureds who were defendants in the Magnolia North POA action were Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation. Heritage Communities, Inc. was the overall developer. Heritage Magnolia North, Inc. was the site specific developer and owned the land upon which the Magnolia North condominiums were constructed and conveyed the condominium units to the individual owners. Buildstar Corporation was the general contractor which oversaw the subcontractors. (Rec. Hardister, pp. 13644-45). The trial court amalgamated the Harleysville insureds.
3. The Plaintiffs in the underlying action sought compensation for faulty workmanship and for negligent construction resulting from damage to other property (building components) from continuous and repeated water intrusion. (Rec. Ex. 9).
4. Buildstar Corporation did not provide any construction. The construction was all performed by subcontractors. (Rec. Hardister, pp. 13585-86).
5. The buildings at Magnolia North were composed of 21 multi-story buildings containing 12, 13, or 15 units per building.
6. Complete copies of all the policies issued by Harleysville to the Harleysville insureds are included in Rec. Ex. 12. A listing of the policies with the

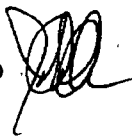
policy periods, face amount of the policies and amounts of available coverage remaining on each of the policies is set forth on Rec. Ex. 17.

7. The Harleysville CGL policies were basically the same policies for both primary and excess coverage and prototype forms are included in Lee Wright's deposition. (Rec. Ex.19)
8. The Harleysville policies listed on Rec. Ex. 17 provide sufficient coverage to indemnify the Harleysville insureds for the judgments rendered in the underlying action should the Court find coverage and, thus, the National Surety Corp. policies would not be triggered.
9. There are no endorsements in any of the Harleysville policies that would adversely affect coverage issues in this action. (Rec. Ex. 11, p. 12243).
10. In the Magnolia North project the first building permit was issued April 16, 1997 and the last Certificate of Occupancy was issued in late 2000. (Rec. Ex. 10, Buric Report).
11. For each building at Magnolia North, the construction began shortly after the building permit was issued and the buildings were completed at or about the time the Certificates of Occupancy were issued.
12. Harleysville insureds expected their subcontractors to be reliable and skilled in their trade and did not expect their subcontractors to perform negligently. (Rec. Hardister, pp. 13639-13640).
13. Harleysville Insureds relied on the skill of their subcontractors and expected and intended them to perform their work in a competent manner. (Rec. Hardister, p. 13638).

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14. Heritage intended their buildings to be quality condominiums. (Rec. Hardister, 13640-41).
15. There were numerous deficiencies in the subcontractor's work including but not limited to: 1) inappropriate installation of flashing or omission of flashing; 2) inappropriate application of sealants or omission of sealants; 3) installation of defective windows some of which leaked; 4) installation of a trim product that turned out to be defective allowing water intrusion; 5) inappropriate attachment of handrails in that the screws attaching the handrails accidentally penetrated the waterproofing on the decks at some locations allowing water intrusion and damage. All of these deficiencies allowed for continuous moisture intrusion resulting in substantial water damage to the condominiums exterior framing and sheathing which was previously undamaged. (Rec. Ex. 10).
16. The continuous moisture intrusion from the faulty workmanship also damaged the interior of the units including sheetrock, drapes and carpeting. (Rec. Hearing 12/9/11, pp. 13966-67).
17. The county inspected the buildings' components including the sheathing and issued a Certificate of Occupancy which required all the building components to meet code.
18. There is no evidence that sheathing, framing, insulation and interior finishes were defective when they were damaged by water seeping into the buildings and units.
19. The repair of the damage from water intrusion will require the removal and replacement of defective and non-defective building components.

20. Progressive damages from water intrusion began to occur at each building thirty (30) days from the time the Certificate of Occupancy was issued and continued thereafter.
21. Some of the deficiencies were latent defects. (Rec. Buric Report, Ex. 10).
22. Not all buildings had the same defects or quantities of defects.
23. There is no evidence in the record to indicate the Harleysville insureds realized that the Louisiana Pacific trim was a defective product. (Rec. Hardister, p. 13641). The defective and improperly installed trim allowed water intrusion which caused damage to other building components. (Rec. Buric Report, pp. 13640-41).
24. The Harleysville insureds neither expected nor intended that the work of the subcontractors be performed negligently nor did they expect or intend water intrusion or damage would result from the negligent construction.
25. The Harleysville insureds did not expect or intend that a defective product be installed on the buildings such as the Louisiana Pacific trim and did not expect or intend there to be water intrusion and damage from the defective product. (Rec. Hardister, pp. 13640-41).
26. The Harleysville insureds did not expect or intend the subcontractors to install defective windows in the buildings. Harleysville insureds intended its subcontractors to install non-defective windows and changed window manufacturers in an attempt to accomplish this. (Rec. Buric Report, Ex. 10; Rec. Ex. 24; Rec. Hearing 12/13/10, Lee Wright, p. 12841-42).

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27. The Harleysville insureds did not expect or intend that the walkway railings would be installed by its subcontractors so as to cause a breach of the waterproofing membrane exposing the framing, sheathing and units to continuous and repeated exposure to water intrusion and rot. (Rec. Ex. 6, pp. 6036-37).
28. The Harleysville insureds did not expect or intend the continuous and repeated water intrusion and deterioration of the buildings due to the negligent construction or the application of defective windows and Louisiana Pacific Trim installed by the subcontractors.
29. Some of the construction defects were latent defects and the record does not provide any evidence that the Harleysville insureds were even aware of some of the defects or that some of the defects were exposing the buildings to continuous and repeated water intrusion causing rot and deterioration of the buildings. (Rec. Buric Report, Ex. 10).
30. The Harleysville insureds did not expect or intend the negligent installation of or omission of building components by its subcontractors or expect or intend the buildings would be exposed to repeated and continuous moisture intrusion causing property damage.
31. Viewing the evidence from the standpoint of the insureds, the continuous moisture intrusion into the condominium buildings and resulting damage was an unexpected happening or event not intended by the Harleysville insureds, in other words an "accident" involving continuous or repeated exposure to the same general harmful conditions.

32. Harleysville issued reservation of rights letters to some of its insureds. (Rec. Ex. 15).
33. Harleysville evidently inadvertently omitted issuing a reservation of rights letter to Buildstar Corporation in the underlying action and, thus, such letter was not a part of Ex. 15. (Rec. Hearing 12/13/10, p. 13828).
34. Harleysville employed defense counsel for the Harleysville insureds and controlled the defense of the insureds in the underlying action. (Rec. Hearing 12/13/10, pp. 13833-34).
35. Harleysville's Reservation of Rights letters were general in nature and set out the provisions of the policies Harleysville thought may affect coverage. Coverage was questioned but not denied. (Rec. Ex. 15).
36. The Reservation of Rights letters did not advise Harleysville's insureds of the conflict of interest or the need for an allocated verdict. (Rec. Ex. 15).
37. Harleysville orally advised the insureds that there was no coverage because the claims did not meet the definition of "occurrence" as opposed to coverage being excluded by one of the policy exclusions. (Rec. Hearing 12/13/10, p. 13829-30).
38. After the reservation of rights letters were sent, Harleysville never modified them but continued advising their insureds there appeared to be no coverage because there was no "occurrence" (Rec. Hearing 12/13/10, pp. 13828-29).
39. Harleysville advised its insureds that if Harleysville intervened it would "create" a conflict of interest so they would wait until after the verdict to litigate coverage. (Rec. Hearing 12/13/10, p. 13829).

40. Harleysville did not detail to its insureds which exclusion if any would preclude coverage because Harleysville did not believe there was an "occurrence" so there was no need to discuss exclusions. (Rec. Hearing 12/13/10, pp. 13830-31).
41. Harleysville advised the insureds personal counsel that there was not likely going to be coverage for a "grand majority" of these damages. (Rec. Hearing 12/13/10, p. 13758).
42. Harleysville advised its insureds that the decision on coverage would be made after the verdict. (Rec. Hearing 12/13/10, p. 13832).
43. Harleysville's representatives including Harleysville's personal counsel attended the trial of the underlying action and discussed the progress of the case with defense counsel. (Rec. Hearing 12/13/10, p. 13836).
44. Harleysville was aware of the coverage issues but based on its understanding of the law and the fact, chose not to discuss the need for an allocated verdict with its insureds and the consequences that an unallocated verdict may cause. (Rec. Hearing 12/13/10, p. 13835).
45. Harleysville made a conscious decision not to intervene in the underlying action and took no action to seek an allocated verdict by informing the trial Court of the need for an allocated verdict or by submitting special interrogatories for the Court's consideration for submission to the jury. (Rec. Hearing 12/13/10, pp. 13835, 13856).

LEGAL ISSUES TO BE RESOLVED

In this declaratory judgment action the court has before it for resolution the following issues:

1. The threshold question to be resolved is: was there an "occurrence(s)" with resulting "property damage" that occurred during the policy period and triggered coverage under the Harleysville policies?
2. If there was an "occurrence(s)" causing "property damage" that triggered coverage, do any of the exclusions advanced by Harleysville preclude indemnification of the Harleysville insureds?
3. In the underlying action the jury reached general verdicts after submission to them of more than one cause of action and numerous claims. If the Court determines that covered claims and non-covered claims were submitted to the jury, can the Court look behind the general verdicts and allocate the damages between covered and non-covered claims?
4. Is the award of punitive damages in the underlying action covered and not excluded by the Harleysville policies?
5. Did Harleysville reserve its rights to contest coverage?
6. Is it possible for the Court to perform a "time on the risk" analysis or do the general verdicts preclude such an analysis?

DISCUSSIONS AND FINDINGS OF LAW

OCCURRENCE.

Harleysville argues that the judgment in the underlying action is not covered by the CGL policy. Specifically, Harleysville argues that the subcontractor's negligent application of

building components did not cause an "accident" constituting an "occurrence" subject to coverage under their policies. As in Newman, *infra*, and Crossmann, *infra*, the Harleysville policies are standard CGL Insurance Services Office (ISO) policies used since 1996. (Rec. Ex. 6). These policies provide that Harleysville will "pay those sums which the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies". The policy also requires that the "bodily injury" or "property damage" be caused by an "occurrence". It defines "occurrence" as an "accident" "including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" is defined as "physical injury to tangible property including all resulting loss of use of that property." The policy does not define "accident".

The pleadings below alleged both negligent construction and use of defective products and alleged damage to parts of the buildings caused by water seeping into the buildings as the result of the negligent construction. (Rec. Ex. 4). The complaint was not simply a claim for faulty workmanship seeking damages for the repair and replacement of defective construction itself, but rather was also a claim for "property damage" resulting from the negligent construction. The Court finds that the underlying Complaint properly alleged negligent construction that resulted in an "occurrence" rather than an occurrence of alleged negligent construction. Here, the record reveals there was "property damage" beyond that of the work product itself caused by a subcontractor and therefore I find that the homeowners' claims are not merely for faulty workmanship typically excluded under a CGL policy.³

The two recent cases of Auto Owners v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), "Newman", and Crossmann Communities of North Carolina, Inc., v. Beazer Homes Investment

³ According to the testimony of the experts hired by the POA and Harleysville insureds, the subcontractors' application of flashing, sealants, windows and decks did not meet code or industry standards and resulted in water seeping into the buildings causing rot and deterioration of building components.

Corp., et al., 395 S.C. 40, 717 S.E.2d 589 (2011), "Crossmann", resolved the long standing and much litigated issue of what constitutes an "occurrence" that would trigger coverage in the context of construction defect litigation under the 1996 ISO CGL policy. The Court in Crossmann held that the expanded definition of "occurrence" to include "continuous or repeated exposure to substantially the same general harmful conditions" leaves the Court with an ambiguity which must be construed against the insurer and in favor of the insured. As in Crossmann, this Court finds that there were allegations of negligent construction causing continuous and repeated exposure to moisture intrusion resulting in "property damage" as defined by the Harleysville policy. Although the subcontractors' negligence in installing the various components of the building does not on its own constitute an "occurrence", the Court finds that the continuous moisture intrusion resulting from the subcontractors' negligence is an "occurrence" and is "property damage" as those terms are defined by the Harleysville policies.⁴ As the Court will discuss below, I find that the continuous moisture intrusion into the condominium buildings was an "unexpected happening or event" not intended by the Harleysville insureds, in other words "an accident" – involving "continuous or repeated exposure to substantially the same general harmful conditions." Accordingly, I find that the subcontractors' negligence resulted in an "occurrence" falling within the Harleysville policies' initial grant of coverage for the resulting "property damage" to the non-defective sheathing, insulation, framing, interior finishes and other non-defective building components of the condominiums, unless excluded as discussed below. Newman, Crossmann.

The Court in Crossmann analyzed the coverage issue not only from the "occurrence" standpoint as it did in Newman, but also from the standpoint of "property damage" as that term is

⁴ High Country Associates v. Hampshire Ins. Co., 139 N. H. 39, 648 A.2d (474 (1994)) ("Occurrence" has a broader meaning than 'accident' because occurrence includes an injurious exposure to continuing conditions as well as a discreet event." Citation Omitted). Id. at p. 44

defined in the policy. The Court said that the term "property damage" required "physical injury" which suggests that the property was not defective at the outset. Therefore, the Crossmann Court held that a claim for the costs of repairing or removing defective work, which is not a claim for "property damage" is not covered by the CGL policy while a claim for the costs of repairing damage caused by the defective work is a claim for "property damage" which may be covered by the CGL policy, unless excluded.⁵

Harleysville contends that because of the numerous and repeated defects in this project, there was no "accident" and coverage is precluded. Harleysville does not define "accident" in its policy. Our Court has, however, defined "accident" as "[a]n unexpected happening or event which occurs by chance, and usually suddenly with harmful results, not intended or designed by the person suffering the harm or hurt." Newman, Id. at p. 192. [*Emphasis supplied*]. Our Courts have made it clear that an accident does not require a sudden happening. Boggs v. Aetna Cas. & Surety Co., 272 S.C. 460, 252 S.E.2d 565 (1979) ("The phrase "injurious exposure to conditions" incorporated in the policy definition of "occurrence" indicates that an occurrence need not be sudden but may be produced over a period of time").

From the evidence presented, the Court finds that the continuous moisture intrusion into the Magnolia North buildings was an unexpected happening or event causing "property damage", in other words an "accident"- involving "continuous or repeated exposure to substantially the same harmful conditions" which triggered coverage under the Harleysville policies.

Based on the record, I find that the non-defective building components damaged by the continuous and repeated water intrusion constitutes "property damage" which was caused by an

⁵ The Court in Crossmann did not discuss exclusions since the parties stipulated that policy exclusions would not be raised.

"occurrence" and falls within the initial grant of coverage under the Harleysville policies. I further find that the negligently installed building components themselves would fall outside the grant of coverage by the Harleysville policies. Also, I find that the costs to remove defective building components to access the water damage would not be covered under the Harleysville policies. However, as discussed below, since there were covered claims and non-covered claims submitted to the jury and a general verdict was rendered, Harleysville must indemnify its insureds for the full amount of the final judgment, (reduced by "time -on-the-risk" analysis as discussed, *infra*.) unless the court finds that the covered claims are excluded.

EXCLUSIONS

Insurance policy exclusions are construed most strongly against the insurance company, which also has the burden of establishing the exclusion's applicability. Owners Insurance Co., v. Clayton, 364 SC 555, 614 S.E.2d 611 (2005). Since the jury in the underlying action returned a general verdict, a finding that a claim submitted to the jury is covered and not excluded answers the coverage question, *ie.*, the entire verdict is covered. Owners, supra. (Discussed *infra*).

Harleysville through its answers to interrogatories (Rec. Ex. 14), its pre-trial brief, and through the testimony of Lee Wright, Harleysville's construction litigation specialist, advances a number of policy exclusions it contends apply to exclude coverage. The following are exclusions advanced by Harleysville which will be discussed below:⁶

Exclusion "a" Expected or Intended Injury;

Exclusion "J-1" Property Damage to Property You Own Rent or Occupy;

Exclusion "J-5" Performing Operations;

Exclusion "J-6" Your Work Incorrectly Performed;

Exclusion "k" Damage to Your Product;

⁶ The numbering or lettering of the exclusions may vary among the various policies.

Exclusion "m" Impaired Property.

A. Exclusion "a"- Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured.⁷ This exclusion does not apply to the "bodily injury" resulting from the use of reasonable force to protect persons or property.

As noted above, the Harleysville insureds did not perform any of the construction. Their function was to oversee the subcontractors that were performing the construction. In Newman, the homeowner sued the contractor ("Trinity") alleging that the application of stucco to their home violated the building code and industry standards and these anomalies caused water to seep into the home and damage the home's exterior sheathing and framing. The stucco work was done by a subcontractor and the alleged defects were similar or identical to the defective work alleged in the underlying case here. Auto Owners claimed that the "expected or intended" exclusion precluded coverage because "a construction professional would expect substantial moisture intrusion from defective stucco to result in these type damages." *Id.* at p. 197. In rejecting this contention, the court stated:

"In our opinion, and in the absence of any evidence otherwise, it is unreasonable to believe that Trinity expected or intended its subcontractor to perform negligently. Therefore Trinity could not have expected or intended the resulting property damage. CF. Lamar Homes v. Mid-Continent Cas. Co., 242 SW 3d 1, 8 (Tx. 2007)('But a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly') *Id.* at p. 197.

⁷ Note that the exclusion expressly provides that it is the injury or damage which must not be intended.

The Court then must examine the record to determine if the Harleysville insureds "expected or intended" its subcontractors to act negligently and expected or intended the resulting property damage.

South Carolina applies a two pronged subjective test in determining the applicability of this exclusion. First, the act causing the damage must be expected or intended by the insured and second, the resulting damage must be expected or intended from the standpoint of the insured. Vermont Mutual Insurance Co., v. Singleton By and Through Singleton, 316 S.C. 5, 446 S.E.2d 417 (1994); Manufacturers and Merchants Mutual Inc. Co. v. Harvey, 330 S.C., 152 498 S.E.2d 222 (S.C. 1998). In South Carolina Farm Bureau Mut. Ins. Co. v. Dawsey, 371 S.C. 353 638 S.E.2d 103 (S.C. App. 2006)(Certiorari Denied), the Court pointed out that the terms "intend" and "expect" are often defined synonymously.

The question then before the Court is did Harleysville's insureds not only expect or intend their subcontractor to perform negligently which caused the damage complained of, but did they also expect or intend the resulting damages to the condominiums? Harleysville's construction litigation manager, Lee Wright explained the proof he believed necessary for exclusion "a" to be applicable:

"On the, on, on the exclusion, you have to prove that – well, intent is, is, difficult to prove in any, in any sense. It's a more subjective argument, that you'd have to climb inside somebody's head and prove that, you know, that there is a reason to believe that they either expected or intended or intended this."⁸
(Rec. p. 1372, 11 6-19).

Mr. Wright also testified that he had no evidence that the insureds "consciously intended to create a situation that water damage would occur, I don't have that." (Rec. p. 13839). The record is replete with numerous deficiencies that were repeated but this is tempered by the fact

⁸ This is clearly in accord with South Carolina law.

that there were 21 buildings containing 12, 13 or 15 units per building. However, for exclusion "a" to apply there must be evidence viewed from the standpoint of the insured that the insured subjectively intended its subcontractors to perform negligently and subjectively intended the resulting damages. The evidence in this record does not support such a finding. In neither the underlying action nor this action was Roger Van Wie called as a witness. Mr. Van Wie, a principal in all the insureds, was intimately involved in the construction. However, officers of the Harleysville insureds were called to testify in the underlying action.

Gwyn Hardister, Chief Operating Officer of Heritage Communities, Inc., the overall developer, testified. He testified that Heritage hired subcontractors thought to be skilled in their trade. (Rec. Video, Tr. pp.13640-41). He also testified that they were not knowingly using products that were defective. (Rec. Video, pp. 13640-41). Mr. Hardister testified that Heritage had no intent to harm the homeowners; that Heritage rectified the construction deficiencies. (Rec. video p. 13643); and that Heritage attempted to lean to the side of the homeowners. (Rec. Video, p. 13643).

Harleysville emphasizes the leaking window issues as negating the existence of an accident. During construction the Harleysville insureds claimed the Betterbilt windows were defective and leaked. Betterbilt claimed the method of installation caused the leaks. James Graham, a Betterbilt representative, testified by deposition (Rec. Ex. 24) that he warned Heritage the windows were being installed in a defective manner. The subcontractor continued installing the windows the same way because the Harleysville insureds were convinced that the windows were defective and the source of the leaks and changed to another manufacturer. This was clearly a dispute between the builder and the manufacturer as to the source of the problem. Post construction tests revealed that leaks occurred both from defective windows and the

method of installation. City of Johnstown N.Y. v. Bankers Standard Ins. Co., 877 Fd.2d. 1146, 1150, 1151 (2nd Cir. N.Y. 1989)(It is not enough that an insured was warned that damages might ensue from its actions or insured decided to take a calculated risk. It is only when the insured knew that damages would flow from his acts that coverage is precluded because the damages are not accidental). It is clear from the record that Heritage was attempting to find the source of the leaks and stop them.

The record reveals defects and installation of a defective product with no proof showing that the Heritage insureds were even aware of, such as the defective Louisiana Pacific trim which caused extensive damages to the buildings.⁹ The fact that there were numerous defects is not determinative. It is the intent, not the foreseeability that determines the application of exclusion "a". Continental Western Ins. Co. v. Toal, 309 Minn. 169, 244 N.W.2d 121 (Minn. 1976)(defining expected injury as a foreseeable injury would have the effect of unduly limiting coverage because foreseeability is an essential element of negligence and therefore would exclude injuries even from simple negligence). This "foreseeability" test was rejected in Newman and the Court will not apply it here.

Harleysville contends that the award of punitive damages is strong evidence that their insureds intended to cause damages. This same position was advanced by the insurance company in Pennsylvania Thresherman & Farmer's Mutual Casualty Ins. Co. v. Thornton, 244 F.2d 823 (C.A. 4 1957).¹⁰ Applying South Carolina law, the court rejected the carrier's position holding that:

"Negligent conduct may be so gross so as to merit characterization as willful and wanton in the sense of the rule for punitive damages, yet fall far short of an assault and battery which would distinguish it from an

⁹ Acceptance Ins. Co. v. American Safety Risk Retention Group, Inc., 2011 WL 3475305 (S.D. Cal. 2011)(In determining what knowledge of insured was, construction defects must be analyzed separately).

¹⁰ This case is cited in Carroway v. Johnson, *supra*.

accidental event and withdraw it from the coverage of the policy...to allow the appellant's argument would lead to the illogical and indefensible result that....the more extreme the recklessness the more likely the insurer would be to escape liability." *Id.* at p. 827.

The Court went on to hold that no matter how reckless the respondent's conduct, there was nothing in the record to establish the insured intended to injure the plaintiff. Likewise in the case at bar there is nothing in the record that indicates the insureds intended to injure the plaintiffs or intended its subcontractors to perform negligently.

In addition, two causes of action were submitted to the jury, negligence and breach of fiduciary duty, both of which would support punitive damages. Unfortunately, Harleysville chose not to attempt to intervene and special interrogatories were not submitted to determine the basis upon which the jury awarded exemplary damages. The Court cannot now speculate. The Court would also note that a finding of intent to harm is not required for an award of punitive damages. Anderson v. Atlantic Coast Line R. Co., 179 S.C. 367, 184 S.E. 164 (1936)(to authorize recovery of punitive damages, an intentional act with a purpose to do wrong to a person is not necessary; reckless disregard of the rights of others is sufficient to authorize such damages. It is not necessary for punitive damages that the Defendant had a specific intent to injure Plaintiff); Hicks v. McCandlish, 221 S.C. 410, 70 S.E.2d 629 (1952)(punitive damages allowed when wrongdoer does not actually realize that he is invading the rights of another). The Court finds this argument unpersuasive.¹¹

This Court finds as a matter of law that there is insufficient evidence to conclude that the Harleysville insureds expected or intended their subcontractors to perform negligently and

¹¹ American Family Mutual Inc. Co. v. Pacchetti, 808 SW2d. 369 (Mo. 1991)(Finding that insured acted recklessly does not compel a finding that injury was intentional. If coverage were to turn on jury's finding whether insured acted negligently or recklessly, insurance would be of scant value); Koch Engineering Co. Inc. Gilbralter Cas. Co. Inc., 78 F. 3rd 1291 (C.A. 8 Mo. 1996)(Finding recklessness is not the equivalent of a finding that insured intended the conduct. This case involved a failure to properly design a filtration system).

expected or intended the property damage that resulted from the negligent construction. The Court finds as a matter of law Harleysville did not meet its burden of proof that exclusion "a" precludes coverage.

B. Exclusion "J-1" – Property You Own Rent or Occupy

This exclusion is intended to carve out coverage that would normally be afforded under a property policy. Bruner & O'Connor Construction Law 11:96 (2010); C.O. Falter, Inc. v. Crum and Forster Ins. Companies, 79 Misc. 2d 981, 361 N.Y.S. 2d 968 (N.Y. Sup. 1974)(this exclusion did not preclude coverage where insured contractor relinquished key to building upon completion of work); Mid-Continent Cas. Co. v. JPH Development, Inc., 557 F.3d. 207 (5th Cir. Tex. 2009). (Exclusion "J" does not apply to damage that occurs after construction is completed).

In a 1979 publication by the Insurance Services Office (ISO), the drafter of exclusion "j", the ISO explained its intent for this exclusion as follows:

"It is intended that property manufactured or purchased by the insureds and constructed or installed at premises not owned by the insured shall be considered property owned by the insured until the construction or installation is accepted by the owner. (Insurance Services Office, Inc., Circular No. General Liability GL 79-12, (Broad form property damage coverage explained) January 29, 1979).
[Emphasis Supplied].

Although it is apparent that some damage from water intrusion (although unspecified) may have begun while construction was being performed, it is also clear damages were occurring after the units were completed and sold. There is no quantification of these damages in the record, nor can there be since there was a general verdict and Harleysville did not seek an allocation of damages. The Court finds as a matter of law that the evidence does not support

the application of this exclusion "J(1)" and even if it did, the exclusion would be a partial exclusion and thus would not aid Harleysville because of the general verdict. Owners, supra.

C. Exclusion "J(5)"

That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations if the "property damage" arises out of those operations;

This exclusion, known as the "Performing Operations Exclusion" only applies to the work that is being actively worked on at the instant the property damage occurs. Assurance Co. of America v. Admiral Ins. Co., 2011 WL 1897589, (S.D. Ala. 2011)(Exclusion "J(5)" applies only to the property damage that occurs while the contractor and/or subcontractor is performing work); Thomas v. Nautilus Ins. Co., 2011 WL 4369519 (D. Mon. 2011)(This "J(5)" exclusion only applies to bar coverage to property on which the insured or any subcontractors "are performing operations").

Again, there is no quantification of damages occurring during the time Buildstar's subcontractors were performing work ("Operations") at the projects. Even if there were such proof it would exclude only a portion, if any, of the damages which would not aid Harleysville because of the general verdict. I find as a matter of law, that Harleysville has not discharged its burden of proof that exclusion "J(5)" applies to exclude coverage of the judgment in the underlying action.

D. Exclusion "J(6)"

That particular part of any property that must be restored, repaired or replaced because of "your work" was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to the "property damage" included in the products completed operations hazard.

This exclusion is one of the "business risk" exclusions and may apply to exclude Plaintiff's claims except for the last paragraph providing that "J(6)" does not apply to property included in the products completed operations hazard.¹²

The Harleysville policies provide completed operations hazard coverage. Since the Harleysville Insureds had completed operations hazard coverage, exclusion "(J)(6)" cannot apply to damage occurring after the insureds work is completed. Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002); Exclusion "J6" applies to damages that occur during construction due to faulty workmanship. Mid-Continent Cas. Co. v. JPH Development, Inc., *supra*.

Harleysville has failed to discharge its burden of proof as to this exclusion's applicability and I find as a matter of law Exclusion "J(6)" does not apply.

E. Exclusion "k" - Damage to Your Product

"Property damage to "your product" arising out of it or any part of it".

This exclusion cannot apply because the policy defines "your product" as "a. any goods or products other than real property manufactured, sold and/or distributed or disposed of by you..." Since "your product" does not include real property, the exclusion cannot apply to the condominiums at Magnolia North. In addition, "goods or products" do not include services, such as the work of contractors and developers. Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 654 (9th Cir. Or. 1988); Scottsdale Ins. Co., v. Tri-State Ins. Co. of MN., 302 F. Supp 2d. 1100 (D.N.D 2004)("Real Property" was deleted from the definition of

¹² The policies define "Products-Completed Operations Hazard" "a. Includes all...property damage occurring away from the premises you own or rent and arising out of... 'your work' except;...(2) work that has not been completed or abandoned.

"Product" in the 1996 CGL policy "clarifying that work on homes, buildings, or other structures is not considered to be the insureds "product") [citation omitted]. The Court concludes as a matter of law that exclusion "k" does not apply.

F. Exclusion "m" - Damage to Impaired Property or Property not Physically Injured

"Property Damage" to "impaired property" or property that has not been physically injured arising out of:

- (1) a defect, deficiency, inadequacy or dangerous condition in "your product" or "your work; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of a sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

"Impaired property" means tangible property, other than "your product" or your work, that cannot be used or is less useful because:

- a. It incorporates "your product" or your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;
if such property can be restored to use by:
 - a. The repair, replacement, adjustment or removal of "your product" or your work; or
 - b. Your fulfilling the terms of the contract or agreement.

[Emphasis Supplied.]

This exclusion is commonly called the "impaired property" exclusion. Our courts have not addressed the impaired property exclusion under the facts and circumstances present in this action. The exclusion contains numerous terms that are defined in the CGL policies and the policy definitions must be applied when determining the applicability of exclusion "m". The

exclusion is complex and difficult to understand. It has been found to be ambiguous. Serigne v. Wildey, 612 So.2d 155 (La. App. 5th Cir. 1992).

If the loss involves damage by work performed by the insured or its subcontractors (and thus falls outside of the definition of "impaired property") or involves physical injury to tangible property, the exclusion will often be found not to apply..." *Bruner & O'Connor Construction Law*, Sec. 11:106, p. 4. The definition of "impaired property" requires that the tangible property whose use has been lost cannot be "your product" or "your work". Thus damage to "your product" or "your work" cannot qualify. *Insurance Coverage of Construction Disputes*, 2nd Edition, Sec. 26:7.

In these cases, the condominiums are not "impaired property" because they are the work of the Harleysville insureds and are therefore "your work" which falls outside of the policy definition of "impaired property". Therefore, exclusion "m" cannot apply. C.J.S.U.B., Inc. v. U.S. Fire Ins. Co., 906 So.2d 303, 311 (Fla. App. 2 Dist. 2005)("impaired property" exclusion does not apply because defective homes are undeniably the builder's work as "your work" is defined in the C.G.L. policy.")(Decision approved 979 So.2d 871 (Fla. 2007); Auto Owners Ins. Co. v. NewMech Companies, Inc., 678 N.W.2d 477 (Minn. App. 2004)(work was performed on behalf of the developer and is thus "your work" which does not come within the definition of "impaired property"). Durbrow v. Mike Check Builders, Inc., 442 F. Supp. 2d. 676, 684 (E.D. Wis. 2006)(the only damage at issue is damage caused by the insured's builder's work, which does not come within the definition of "impaired property" since it is the builder's work). Accordingly, "m(1)" of the impaired property exclusion does not apply.

The second part of exclusion "m" includes failure to perform a contract in accordance with its terms. This exclusion by its terms excludes contract claims. In this case, the allegations

and proof were in tort in that the insureds violated applicable building codes and industry standards. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989)(violation of a building code violates a legal duty for which a builder can be held liable in tort).

The Court finds as a matter of law that exclusion "m" does not exclude coverage for the final underlying judgment.

As a result of the Court's findings that there was an "occurrence(s)" causing "property damage", and none of the exclusions advanced by Harleysville excluded all coverage, the Court finds as a matter of law that there were covered claims submitted to the jury and since there was a general verdict, that answers the coverage question, *ie*, Harleysville must indemnify the Harleysville Insureds for the entire final judgments rendered in the underlying action. Owners, supra.

GENERAL VERDICT

The Court has determined as discussed above that both covered claims and non-covered claims and various causes of action were submitted to the jury in the underlying action which reached a general verdict. Harleysville offered evidence in an attempt to allocate the general verdict between covered and non-covered claims. The judgment holders objected on two grounds:

1. Since there was a general verdict any attempt at allocation would be speculative and;
2. The testimony would be irrelevant under Rules 401 & 402, *SCRE*.

Although I sustained the objection, I allowed Harleysville to proffer the testimony. Harleysville offered F.E. Baiden, a general contractor, to proffer evidence of an estimate that he performed

to completely repair the Magnolia North buildings. He then segregated that portion of his estimate which constituted cost to repair damage from water intrusion which under Newman and Crossmann would constitute "covered damages". He then took the percentage of the covered damages contained in his estimate and multiplied it times the jury's verdict to arrive at an amount representing damages from water intrusion. Mr. Baiden admitted that his estimate does not correlate or correspond with the underlying jury award (Rec. Tr. p. 13909). His estimate was based on labor rates and material costs current in 2010. (Rec. Tr. p. 13901). Plaintiff's estimate submitted at trial was based upon an investigation and scope of work prepared much earlier. Mr. Baiden's testimony would be irrelevant and speculative under Rule 401 & 402 *SCRE*, and therefore inadmissible even if the Court allowed Harleysville to attempt an allocation of the general verdict. This attempt at a re-litigation of damages was addressed in Newman.

Newman was a declaratory judgment action to determine if an arbitration award was covered under a CGL policy. Both covered claims and non-covered claims had been submitted to the arbitrator. The arbitrator issued a general award and did not allocate damages between covered and non-covered claims. The Court held that because the arbitrator did not allocate damages, Auto Owners would be liable for the entire award. Strikingly, the Court had this to say:

Nevertheless, it is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter [allocation of damages between covered and non-covered damages] when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits. FN5 (citation omitted).
Id. at p. 198.

FN5. Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

Id. at p. 198.

The Court refused to allow Auto Owners to re-litigate damages as have other courts.¹³ This Court likewise will not allow Harleysville to re-litigate the damages for to do so would be a clear invasion of the province of the jury. Lorick S. Lowrance, Inc. v. Julius H. Walsh, Co., 153 S.C. 309, 319, 150 S.E. 789 792(1929)("The law rather forbids this Court assuming to take upon itself the powers, duties, rights and privileges of a jury"). Anderson v. Aetna Cas. Sur. Co., 175 S.C. 254, 282, 178 S.E.819, 829 (1934)("Obviously, the absolute power to change or modify the findings of the jury upon an issue of fact properly submitted to them would when exercised, amount to the substitution of the trial judge's findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury". *Id.* at p. 283). As the Court said in S.C. State Hwy. Dept. v. Miller, 237 S.C. 386, 117 S.E.2d 561 (1960). "A verdict is the product of the minds of twelve men, and to a certain extent...frequently represents a result which no individual member of the panel would have reached in the first instance if free to follow his own judgment." *Id.* at p. 395.

In the underlying action, Harleysville undertook the defense of its insureds and hired attorneys to defend its insureds as it was required to do under the terms of its policies. Harleysville represented some of the insureds under a reservation of rights with an

¹³ Herrera v. American Standard Ins. Co., 203 Neb. 477, 279 N.W.2d 140 (1979)(Where numerous types of damages were submitted and defendant did not request an allocated verdict, the defendant at this late date will not be allowed to relitigate damages).

understanding that coverage issues would be reserved for judicial consideration in a separate proceeding. (Rec. Tr. pp. 13832, 13835-36). Harleysville's representatives and its legal counsel attended the trial (Rec. Tr. p. 13836) and were in contact both pre-trial and at trial with the trial counsel Harleysville employed to represent its insureds. (Rec. Tr. pp. 13833-34). Harleysville made the decision not to file a motion to intervene or otherwise seek an allocated verdict as it could have done under Rules 24 and 49, *SCRCP*. (Rec. Tr. p. 13835). Harleysville never explained to its insureds the need for an allocated verdict and the potentially devastating consequences of an unallocated verdict. (Rec. Tr. 13835-36). Nor did Harleysville explain to its insureds the divergence of interest (conflict) between it and its insureds. (Rec. Tr. 13839). Harleysville's representative conceded at trial that it is now impossible to determine how the jury allocated damages. (Rec. Ex. 11, p. 12245, Wright Depo); The Court will not engage in speculation.¹⁴

Harleysville contends, in part, that it made the decision not to intervene because at the time of the trial the law on CGL coverage was in a state of flux and an intervention would have

¹⁴ Jenkins v. Few, 391 S.C. 209, 705 S.E.2d 457 (S.C. App. 2010)(Defendant contributed to drafting general verdict form and general verdict makes it impossible to determine how the jury allocated damages. The Court will not speculate on how the jury allocated damages.);
Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (S.C. App. 2004)(“since the jury returned a general verdict and appellant did not request the trial court to submit a special verdict form to determine the type of damages rendered by the jury, the Court cannot speculate as to what portion of the award the jury attributed to lost profits as opposed to other tort damages”);
Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (S.C. App. 2005)(the jury's verdict was declared a general verdict by the trial Court and because the verdict was a general verdict we cannot now speculate as to how the jury allocated damages”);
Pearson v. Bridges, 344 S.C. 366, 544 S.E.2d 617 (2001)(since the jury returned a general verdict and the Defendant never requested a special verdict form separating the elements of damage, there is no way of knowing now how the jury allocated damages);
Harry L. Hussmann Refrigerator & Supply Co. v. Cash & Carry Grocer, 134 S.C. 191, 132 S.E.173 (1926)(since the Defendant's counsel made no attempt to find out what the jury intended, the Court cannot now clarify the jury's verdict).
Owners Ins. Co. v. Clayton, 364 S.C. 555, 614 S.E.2d 611 (2005)(Where covered claims were submitted to the jury which reached a general verdict, a finding that any of the three claims submitted to the jury is not excluded answers the coverage question, i.e., the carrier must pay the entire general verdict).

put Harleysville in a direct conflict with its insureds. Harleysville had advised its insureds that the claims in the underlying action may not be covered because the cases said there was no "occurrence". (Rec. Tr. pp. 13829-30). Harleysville relied on its assessment and sat silent when the forms of the verdict were being drafted and submitted to the jury. Harleysville cannot now use its own miscalculation to prejudice the rights of the insureds. Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 498, 473 S.E.2d 52 (1996) ("There is an implied covenant of good faith and fair dealing that neither party, insurer or insured, will do anything to impair the other's rights to receive benefits under the contract"). Our Courts have long recognized that when the insurer undertakes to represent its insured, it must subordinate its interests to those of its insureds. Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933) is apposite. In Tyger River, *supra*, the Court rejected the Kentucky rule that an insurance company in processing a claim may look to its own interest as well as interests of the insured stating that:

We especially dissent from the language of the [Kentucky] opinion which we have italicized. The very thing which the appellant in the case which we have before us for determination undertook to do was to hold the respondent harmless in the disposition of Chesser's claim. If, in the effort to do this, its own interest conflicted with those of respondent, it was bound, under its contract of indemnity, and in good faith, *to sacrifice its interest in favor of those of the respondent*. If the Kentucky rule is the law, then a policy of indemnity such as is before us becomes a delusion and a snare. In the nature of things when there is a conflict of interests – as is inevitably the case in all such matters – the company will give the preference to its own. [*Emphasis by the Court*].

For the protection of its interests the casualty company especially reserved the right to control and direct the matter of negotiations for settlement and compromise, and of the defense of the action if litigation ensued. The plaintiff was directly deprived of a voice or part in such negotiations and defense. If the rule of the Kentucky case shall prevail, the indemnity companies may well felicitate themselves, for they are in a position to say to the insured, 'Heads I win, tails you lose.'"

Id. at p. 348.

As the Court said in Newman, it is the insurer's responsibility, who is in control of the litigation, to make sure there is an allocated verdict. Harleysville must sacrifice its interests in favor of the insureds. Courts throughout the country have determined likewise.

The following, taken from the case of Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491 (10th Cir. Oak. 1994), is worth quoting:

As an initial matter, we note that an insurer who undertakes the defense of a suit against its insured must meet a high standard of conduct. Duke v. Hoch, 468 F.2d 973, 978, (5th Cir. 1972); Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co., 550 F. Supp. 710, 714-16 (W.D.Okla.1981). The right to control the litigation carries with it certain duties. Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 627 (10th Cir.1942). One of these is the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages. See Gay & Taylor, 550 F.Supp. at 716. The reason for this is that when grounds of liability are asserted, some of which are covered by insurance and some of which are not, a conflict of interest arises between the insurer and the insured. If the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories. Duke, 468 F.2d at 979. The insurer is in the best position to see to it that the damages are allocated; therefore, it should be given the incentive to do so. *Id.* at. pp. 1498-1499.

Harleysville's failure to attempt to intervene or otherwise seek an allocated verdict cannot now be used to prejudice the rights of its insureds or the rights of the claimants who step into the shoes of the insureds. As the court said in Buckley v. Orem, 112 Idaho 117, 123, 730 P.2d 1037 (Idaho App. 1986):

"...when the insurer sought to limit its liability to the coverage provided by the contract, the insurer was required to show that it had faithfully and fully performed its responsibilities to its insured by disclosing the need for an allocated verdict. The application of this principle has consequences in the secondary action where the

injured party was directly pursuing insurance proceeds through garnishment or other post-trial litigation involving the insurer. This carry over effect occurred because at this secondary stage of the litigation the injured party stands in the shoes of the insured party. Accordingly, the injured party would be able to assert rights the insured would have had against the insurer and the insurer would be able to rely on any defenses which it could have asserted against its insured. *Id.* at p. 124 [*Emphasis Supplied*].

Harleysville relies on Duke v. Hoch, 468 F.2d 973 (C.A.5 1973) for the proposition that the Court should allow it to estimate what part of the unallocated verdicts constitute non-covered claims. In Duke, because the Court directed a verdict on one issue, the insurance carrier was able to carry its burden of showing that the jury allocated damages to a non-covered claim. Duke clearly holds that a post verdict allocation of damages in the coverage context should not even be considered unless and until the insurer meets its burden of showing that the general verdict includes damages for non-covered acts. In the case at bar, that is simply not possible. Here, the Court has no basis upon which to make a logical assessment of the jury's purpose when it awarded the general verdict, and the Court will not engage in unguided speculation with respect to this issue, particularly when the dilemma now confronting Harleysville is of its own making.¹⁵

The Court concludes as a matter of law that because there were covered claims submitted to the jury which were not excluded and the jury rendered a general verdict, Harleysville is precluded from now re-litigating damages. Harleysville must indemnify its insureds for the entire amount of the final judgment in the underlying case.

¹⁵ McCloud v. Roy Riegels Chemicals, 20 Cal. App. 3rd 928, 97 Cal. Repr. 910 (Cal. App. 3d Dist. 1971) (parties should have one chance (by request for special verdict forms) to have the jury's verdict pinpointed. They should not be permitted to drag out litigation by turning their backs on the safeguards provided by the legislature. Where a general verdict was rendered where a special verdict could have been used, it puts the courts in a guessing game as to how the jury traveled to reach its verdict).

PUNITIVE DAMAGES

Harleysville denies that its CGL policies provide coverage for punitive damages "because they are uninsurable as damages under the policies". (Ex. 3 Complaint, p. 7 paragraph "P"). The Court disagrees. Our Courts have long held that a builder who is grossly negligent in the construction of a building is subject to punitive damages. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989).

Some Courts have found that the "all sums" and "damages" language in the CGL policy is ambiguous which requires the ambiguity to be construed against the insurer and in favor of coverage. United Services Auto Ass'n. v. Webb, 235 Va. 655, 369 S.E.2d 196 (1988). Other Courts such as South Carolina have found punitive damages recoverable under the plain language of the CGL policy. Carroway v. Johnson, 245 S.C. 200, 205, 139 S.E.2d 908, 910 (1965)(stated by the Court to be the majority rule); S.C. State Budget & Control Board Division of General Services v. Prince, 304 S.C. 241, 403 S.E.2d 643 (1991)(the term "all sums" requires the construction of the policy to include coverage for punitive damages).

In Carroway v. Johnson, *supra*, the Court was faced with the coverage of punitive damages under the identical language contained in the Harleysville policies. The insuring agreement in the Carroway policy provided the carrier agreed:

"to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of"
Id. at p. 202.

The Court held that the average insured would contemplate punitive damages would be covered under the CGL policy, stating: "with this view the majority of Courts have agreed, and have imposed liability upon the insurer even though the recovery was based upon willful or wanton

conduct..." *Id.* at p. 205. The Court concluded the language in the policy was broad enough to include liability for punitive damages.¹⁶

The Supreme Court examined this same issue in South Carolina State Budget and Control Board v. Prince, *supra*, wherein the court was once again faced with the identical language contained in the Harleysville policies:

"The fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages." [Emphasis supplied]. *Id.* at p. 648. (citing Carroway, *supra*.)

The Court pointed out that the policy does not define "damages" and does not limit recovery to "actual damages". The Court held that this broad language must be interpreted to include punitive damages.¹⁷

Harleysville agreed to indemnify its insureds for "all sums" its insureds become legally obligated to pay. Punitive damages are not excluded by the language of the policy. If insurers intend to preclude coverage of an item, it is incumbent upon them to include clear language accomplishing that result. Crossmann, *supra*. Harleysville could have simply added the word "compensatory" before the word "damages" if it had intended to exclude punitive damages. United Services Automobile Assn. v. Webb, *Id.* at p. 204. ("The insurance carrier could have inserted the word 'compensatory' before the word 'damages', or specifically excluded liability for punitive damages elsewhere in the policy, and resolved the ambiguity but it did not. Therefore we construe the ambiguity, against the insurance company and in favor of coverage").

¹⁶ Harleysville's representative, Lee Wright testified that if the claim met the requirements of the insuring agreement there is nothing in the policy that says Harleysville will not pay punitive damages. "There is not a punitive damages exclusion in the policy" (Rec. Ex. 11, Lee Wright depo. p. 12245).

¹⁷ Fluke Corp. v. Hartford Acc. & Indemnity Co., 102 Wash. App. 237, 7 P.3d. 825 (2000) (Trial Court was in error in interpreting the policy to include only "compensatory damages". We elect to follow the majority rule that the terms of the policy "all sums that the insured becomes legally obligated to pay as damages" will be interpreted to provide coverage for punitive damages). [Citing among other cases South Carolina State Budget and Control Board v. Prince, *supra*.]

Harleysville advances the position that the jury's award of punitive damages is tantamount to a finding of intentional conduct which would exclude coverage for punitive damages. This same position was advanced by the insurance company in Pennsylvania Thresherman & Farmer's Mutual Casualty Ins. Co. v. Thornton, 244 F.2d 823 (C.A. 4 1957).¹⁸

Applying South Carolina law, the court rejected the carrier's position holding that:

"Negligent conduct may be so gross so as to merit characterization as willful and wanton in the sense of the rule for punitive damages, yet fall far short of an assault and battery which would distinguish it from an accidental event and withdraw it from the coverage of the policy...to allow the appellant's argument would lead to the illogical and indefensible result that....the more extreme the recklessness the more likely the insurer would be to escape liability." Id. at p. 827.

The Court went on to hold that no matter how reckless the respondent's conduct, there was nothing in the record that the insured intended to injure the plaintiff.

Likewise in the case at bar there is nothing in the record that the insureds intended to injure the plaintiff.

Despite the contrary arguments by Harleysville, the Court concludes that punitive damages are covered under the Harleysville policies and Harleysville must indemnify its insureds for any punitive damages in the final judgment.

RESERVATION OF RIGHTS

Magnolia North POA contends that Harleysville did not issue a reservation of rights letter ("R/R/L") to Buildstar, the general contractor. Magnolia North POA also contends that the R/R/Ls issued to Heritage Communities, Inc. and Heritage Magnolia North, Inc. were insufficient to reserve its rights to contest coverage. This issue was raised by the parties in both the pleadings and discovery and was thoroughly explored in the testimony at trial.

¹⁸ This case is cited in Carroway v. Johnson, *supra*.

A. FAILURE TO ISSUE R/R/L TO BUILDSTAR.

Lee Wright, construction Litigation Specialist for Harleysville, testified that he believed a R/R/L was sent to Buildstar but could not find one. (Rec. Tr. p. 13745). Harleysville produced no copy of the letter or other proof that one had been sent. While it may have been an inadvertent oversight, the Court concludes that Harleysville never sent a letter reserving its rights as to Buildstar.

Harleysville, however contends that its discussions with principals of its insureds were sufficient to reserve its rights because the same principals were in all three of its insureds and Harleysville's representatives had conversations with the principals and their attorney about coverage issues, ergo., their insureds including Buildstar understood and agreed that coverage issues would be reserved post litigation. The Court disagrees.

As noted in the findings of facts, Harleysville issued general reservation of rights letters to Heritage Communities and Heritage Magnolia North and never supplemented them to advise their insureds of their specific policy defenses even though Harleysville recognized that facts arise during litigation that may or may not affect coverage. (Rec. Tr. p. 12234). In fact, although Harleysville set forth practically all of its policy exclusions, Harleysville advised its insureds that it was relying on Harleysville's interpretation of the law that there was no "occurrence" as that term is defined under the policy and therefore there was no need to even consider exclusions. (Rec. Tr. pp. 13829-31). Now that there is a judgment against its insureds, Harleysville has decided that there are four exclusions that may be applicable. (See Harleysville's Amended Answers to Interrogatories dated Oct. 15, 2010, interrogatory No. 37.). There is no South Carolina law that details what a properly written R/R/L must contain.

However, several commentators have discussed the purpose of a R/R/L and the minimum such a letter should contain.

PURPOSE

1. "[t]he purpose of reservation of rights letters is to enable insureds to make informed decisions as to whether they should because of the existence of conflicts of interest between themselves and their insurers, take some action in order to protect their interests." Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies & Insureds* § 2.14 (5th ed.2007).

CONTENTS

2. "The insurer must avoid ambiguity, since any ambiguity in the reservation of rights will be resolved against the insurer." Goodman & Jacobs § 8.9. To avoid ambiguity, certain elements should be included in a reservation of rights letter, including (i) specific identification of the policy at issue; (ii) a description of the claims or allegations in the complaint, including details of the facts known at that time (iii) citation and quotation of each policy provision forming the basis of the insurer's coverage defenses, including an explanation of why each provision could cause denial of coverage; (iv) a specific reservation of the insurer's right to change its coverage position and to assert defenses based on any of the policy provisions, even if not specifically set forth in the letter; (v) a detailed explanation of the claim investigation that will be undertaken to determine the insurer's ultimate coverage decision and when that decision should be expected; and (vi) an advisement of any issues that actually or potentially give rise to a conflict of interest between the insurer and insured. See Peter Kalis, et al., *Policyholder's Guide to the Law of Insurance Coverage* § 24.04 (1998 & Supp.2007); Jerold Oshinsky & Theodore A. Howard, *Practitioner's Guide to the Law of Insurance Coverage* § 205 (2nd ed.1198 & Supp.2007); Goodman & Jacobs § 8.9.

As to the timing of a reservation of rights letter, once the insurer determines that it has a duty to defend, it should send the letter "prior to assuming the insured's defense, or within a reasonable time thereafter." Windt § 2.14; see Oshinsky &

Howard § 205 ("there are two basic requirements for reservations of rights and disclaimers of coverage: (1) they must be given in a timely fashion; and (2) they must be made with specificity"). Sometimes an insurer may need additional time to analyze the existence of coverage and thus it may send a general reservation of rights letter; however, the insurer must then supplement the reservation of rights letter as soon as it learns of its specific defenses, Windt § 2.14.

The Harleysville R/R/Ls fall far short of these requirements. The R/R/L does not explain why each provision or exclusion would cause a denial of coverage; does not contain a detailed explanation of the claim investigation that will be undertaken to determine the insurer's ultimate coverage decision and when that decision could be expected; and does not set forth issues that actually or potentially could give rise to a conflict of interest. Harleysville's R/R/Ls fail in specificity and Harleysville never supplemented its letters to detail their specific defenses and importantly, Harleysville never advised its insureds of the need for an allocated verdict and the devastating consequences a general verdict may cause.

Although the Court could find no legal precedent in South Carolina for an oral reservation of rights, it is generally frowned upon because it can lend itself to ambiguity and is at odds with the very purpose behind a R/R/L – that is, to inform the insured in a timely manner specifically what the policy defenses are so that the insureds can take appropriate action to protect their own interest due to a conflict of interest with the insurer. Oshinsky & Howard § 205; Windt § 2.14; Goodman & Jacobs § 8.9. An oral reservation is likely to generate a dispute as to what was said and lead to exactly the kind of expensive and protracted litigation Magnolia North is now experiencing. Even if an oral reservation is allowed under South Carolina jurisprudence, when viewing the facts in the light most favorable to Harleysville, the oral communications by Lee Wright fall short of the specificity and are ambiguous at best. On the one hand he was advising the insureds Harleysville did not believe anything was covered

(Rec. Tr. p. 13827), and on the other hand he was advising them that the "grand majority" of the claims were not covered. This exemplifies the need for a written and specific reservation of rights.

Providing timely and specific policy defenses and disclosing actual or potential conflicts are important fiduciary duties of the insurer especially when, as here, Harleysville is controlling the defense of its insured.

The Court concludes as a matter of law that Harleysville failed to properly reserve its rights to dispute coverage not only as to Buildstar, but also as to Heritage Communities, Inc and Heritage Magnolia North, Inc. The Court further finds that this action clearly prejudiced the Harleysville insureds and can be raised by Magnolia North. Lee, supra. The Court further finds that Harleysville's actions constitute an implied waiver of Harleysville's right to contest coverage in this action. Lyles v. MBI, Inc., 292 S.C 153, 355 S.E.2d 282 (S.C. App. 1987) (Implied waiver results from acts and conduct of party against whom doctrine is invoked from which an intentional relinquishment of right is reasonably inferable).

Although the Court has already concluded that Harleysville has a duty to indemnify the insureds, this issue was fully litigated and the Court felt it appropriate to address the issue.

TIME ON THE RISK

Harleysville has asked this Court to apply a time-on-the risk analysis to the damages if the Court finds that there are damages covered by the Harleysville policies. As noted above, I have determined that the judgment rendered in the underlying action is covered by the Harleysville policies. However, I find as a matter of law that the "time-on-the-risk" analysis recently adopted by the Supreme Court in Crossmann, supra, should be applied to the actual damages awarded of \$4,968,937.02 (verdict with set-off and less the \$2,000,000 punitive

damages). I find that the "time-on-the-risk" analysis should not be applied to the punitive damages.

In the recent Crossmann, supra, case the court had before it the question of how to equitably allocate damages among successive insurance policies when the damages were "progressive" damages that occurred over several policy periods or uninsured periods. The parties stipulated that the damages resulted from water intrusion (and were all progressive damages) and the time the damages began and progressed. The parties in Crossmann, supra, also stipulated that either "time-on-the-risk" analysis or "joint-and-several" analysis would apply to those progressive damages. The Supreme Court adopted a time-on-the-risk analysis. The Court instructed that in cases where progressive damages have occurred over a number of successive policy periods so that it is impossible both scientifically and administratively to determine the amount of damages occurring in each policy period, a default method is to be employed. The default method would require the total amount of progressive damage to be divided by the number of policy periods to determine the approximate amount of damages in each policy period. If there were periods in which the insured did not provide insurance the insured would absorb the amount of damages occurring during the uninsured periods. I find that it is appropriate for the Court to apply a time-on-the-risk analysis to the general verdict pursuant to Crossmann, supra. In order to accomplish this I must determine when damages began to occur and an ending date of those damages for the purpose of this analysis.

Drew Brown, expert for the underlying Plaintiffs testified that damages began 30 days following the Certificate of Occupancy. The first Certificate of Occupancy was issued December 10, 1998 so the damages began on January 10, 1999. The last time that anyone went out to look at that property in connection with the Buric Report was May 5, 2004. I find that the



damages were advanced enough that they needed repair and/or replacement and that the passage of additional time, while it may have made something even less sound, it did not change the point in time that they needed repair and/or replacement. Accordingly, I find that there were 1,943 days in which these damages occurred and had reached a point where all of the repairs and/or replacements would have needed to be made. The Court is not going to attempt to compute damages using a per building Certificate of Occupancy date. The verdict rendered in this case was a general verdict and, thus, made no award based on damages for a particular building, but awarded damages as to the whole project. Using a per building Certificate of Occupancy would, in essence, require the Court to allocate damages and would be speculative, at best. The Court concludes that in applying "Time-on-the-Risk" to these facts, the most equitable way to proceed is by comparing the total number of days in which damage occurred to the entire project to the total number of days of coverage under the Harleysville policies.

Harleysville had coverage on January 10, 1999 when the damage began and I find that this coverage for Magnolia North continued until November 30, 2000 which are the dates of coverage put into evidence in the 2010 hearing and in the 2011 hearing. I find that Harleysville, therefore, had coverage for Magnolia North for a period of 691 days. In using the numerator and denominator in the Crossmann case, this creates a multiplier of .3556 which is used to multiply the general verdict. Using this multiplier, Harleysville will be responsible for only a part of the general verdict as follows:

MAGNOLIA NORTH PROPERTY OWNERS ASSOCIATION

\$4,968,937.02	actual damages after set-off and less punitive damages
x .3556	multiplier as determined above
\$ 1,766,954	actual damages after applying "time-on-the-risk"

\$ 2,000,000 punitive damages added back
\$ 2,766,954 amount covered by Harleysville policies

CONCLUSION

IT IS HEREBY ORDERED AS FOLLOWS:

- A. I find and conclude that there were "occurrences" with resulting "property damage" which occurred during the policy period and which triggered coverage for the Association's claim for actual and punitive damages;
- B. I find and conclude that the exclusions advanced by Harleysville do not exclude coverage for the claims made in the underlying action by the Association;
- C. I find and conclude that the general verdict rendered in the underlying action preclude the Court from looking behind the general verdict in an attempt to allocate damages between covered and non-covered damages. I further find and conclude that covered claims and non-covered claims were submitted to the jury and since there was a general verdict, the entire amounts awarded by the jury in the underlying actions are covered by the Harleysville policies;
- D. I find and conclude that it is appropriate to perform a time-on-the-risk analysis to the actual damages in the underlying action but that it would not be appropriate to apply the time-on-the-risk analysis to the punitive damages awarded to the association. Applying the time-on-the-risk analysis to the actual damages awarded to the Association, Harleysville would have coverage for actual damages awarded the Association in the amount of One Million Seven Hundred Sixty-Six Thousand Nine Hundred Fifty-Four and 00/100

- (\\$ 1,766,954.00) Dollars as calculated on page forty-three (43) above. Harleysville would also have coverage for punitive damages awarded the Association in the amount of Two Million and 00/100 (\\$ 2,000,000.00) Dollars.
- E. I find and conclude that punitive damages are not excluded from the Harleysville policies and are covered under the terms of the Harleysville policies;
- F. I find and conclude that Harleysville did not properly reserve its right to contest coverage for the claims made by the Association;
- G. I find and conclude that the Association is entitled to judgment against Harleysville for actual damages in the amount of One Million Seven Hundred Sixty-Six Thousand Nine Hundred Fifty-Four and 00/100 (\\$ 1,766,954.00) Dollars and punitive damages in the amount of Two Million and 00/100 (\\$ 2,000,000.00) Dollars;
- H. I find and conclude that Harleysville's policies here under consideration specifically provide coverage for post-judgment interest and the Association is entitled to judgment for statutory post-judgment interest on the amounts found covered from the date of the order for judgment in the underlying actions;
- I. The Motion by Harleysville to amend or reopen the record is denied;
- J. As noted above, the underlying actions are under appeal. The provisions of this Order are subject to modification if warranted by the final judgment in the underlying actions and this order is without prejudice to the parties to move



pursuant to Rule 60, SCRCP, for the correction of the amount to be indemnified.

AND IT IS SO ORDERED.



JOHN M. MILLING
Special Referee

Darlington, South Carolina.
February 28, 2013.



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 CAROLINACORPORATION;)
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

COP

ORDER

13 APR 24 PM 4:01
CLERK OF COURT

This matter came before the undersigned as Special Referee pursuant to Motions to Vacate, Alter or Amend the Orders which I previously issued dated February 28, 2013, and filed with the Court on March 13, 2013. This hearing was held on April 9, 2013.

Harleysville is represented by Robert C. Calamari, Esquire, formerly of the firm of McAngus, Goudelock & Courie, LLC and now of Nelson Mullins Riley and Scarborough and C. Mitchell Brown, also of Nelson Mullins Riley and Scarboarough; the "judgment holders", Heritage Magnolia North, Inc. Property Owners Association is represented by John P. Henry, Esquire, and Philip C. Thompson, Esquire, of the firm of Thompson & Henry, P.A.; National Surety Corp. is represented by Laura Johnson Evans of the firm of Smith Moore Leatherwood, LLP and Karin McCarthy of the firm of Rivkin Radler, Attorneys at Law, of New York. The

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positions of the parties have been set forth in their Motions and/or correspondence submitted to the undersigned and were fully argued.

I have considered the positions addressed by the Plaintiff in this matter, as well as the Defendant judgment holders represented by Mr. John P. Henry, and National Surety Corp. represented by Ms. Laura Johnson Evans and Ms. Karin McCarthy. Except as provided for hereinafter, the requests of the parties to this suit presented to the undersigned by way of Motion and oral argument are denied.

The Plaintiff requested clarification as to its Motion for a Default Judgment with respect to its insureds, Heritage Communities, Inc., Heritage Magnolia North, Inc. and Build-Star Corporation. The Court notes that while the issue was discussed in its initial Order, the decretal portion did not contain the Court's Ruling. As stated by the Court in its prior Order, Harleysville's insured, being Heritage Communities, Inc., Heritage Magnolia North, Inc. and Build-Star Corporation, did not answer or otherwise appear in the declaratory action, although properly served. The Court does find that these insureds of Harleysville are in default. However, while the Court finds that these insureds are in default and are individually prohibited from re-litigating any issues involved in the case, this default does not affect the rights of the Plaintiff judgment holders in the underlying cases. These Plaintiff judgment holders in the underlying cases have stepped into the shoes of the Harleysville insureds, and they are not prejudiced in any way by the default of Harleysville's insureds.

By a separate Order, the Court found that the claim by the Plaintiff in this declaratory action against the Defendant, National Surety Corp., should be dismissed, as the coverage provided by the Harleysville policies was sufficient to pay the claims of the Plaintiff judgment holders in the underlying action. The Court further provided that in the event that there was, at some point, a final judgment that would trigger coverage under the National Surety Corp.'s

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excess policy, then such claim could be asserted at that time. National Surety Corp. has requested that all discovery responses that have been generated in the action between these two parties be preserved by Harleysville. The Court finds that it would be implicit in its Order that since the claims between Harleysville and National Surety Corp. could arise in the future that such discovery responses would be preserved. However, the Court will, by this Order, make the same clear.

IT IS, THEREFORE, ORDERED:

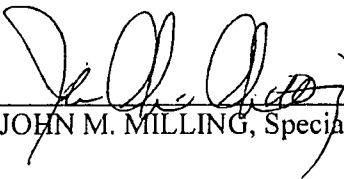
1. That Harleysville's insureds, Heritage Communities, Inc., Heritage Magnolia North, Inc. and Build-Star Corporation, be and the same hereby are declared to be in default. However, this default as to these Defendants, while prohibiting them from individually re-litigating any issues involved in these cases, does not affect the rights of the Plaintiff judgment holders in the underlying action, who have stepped into the shoes of the insured.

2. That Harleysville Group Insurance, a Pennsylvania Corporation, and National Surety Corp. shall both preserve any and all discovery materials that are responsive to discovery which has been initiated in the case between these two (2) parties, which was bifurcated from the principal case so that this information will be available in the event that there is a final judgment at some point in time that would trigger coverage under National Surety Corp.'s excess policy.

3. That all other relief requested by the various parties, pursuant to their Motions to Vacate, Alter or Amend, or other filings which were addressed by these parties at the hearing on April 9, 2013, be and same hereby is denied.

IT IS SO ORDERED.

Darlington, South Carolina.
April 22, 2013.


JOHN M. MILLING, Special Referee

3 

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

PLAINTIFF,)
VS.)

HERITAGE COMMUNITIES, INC, A)
SOUTH CAROLINA CORPORATION;)
HERITAGE RIVERWALK, A SOUTH)
CAROLINA CORPORATION; BUILD-)
STAR CORPORATION, A SOUTH)
CAROLINA CORPORATION, RIVER-)
WALK AT ARROWHEAD COUNTRY)
CLUB HORIZONTAL PROPERTY)
REGIME, RIVERWALK AT ARROW-)
HEAD COUNTRY CLUB 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)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-26-10053

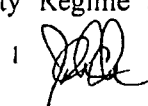
COPIES

ORDER

13 APR 24 PM 4:01
CLERK OF COURT

This matter came before the undersigned as Special Referee pursuant to Motions to Vacate, Alter or Amend the Orders which I previously issued dated February 28, 2013, and filed with the Court on March 13, 2013. This hearing was held on April 9, 2013.

Harleysville is represented by Robert C. Calamari, Esquire, formerly of the firm of McAngus, Goudelock & Courie, LLC and now of Nelson Mullins Riley and Scarborough and C. Mitchell Brown, also of Nelson Mullins Riley and Scarborough; the "judgment holders", Riverwalk at Arrowhead Country Club Property Owners Association 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 represented by John P. Henry,

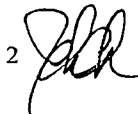
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Esquire, and Philip C. Thompson, Esquire, of the firm of Thompson & Henry, P.A.; National Surety Corp. is represented by Laura Johnson Evans of the firm of Smith Moore Leatherwood, LLP and Karin McCarthy of the firm of Rivkin Radler, Attorneys at Law, of New York. The positions of the parties have been set forth in their Motions and/or correspondence submitted to the undersigned and were fully argued.

I have considered the positions addressed by the Plaintiff in this matter, as well as the Defendant judgment holders represented by Mr. John P. Henry, and National Surety Corp. represented by Ms. Laura Johnson Evans and Ms. Karin McCarthy. Except as provided for hereinafter, the requests of the parties to this suit presented to the undersigned by way of Motion and oral argument are denied.

The Plaintiff requested clarification as to its Motion for a Default Judgment with respect to its insureds, Heritage Communities, Inc., Heritage Riverwalk, Inc. and Build-Star Corporation. The Court notes that while the issue was discussed in its initial Order, the decretal portion did not contain the Court's Ruling. As stated by the Court in its prior Order, Harleysville's insured, being Heritage Communities, Inc., Heritage Riverwalk, Inc. and Build-Star Corporation, did not answer or otherwise appear in the declaratory action, although properly served. The Court does find that these insureds of Harleysville are in default. However, while the Court finds that these insureds are in default and are individually prohibited from re-litigating any issues involved in the case, this default does not affect the rights of the Plaintiff judgment holders in the underlying cases. These Plaintiff judgment holders in the underlying cases have stepped into the shoes of the Harleysville insureds, and they are not prejudiced in any way by the default of Harleysville's insureds.

By a separate Order, the Court found that the claim by the Plaintiff in this declaratory action against the Defendant, National Surety Corp., should be dismissed, as the coverage provided by the Harleysville policies was sufficient to pay the claims of the Plaintiff judgment

2 

holders in the underlying action. The Court further provided that in the event that there was, at some point, a final judgment that would trigger coverage under the National Surety Corp.'s excess policy, then such claim could be asserted at that time. National Surety Corp. has requested that all discovery responses that have been generated in the action between these two parties be preserved by Harleysville. The Court finds that it would be implicit in its Order that since the claims between Harleysville and National Surety Corp. could arise in the future that such discovery responses would be preserved. However, the Court will, by this Order, make the same clear.

IT IS, THEREFORE, ORDERED:

1. That Harleysville's insureds, Heritage Communities, Inc., Heritage Riverwalk, Inc. and Build-Star Corporation, be and the same hereby are declared to be in default. However, this default as to these Defendants, while prohibiting them from individually re-litigating any issues involved in these cases, does not affect the rights of the Plaintiff judgment holders in the underlying action, who have stepped into the shoes of the insured.

2. That Harleysville Group Insurance, a Pennsylvania Corporation, and National Surety Corp. shall both preserve any and all discovery materials that are responsive to discovery which has been initiated in the case between these two (2) parties, which was bifurcated from the principal case so that this information will be available in the event that there is a final judgment at some point in time that would trigger coverage under National Surety Corp.'s excess policy.

3. That all other relief requested by the various parties, pursuant to their Motions to Vacate, Alter or Amend, or other filings which were addressed by these parties at the hearing on April 9, 2013, be and same hereby is denied.

IT IS SO ORDERED.

Darlington, South Carolina.
April 22, 2013.


JOHN M. MILLING, Special Referee


3

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
Harleysville Group Insurance Group, a)
Pennsylvania Corporation,)
)
Plaintiff,)
)
vs.)
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 Country Club 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)
)
Defendants.)

In the Court of Common Pleas
Fifteenth Judicial Circuit
Civil Action No.: 2009-CP-26-_____

SUMMONS

Jury Trial Demanded

FILED
CLERK OF COURT
HORRY COUNTY
OCT 14 PM 1:53
KIMBERLY HUGGINS

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribers at their offices within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Robert C. Calamari
Post Office Box 1349
1107 48th Avenue North, Suite 210 (29577)
Myrtle Beach, South Carolina 29578
(843) 848-6000
ATTORNEY FOR PLAINTIFF

October 14, 2009

STATE OF SOUTH CAROLINA) In the Court of Common Pleas
) Fifteenth Judicial Circuit
COUNTY OF HORRY) Civil Action No.: 2009-CP-26-_____

Harleysville Group Insurance Group, a)
Pennsylvania Corporation,)
)
Plaintiff,)

vs.)

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 Country Club 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)
)
Defendants.)

COMPLAINT FOR DECLARATORY
JUDGMENT

Jury Trial Demanded

CLERK OF COURT
JULY 14, 2009
PM 1:53
HARRIS COUNTY, TX

Harleysville Group Insurance Group, a Pennsylvania Corporation,
("Harleysville"), submits this declaratory judgment action unto this Honorable Court and
alleges as follows:

INTRODUCTION
(Declaratory Judgment)

1. This is an action for declaratory judgment pursuant to South Carolina
Code §§ 15-53-10 *et seq.* to determine and resolve questions of actual controversy involving
insurance policies that were issued by Harleysville Mutual Insurance Company
("Harleysville") to its insureds.

2. Harleysville is a corporation organized and existing pursuant to the laws of a state other than South Carolina with its principal place of business in a state other than South Carolina and at all times relevant to this matter was involved as a party to contracts of insurance between Harleysville and several defendants named herein.

3. Buildstar Corporation, a South Carolina Corporation, ("Buildstar") at one time was organized and existed pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

4. Heritage Communities, Inc., a South Carolina Corporation, ("Heritage"), at one time was organized and existed pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

5. Heritage Riverwalk, Inc., a South Carolina Corporation, ("Heritage Riverwalk"), at one time was organized and existed pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

6. Riverwalk Property Owners Association, Inc., a South Carolina Corporation, ("Riverwalk POA"), is organized and exists pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

7. Riverwalk Horizontal Property Regime, ("Riverwalk HPR"), is organized and exists pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

8. National Surety Corp., ("National Surety"), is organized and exists pursuant to the laws of one of the United States of America and provided an excess policy that may have relevance to this matter.

9. A lawsuit (hereafter "underlying lawsuit") has been filed by Riverwalk POA and Riverwalk HPR against the Heritage entities, insureds of Harleysville, alleging certain construction deficiencies and damages.

10. The underlying lawsuit reached trial in May of 2009 and a verdict was rendered against the Heritage entities.

11. This Honorable Court has jurisdiction over the parties and venue is proper in the Fifteenth Judicial Circuit, county of Horry, state of South Carolina.

THE INSURANCE POLICIES

12. Harleysville issued to Heritage, Buildstar and Heritage Riverwalk, ("the Heritage entities"), certain contracts of insurance. Each contract of insurance issued to Heritage, Buildstar and Heritage Riverwalk by Harleysville that may be claimed to provide policy rights to the insured based on the allegations in this matter and the underlying lawsuit are fully incorporated herein by reference as if set forth verbatim herein. Harleysville issued various policies to the Heritage entities and associated entities from 1994 through 2001. Each of those referenced policies is subject to this action and fully incorporated by reference herein. A sample representative of the contracts of insurance is attached hereto, labeled as Exhibit A and incorporated fully herein.

13. Harleysville would show that the above-referenced contracts of insurance are the only Harleysville contacts of insurance, known to Harleysville, under which any party to this action might assert rights. In the event that other Harleysville contracts of

insurance are asserted to or determined to be relevant to the issues in this action by any party, Harleysville seeks a declaration from this Honorable Court as to the rights and obligations under each as it relates to this action and incorporates those policies into this action.

UNDERLYING LAWSUIT

14. The underlying lawsuit involves allegations of numerous defects and/or deficiencies in the design and construction of a condominium project known as Riverwalk which contains multiple buildings and is located in South Carolina. All claims, causes of action and factual allegations in the underlying lawsuit, included in the pleadings, discovery documents, construction documents, expert reports, other written materials, trial exhibits, trial testimony, content of motions arguments, statements by counsel on behalf of plaintiff and any other information, evidence or written materials of any kind relating to this matter are incorporated herein by reference and made part and parcel of this action.

CLAIM FOR DECLARATORY RELIEF

15. There is a real, substantial and justiciable controversy between the parties concerning insurance coverage for the above-mentioned claim.

16. This is an action for a declaratory judgment pursuant to South Carolina Code §§ 15-53-10, *et seq.* for the purpose of determining a question of actual controversy between the parties as set forth below.

17. Harleysville seeks a declaration of the rights and obligations of the parties herein with reference to the contracts of insurance addressed in this action.

18. Harleysville is informed and believes that it is entitled to an Order from this Honorable Court that the contracts of insurance addressed in this action, in their entirety

and incorporated herein by reference, do not obligate a duty of indemnity to address the alleged claims, damages and judgment in the underlying lawsuit.

FIRST CAUSE OF ACTION

(Declaration of Rights and Obligations Under Policies)

19. Harleysville realleges all prior allegations.

20. Harleysville would show that the applicable contract(s) of insurance do not obligate Harleysville to provide indemnity to the Heritage entities or Riverwalk POA or Riverwalk HPR for the claims asserted in the underlying lawsuit, for one or more of the following reasons:

A. The contracts of insurance are designed to address claims of bodily injury to or property damage of a person or entity other than the insured and other than the product or work of the insured, and not those claims for damages in the underlying action;

B. The contracts of insurance, when read in a fair, reasonable and objective manner, obligate a duty of defense and indemnity for damage to property of another that is not the property constructed by the insured or its subcontractors, but not for those claims for damages as alleged in the underlying action;

C. The damages, or a portion thereof, complained of in the underlying lawsuit are not the result of an occurrence, as required by the contracts of insurance;

D. The damages complained of in the underlying lawsuit are not the result of an accident as required by the contracts of insurance;

E. All or a portion of the alleged damages are the result of a breach of contract which does not obligate rights under the contracts of insurance;

F. All or a portion of the alleged damages were expected or intended by the insured which does not obligate rights under the contracts of insurance;

G. All or a portion of the alleged damages arise out of the work of the insured identifies as "your work" which does not obligate rights under the contracts of insurance;

H. All or a portion of the alleged damages arise out of property that was owned, rented or occupied by the insured which does not obligate rights under the contracts of insurance;

I. All or a portion of the alleged damages arise out of property that the insured sold, gave away, abandoned, occupied, rented or held for rental which does not obligate rights under the contracts of insurance;

J. All or a portion of the alleged damages arise out of property on which the insured or any contractors or subcontractors working directly or indirectly on the insured's behalf were performing operations which does not obligate rights under the contracts of insurance;

K. All or a portion of the alleged damages arise out of the insured's incorrectly performed work which does not obligate rights under the contracts of insurance;

L. All or a portion of the alleged damages arise out of those damage to the insured's product from all or a part of the insured's product which does not obligate rights under the contracts of insurance;

M. All or a portion of the alleged damages arise out of those damage to insured's work from all or a part of the insured's work which does not obligate rights under the contracts of insurance;

N. All or a portion of the alleged damages arise out of damage to impaired property or property not physically injured which does not obligate rights under the contracts of insurance;

O. All or a portion of the alleged damages occurred outside the policy period and insured rights under the contracts of insurance must result from damages during the policy period;

P. There is no coverage for punitive damages because they are uninsurable as damages under the policies;

Q. All or a portion of the damages are recoverable, if at all, under other contracts of insurance between defendants and insurance companies other than Harleysville and therefore not recoverable under the contracts of insurance addressed herein;

R. All or a portion of the damages are not recoverable due to endorsements excluding damages within the "products completed operations hazard";

S. All or a portion of the damages are the result of an assumption of liability in a contract; and/or

T. For any and other reason that this Honorable Court deems to negate a duty of defense or indemnity.

21. Harleysville is informed and believes that, based on the above-stated reasons, it is entitled to a Declaration from this Honorable Court that the contracts of insurance addressed in this action, in their entirety and incorporated herein by reference, do not obligate a duty of indemnity to address the claims alleged or judgment in the underlying lawsuit.

SECOND CAUSE OF ACTION

(Time On Risk)

22. Harleysville realleges all prior allegations.

23. Harleysville would show 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.

24. Harleysville would show that certain periods exist where damages were alleged to be occurring when no policy was in place or in uninsured periods.

25. Harleysville would show that pursuant to a time on risk analysis, this Honorable Court should allocate covered damages, if any, between insured periods and uninsured periods to determine the percentage of damages covered by the policies, if any, pursuant to South Carolina's modified continuous trigger when determining coverage periods.

26. Harleysville is informed and believes that this Honorable Court should declare that most, if not all, of the covered damages, if any, occurred during uninsured periods and, therefore, there is no duty of indemnity by Harleysville in this action.

THIRD CAUSE OF ACTION

(Accounting of Covered and Non-Covered Damages)

27. Harleysville realleges all prior allegations.

28. Harleysville would show that even if the court determines that the facts resulting in the damages award in the underlying action were caused by an occurrence, this Honorable Court must decide which portions of the jury's verdict are covered by the policies and must be borne by Harleysville and which portions of the jury's verdict are not covered by the policies and must be borne by the insured.

29. The trial in the underlying action reached a general verdict with actual damages and punitive damages.

30. Harleysville is informed and believes that based on the South Carolina Supreme Court's ruling in *Newman v. Auto Owners*, this Honorable Court must conduct an accounting or detailed itemization of cost to reach a conclusion as to which damages are covered damages and which damages are not covered damages.

31. This Honorable Court should make a determination as to which damages awarded in the underlying trial are:

- a. costs associated with removing undamaged portions of the building to reach the defective work and those portions of the building damaged resulting from the defective work;
- b. costs associated with removing, repairing or replacing defective work or faulty workmanship of any kind;
- c. costs associated with repairing the defective work or faulty workmanship that led to the resulting damages;
- d. costs associated with repairing that portion of the building that was damaged as a result of the defective work or faulty workmanship; and
- e. cost associated with replacing undamaged portions of the building after the defective work has been repaired and after the damages resulting from the defective work has been repaired.

32. This Honorable Court should review the following items to make a determination as to the category of costs or damages that comprise the verdict in the underlying action:

- a. Testimony in the underlying action;
- b. Evidence submitted in the underlying trial;
- c. New testimony from expert witnesses to review the cost estimates from the underlying trial and offer evidence necessary to break down the jury's verdict into the proper categories of damages;
- d. New testimony from fact witnesses to explain and break down the jury's verdict into the proper categories of damages;
- e. Any other relevant or pertinent information to enable the trier of fact in this matter to reach a conclusion as to what damages are covered and what damages are not covered by the applicable policies of insurance.

33. Harleystown would show that, based on the South Carolina Supreme Court's ruling in *Newman* that the duty to pay for damages is limited to the cost to repair the damage resulting from the defective work or faulty workmanship.

34. Harleystown would show that, based on the South Carolina Supreme Court's ruling in *Newman*, that its policies do not provide insurance coverage benefits for the following categories of damages to be determined in this action:

- a. costs associated with removing undamaged portions of the building to reach the defective work and those portions of the building damaged resulting from the defective work;
- b. costs associated with repairing defective work or faulty workmanship of any kind;
- c. costs associated with repairing the defective work or faulty workmanship that led to the resulting damages;

d. cost associated with replacing undamaged portions of the building after the defective work has been repaired and after the damages resulting from the defective work has been repaired.

35. Harleysville requests that this court perform an accounting of those claims for which coverage should be provided and those claims for which coverage should not be provided.

FOURTH CAUSE OF ACTION
(Punitive Damages Award Not Covered)

36. Harleysville realleges all prior allegations.

37. The verdict in the underlying action was comprised of actual and punitive damages.

38. The Harleysville policies exclude damages resulting from intentional acts.

39. Trial testimony demonstrated that punitive damages were awarded based on acts of the insured that were intentional with the expectation that damages would result.

40. Trial testimony demonstrated that the punitive damages award was the result of the insured performing acts that it had full knowledge of damages caused by those identical or similar acts on past projects.

41. The actual damages supporting the award of punitive damages were caused by actions of the insured or its agents and are not covered losses.

42. Trial testimony demonstrated that the punitive damages award was based on the actions of the insured that had already been performed on other projects where damages resulted from those acts and the insured chose to continue those intentional acts with the knowledge and expectation that the same damages would result.

43. Harleystown is informed and believes that its policies do not provide coverage for actual damages that result from an intentional act of the insured or its agents where the damages are expected or reasonably foreseeable.

44. Harleystown is informed and believes that its policies do not provide coverage for punitive damages that result from an intentional act of the insured or its agents where the damages are expected or reasonably foreseeable.

45. Harleystown is informed and believes that if the actual damages are excluded from coverage, any award for punitive damages based on those facts forming the basis for the actual damages are also excluded.

46. Harleystown is informed and believes that it is entitled to a declaration by this Honorable Court that the punitive damages award in the underlying action is not a covered damages award by the policies and Harleystown has no duty of indemnity.

WHEREFORE, having fully stated its claim against Defendants, Harleystown prays unto this Honorable Court as follows:

- a. That this Honorable Court fully analyze each Cause of Action and each contract of insurance and issue a declaration as to the rights and obligations of the parties hereto;
- b. That this Honorable Court issue an order declaring that the express written terms of the Harleystown insurance policies result in no duty to indemnify on the part of Harleystown with respect to the claims made against the Heritage entities in the underlying action;
- c. That this Honorable Court Order, notwithstanding relief sought in (a) and (b), that the damages recoverable pursuant to the Harleystown policy, at most and if any, may only be those damages that occurred during the coverage period of the Harleystown policy;

d. That this Honorable Court rule that the exclusions, endorsements and limitations set forth in the contracts of insurance bar coverage to defendants, in whole or in part, and therefore no rights under the insurance contracts are available to defendants;

e. That this Honorable Court perform a time on risk analysis and declare that no duty of indemnity exists for damages occurring in periods outside of those covered by the Harleysville policies;

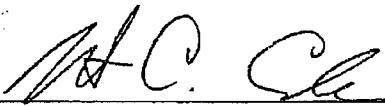
f. That this Honorable Court perform an accounting to determine what part of the damage award, if any, in the underlying lawsuit triggers a duty of indemnity under the Harleysville policies;

g. That this Honorable Court Order that the contracts of insurance do not require the obligation of indemnity for punitive damages;

h. That this Honorable Court award costs and attorneys fees to Harleysville;
and

i. For any other and further relief this Honorable Court deems just and proper.

McAngus, Goudelock & Courie, LLC

By: 

Robert C. Calamari, Esquire

E-Mail Address: bob.calamari@mgclaw.com

SC Bar No. 064985

1107 48th Avenue North, Suite 210

Myrtle Beach, South Carolina 29577

(843) 848-6000

Attorney for Harleysville Group Insurance, Inc.

October 14, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Horry	)	CASE NO. 2009-CP-26-10053

HARLEYSVILLE GROUP INSURANCE	)
GROUP, A PENNSYLVANIA CORPORATION	)

VS.	)

HERITAGE COMMUNITIES, INC, A SOUTH	)
CAROLINA CORPORATION; HERITAGE	)
RIVERWALK, A SOUTH CAROLINA	)
CORPORATION; BUILDSTAR CORPORATION,	)
A SOUTH CAROLINA CORPORATION, RIVER-	)
WALK AT ARROWHEAD COUNTRY CLUB	)
HORIZONTAL PROPERTY REGIME, RIVER-	)
WALK AT ARROWHEAD COUNTRY CLUB	)
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.	)

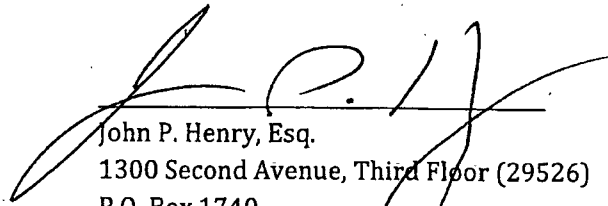
DEFENDANTS	)

SUMMONS

TO: THE PLAINTIFF ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Counterclaim in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said counterclaim on the subscribers at their office at Thompson & Henry, P.A., 1300 Second Avenue, Third Floor, Conway, South Carolina, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Counterclaim within the time aforesaid, the Defendant in this action will apply to the Court for the relief demanded in the Counterclaim.

THOMPSON & HENRY, P.A.



John P. Henry, Esq.

1300 Second Avenue, Third Floor (29526)

P.O. Box 1740

Conway, South Carolina 29528

Telephone: (843) 248-5741

Fax: (843) 248-6396

Conway, South Carolina

Oct. 21, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-26-10053

HARLEYSVILLE GROUP INSURANCE)
GROUP, A PENNSYLVANIA CORPORATION)

VS.)

HERITAGE COMMUNITIES, INC, A SOUTH)
CAROLINA CORPORATION; HERITAGE)
RIVERWALK, A SOUTH CAROLINA)
CORPORATION; BUILDSTAR CORPORATION,)
A SOUTH CAROLINA CORPORATION, RIVER-)
WALK AT ARROWHEAD COUNTRY CLUB)
HORIZONTAL PROPERTY REGIME, RIVER-)
WALK AT ARROWHEAD COUNTRY CLUB)
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.)

DEFENDANTS)

ANSWER & COUNTERCLAIM

TO: THE PLAINTIFF NAMED ABOVE:

The Defendants, Riverwalk at Arrowhead Country Club Horizontal Property Regime (Defendants believe this not to be a separate entity), Riverwalk at Arrowhead Country Club Property Owners Association, Inc., A South Carolina Corporation, and Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club, would answer the Complaint for declaratory judgment as follows:

FOR A FIRST DEFENSE

- 1) These answering Defendants deny each and every allegation of the Plaintiffs' complaint not hereinafter specifically admitted or denied.
- 2) These answering Defendants, on information and belief, admit paragraphs, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.
- 3) On information and belief these answering Defendants admit so much of paragraph 12 as alleges that Harleysville issued to Heritage, Buildstar and Heritage Riverwalk ("the Heritage entities") certain contracts of insurance. As to the remaining allegations of paragraph 12 this answering Defendant does not have copies of the policies issued by Harleysville and therefore does not have sufficient information or belief to form an opinion and would therefore require strict proof of those allegations.
- 4) As to paragraph 13, these answering Defendants do not have sufficient information to admit or deny same and therefore would deny same and require strict proof thereof.
- 5) In reference to paragraph 14, these answering Defendants would admit that the underlying lawsuit involved allegations of numerous defects and/or deficiencies in the Riverwalk condominium buildings, the subject of this action, which resulted in water intrusion and damage.
- 6) In reference paragraphs 15, 16 and 17, this answering Defendant does not have sufficient information to form a belief and therefore denies same and requires strict proof thereof.
- 7) These answering Defendants deny paragraph 18 and would allege that the claims of the Plaintiffs in the underlying lawsuit are covered under the policies issued by Harleysville to the Heritage entities.
- 8) Paragraph 19 requires no response.
- 9) These answering Defendants deny paragraphs 20 and 21 and all sub-parts thereof.
- 10) Paragraph 22 requires no response.

- 11) As to paragraphs 23, 24, 25 and 26 these answering Defendants deny same and require strict proof thereof.
- 12) Paragraph 27 requires no response.
- 13) As to paragraph 28, these answering Defendants would allege that all damages in the underlying action were caused by an occurrence which are covered under the policies issued by the Plaintiff to the Heritage entities.
- 14) These answering Defendants admit paragraph 29.
- 15) These answering Defendants deny paragraphs 30, 31, 32, 33, 34 and 35 and all sub-parts thereof, and require strict proof thereof.
- 16) Paragraph 36 requires no response.
- 17) These answering Defendants admit paragraph 37.
- 18) These answering Defendants deny paragraphs 38, 39, 40, 41, 42, 43, 44, 45, and 46 and require strict proof thereof.

FOR A SECOND DEFENSE

- 1) The allegations of the first defense are incorporated herein and made a part and parcel hereof in this second defense as of set out verbatim.
- 2) The Plaintiff in this action had the right to intervene in the underlying action, which is customary and submit special interrogatories to the Jury to ask the Jury to specifically allocate the award of damages to the specific claims of the Plaintiff in the underlying action. Harleysville failed to do this and, in accordance with Auto Owners vs. Newman, 2009 WL 2851211 (S.C.) (2009) ("Newman") all damages are covered in the underlying action under the Plaintiffs' policy.

- 3) Harleysville slumbered on its rights because it took the position that none of the claims of the Plaintiffs in the underlying action were covered and failed to take appropriate action to protect its interests.
- 4) To now ask the Court to re-litigate damages is prejudicial to its insureds and to the answering Defendants. It is also prejudicial to the Courts and to judicial economy.

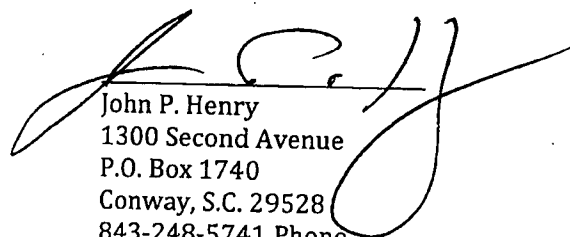
FOR A THIRD DEFENSE AND COUNTERCLAIM

- 1) The allegations of the first and second defense are incorporated herein and made a part and parcel hereof.
- 2) Harleysville issued numerous policies to the Heritage entities which on information and belief were standard ISO Commercial General Liability policies. ("Harleysville Policies").
- 3) When the Plaintiffs brought the underlying action, claims were made against the Harleysville policies but Harleysville failed and refused without justification to pay any of the claims in spite of the fact that some of the Plaintiffs' claims were covered and Harleysville and its counsel were fully aware of covered claims.
- 4) Instead of acting in good faith and paying the claims that were clearly covered in accordance with South Carolina case law, Harleysville refused to pay any claims and instead sat back and gambled that the Jury would extricate them from any and all liability. The underlying action was filed December 8, 2003. Harleysville was made aware of the claims but yet waited until October 2009, almost six years after the underlying action was filed and after a general verdict was delivered by a Jury after approximately a two week trial to bring this declaratory action. At all times after the filing of the underlying action in December 2003, Harleysville and its counsel were fully involved in the discovery and trial.

- 5) In the underlying action, Harleysville employed counsel to defend the Heritage entities. Counsel employed by Harleysville consented to a general verdict which was rendered by the Jury.
- 6) Harleysville had counsel and its officers/agents attend the trial of the underlying action. Counsel and the officer/agents of Harleysville met during the trial with the counsel Harleysville hired to represent its insured and on information and belief discussed the case and how to proceed in the case.
- 7) Harleysville did not attempt to intervene or in any way contest the general verdict and should not be allowed now to attempt to re-litigate and "guess" at what amount the Jury allocated or did not allocate to the specific claims.
- 8) In accordance with "Newman", the court should dismiss this action and issue its order declaring that all claims in the underlying action are covered by the Harleysville policies.

WHEREFORE, having fully answered the Complaint of the Plaintiff herein, these answering Defendants would request that the Complaint be dismissed and the Court determine that all damages in the underlying action are covered under the Harleysville policies.

THOMPSON & HENRY, P.A.


John P. Henry
1300 Second Avenue
P.O. Box 1740
Conway, S.C. 29528
843-248-5741 Phone
843-248-6396 Fax

October 21, 2009

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

HARLEYSVILLE GROUP INSURANCE
GROUP, A PENNSYLVANIA CORPORATION

VS.

HERITAGE COMMUNITIES, INC, A SOUTH
CAROLINA CORPORATION; HERITAGE
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CORPORATION; BUILDSTAR CORPORATION,
A SOUTH CAROLINA CORPORATION, RIVER-
WALK AT ARROWHEAD COUNTRY CLUB
HORIZONTAL PROPERTY REGIME, RIVER-
WALK AT ARROWHEAD COUNTRY CLUB
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.

DEFENDANTS

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-26-10053AMENDED
ANSWER & COUNTERCLAIMFILED
HORRY COUNTY
2009 NOV -6 PM 3:29
KELLY HUGHES-WARD
CLERK OF COURTTO: THE PLAINTIFF NAMED ABOVE AND IT'S ATTORNEY ROBERT C. CALAMARI - ATTORNEY
FOR HARLEYSVILLE INSURANCE GROUP, A PENNSYLVANIA CORPORATION.

The Defendants Riverwalk at Arrowhead Country Club Horizontal Property Regime,
Riverwalk at Arrowhead Country Club Property Owners Association, Inc., A South Carolina
Corporation, and Tony L. Pope and Lynn Pope, individually and representing as a class all unit
owners at Riverwalk at Arrowhead Country Club would answer the Complaint of the Plaintiff as
follows:

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- 2) These answering Defendants, on information and belief, admit paragraphs, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.
- 3) On information and belief these answering Defendants admit so much of paragraph 12 as alleges that Harleysville issued to Heritage, Buildstar and Heritage Riverwalk ("the Heritage entities") certain contracts of insurance. As to the remaining allegations of paragraph 12 this answering Defendant does not have copies of the policies issued by Harleysville and therefore does not have sufficient information or belief to form an opinion and would therefore require strict proof of those allegations.
- 4) As to paragraph 13, these answering Defendants do not have sufficient information to admit or deny same and therefore would deny same and require strict proof thereof.
- 5) In reference to paragraph 14, these answering Defendants would admit that the underlying lawsuit involved allegations of numerous defects and/or deficiencies in the Riverwalk condominium buildings, the subject of this action, which resulted in water intrusion and damage.
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FOR A SECOND DEFENSE

- 19) The allegations of the first defense are incorporated herein and made a part and parcel hereof in this second defense as of set out verbatim.
- 20) The Plaintiff in this action had the right to intervene in the underlying action, which is customary and submit special interrogatories to the jury to ask the jury to specifically allocate the award of damages to the specific claims of the Plaintiff in the underlying action. This clearly could have been done without injecting insurance into the trial. Harleysville failed to do this and, in accordance with Auto Owners vs. Newman, 2009 WL 2851211 (S.C.) (2009) ("Newman") all damages encompassed in the general verdict are covered in the underlying action under the Plaintiffs' policy.

- 21) Harleysville slumbered on its rights because it took the position that none of the claims of the Plaintiffs in the underlying action were covered and failed to take appropriate action to protect its interests and thereby prejudiced the rights of its insured and of these Defendants.
- 22) To now ask the Court to re-litigate damages is prejudicial to its insureds and to the answering Defendants. It is also prejudicial to the Courts, to its insureds, to the Defendants and to judicial economy. Harleysville should be estopped from now trying to re-litigate damages and asking the Court to guess at how the Jury allocated damages.

FOR A THIRD DEFENSE AND COUNTERCLAIM

- 23) The allegations of the first and second defense are incorporated herein and made a part and parcel hereof.
- 24) Harleysville issued numerous policies to the Heritage entities which on information and belief were standard ISO Commercial General Liability policies. ("Harleysville Policies").
- 25) When the Plaintiffs brought the underlying action, claims were made against the Harleysville policies but Harleysville failed and refused without justification to pay any of the claims.
- 26) Instead of acting in good faith and paying the claims that were clearly covered in accordance with South Carolina case law, Harleysville refused to pay any claims and instead sat back and gambled that the Jury would extricate them from any and all liability. The underlying action was filed December 8, 2003. Harleysville was made aware of the claims but yet waited until October 2009, almost six years after the underlying action was filed and after a general verdict was delivered by a Jury after approximately a two week trial to bring this declaratory action. At all times after the filing of the underlying action in December 2003, Harleysville and its counsel were fully involved in the discovery and trial.

- 27) In the underlying action, Harleysville employed counsel to defend the Heritage entities. Counsel employed by Harleysville consented to a general verdict which was rendered by the jury and Harleysville made no objection nor did it attempt to intervene.
- 28) Harleysville had counsel and its officers/agents attend the trial of the underlying action. Counsel and the officer/agents of Harleysville met during the trial with the counsel Harleysville hired to represent its insured and on information and belief discussed the case and how to proceed in the case.
- 29) Harleysville did not attempt to intervene or in any way contest the general verdict and should not be allowed now to attempt to re-litigate and "guess" at what amount the jury allocated or did not allocate to the specific claims.
- 30) In accordance with "Newman", the court should dismiss this action and issue its order declaring that Harleysville is required to pay the full amount of the general verdict together with post judgment interest, costs and attorneys fees.

FOR A FOURTH DEFENSE AND SECOND COUNTERCLAIM

- 31) The allegations above set forth for a third defense and counterclaim are incorporated herein and made a part and parcel hereof.
- 32) On information and belief, Harleysville issued numerous policies to the Heritage entities, which on information and belief, were standard ISO Commercial general liability policies ("Harleysville's policies").
- 33) On the 15th day of January, 2009 the jury in the underlying actions returned a general verdict against the Heritage entities, a copy of the judgment is attached hereto and made a part and parcel hereof as "Exhibit A". By order of the Honorable Clifton Newman, the Court denied all post trial motions and entered a final judgment in the amount of \$4,471,178.31, a copy of which is attached hereto and made a part and parcel hereof as "Exhibit B".

34) On information and belief, the Harleysville policies issued to the Heritage entities contained the following provision:

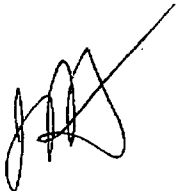
"A person or organization may sue us [Harleysville] to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance."

35) Plaintiffs in the underlying actions, now hold a final judgment against the Heritage entities, Harleysville's insureds, and by virtue of the general verdict, all claims are covered, as matter of law.

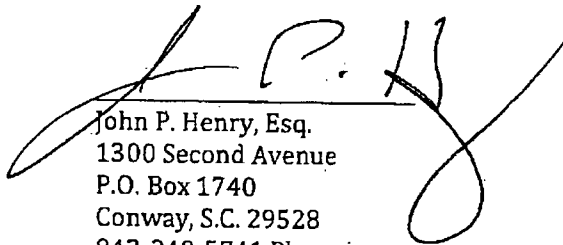
36) These answering Defendants would allege that they are entitled to judgment against Harleysville for the full amount of the final judgment together with post judgment interest, costs and attorneys fees.

37) These answering Defendants would ask that the Court award the Plaintiffs in the underlying actions, judgment against Harleysville for the full amount of \$4,471,178.31 together with post judgment interest, costs and attorneys fees.

WHEREFORE, having fully answered the Complaint of the Plaintiff herein, these answering Defendants would request that the Complaint be dismissed and the Court render judgment in the amount of \$4,471,178.31 against Harleysville in favor of these answering Defendants together with post judgment interest, costs and attorneys fees as may be appropriate.



THOMPSON & HENRY, P.A.



John P. Henry, Esq.
1300 Second Avenue
P.O. Box 1740
Conway, S.C. 29528
843-248-5741 Phone
843-248-6396 Fax

Attorney for Defendants
Riverwalk at Arrowhead Country Club
Horizontal Property Regime, Riverwalk
At Arrowhead POA, Inc., Tony L. and Lynn S.
Pope individually and representing as a class
all unit owners at Riverwalk at Arrowhead
Country Club

November 5, 2009

Amended Answer & Counterclaim
2009-CP-26-10053

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2003-CP-26-7169

Riverwalk At Arrowhead County Club

POA

VS.

Heritage Communities Inc et al.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

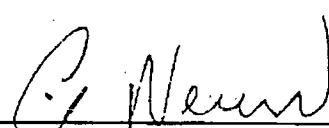
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See Attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

WE THE JURY FIND FOR THE PLAINTIFF IN THE AMOUNT OF Four Million, Two Hundred Fifty Thousand dollars Actual Damages and Two Hundred Fifty-Thousand Dollars Punitive.

Dated at Conway, South Carolina, this 15th day of January 2009,


PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

PAT HENRY, ATTYPHILLIP THOMPSON, ATTY

ATTORNEY(S) FOR THE PLAINTIFF(S)

ERIC FOSMIRE, ATTYANDREW COLE, ATTY

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) CASE NO. 03-CP-26-7169

Riverwalk At Arrowhead Country)
Club Property Owners' Association,)
Inc.,)

Plaintiff,)

vs.)

VERDICT FORM

Heritage Communities, Inc.,)
Heritage Riverwalk, Inc., and)
BuildStar Corporation,)

Defendants.)

FILED
2009 JUN 22 AM 7:51
CLERK OF COURT

As to the Negligence cause of action, were the Defendants negligent in the construction of the Riverwalk Condominiums: X Yes ___ No

As to the Breach of Fiduciary Duty cause of action, we the Jury find:

The Defendants breached the duty X Yes ___ No

As to the Breach of the Warranty of Habitability, we the Jury find:

The Defendants breached the warranty ___ Yes X No

(1) We the Jury find for the Plaintiff the sum of four million, two
dollars actual damages. hundred fifty thousand
4.25 Million

(1) Does the Jury find by clear and convincing evidence that the Defendants' actions were willful, wanton, reckless, and/or grossly negligent? ☒ Yes ☐ No

If the answer is "No", proceed no further. If the answer is "Yes" then go to the next paragraph.

We, the jury, award punitive damages in the amount of \$ two hundred
fifty thousand \$250,000

Linda J. Sukic
Foreperson

January 15, 2009

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-26-3289

TROY L POPE, ETAL

HERITAGE COMMUNITIES INC et al.

VS.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other.
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

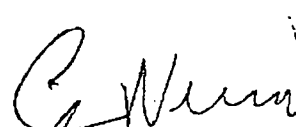
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See Attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

WE THE JURY FIND FOR THE PLAINTIFF IN THE AMOUNT OF \$250,000.00 Actual Damages and \$750,000.00 Punitive Damages/

Dated at Conway, South Carolina, this 15th day of January 2009


PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Pat Henry, Atty

Eric Fosmire, Atty

Phil Thompson, Atty

Andrew Cole, Atty

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) CASE NO. 05-CP-26-3289

Tony L. Pope and Lynn S. Pope,)
Individually and Representing)
As A Class All Unit Owners of)
Riverwalk At Arrowhead Country)
Club Horizontal Property Regime,)
)
Plaintiffs,)

vs.)

Heritage Communities, Inc.,)
Heritage Riverwalk, Inc., and)
BuildStar Corporation,)
)
Defendants)

VERDICT FORM

FILED
2009 JAN 22 AM 7:50
CLERK OF COURT
JENNIFER J. JENNINGS

As to the Negligence cause of action, were the Defendants negligent in the construction of the Riverwalk Condominiums: X Yes No

As to the Breach of the Warranty of Habitability cause of action for loss of use, we the Jury find:

The Defendants breached the warranty

Yes ~~No~~

(1) We the Jury find for the Plaintiff the sum of 250,000.00 dollars actual damages.

Two hundred fifty thousand 00/100

~~250,000.00~~ *250,000.00*

(2) Does the Jury find by clear and convincing evidence that the Defendants' actions were willful, wanton, reckless, and/or grossly negligent?

X Yes _____ No *for*

If the answer is "No", proceed no further. If the answer is "Yes" then go to the next paragraph.

seven hundred fifty thousand 00/00

We the jury, award punitive damages in the amount of \$ *for* *one million*

\$750,000.00

R. C. Smith
Forster S. Zukin
Foreperson

January 15, 2009

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Tony L. Pope and Lynn S. Pope,
Individually and Representing
As A Class All Unit Owners of
Riverwalk At Arrowhead Country
Club Horizontal Property Regime,

Plaintiffs,

vs.

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Buildstar Corporation

Defendants.

Riverwalk At Arrowhead Country
Club Property Owners' Association, Inc.

Plaintiff,

vs.

Heritage Communities, Inc., Heritage
Riverwalk, Inc., and Buildstar Corporation

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NOS. 05-CP-26-3289
03-CP-26-7169

**ORDER DENYING DEFENDANTS'
POST-TRIAL MOTIONS**

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CLERK OF COURT

The above actions were consolidated for trial and tried by this Court January 5-15, 2009. The Riverwalk at Arrowhead Country Club Property Owners Association, Inc. ("Riverwalk POA Action") brought their construction defect lawsuit to recover for repair costs, and a class of homeowners (the "Pope Class Action") brought their lawsuit to recover loss of use of their units during the repair period. The trial resulted in a \$5,500,000.00 verdict in favor of the Plaintiffs against the Defendants, broken down as follows:

1. \$4,250,000.00 actual damages and \$250,000.00 punitive damages in the Riverwalk POA Action; and
2. \$250,000.00 actual damages and \$750,000.00 punitive damages in the Pope Class Action.

The Defendants timely moved for a New Trial – Thirteenth Juror Doctrine, or in the alternative, for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial Absolute, or in the alternative, for a New Trial *Nisi Remittitur*, or in the alternative and as a matter of right, for a Punitive Damages Review, and as a further matter of right, for Setoff.

After considering the motions, memoranda and accompanying law submitted by the parties, as well as the arguments of the parties at the February 24, 2009 hearing upon the post-trial motions, the Court denies the Defendants' Motion for New Trial under the Thirteenth Juror Doctrine. An abundance of the evidence to support the jury's verdict was provided by experts for both the Plaintiffs and the Defendants on the issue of actual damages for repair costs and loss of use. The jury's punitive damage award was also supported by the evidence which included testimony by the experts for both the Plaintiffs and the Defendants that the Defendants repeatedly violated Industry Standards and the Standard Building Code in the construction of the Riverwalk condominiums. This evidence was sufficient for a finding by the jury of gross negligence by the Defendants. Where a builder's actions are grossly negligent, punitive damages may be awarded. *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989). Therefore, the Court concludes that the jury's verdict was supported by the evidence.

The Court also denies the Defendants' Motion for Judgment Notwithstanding the Verdict. After reviewing the evidence and all reasonable inferences in the light most favorable to the

Plaintiffs, it is obvious that more than one inference could be drawn from the evidence and the case had to be submitted to the jury. As noted above, there was sufficient evidence to sustain the factual findings implicit in the jury's decision.

The Court also denies the Defendants' Motion for a New Trial Absolute. The amounts of the verdicts for actual damages were within the ranges provided by the parties' experts. The punitive damage award was appropriate under the Punitive Damages Review discussed below. The Defendants have failed to show that the verdicts were grossly excessive so as to shock the conscience of the Court. The verdicts clearly do not indicate the figures reached were the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive.

The Court also denies the Defendants' Motion for New Trial *Nisi Remittitur*. This Court evaluated the adequacy of the verdict in light of the evidence presented and has determined that the jury was not unduly liberal in determining damages, given the evidence of defective construction and the cost of repair and loss of use damages testimony provided by the parties' experts. The verdict was clearly within the damage evidence submitted to the jury.

The Court has also determined after a Punitive Damages Review pursuant to the factors provided by *Gamble v. Stevenson*, 305 S.C. 104; 406 S.E.2d 350 (1991) that the punitive damages award is proportionate to the severity of the offense. The testimony of the Plaintiffs' and the Defendants' experts and Gwyn Hardister provided clear and convincing evidence that the award of punitive damages was justified. In making this finding, this Court reviewed the *Gamble* factors:

- (1) Defendants' degree of culpability. The Defendants were the developers and general contractors of the condominiums. They admitted through their experts

that they repeatedly violated the Standard Building Code and Industry Standards in the construction of the condominiums. They also admitted that they placed defectively constructed condominiums into the stream of commerce both in the Riverwalk development that was the subject of these actions and other condominium projects they were involved in;

- (2) Duration of the conduct. The testimony showed that this conduct of building and selling defectively constructed condominiums in Horry and Georgetown Counties lasted over a period of several years;
- (3) Defendants' awareness or concealment. The Defendants admitted they were aware of the construction deficiencies and failed to disclose those construction deficiencies to the Plaintiffs;
- (4) The existence of similar past conduct. The Defendants admitted that they and other companies owned by the Defendants engaged in similar conduct in at least four other developments in Horry and Georgetown Counties;
- (5) Likelihood the award will deter the Defendants or others from like conduct. Although the Defendants are no longer in business, there is a strong likelihood that the \$1,000,000.00 punitive damages award will deter others from building and selling defectively constructed condominiums;
- (6) Whether the award is reasonably related to the harm likely to result from such conduct. The \$1,000,000.00 punitive damages award is reasonably related to the costs and losses the homeowners' and homeowners' association will incur as a result of the Defendants' defective construction of the condominiums. The

testimony of actual damages ranged from \$2,391,000.00 to over \$9,000,000.00;
and

- (7) Defendants' ability to pay. The Defendants are no longer in business and have no assets to pay either the actual damages or the punitive damages. However, "[t]here is no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages." *Welch v. Epstein*, 342 S.C. 279, 308; 536 S.E.2d 408, 423 (Ct. App. 2000), citing *Norton v. Ewascio*, 241 S.C. 557, 565; 129 S.E.2d 517, 521 (1963). In fact, an award of punitive damages will have no economic effect on the Defendants since they are no longer in business and have no assets.

THEREFORE, IT IS

ORDERED, ADJUDGED AND DECREED, that Defendants' Motions for New Trial – Thirteenth Juror Doctrine, Judgment Notwithstanding the Verdict, New Trial Absolute and New Trial *Nisi Remittitur* are denied; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that after a Punitive Damages Review pursuant to *Gamble v. Stevenson*, 305 S.C. 104; 406 S.E.2d 350 (1991), that the punitive damages award is appropriate and proportionate to the severity of the offense and will accomplish society's goals of punishment and deterrence; and

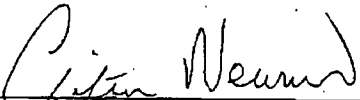
IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that a setoff of \$1,028,821.69 is granted against the \$5,500,000.00 verdict; and

Judgment is hereby entered against the Defendants in the amount of \$4,471,178.31.

IT IS SO ORDERED.

Page 5 of 6

CW


CLIFTON NEWMAN, Presiding Judge
Multi-Week Trial Docket, 15th Judicial Circuit

Myrtlewood, South Carolina
April 10, 2009

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

HARLEYSVILLE INSURANCE GROUP,)
A PENNSYLVANIA CORPORATION,)

Civil Action No. 2009-CP-26-10053

Plaintiff,)

vs.)

REPLY
TO AMENDED COUNTERCLAIMS
(Jury Trial Demanded)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 COUNTRY CLUB)
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,)

Defendants.)

FILED
HORRY COUNTY
2009 JUN 24 PM 12:54
CLERK OF COURT

Plaintiff, Harleysville Insurance Group, a Pennsylvania Corporation ("Harleysville"),

submits this Reply to Counterclaim onto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. Each and every allegation not specifically admitted or denied to this Counterclaim herein, is denied.

FOR A SECOND DEFENSE
AND BY WAY OF REPLY
TO FIRST COUNTERCLAIM

2. Harleysville incorporates each and every allegation and statement of its original Complaint into this Reply to Amended Counterclaims and allegations set forth in the Amended Answer and Counterclaim of the Defendants, Riverwalk at Arrowhead Country Club Horizontal Property Regime, Riverwalk at Arrowhead Country Club Property Owners Association, Inc., a South Carolina Corporation, and Tony L. Pope and Lynn Pope, individually and representing as a class all unit owners at Riverwalk at Arrowhead Country Club. Harleysville is not required to respond to any items set forth in Paragraphs 1 through 22 of the Answer but in the event allegations are made, they are denied.

3. Harleysville has responded to the allegations set forth in Paragraph 23 of the Counterclaim. Any remaining allegations are denied.

4. Harleysville, answering Paragraph 24 of the Counterclaim, would show that the policies speak for themselves. Those policies are referenced in the body of the original Complaint in this action. Any allegation inconsistent with the express written language of the policies is denied.

5. Harleysville denies the allegations set forth in Paragraph 25 of the Counterclaim.

6. Harleysville denies the allegations set forth in Paragraph 26 of the Counterclaim. Harleysville specifically admits that the underlying action was filed December 8, 2003, and that nearly six years has elapsed since the original date of filing. Any remaining allegations are denied.

7. Harleysville denies the allegations set forth in Paragraph 27 of the Counterclaim. Harleysville specifically admits that it employed attorneys to provide a defense to the Heritage

Entities. Harleysville would show that the attorneys hired protected the interests of the insureds and that the insureds' best interests, in the opinion of those attorneys, were best served by a general verdict. Harleysville was without the ability to have an impact on the verdict form in the underlying action. Harleysville would show that the attorneys provided a full and proper defense to the insureds in this action.

8. Harleysville denies the allegations set forth in Paragraph 28 of the Counterclaim. Harleysville specifically admits that its counsel and adjuster attended trial of the underlying action at the verbal order of the Court and in response to threatened sanctions including a penalty of \$10,000.00 per day for failure to attend previous trials involving Harleysville insureds. Harleysville specifically admits that an adjuster and counsel may have briefly discussed the public proceedings in general terms but at no time were any directions made or advice given as to how to proceed in the case. The attorneys handling the case used the insureds' best interests as the guiding force to the defense. Any remaining allegations are denied.

9. Harleysville denies the allegations set forth in Paragraph 29 of the Counterclaim. Harleysville specifically admits that no motion was filed to intervene in this action and such lack of motion was based on prior Circuit Court rulings in the Fifteenth Judicial Circuit and other Circuits where trial court judges had denied efforts by an insurance carrier to intervene for any purpose. Further, Harleysville would show that it is not practical to intervene in the underlying action given that South Carolina law does not permit the existence or non-existence of insurance to have an impact on liability in an underlying action. Further, South Carolina law provides that an insurer has the ability to relitigate and present any evidence desired to support its position in relation to coverage issues in a subsequent trial.

10. Harleysville denies the allegations set forth in Paragraph 30 of the Counterclaim.

Harleysville would further show that Defendants are simply making a legal conclusion through an incorrect interpretation of the South Carolina Supreme Court's recent Order in Auto-Owners v. Newman. Harleysville has the right to assert all coverage defenses in this coverage action and the this Honorable Court should allow testimony and evidence to determine covered and non-covered damages as the Complaint in this action requests.

FOR A THIRD DEFENSE
AND BY WAY OF REPLY
TO SECOND COUNTERCLAIM

11. Harleysville has responded to the allegations referenced in Paragraph 31 of the Counterclaim. Any remaining allegations are denied.

12. Harleysville, answering Paragraph 32 of the Counterclaim, would show that the policies speak for themselves. Those policies are referenced in the body of the original Complaint in this action. Any allegation inconsistent with the express written language of the policies is denied.

13. Harleysville admits the allegation in Paragraph 33 that the jury returned a verdict on January 15, 2009 as suggested. The verdict form speaks for itself. Any allegation inconsistent with the verdict form is denied.

14. Harleysville admits the portion of Paragraph 34 that the language is consistent with the policy language of the actual Harleysville policies at issue. Any allegation inconsistent with the express written language of the policies is denied.

15. Harleysville admits the portion of Paragraph 35 that a judgment is held. Harleysville denies that the judgment is covered and incorporates all issues and allegations of the Complaint herein. Any remaining allegations are denied.

16. Harleysville denies the allegations of Paragraphs 36 and 37 of the Counterclaim.

FOR A FOURTH DEFENSE
(Statute of Limitations)

17. Harleysville would show that any allegations by any party in this matter inconsistent with the written positions taken by Harleysville in the reservation of rights letters submitted more than three years prior to any claims by any Defendant in this action are barred by the applicable statute of limitations and should be dismissed with prejudice. Harleysville would further show that based on the statute of limitations, it is entitled to the full and specific relief requested in the prayer in its Complaint in this action.

FOR A FIFTH DEFENSE
(Incorporation of Complaint)

18. Harleysville incorporates all defenses, allegations, statements and relief sought in its original Complaint into this Reply.

Wherefore, having fully replied to the Counterclaim of Defendants, Plaintiff prays unto this Honorable Court as follows:

- a) that the Counterclaims be dismissed with prejudice;
- b) for judgment on all claims set forth in the Complaint in this action;
- c) for all relief requested in the prayer in the Complaint in this action;
- d) that any claim by any Defendant in this action be dismissed if it is inconsistent with written reservation of rights letters submitted more than three years prior to any legal claim filed and served by any of the Defendants in this action;
- e) for the cost of this action; and

f) for any and other further relief this Honorable Court deems just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Robert C. Calamari

Post Office Box 1349

1107 48th Avenue North, Suite 210 (29577)

Myrtle Beach, South Carolina 29578

(843) 848-6000

ATTORNEY FOR PLAINTIFF

November 23, 2009

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Harleysville Group Insurance Group, 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; and Magnolia North Property
Owners Association, Inc., a South Carolina
Corporation, and National Surety Corp.

Defendants.

In the Court of Common Pleas
Fifteenth Judicial Circuit
Civil Action No.: 2009-CO-26-_____

SUMMONS

Jury Trial Demanded

FILED
CLERK OF COURT
09 DEC 10 PM 1:21
HARRIS COUNTY

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
of which a copy is herewith served upon you, and to serve a copy of your Answer to said
Complaint on the subscribers at their offices within thirty (30) days after the service hereof,
exclusive of the day of such service; and if you fail to answer the Complaint within the time
aforesaid, judgment by default will be rendered against you for the relief demanded in the
Complaint.

MCANGUS GOUDELOCK & COURIE, L.L.C.

Robert C. Calamari by Aum

Robert C. Calamari
Post Office Box 1349
1107 48th Avenue North, Suite 210 (29577)
Myrtle Beach, South Carolina 29578
(843) 848-6000
ATTORNEY FOR PLAINTIFF

December 10, 2009

STATE OF SOUTH CAROLINA) In the Court of Common Pleas
) Fifteenth Judicial Circuit
COUNTY OF HORRY) Civil Action No.: 2009-CP-26-_____

Harleysville Group Insurance Group, 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.)

COMPLAINT FOR DECLARATORY
JUDGMENT

Jury Trial Demanded

HORRY COUNTY
2009 DEC 10 PM 1:18
CLERK OF COURT

Harleysville Group Insurance Group, a Pennsylvania Corporation,
("Harleysville"), submits this declaratory judgment action unto this Honorable Court and
alleges as follows:

INTRODUCTION
(Declaratory Judgment)

1. This is an action for declaratory judgment pursuant to South Carolina
Code §§ 15-53-10 *et seq.* to determine and resolve questions of actual controversy involving
insurance policies that were issued by Harleysville Mutual Insurance Company
("Harleysville") to its insureds.

2. Harleysville is a corporation organized and existing pursuant to the laws of a state other than South Carolina with its principal place of business in a state other than South Carolina and at all times relevant to this matter was involved as a party to contracts of insurance between Harleysville and several defendants named herein.

3. Buildstar Corporation, a South Carolina Corporation, ("Buildstar") at one time was organized and existed pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

4. Heritage Communities, Inc., a South Carolina Corporation, ("Heritage"), at one time was organized and existed pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

5. Heritage Magnolia North, Inc., a South Carolina Corporation, ("Heritage Magnolia North"), at one time was organized and existed pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

6. Magnolia North Property Owners Association, Inc., a South Carolina Corporation, ("Magnolia North POA"), is organized and exists pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

7. Magnolia North Horizontal Property Regime, ("Magnolia North HPR"), is organized and exists pursuant to the state of South Carolina and at all times relevant to this action was doing business in the state of South Carolina, county of Horry.

8. National Surety Corp., ("National Surety"), is organized and exists pursuant to the laws of one of the United States of America and provided an excess policy that may have relevance to this matter.

9. A lawsuit (hereafter "underlying lawsuit") has been filed by Magnolia North POA and Magnolia North HPR against Heritage, Buildstar and Heritage Magnolia North, insureds of Harleysville, alleging certain construction deficiencies and damages.

10. The underlying lawsuit reached trial in May of 2009 and a verdict was rendered against the Heritage entities.

11. This Honorable Court has jurisdiction over the parties and venue is proper in the Fifteenth Judicial Circuit, county of Horry, state of South Carolina.

THE INSURANCE POLICIES

12. Harleysville issued to Heritage, Buildstar and Heritage Magnolia North certain contracts of insurance. Each contract of insurance issued to Heritage, Buildstar and Heritage Magnolia North by Harleysville that may be claimed to provide policy rights to the insured based on the allegations in this matter and the underlying lawsuit are fully incorporated herein by reference as if set forth verbatim herein. Harleysville issued various policies to the Heritage, Buildstar and Magnolia North and associated entities from 1994 through 2001. Each of those referenced policies is subject to this action and fully incorporated by reference herein. A sample representative of the contracts of insurance is attached hereto, labeled as Exhibit A and incorporated fully herein.

13. Harleysville would show that the above-referenced contracts of insurance are the only Harleysville contacts of insurance, known to Harleysville, under which any party to this action might assert rights. In the event that other Harleysville contracts of

insurance are asserted to or determined to be relevant to the issues in this action by any party, Harleysville seeks a declaration from this Honorable Court as to the rights and obligations under each as it relates to this action and incorporates those policies into this action.

UNDERLYING LAWSUIT

14. The underlying lawsuit involves allegations of numerous defects and/or deficiencies in the design and construction of a condominium project known as Magnolia North which contains multiple buildings and is located in South Carolina. All claims, causes of action and factual allegations in the underlying lawsuit, included in the pleadings, discovery documents, construction documents, expert reports, other written materials, trial exhibits, trial testimony, content of motions arguments, statements by counsel on behalf of plaintiff and any other information, evidence or written materials of any kind relating to this matter are incorporated herein by reference and made part and parcel of this action.

CLAIM FOR DECLARATORY RELIEF

15. There is a real, substantial and justiciable controversy between the parties concerning insurance coverage for the above-mentioned claim.

16. This is an action for a declaratory judgment pursuant to South Carolina Code §§ 15-53-10, *et seq.* for the purpose of determining a question of actual controversy between the parties as set forth below.

17. Harleysville seeks a declaration of the rights and obligations of the parties herein with reference to the contracts of insurance addressed in this action.

18. Harleysville is informed and believes that it is entitled to an Order from this Honorable Court that the contracts of insurance addressed in this action, in their entirety

and incorporated herein by reference, do not obligate a duty of indemnity to address the alleged claims, damages and judgment in the underlying lawsuit.

FIRST CAUSE OF ACTION

(Declaration of Rights and Obligations Under Policies)

19. Harleystville realleges all prior allegations.

20. Harleystville would show that the applicable contract(s) of insurance do not obligate Harleystville to provide indemnity to Heritage, Buildstar and/or Heritage Magnolia North for the claims asserted in the underlying lawsuit, for one or more of the following reasons:

A. The contracts of insurance are designed to address claims of bodily injury to or property damage of a person or entity other than the insured and other than the product or work of the insured, and not those claims for damages in the underlying action;

B. The contracts of insurance, when read in a fair, reasonable and objective manner, obligate a duty of defense and indemnity for damage to property of another that is not the property constructed by the insured or its subcontractors, but not for those claims for damages as alleged in the underlying action;

C. The damages, or a portion thereof, complained of in the underlying lawsuit are not the result of an occurrence, as required by the contracts of insurance;

D. The damages complained of in the underlying lawsuit are not the result of an accident as required by the contracts of insurance;

E. All or a portion of the alleged damages are the result of a breach of contract which does not obligate rights under the contracts of insurance;

F. All or a portion of the alleged damages were expected or intended by the insured which does not obligate rights under the contracts of insurance;

G. All or a portion of the alleged damages arise out of the work of the insured identifies as "your work" which does not obligate rights under the contracts of insurance;

H. All or a portion of the alleged damages arise out of property that was owned, rented or occupied by the insured which does not obligate rights under the contracts of insurance;

I. All or a portion of the alleged damages arise out of property that the insured sold, gave away, abandoned, occupied, rented or held for rental which does not obligate rights under the contracts of insurance;

J. All or a portion of the alleged damages arise out of property on which the insured or any contractors or subcontractors working directly or indirectly on the insured's behalf were performing operations which does not obligate rights under the contracts of insurance;

K. All or a portion of the alleged damages arise out of the insured's incorrectly performed work which does not obligate rights under the contracts of insurance;

L. All or a portion of the alleged damages arise out of those damage to the insured's product from all or a part of the insured's product which does not obligate rights under the contracts of insurance;

M. All or a portion of the alleged damages arise out of those damage to insured's work from all or a part of the insured's work which does not obligate rights under the contracts of insurance;

N. All or a portion of the alleged damages arise out of damage to impaired property or property not physically injured which does not obligate rights under the contracts of insurance;

O. All or a portion of the alleged damages occurred outside the policy period and insured rights under the contracts of insurance must result from damages during the policy period;

P. There is no coverage for punitive damages because they are uninsurable as damages under the policies;

Q. All or a portion of the damages are recoverable, if at all, under other contracts of insurance between defendants and insurance companies other than Harleysville and therefore not recoverable under the contracts of insurance addressed herein;

R. All or a portion of the damages are not recoverable due to endorsements excluding damages within the "products completed operations hazard."

S. All or a portion of the damages are the result of an assumption of liability in a contract; and/or

T. For any and other reason that this Honorable Court deems to negate a duty of defense or indemnity.

21. Harleysville is informed and believes that, based on the above-stated reasons, it is entitled to a Declaration from this Honorable Court that the contracts of insurance addressed in this action, in their entirety and incorporated herein by reference, do not obligate a duty of defense or indemnity to address the claims alleged in the underlying lawsuit.

SECOND CAUSE OF ACTION

(Time On Risk)

22. Harleystown realleges all prior allegations.

23. Harleystown would show 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.

24. Harleystown would show that certain periods exist where damages were alleged to be occurring when no policy was in place or in uninsured periods.

25. Harleystown would show that pursuant to a time on risk analysis, this Honorable Court should allocate covered damages, if any, between insured periods and uninsured periods to determine the percentage of damages covered by the policies, if any, pursuant to South Carolina's modified continuous trigger when determining coverage periods.

26. Harleystown is informed and believes that this Honorable Court should declare that most, if not all, of the covered damages, if any, occurred during uninsured periods and, therefore, there is no duty of indemnity by Harleystown in this action.

THIRD CAUSE OF ACTION

(Accounting of Covered and Non-Covered Damages)

27. Harleystown realleges all prior allegations.

28. Harleystown would show that even if the court determines that the facts resulting in the damages award in the underlying action were caused by an occurrence, this Honorable Court must decide which portions of the jury's verdict are covered by the policies and must be borne by Harleystown and which portions of the jury's verdict are not covered by the policies and must be borne by the insured.

29. The trial in the underlying action reached a general verdict with actual damages and punitive damages.

30. Harleystown is informed and believes that based on the South Carolina Supreme Court's ruling in *Newman v. Auto Owners*, this Honorable Court must conduct an accounting or detailed itemization of cost to reach a conclusion as to which damages are covered damages and which damages are not covered damages.

31. This Honorable Court should make a determination as to which damages awarded in the underlying trial are:

- a. costs associated with removing undamaged portions of the building to reach the defective work and those portions of the building damaged resulting from the defective work;
- b. costs associated with removing, repairing or replacing defective work or faulty workmanship of any kind;
- c. costs associated with repairing the defective work or faulty workmanship that led to the resulting damages;
- d. costs associated with repairing that portion of the building that was damaged as a result of the defective work or faulty workmanship; and
- e. cost associated with replacing undamaged portions of the building after the defective work has been repaired and after the damages resulting from the defective work has been repaired.

32. This Honorable Court should review the following items to make a determination as to the category of costs or damages that comprise the verdict in the underlying action:

- a. Testimony in the underlying action;
- b. Evidence submitted in the underlying trial;
- c. New testimony from expert witnesses to review the cost estimates from the underlying trial and offer evidence necessary to break down the jury's verdict into the proper categories of damages;
- d. New testimony from fact witnesses to explain and break down the jury's verdict into the proper categories of damages;
- e. Any other relevant or pertinent information to enable the trier of fact in this matter to reach a conclusion as to what damages are covered and what damages are not covered by the applicable policies of insurance.

33. Harleysville would show that, based on the South Carolina Supreme Court's ruling in *Newman* that the duty to pay for damages is limited to the cost to repair the damage resulting from the defective work or faulty workmanship.

34. Harleysville would show that, based on the South Carolina Supreme Court's ruling in *Newman*, that its policies do not provide insurance coverage benefits for the following categories of damages to be determined in this action:

- a. costs associated with removing undamaged portions of the building to reach the defective work and those portions of the building damaged resulting from the defective work;
- b. costs associated with repairing defective work or faulty workmanship of any kind;
- c. costs associated with repairing the defective work or faulty workmanship that led to the resulting damages;

d. cost associated with replacing undamaged portions of the building after the defective work has been repaired and after the damages resulting from the defective work has been repaired.

35. Harleysville requests that this court perform an accounting of those claims for which coverage should be provided and those claims for which coverage should not be provided.

FOURTH CAUSE OF ACTION
(Punitive Damages Award Not Covered)

36. Harleysville realleges all prior allegations.

37. The verdict in the underlying action was comprised of actual and punitive damages.

38. The Harleysville policies exclude damages resulting from intentional acts.

39. Trial testimony demonstrated that punitive damages were awarded based on acts of the insured that were intentional with the expectation that damages would result.

40. Trial testimony demonstrated that the punitive damages award was the result of the insured performing acts that it had full knowledge of damages caused by those identical or similar acts on past projects.

41. The actual damages supporting the award of punitive damages were caused by actions of the insured or its agents and are not covered losses.

42. Trial testimony demonstrated that the punitive damages award was based on the actions of the insured that had already been performed on other projects where damages resulted from those acts and the insured chose to continue those intentional acts with the knowledge and expectation that the same damages would result.

43. Harleystville is informed and believes that its policies do not provide coverage for actual damages that result from an intentional act of the insured or its agents where the damages are expected or reasonably foreseeable.

44. Harleystville is informed and believes that its policies do not provide coverage for punitive damages that result from an intentional act of the insured or its agents where the damages are expected or reasonably foreseeable.

45. Harleystville is informed and believes that if the actual damages are excluded from coverage, any award for punitive damages based on those facts forming the basis for the actual damages are also excluded.

46. Harleystville is informed and believes that it is entitled to a declaration by this Honorable Court that the punitive damages award in the underlying action is not a covered damages award by the policies and Harleystville has no duty of indemnity.

WHEREFORE, having fully stated its claim against Defendants, Harleystville prays unto this Honorable Court as follows:

a. That this Honorable Court fully analyze each Cause of Action and each contract of insurance and issue a declaration as to the rights and obligations of the parties hereto;

b. That this Honorable Court issue an order declaring that the express written terms of the Harleystville insurance policies result in no duty to indemnify on the part of Harleystville with respect to the claims made against Heritage, Buildstar and Heritage Magnolia North in the underlying action;

c. That this Honorable Court Order, notwithstanding relief sought in (a) and (b), that the damages recoverable pursuant to the Harleystville policy, at most and if any, may only be those damages that occurred during the coverage period of the Harleystville policy;

d. That this Honorable Court rule that the exclusions and limitations set forth in the contracts of insurance bar coverage to defendants and therefore no rights under the insurance contracts are available to defendants;

e. That this Honorable Court perform a time on risk analysis and declare that no duty of indemnity exists for damages occurring in periods outside of those covered by the Harleysville policies;

f. That this Honorable Court perform an accounting to determine what part of the damage award, if any, in the underlying lawsuit triggers a duty of indemnity under the Harleysville policies;

g. That this Honorable Court Order that the contracts of insurance do not require the obligation of indemnity for punitive damages;

h. That this Honorable Court award costs and attorneys fees to Harleysville;
and

i. For any other and further relief this Honorable Court deems just and proper.

McAngus, Goudelock & Courie, LLC

By: 

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SC Bar No. 064985

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Myrtle Beach, South Carolina 29577

(843) 848-6000

Attorneys for Harleysville Group Insurance, Inc.

Myrtle Beach, South Carolina

December 10, 2009

Harleysville Mutual Insurance Company

355 Maple Avenue
Harleysville, Pennsylvania 19438



Exhibit A

This policy jacket with the policy provisions, declarations or information page, and endorsements, if any, completes this policy.

We will provide the insurance described in this policy in return for the premium and compliance with all applicable policy provisions.

Mutual Conditions

This policy is non-assessable. Upon acceptance of this policy, the insured becomes a member of the Company but such membership shall terminate if and when the policy of insurance shall be terminated, without renewal, for any reason whatsoever. The insured shall participate in the distribution of dividends to the extent and upon the conditions fixed and determined by the Board of Directors in accordance with the provision of law.

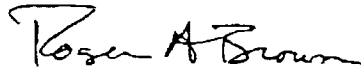
Annual Meeting

As a member of the Company the insured is entitled to vote either in person or by proxy at any and all meetings of said Company. The Annual Meeting is held in the Company's home office, Harleysville, Pennsylvania on the fourth Wednesday of April in each year at 11:00 o'clock a.m. The inclusion of this notice in this policy shall constitute notice of the time and place of the Annual meeting.

In Witness Whereof, the Company has caused this policy to be executed and attested.



Walter R. Bateman
President



Roger A. Brown
Secretary

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CALCULATION OF PREMIUM

This endorsement modifies insurance provided under the following:

BOILER AND MACHINERY COVERAGE PART
BUSINESSOWNERS POLICY
COMMERCIAL AUTO COVERAGE PART
COMMERCIAL CRIME COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
SPECIAL PROTECTIVE AND HIGHWAY LIABILITY POLICY - NEW YORK

The following is added:

The premium shown in the Declarations was computed based on rates in effect at the time the policy was issued. On each renewal, continuation, or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward

D. Inspections And Surveys

1. We have the right to
 - a. Make inspections and surveys at any time;

- b. Give you reports on the conditions we find; and

- c. Recommend changes

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - a. Are safe or healthful; or
 - b. Comply with laws, regulations, codes or standards.

3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**SOUTH CAROLINA CHANGES - CANCELLATION
AND NONRENEWAL**

This endorsement modifies insurance provided under the following:

BOILER AND MACHINERY COVERAGE PART
COMMERCIAL CRIME COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
PROFESSIONAL LIABILITY COVERAGE PART

- A. Paragraphs 2. and 3. of Cancellation Common Policy Condition are replaced by the following:
2. We may cancel this policy by mailing or delivering to the first Named Insured and the agent, if any, written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
 3. We will mail or deliver our notice to the first Named Insured's and agent's last known addresses.
- B. The following is added to the Cancellation Common Policy Condition:
7. **Cancellation Of Policies In Effect For 90 Days Or More**
If this policy has been in effect for 90 days or more, or is a renewal or continuation of a policy we issued, we may cancel this policy only for one or more of the following reasons:
 - a. Nonpayment of premium;
 - b. Material misrepresentation of fact which, if known to us, would have caused us not to issue the policy;

- c. Substantial change in the risk assumed, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the policy;
- d. Substantial breaches of contractual duties, conditions or warranties; or
- e. Loss of our reinsurance covering all or a significant portion of the particular policy insured, or where continuation of the policy would imperil our solvency or place us in violation of the insurance laws of South Carolina.
Prior to cancellation for reasons permitted in this Item e., we will notify the Commissioner, in writing, at least sixty days prior to such cancellation and the Commissioner will, within thirty days of such notification, approve or disapprove such action.

Any notice of cancellation will state the precise reason for cancellation.

- C. The following is added and supersedes any provisions to the contrary:

NONRENEWAL

1. If we decide not to renew this policy, we will mail or deliver written notice of nonrenewal to the first Named Insured and agent, if any, at least 30 days before:
 - a. The expiration date of this policy, if the policy is written for a term of one year or less; or

- b. An anniversary date of this policy, if the policy is written for a term of more than one year or for an indefinite term.

However, we will not refuse to renew a policy issued for a term of more than one year, until expiration of its full term, if anniversary renewal has been guaranteed by additional premium consideration.

2. Any notice of nonrenewal will be mailed or delivered to the first Named Insured's and agent's last known addresses. If notice is mailed, proof of mailing will be sufficient proof of notice.
3. Any notice of nonrenewal will state the precise reason for nonrenewal.



The Harleyville
Insurance Companies
155 Maple Avenue
Harleysville, PA 19438-2297
www.harleysvillegroup.com

New Reporting Options:

Direct Claims Reporting Saves You Time

1-800-892-8877

Call us to report a claim 24 hours a day – 7 days a week

While we hope you never suffer a loss, you can rest assured that your claim will get immediate and professional attention. With our 24-hour service, you can file your claims directly with us any time, including after normal business hours and holidays.

Whether your loss involves your home, your vehicle, your personal belongings, your boat, your business or glass breakage, just call 1-800-892-8877 to report the claim. Our courteous, professional staff will start all the necessary paperwork as soon as you call. We will ask you for essential information to help determine the extent of your loss, and within minutes, we can assign a claim number to your loss and advise you on the handling process.

Direct reporting benefits you directly

24-hour service

To make it easy for you to report your loss promptly, we're available every day of the year – day and night.

Immediate, personal assistance

With direct reporting, you will be immediately connected to a knowledgeable person who understands your situation.

You save time

When you phone in your claim, there's no need to complete a written report. We'll handle the paperwork for you.

Your satisfaction guaranteed

If your vehicle has been damaged, we can offer your participation in our Preferred Repair Program. If you choose one of the quality repair shops offered, you won't have to wait for an appraiser's inspection or for your check. Repairs are fully guaranteed and we pay for the repairs directly but only after you tell us you're completely satisfied.

If your home or business has been damaged, we can offer you participation in our Approved Contractor Program. Not only will the quality contractor promptly prepare an estimate of damages for your review, but, at your option, will perform the repairs for the amount agreed upon in the estimate. These repairs are fully guaranteed for a period of one year.

A National Network of Regional Insurers

Great Oaks Insurance Company	Harleysville Mutual Insurance Company	Minnesota Fire and Casualty Company
Harleysville-Atlantic Insurance Company	Hubert Insurance Company	New York Casualty Insurance Company
Harleysville-Garden State Insurance Company	Lake States Insurance Company	Penland Insurance Company
Harleysville Insurance Company of New Jersey	Mainland Insurance Company	Worcester Insurance Company
Harleysville Life Insurance Company	Mid-America Insurance Company	

You get free mobile service for windshield repair

If you report a broken windshield or other auto glass damage, we'll arrange for one of our glass specialists to assess your vehicle. You may have the repairs or replacement performed at one of our hundreds of conveniently located glass shops or, if you prefer, our mobile service will come to your driveway, office parking lot, or any other place you designate to do the work on the spot. It couldn't be simpler and, except for any deductibles that may apply, there's no charge to you.

We'll help you prevent further damage

Whether you've suffered a loss to your vehicle, home, business or boat, we can advise you of the proper steps to minimize your loss and protect your property from further damage.

We'll assure quality medical care

If you're reporting a workers compensation claim, our early intervention program helps ensure that your employee is treated by a physician committed to quality care and to getting your employee back to work as soon as possible.

TO HELP YOU KEEP OUR CLAIMS NUMBERS WITHIN EASY REACH, WE'VE ENCLOSED TWO WALLET CARDS AND TWO STICKERS FOR YOUR IMMEDIATE USE. (SIMPLY DETACH THE CARDS AND PEEL OFF THE LABELS.)

Direct Claims Reporting:

1-800-892-8877

24 hours a day, 7 days a week

or

**If you do not wish to utilize our Direct Claims Reporting,
you may call your professional independent agent.**

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under WHO IS AN INSURED (SECTION II).

Other words and phrases that appear in quotation marks have special meaning. Refer to DEFINITIONS (SECTION V).

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
- (2) The "bodily injury" or "property damage" occurs during the policy period.

- c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

- (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers Compensation and Similar Laws

Any obligation of the insured under a workers compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of paragraph (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

- (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;

- (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

- (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

- (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

- (i) If the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or

- (ii) If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Subparagraph (d)(i) does not apply to "bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the fuels, lubricants or other operating fluids are intentionally discharged, dispersed or released, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent to be discharged, dispersed or released as part of the operations being performed by such insured contractor or subcontractor.

Subparagraphs (a) and (d)(i) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

(2) Any loss, cost or expense arising out of any:

- (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

g. Aircraft, Auto or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
 - (a) Less than 26 feet long; and
 - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of the operation of any of the equipment listed in paragraph f.(2) or f.(3) of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage" due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution. This exclusion applies only to liability assumed under a contract or agreement.

j. Damage to Property

"Property damage" to:

- (1) Property you own, rent, or occupy;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage to Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage to Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage to Impaired Property or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in LIMITS OF INSURANCE (Section III).

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal injury" or "advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B.

b. This insurance applies to:

- (1) "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;
- (2) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the "coverage territory" during the policy period

2. Exclusions

This insurance does not apply to:

a. "Personal injury" or "advertising injury":

- (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

- (2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
 - (3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured;
 - (4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement; or
 - (5) Arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.
- b. "Advertising injury" arising out of:
- (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract;
 - (2) The failure of goods, products or services to conform with advertised quality or performance;
 - (3) The wrong description of the price of goods, products or services; or
 - (4) An offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

- c. Any loss, cost or expense arising out of any:
- (1) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
 - (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

COVERAGE C. MEDICAL PAYMENTS

1. Insuring Agreement

- a. We will pay medical expenses as described below for "bodily injury" caused by an accident:
 - (1) On premises you own or rent;

- (2) On ways next to premises you own or rent; or
- (3) Because of your operations; provided that:

- (1) The accident takes place in the "coverage territory" and during the policy period;
 - (2) The expenses are incurred and reported to us within one year of the date of the accident; and
 - (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.
- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:
- (1) First aid administered at the time of an accident;
 - (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
 - (3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

- a. To any insured.
- b. To a person hired to do work for or on behalf of any insured or a tenant of any insured.
- c. To a person injured on that part of premises you own or rent that the person normally occupies.
- d. To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers compensation or disability benefits law or a similar law.
- e. To a person injured while taking part in athletics.
- f. Included within the "products-completed operations hazard".
- g. Excluded under Coverage A.
- h. Due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1. All expenses we incur.
2. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
3. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
4. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
5. All costs taxed against the insured in the "suit".
6. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

- a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
 - b. This insurance applies to such liability assumed by the insured;
 - c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
 - d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
 - f. The indemnitee:
 - (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the "suit";
 - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
 - (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the "suit"; and
 - (b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of paragraph 2.b.(2) of COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I - Coverages), such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys fees and necessary litigation expenses as Supplementary Payments ends when:

- a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or
- b. The conditions set forth above, or the terms of the agreement described in paragraph f. above are no longer met.

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
 - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
2. Each of the following is also an insured:
 - a. Your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" is an insured for:
 - (1) "Bodily injury" or "personal injury":
 - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while that co-"employee" is either in the course of his or her employment or performing duties related to the conduct of your business;
 - (b) To the spouse, child, parent, brother or sister of that co-"employee" as a consequence of paragraph (1)(a) above;
 - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in paragraphs (1)(a) or (b) above; or
 - (d) Arising out of his or her providing or failing to provide professional health care services
 - (2) "Property damage" to property:
 - (a) Owned, occupied or used by,
 - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your "employees", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
 - b. Any person (other than your "employee"), or any organization while acting as your real estate manager.
 - c. Any person or organization having proper temporary custody of your property if you die, but only:
 - (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
 - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. With respect to "mobile equipment" registered in your name under any motor vehicle registration law, any person is an insured while driving such equipment along a public highway with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for this liability. However, no person or organization is an insured with respect to:
 - a. "Bodily injury" to a co-"employee" of the person driving the equipment; or
 - b. "Property damage" to property owned by, rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision.
4. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
 - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

- b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
- c. Coverage B does not apply to "personal injury" or "advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or "suits" brought; or
 - c. Persons or organizations making claims or bringing "suits".
2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
 - c. Damages under Coverage B.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
4. Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal injury" and all "advertising injury" sustained by any one person or organization.
5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and
 - b. Medical expenses under Coverage C because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to 5. above, the Fire Damage Limit is the most we will pay under Coverage A for damages because of "property damage" to premises, while rented to you or temporarily occupied by you with permission of the owner, arising out of any one fire.
7. Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

- (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
- (2) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner; or
- (3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V - DEFINITIONS

1. "Advertising injury" means injury arising out of one or more of the following offenses:
 - a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - b. Oral or written publication of material that violates a person's right of privacy;
 - c. Misappropriation of advertising ideas or style of doing business; or
 - d. Infringement of copyright, title or slogan.
2. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment".
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
 - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
 - b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or
 - c. All parts of the world if:
 - (1) The injury or damage arises out of:
 - (a) Goods or products made or sold by you in the territory described in a. above; or

- (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
 - (2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
 - 5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
 - 6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
 - 7. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
 - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;
 if such property can be restored to use by:
 - a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
 - b. Your fulfilling the terms of the contract or agreement.
 - 8. "Insured contract" means:
 - a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
 - b. A sidetrack agreement;
 - c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;
 - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
- Paragraph f. does not include that part of any contract or agreement:
- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
 - (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
 - (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.
9. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
10. "Loading or unloading" means the handling of property:
 - a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

11. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing, or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

13. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

e. Oral or written publication of material that violates a person's right of privacy.

14. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

15. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

16. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

17. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

18. "Your product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (1) You;
 - (2) Others trading under your name; or
 - (3) A person or organization whose business or assets you have acquired; and
- b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

19. "Your work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
- b. The providing of or failure to provide warnings or instructions.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**AMENDMENT OF POLLUTION EXCLUSION - EXCEPTION
FOR BUILDING HEATING EQUIPMENT**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART

Subparagraph (1)(a) of the Pollution exclusion under Paragraph 2., Exclusions of Bodily Injury And Property Damage Liability Coverage (Section I - Coverages) is replaced by the following:

This insurance does not apply to:

POLLUTION

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

- (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.

However, Subparagraph (a) does not apply to "bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**AMENDMENT OF OTHER INSURANCE CONDITION
OCCURRENCE VERSION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART (OCCURRENCE VERSION)

Paragraph 4.b. of the Other Insurance Condition - (Section IV - Commercial General Liability Conditions) is replaced by the following:

4. Other Insurance

b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
 - (b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner; or
 - (c) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of COVERAGE A (SECTION I).
- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under COVERAGES A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - CONTROLLING INTEREST

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to their liability arising out of:
 - a. Their financial control of you; or
 - b. Premises they own, maintain or control while you lease or occupy these premises.
2. This insurance does not apply to structural alterations, new construction and demolition operations performed by or for that person or organization.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED - MANAGERS OR LESSORS OF
PREMISES**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

1. Designation of Premises (Part Leased to You):
2. Name of Person or Organization (Additional Insured):
3. Additional Premium:

(If no entry appears above, the information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**EXCLUSION - PRODUCTS - COMPLETED OPERATIONS
HAZARD**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

This insurance does not apply to "bodily injury" or "property damage" included within the "products - completed operations hazard".

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to paragraph 2., Exclusions of COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I - Coverages):

This insurance does not apply to:

"Bodily injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

- B. The following exclusion is added to paragraph 2., Exclusions of COVERAGE B - PERSONAL AND ADVERTISING INJURY LIABILITY (Section I - Coverages):

This insurance does not apply to:

"Personal injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "personal injury" to that person at whom any of the employment-related practices described in paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY POLICY
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY POLICY

CG-7108
(Ed. 12-88)

EXCLUSION - ASBESTOS

This insurance does not apply to "bodily injury," "property damage" or "personal injury" arising out of the "Asbestos Hazard."

We shall have no obligation under this insurance:

- 1) to investigate, settle or defend any claim or "suit" against any insured alleging actual or threatened injury or damage of any nature or kind to persons or property which arises out of or would not have occurred but for the "asbestos hazard;" or
- 2) to pay, contribute to or indemnify another for any damages, judgments, settlements, loss, costs or expenses that may be awarded or incurred by reason of any such claim or "suit" or any injury or damage, or in complying with any action authorized by law and relating to such injury or damage.

As used in this exclusion:

"Asbestos Hazard" means:

- (a) an actual exposure or threat of exposure to the harmful properties of "asbestos," or
- (b) the presence of "asbestos" in any place, whether or not within a building or structure.

"Asbestos" means the mineral in any form, including but not limited to fibers or dust.

This endorsement must be attached to a Change Endorsement when issued after the policy is written.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
BUSINESS OWNERS POLICY
CONTRACTORS BUSINESS OWNERS POLICY

CG-7149
(Ed. 10-92)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LEAD LIABILITY EXCLUSION

This insurance does not apply to:

- (1) "Bodily injury", "property damage" or "personal injury" arising out of or caused by the actual or alleged:
 - (a) exposure to or existence of lead, paint containing lead, or any other material or substance containing lead; or
 - (b) manufacture, distribution, sale, resale, rebranding, installation, repair, removal, encapsulation, abatement, replacement or handling of lead, paint containing lead, or any other material or substance containing leadwhether or not the lead is or was at any time airborne as a particle contained in a product ingested, inhaled, transmitted in any fashion, or found in any form whatsoever;
- (2) Any legal obligation of any insured for indemnification or contribution due to damages arising out of "bodily injury," "property damage" or "personal injury" caused by lead, paint containing lead, or any other substance or material containing lead;
- (3) Any loss, cost, expense or damages, whether direct or consequential, arising out of any:
 - (a) request, demand or order that any insured or others test for, monitor, clean up, remove, abate, contain, treat, or neutralize lead, paint containing lead, or any other substance or material containing lead, or in any way respond to, or assess the effects of lead; or
 - (b) claim or suit relating to, testing for, monitoring, cleaning up, removing, abating, containing, treating, or neutralizing lead, paint containing lead, or any other substance or material containing lead or in any way responding to or assessing the effects of lead.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**NUCLEAR ENERGY LIABILITY EXCLUSION
ENDORSEMENT
(Broad Form)**

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS POLICY
COMMERCIAL AUTO COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
FARM COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
SPECIAL PROTECTIVE AND HIGHWAY LIABILITY POLICY NEW YORK DEPARTMENT OF
TRANSPORTATION
UNDERGROUND STORAGE TANK POLICY

1. The insurance does not apply:

A. Under any Liability Coverage, to "bodily injury" or "property damage":

- (1) With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
- (2) Resulting from the "hazardous properties" of "nuclear material" and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.

C. Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:

- (1) The "nuclear material" (a) is at any "nuclear facility" owned by, or operated by or on behalf of, an "insured" or (b) has been discharged or dispersed therefrom;
- (2) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an "insured"; or
- (3) The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to "property damage" to such "nuclear facility" and any property thereat.

2. As used in this endorsement:

"Hazardous properties" includes radioactive, toxic or explosive properties.

"Nuclear material" means "source material", "Special nuclear material" or "by-product material".

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

"Waste" means any waste material (a) containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and (b) resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

"Nuclear facility" means:

- (a) Any "nuclear reactor";
- (b) Any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing "spent fuel", or (3) handling, processing or packaging "waste";

(c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

(d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"Property damage" includes all forms of radioactive contamination of property.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**SOUTH CAROLINA CHANGES - CANCELLATION
AND NONRENEWAL**

This endorsement modifies insurance provided under the following:

BOILER AND MACHINERY COVERAGE PART
COMMERCIAL CRIME COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. Paragraphs 2. and 3. of CANCELLATION Common Policy Condition are replaced by the following:

2. We may cancel this policy by mailing or delivering to the first Named Insured and the agent, if any, written notice of cancellation at least:

- a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
- b. 30 days before the effective date of cancellation if we cancel for any other reason.

3. We will mail or deliver our notice to the first Named Insured's and agent's last known addresses.

B. The following is added to the CANCELLATION Common Policy Condition:

7. CANCELLATION OF POLICIES IN EFFECT FOR 90 DAYS OR MORE

If this policy has been in effect for 90 days or more, or is a renewal or continuation of a policy we issued, we may cancel this policy only for one or more of the following reasons:

- a. Nonpayment of premium;
- b. Material misrepresentation of fact which, if known to us, would have caused us not to issue the policy;

c. Substantial change in the risk assumed, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the policy;

d. Substantial breaches of contractual duties, conditions or warranties; or

e. Loss of our reinsurance covering all or a significant portion of the particular policy insured, or where continuation of the policy would imperil our solvency or place us in violation of the insurance laws of South Carolina.

Prior to cancellation for reasons permitted in this item e., we will notify the Commissioner, in writing, at least sixty days prior to such cancellation and the Commissioner will, within thirty days of such notification, approve or disapprove such action.

Any notice of cancellation will state the precise reason for cancellation.

C. The following is added and supersedes any provisions to the contrary:

NONRENEWAL

1. If we decide not to renew this policy, we will mail or deliver written notice of nonrenewal to the first Named Insured and agent, if any, at least 30 days before:

- a. The expiration date of this policy, if the policy is written for a term of one year or less; or

- b. An anniversary date of this policy, if the policy is written for a term of more than one year or for an indefinite term.

However, we will not refuse to renew a policy issued for a term of more than one year, until expiration of its full term, if anniversary renewal has been guaranteed by additional premium consideration.

2. Any notice of nonrenewal will be mailed or delivered to the first Named Insured's and agent's last known addresses. If notice is mailed, proof of mailing will be sufficient proof of notice.
3. Any notice of nonrenewal will state the precise reason for nonrenewal.

IMPORTANT NOTICE OF COVERAGE RESTRICTIONS

These restrictions only apply if the endorsements described below are attached to your policy.

CG 00 55 – Amendment Of Other Insurance Condition (Occurrence Version)

This endorsement amends the OTHER INSURANCE Condition in the CGL policy to make an insured's own CGL coverage excess insurance over the insurance provided by any other liability policy when that same insured is covered by that other policy as an additional insured. In those limited situations in which these endorsements apply, there will be a slight reduction in coverage under the policy of the named insured who is being added as an additional insured on another policy, since that named insured's policy will now provide excess rather than primary insurance. On the other hand, however, since primary coverage in those situations will be provided by another policy, the insured's limits of insurance will be less likely to be affected by losses covered by the other policy under its additional insured endorsement. Coverage provided to an insured that is not named as an additional insured on another policy will continue to apply as primary insurance.

CG 21 37 – Exclusion - Employees As Insureds

Currently, endorsement CG 21 37 excludes employees as insureds under the CGL policy. This endorsement has been revised to amend the "Aircraft, Auto or Watercraft" exclusion to indicate that liability arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto, or watercraft operated by employees of the insured is excluded. Additionally, the exception to this exclusion that deals with the parking of autos on, or on ways next to, premises the named insured owns or rents has been amended to added reference to autos not owned by or rented or loaned to employees of the insured. For policies to which this endorsement is currently attached and will continue to be attached, there will be a reduction in coverage to the extent that employees operate autos, aircraft or watercraft that are not owned by, or rented or loaned to any insured.

CG 20 33 – Additional Insured - Owners, Lessees Or Contractors - Automatic Status When Required In Construction Agreement With You

If this endorsement replaces CG 71 67 (Additional Insured Endorsement - Construction Contracts), coverage no longer applies to oral contracts. Only written contracts are covered.

READ YOUR POLICY CAREFULLY to determine rights, duties and what is and is not covered.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

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

HARLEYSVILLE GROUP INSURANCE)
GROUP, 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)

ANSWER & COUNTERCLAIM

TO: THE PLAINTIFF NAMED ABOVE AND IT'S ATTORNEY ROBERT C. CALAMARI - ATTORNEY
FOR HARLEYSVILLE INSURANCE GROUP, A PENNSYLVANIA CORPORATION.

The Defendants Magnolia North Horizontal Property Regime and Magnolia North Property
Owners Association, Inc., A South Carolina Corporation answer the Complaint of the Plaintiff as
follows:

FOR A FIRST DEFENSE

- 1) These answering Defendants deny each and every allegation of the Plaintiffs' complaint not
hereinafter specifically admitted or denied.
- 2) These answering Defendants, on information and belief, admit paragraphs, 1, 2, 3, 4, 5, 6, 7,
8, 9, 10, and 11.

- 3) On information and belief these answering Defendants admit so much of paragraph 12 as alleges that Harleysville issued to Heritage, Buildstar and Heritage Magnolia ("the Heritage entities") certain contracts of insurance. As to the remaining allegations of paragraph 12 these answering Defendants do not have copies of the policies issued by Harleysville and therefore do not have sufficient information or belief to form an opinion and would therefore require strict proof of those allegations.
- 4) As to paragraph 13, these answering Defendants do not have sufficient information to admit or deny same and therefore would require strict proof thereof.
- 5) In reference to paragraph 14, these answering Defendants would admit that the underlying lawsuit involved allegations of numerous defects and/or deficiencies in the Magnolia North condominium buildings, the subject of this action, which resulted in water intrusion and structural damage.
- 6) In reference paragraphs 15, 16 and 17, these answering Defendants do not have sufficient information and belief to form an opinion and therefore deny same and require strict proof thereof.
- 7) These answering Defendants deny paragraph 18 and would allege that the claims of the Plaintiffs in the underlying lawsuit are covered under the policies issued by Harleysville to the Heritage entities and the Court should so hold.
- 8) Paragraph 19 requires no response.
- 9) These answering Defendants deny paragraphs 20 and 21.
- 10) Paragraph 22 requires no response.
- 11) As to paragraphs 23, 24, 25 and 26 these answering Defendants deny same and require strict proof thereof.
- 12) Paragraph 27 requires no response.

- 13) As to paragraph 28, these answering Defendants would allege that all damages in the underlying action were caused by an occurrence which are covered under the policies issued by the Plaintiff to the Heritage entities, and the Court should so hold.
- 14) These answering Defendants admit paragraph 29.
- 15) These answering Defendants deny paragraphs 30, 31, 32, 33, 34 and 35 and all sub-parts thereof, and require strict proof thereof.
- 16) Paragraph 36 requires no response.
- 17) These answering Defendants admit paragraph 37.
- 18) These answering Defendants deny paragraphs 38, 39, 40, 41, 42, 43, 44, 45, and 46 and require strict proof thereof.

FOR A SECOND DEFENSE

- 19) The allegations of the first defense are incorporated herein and made a part and parcel hereof in this second defense as of set out verbatim.
- 20) The Plaintiff in this action had the right to intervene in the underlying action, which is customary and submit special interrogatories to the Jury to ask the Jury to specifically allocate the award of damages to the specific claims of the Plaintiff in the underlying action. This clearly could have been done without injecting insurance into the trial. Harleysville failed to do this and, in accordance with Auto Owners vs. Newman, 2009 WL 2851211 (S.C.) (2009) ("Newman") all damages encompassed in the general verdict are covered in the underlying action under the Plaintiffs' policy.
- 21) Harleysville slumbered on its rights because it took the position that none of the claims of the Plaintiffs in the underlying action were covered and failed to take appropriate action to protect its interests and thereby prejudiced the rights of its insured and of these Defendants.

22) To now ask the Court to re-litigate damages is prejudicial to its insureds and to the answering Defendants. It is also prejudicial to the Courts, to its insureds, to the Defendants and to judicial economy. Harleysville should be estopped from now trying to re-litigate damages and asking the Court to guess at how the Jury allocated damages.

FOR A THIRD DEFENSE AND COUNTERCLAIM

23) The allegations of the first and second defense are incorporated herein and made a part and parcel hereof.

24) Harleysville issued numerous policies to the Heritage entities which on information and belief were standard ISO Commercial General Liability policies. ("Harleysville Policies").

25) When the Plaintiffs brought the underlying action, claims were made against the Harleysville policies but Harleysville failed and refused without justification to pay any of the claims.

26) Instead of acting in good faith and paying the claims that were clearly covered in accordance with South Carolina case law, Harleysville refused to pay any claims and instead sat back and gambled that the Jury would extricate them from any and all liability. The underlying action was filed May 28, 2003. Harleysville was made aware of the claims but yet waited until December 2009, over six years after the underlying action was filed and after a general verdict was delivered by a Jury after approximately a two week trial to bring this declaratory action. At all times after the filing of the underlying action in May 2003, Harleysville and its counsel were fully involved in the discovery and trial.

27) In the underlying action, Harleysville employed counsel to defend the Heritage entities. Counsel employed by Harleysville consented to a general verdict which was rendered by the Jury and Harleysville made no objection nor did it attempt to intervene.

28) Harleysville had counsel and its officers/agents attend the trial of the underlying action. Counsel and the officer/agents of Harleysville met during the trial with the counsel

Harleysville hired to represent its insured and on information and belief discussed the case and how to proceed in the case.

29) Harleysville did not attempt to intervene or in any way contest the general verdict and should not be allowed now to attempt to re-litigate and "guess" at what amount the jury allocated or did not allocate to the specific claims.

30) In accordance with "Newman", the court should dismiss this action and issue its order declaring that Harleysville is required to pay the full amount of the general verdict together with post judgment interest, costs and attorneys fees.

FOR A FOURTH DEFENSE AND SECOND COUNTERCLAIM

31) The allegations above set forth for a third defense and counterclaim are incorporated herein and made a part and parcel hereof.

32) On information and belief, Harleysville issued numerous policies to the Heritage entities, which on information and belief, were standard ISO Commercial general liability policies ("Harleysville's policies").

33) On the 20th day of May, 2009 the Jury in the underlying action returned a general verdict against the Heritage entities, a copy of the judgment is attached hereto and made a part and parcel hereof as "Exhibit A". By order of the Honorable Clifton Newman, the Court denied all post trial motions and entered a final judgment in the amount of \$6,968,936.85 a copy of which is attached hereto and made a part and parcel hereof as "Exhibit B".

34) On information and belief, the Harleysville policies issued to the Heritage entities contained the following provision:

"A person or organization may sue us [Harleysville] to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance."

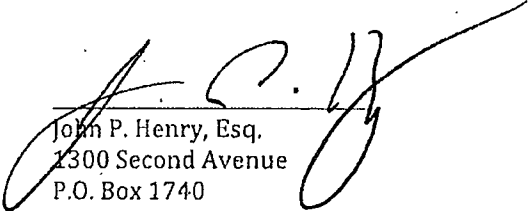
35) Plaintiffs in the underlying actions, now hold a final judgment against the Heritage entities, Harleysville's insureds, and by virtue of the general verdict, all claims are covered, as matter of law.

36) These answering Defendants would allege that they are entitled to judgment against Harleysville for the full amount of the final judgment together with post judgment interest, costs and attorneys fees.

37) These answering Defendants would ask that the Court award the Plaintiffs in the underlying actions, judgment against Harleysville for the full amount of \$6,968,936.85 together with post judgment interest, costs and attorneys fees.

WHEREFORE, having fully answered the Complaint of the Plaintiff herein, these answering Defendants would request that the Complaint be dismissed and the Court render judgment in the amount of \$6,968,936.85 against Harleysville in favor of these answering Defendants together with post judgment interest, costs and attorneys fees as may be appropriate.

THOMPSON & HENRY, P.A.



John P. Henry, Esq.
1300 Second Avenue
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843-248-5741 Phone
*Attorneys for Magnolia North
Horizontal Property Regime, and
Magnolia North Prop. Owners Assoc.*

Conway, SC
Dec. 16, 2009

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

MAGNOLIA NORTH PROPERTY
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

v.)

HERITAGE COMMUNITIES, INC.,)
HERITAGE MAGNOLIA NORTH, INC.,)
BUILDSTAR CORPORATION,)

Defendants,)

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

CASE NO. 2003-CP-26-3203

VERDICT FORM

We, the Jury, by unanimous consent, find:

1. As to the Negligence cause of action:

The Defendants were negligent in the construction of the Magnolia North
CondominiumsX Yes ___ No

2. As to the Breach of the Warranty of Workmanlike Service cause of action:

The Defendants breached the warranty:

X Yes ___ No

3. As to the Breach of Fiduciary Duty cause of action:

The Defendants breached its fiduciary duty:

✓ Yes ___ No

4. We, the Jury, find for the Plaintiff actual damages in the amount of

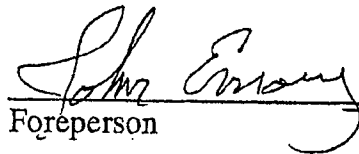
six million, five-hundred thousand dollars.FILED
HORRY COUNTY
2009 MAY 20 PM 5:45
MELANIE JUDGE
CLERK OF COURT

5. Does the Jury find by clear and convincing evidence that the Defendants' actions were willful, wanton, reckless, and/or grossly negligent? ☒ Yes ☐ No

If the answer is "No", proceed no further. If the answer is "Yes" then go to the next paragraph.

We, the jury, award punitive damages in the amount of

two million dollars.


Foreperson

May 20, 2009

Conway, South Carolina

Ex. B

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Magnolia North Property Owners'
Association, Inc.)

Plaintiffs)

vs.)

Heritage Communities, Inc., Heritage
Magnolia North, Inc. and BuildStar
Corporation,)

Defendants,)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2003-CP-26-3203

05 cp 26-0044

ORDER DENYING DEFENDANTS'
POST TRIAL MOTIONS AND GRANTING
DEFENDANTS' MOTION FOR A SET OFF

DEC - 1 AM 10:46
COURT

This is a construction defects case. It was tried by a Jury beginning May 11, 2009 and resulted in a verdict for the Plaintiff in the amount of \$6,500,000 actual damages and \$2,000,000 punitive damages. The Defendants (hereinafter sometimes referred to collectively as "Heritage") timely filed post trial motions on various grounds seeking a new trial - Thirteenth Juror Doctrine, or in the alternative, for Judgment Notwithstanding the Verdict, or in the alternative A New Trial Absolute. Also, Defendants seek a new trial *NISI Remittitur* and also seek to have the punitive damages award set aside on numerous grounds. Defendants also seek a set off.

After considering the motions, memoranda and accompanying law submitted by the parties, as well as the arguments of the parties at the hearing on the post trial motions conducted on the 12th day of August, 2009, the Court denies the Defendants' motion on the Thirteenth Juror Doctrine, denies the Defendant's motion on the Judgment Notwithstanding the Verdict and on a New Trial Absolute. Further, the Court also denies the Defendants' motion seeking a new trial *NISI Remittitur* and also seeking to have the punitive damage award set aside on numerous grounds. The Court grants the Defendants' Motion for a Set Off.

The Defendants object to the Court's admission of evidence related to prior conduct of the Defendants. Under South Carolina law, one of the elements that the Jury can consider in the award of

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punitive damages is the existence of similar past conduct. Welch v. Epstein, 342, SC 279 536 SE 2d 408 (Ct. App. 2000). The Court finds no error in the admission of evidence of similar past conduct.

THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.

Defendants object to the Court's amalgamating the Defendants. The Court finds that there was sufficient evidence to find amalgamation between the Defendants. Kincaid vs. Landing Development Corporation et al., 289 S.C. 89, 344 S.E. 2d 869 (1986). **THEREFORE, DEFENDANTS' MOTION IS DENIED ON THIS GROUND.**

Defendants further object to the Court's finding that the statute of limitations was equitably tolled. The Court finds that the evidence was sufficient to find equitable estoppel and/or equitable tolling. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next object to the Court's directing a verdict on the implied warranty of workmanlike service and negligence. The Court finds that the testimony from both the Plaintiff and the Defendants warranted the Court's direction of a verdict. **THEREFORE, DEFENDANTS' MOTION IS DENIED ON THIS GROUND.**

Defendants next objects to the Court's direction of a verdict since there was no evidence that the materials used by Buildstar in the construction of Magnolia North were known to be defective materials at the time the buildings were constructed. The Court finds that there was sufficient evidence from the Plaintiff and from the Defendants of numerous code violations which was sufficient standing alone for the Court to direct a verdict of liability. **THEREFORE, DEFENDANTS' MOTION IS DENIED ON THIS GROUND.**

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Defendants next contend that the Plaintiff did not meet its burden of proof as to proximate cause and actual damages. There was sufficient evidence before the Jury to determine damages and the proximate cause of those damages. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next object to the Court's refusal to bifurcate the punitive damages and actual damages stages of the trial. Under Rule 42(b) *SCRCP*, a motion seeking bifurcation is addressed to the sound discretion of the trial Court. The Court believes that the evidence at trial did not warrant bifurcation of the punitive damages and actual damages. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next contend that the Plaintiff failed in its proof by not presenting evidence of the standard of care of a developer. The Court's determination that the Defendants were amalgamated is clearly supported by the evidence, therefore evidence of the standard of care of a developer was not required. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next object to the Court's refusal to allow a Jury view. Whether to allow a Jury view or to deny a Jury view is within the discretion of the trial judge. Testimony in this case and exhibits introduced were sufficient to allow the Jury to make their determination without a Jury view. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

Defendants next contend that the Court erred by instructing the Jury that they must award damages for repair costs. The Court finds that there was sufficient evidence both from the Defendants and from the Plaintiff for this instruction. **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

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Defendants next object to the submission to the Jury of punitive damages. Our Court has long held that where a builder's actions are grossly negligent, punitive damages may be sought and awarded. Kennedy vs. Columbia Lumber, 299 S.C. 335, 384 S.E. 2d 730 (1989). In the case at bar, Heritage admitted to the Jury that it was guilty of a violation of numerous codes. The Court finds that there was sufficient evidence to submit the issue of punitive damages to the Jury as to all Defendants.

Heritage claims that the award of \$2,000,000 in punitive damages was improper and violated Heritage's due process rights. In the recent case of Mitchell vs. Fortis Insurance Company, __ S.E. 2d __, 209 WL 2948558 (S.C.) (Sept. 14, 2009), The South Carolina Supreme court went through the history of the award of and reason for punitive damages in this state. Punitive damages have been awarded in this state from the principals of common law to deter the wrong doers and others from committing like offenses and to further the state's legitimate interest in punishing unlawful conduct and deterring its repetition. However, there are constitutional limits to the award of punitive damages and these limits have been espoused by the United States Supreme Court beginning with Pacific Mutual Life Insurance Company vs. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991). In State Farm vs. Campbell, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L. Ed. 2d 585 (2003) the Court held that "to the extent an award is grossly excessive, it furthers no legitimate purposes and constitutes an arbitrary deprivation of property." Id. at 417. In BMW N. Am., Inc. vs. Gore, 517 U.S. 599, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996) (hereinafter "Gore") the Supreme Court enunciated three guideposts that indicate whether the due process requirements have been met. In determining the constitutionality of a punitive damage award, Gore directed that Courts consider:

- 1) The degree of reprehensibility of the Defendant's conduct;
- 2) The disparity between the actual and potential harm suffered by Plaintiff and the punitive damages award;
- 3) The difference between the punitive damages awarded by the Jury and the civil penalties authorized or imposed in comparable cases.

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Our State Supreme Court has largely tracked the United States Supreme Court with its pronouncements beginning in Gamble vs. Stevenson, 305 S.C. 104, 406 S.E. 2d 350 (1991) in which it held that in order to ensure that punitive damages awards are proper that the Court conduct a post trial review and may consider the following:

- 1) Defendants degree of culpability;
- 2) Duration of the conduct;
- 3) Defendant's awareness or concealment;
- 4) The existence of similar past conduct;
- 5) Likelihood the award will deter the Defendants or others from like conduct;
- 6) Whether the award is reasonably related to the harm likely to result from such conduct;
- 7) Defendants ability to pay; and
- 8) Other factors deemed appropriate.

Our Supreme Court also required in Gamble, supra, that upon completing its review, dedicated to the postulate that no award be grossly disproportionate to the severity of the offense, that the trial Court set forth its findings on the record. However, the Court has also stated, that the amount of damages, actual or punitive, remains largely within the discretion of the Jury, as reviewed by the trial Judge. Fennell vs. Littlejohn, 240 S.C. 189 125 S.E. 2d 408 (1992).

The Court conducted a hearing on the Plaintiffs' post trial motions including arguments as to punitive damages. After listening to arguments of punitive damages and reviewing the testimony and evidence submitted to this Court, using the Gamble factors, the Court finds that the award of punitive damages is not grossly disproportionate to the severity of the offense and does not offend the due process rights of Heritage. In reviewing the "Gamble factors" the Court determines the following:

- 1) **Defendant's Degree of Culpability.** Heritage, in the construction of Magnolia North was required by Horry County to abide by the Southern Standard Building Code. The expert witness for Heritage, David Roady, who investigated the Plaintiff's claims against Heritage,

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forthrightly conceded that in the construction of the Magnolia North project, Heritage violated numerous requirements of the Southern Standard Building Code. Thus, Heritage repeatedly violated a legal duty.

- 2) **Duration of the Conduct.** Heritage constructed numerous condominiums in Horry County and in Georgetown County beginning in the early 1990s and throughout that decade. Testimony established that the identical or similar deficiencies found at Magnolia North were also found in many of the other condominiums constructed by Heritage.
- 3) **Defendants Awareness or Concealment.** Heritage was clearly aware of the significant deficiencies that were in the buildings at Magnolia North. In spite of this knowledge, Heritage made no affirmative effort to inform the prospective purchasers of these deficiencies yet continued selling the condominiums which they knew were laden with deficiencies.
- 4) **Existence of Similar Past Conduct.** The record is replete with conduct by Heritage prior to and concurrent with Magnolia North in which Heritage constructed numerous condominiums with deficiencies similar to those found at Magnolia North. It is significant that despite the knowledge of these deficiencies Heritage continued to market these condominiums without informing prospective purchasers of the existence of these substantial construction deficiencies in the condominiums.
- 5) **Whether the Award is Reasonably Related to the Harm Likely to Result from Such Conduct.** The award of \$2,000,000 in punitive damages is less than one third (1/3) of the amount awarded in actual damages.
- 6) **Defendant's Ability to Pay.** Although the Defendant's ability to pay is nonexistent since Heritage went out of business prior to the filing of this lawsuit, the ability to pay is only one element and is not fatal to the award of punitive damages. Although the Gamble factors are relevant in accessing an award of punitive damages, specific factual findings concerning each factor is not required. Miller vs. City of West Columbia, 322 S.C. 224, 471 S.E. 2d 683

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(1996). Clearly the award of \$2,000,000 in punitive damages comports with the Gamble factors and does not violate Heritage's due process rights, and the Court so holds.

Our Supreme Court has also directed that trial courts not only review the award of punitive damages pursuant to the Gamble factors, but the Court has mandated that the trial Court review the ruling on punitive damages pursuant to Gore, supra. According to Gore, a trial Court shall review the constitutionality of the punitive damages award by determining whether the award was reasonable under the following guideposts:

- I. The degree of reprehensibility of the Defendants' conduct: Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award". Gore, 517 US at 565. In considering reprehensibility, the Supreme Court in Gamble, supra, directed the trial court to consider the following factors:
 - a) The harm caused was physical as opposed to economic. Although the harm caused by Heritage was economic as opposed to physical, Heritage's conduct placed the life and safety of the owners and/or residents of the Magnolia North condominiums in jeopardy. For example, Heritage failed to properly firestop condominiums giving the potential rise to a rapidly spreading fire; constructed inadequate walkways which rotted causing a safety hazard and constructed inadequate railings also resulting in a safety hazard.
 - b) The tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others. As set forth above, Heritage constructed the condominiums with little or no regard for the health and safety of the owners/residents of the condominiums. They failed to properly firestop the units and they improperly constructed walkways and railings all in violation of the Standard Building Code. These violations were not just sporadic but were found in practically every building.

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- c) The target of the conduct had financial vulnerability. The condominium units at Magnolia North were sold to many people in South Carolina and without the borders of South Carolina. The potential purchasers were given advertising touting the superior construction of the units while, at the same time, Heritage had knowledge of substantial and continuing construction deficiencies causing rot and water intrusion into the units. As Mr. McCartney, President of the Association Board testified, he put his life's savings into his condominium in Magnolia North. He was assured by Heritage on numerous occasions that the construction deficiencies in the units would be repaired which did not happen.
- d) The conduct involved repeated actions or was an isolated incident. Clearly, the conduct by Heritage was not isolated at or to Magnolia North. Heritage was building other units at the same time that they were building Magnolia North or had completed many units prior to building the units at Magnolia North. Many of these units had the same deficiencies that infected Magnolia North and Heritage was aware of that yet continued to repeat their conduct of building deficient and defective condominium units.
- e) The harm was the result of intentional malice, trickery or deceit rather than mere accident. Although there is little or no evidence of any intentional malice or trickery, there is evidence of deceit in that Heritage knew as indicated above, of the substantial deficiencies in these units yet continued to market them without any proactive program to inform potential purchasers that these substantial deficiencies existed.

II. Disparity between the actual or potential harm suffered by Plaintiff and the amount of punitive damages. The punitive damages award of \$2,000,000 represents less than one third (1/3) of the actual damages. Based upon the recent case of Mitchell vs. Fortis Insurance Company, supra, this award clearly meets constitutional scrutiny.

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III. Comparative Penalty Awards; what the Court has done in similar cases. An analysis of the cases set forth in Mitchell vs. Fortis Insurance Company, supra, leaves no doubt that the award of \$2,000,000 in punitive damages comports with due process and constitutional limitations, and the Court so finds. **DEFENDANT'S MOTION IS DENIED ON THESE GROUNDS.**

After its review under the Gamble and Gore factors and considering the recent holding in Mitchell, the Court finds that the punitive damages award was reasonable and comports with constitutional limitations.

The Defendants next contention is that the verdict of \$6,500,000.00 was not supported by the evidence. The Court finds that the evidence was sufficient for the Jury to find a verdict for the Plaintiff of \$6,500,000.00 actual damages. The Jury's verdict was clearly within the two estimates of damages by the Plaintiff and Defendants. See Burghardt v. Cromer, 272 S.C. 159, 249 S.E. 2d 898 (1978). (Where the amount of the verdict falls within the range of the damages testified to, verdict cannot be disturbed on the grounds of excessiveness). **THEREFORE, DEFENDANT'S MOTION IS DENIED ON THIS GROUND.**

The next and final ground for Defendants' post trial motions is there contention that the Plaintiff did not present evidence regarding the existence of similar past conduct because the conduct was not in the past, but was conduct concurrent with the construction of Magnolia North. The Court finds that there was evidence of past similar conduct and the admission of this evidence was proper. **DEFENDANTS' MOTION IS DENIED ON THIS GROUND.**

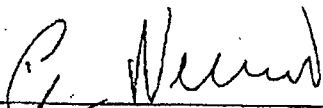
For the reasons hereinabove set forth, the Court respectfully denies Defendants' Post Trial Motions and hereby sustains the Jury's verdict.

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Heritage has also moved for an Order granting Heritage a set-off for money previously paid to the Plaintiffs in the amount of \$1,531,063.15. The Court finds that Heritage is entitled to set-off for the full amount of \$1,531,063.15. Therefore the total verdict of \$8,500,000.00 is set-off by \$1,531,063.15 resulting in a verdict of \$6,968,936.85.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that judgment be entered for Plaintiff against the Defendants in the total sum of \$6,968,936.85.

AND IT IS SO ORDERED.



THE HONORABLE CLIFTON NEWMAN
PRESIDING JUDGE FOR THE 15TH JUDICIAL CIRCUIT

Charleston, South Carolina
November 16, 2009

20721.09006
Pleading 5

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

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

HARLEYSVILLE GROUP INSURANCE)
GROUP, 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.)

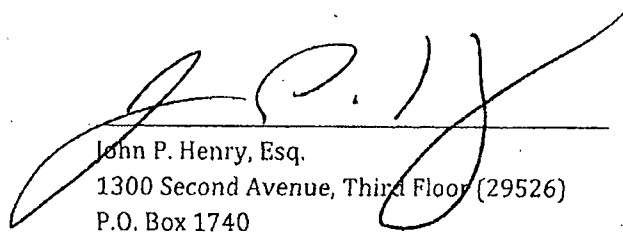
Defendants

SUMMONS

TO: THE PLAINTIFF ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Counterclaim in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said counterclaim on the subscribers at their office at Thompson & Henry, P.A., 1300 Second Avenue, Third Floor, Conway, South Carolina, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Counterclaim within the time aforesaid, the Defendant in this action will apply to the Court for the relief demanded in the Counterclaim.

THOMPSON & HENRY, P.A.

A large, stylized handwritten signature in black ink, appearing to read 'J.P. Henry', is written over a horizontal line.

John P. Henry, Esq.
1300 Second Avenue, Third Floor (29526)
P.O. Box 1740
Conway, South Carolina 29528
Telephone: (843) 248-5741
Fax: (843) 248-6396
*Attorneys for Magnolia North
Horizontal Property Regime, and
Magnolia North Prop. Owners Assoc.*

Conway, South Carolina

December 16, 2009

09-CP-26-11862

Consolidated ROA 0241

3. Harleysville has responded to the allegations set forth in Paragraph 23 of the Counterclaim. Any remaining allegations are denied.

4. Harleysville, answering Paragraph 24 of the Counterclaim, would show that the policies speak for themselves. Those policies are referenced in the body of the original Complaint in this action. Any allegation inconsistent with the express written language of the policies is denied.

5. Harleysville denies the allegations set forth in Paragraph 25 of the Counterclaim.

6. Harleysville denies the allegations set forth in Paragraph 26 of the Counterclaim. Harleysville specifically admits that the underlying action was filed May 23, 2003, and that nearly six years has elapsed since the original date of filing. Any remaining allegations are denied.

7. Harleysville denies the allegations set forth in Paragraph 27 of the Counterclaim. Harleysville specifically admits that it employed attorneys to provide a defense to the Heritage Entities. Harleysville would show that the attorneys hired protected the interests of the insureds and that the insureds' best interests, in the opinion of those attorneys, were best served by a general verdict. Harleysville was without the ability to have an impact on the verdict form in the underlying action. Harleysville would show that the attorneys provided a full and proper defense to the insureds in this action.

8. Harleysville denies the allegations set forth in Paragraph 28 of the Counterclaim. Harleysville specifically admits that its counsel and adjuster periodically attended trial of the underlying action based on a previous matter in which the court verbally ordered Harleysville and counsel to attend. Harleysville specifically admits that an adjuster and counsel may have briefly discussed the public proceedings in general terms but at no time were any directions

made or advice given as to how to proceed in the case. The attorneys handling the case used the insureds' best interests as the guiding force to the defense. Any remaining allegations are denied.

9. Harleysville denies the allegations set forth in Paragraph 29 of the Counterclaim. Harleysville specifically admits that no motion was filed to intervene in this action and such lack of motion was based on prior Circuit Court rulings in the Fifteenth Judicial Circuit and other Circuits where trial court judges had denied efforts by an insurance carrier to intervene for any purpose. Further, Harleysville would show that it is not practical to intervene in the underlying action given that South Carolina law does not permit the existence or non-existence of insurance to have an impact on liability in an underlying action. Further, South Carolina law provides that an insurer has the ability to relitigate and present any evidence desired to support its position in relation to coverage issues in a subsequent trial.

10. Harleysville denies the allegations set forth in Paragraph 30 of the Counterclaim. Harleysville would further show that Defendants are simply making a legal conclusion through an incorrect interpretation of the South Carolina Supreme Court's recent Order in Auto-Owners v. Newman. Harleysville has the right to assert all coverage defenses in this coverage action and this Honorable Court should allow testimony and evidence to determine covered and non-covered damages as the Complaint in this action requests.

FOR A THIRD DEFENSE
AND BY WAY OF REPLY
TO SECOND COUNTERCLAIM

11. Harleysville has responded to the allegations referenced in Paragraph 31 of the Counterclaim. Any remaining allegations are denied.

12. Harleysville, answering Paragraph 32 of the Counterclaim, would show that the policies speak for themselves. Those policies are referenced in the body of the original

Complaint in this action. Any allegation inconsistent with the express written language of the policies is denied.

13. Harleysville admits the allegation in Paragraph 33 that the jury returned a verdict on May 20, 2009. The verdict form speaks for itself. Any allegation inconsistent with the verdict form is denied. The verdict is currently on appeal.

14. Harleysville admits the portion of Paragraph 34 that the language is consistent with the policy language of the actual Harleysville policies at issue. Any allegation inconsistent with the express written language of the policies is denied.

15. Harleysville admits the portion of Paragraph 35 that a judgment is held. Harleysville denies that the judgment is covered and incorporates all issues and allegations of the Complaint herein. Any remaining allegations are denied.

16. Harleysville denies the allegations of Paragraphs 36 and 37 of the Counterclaim.

FOR A FOURTH DEFENSE
(Statute of Limitations)

17. Harleysville would show that any allegations by any party in this matter inconsistent with the written positions taken by Harleysville in the reservation of rights letters submitted more than three years prior to any claims by any Defendant in this action are barred by the applicable statute of limitations and should be dismissed with prejudice. Harleysville would further show that based on the statute of limitations, it is entitled to the full and specific relief requested in the prayer in its Complaint in this action.

FOR A FIFTH DEFENSE
(Incorporation of Complaint)

18. Harleysville incorporates all defenses, allegations, statements and relief sought in its original Complaint into this Reply.

Wherefore, having fully replied to the Counterclaim of Defendants, Plaintiff prays unto this Honorable Court as follows:

- a) that the Counterclaims be dismissed with prejudice;
- b) for judgment on all claims set forth in the Complaint in this action;
- c) for all relief requested in the prayer in the Complaint in this action;
- d) that any claim by any Defendant in this action be dismissed if it is inconsistent with written reservation of rights letters submitted more than three years prior to any legal claim filed and served by any of the Defendants in this action;
- e) for the cost of this action; and
- f) for any and other further relief this Honorable Court deems just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Robert C. Calamari
Post Office Box 1349
1107 48th Avenue North, Suite 210 (29577)
Myrtle Beach, South Carolina 29578
(843) 848-6000
ATTORNEY FOR PLAINTIFF

January 4, 2010

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

COURT OF COMMON PLEAS

Harleysville Group Insurance Group, A
Pennsylvania Corporation,

Plaintiff,

-versus-

CASE NO: 2009-CP-26-11862

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

Defendants.

Harleysville Group Insurance Group, A
Pennsylvania Corporation,

Plaintiff,

-versus-

CASE NO: 2009-CP-26-10053

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 Country Club
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.

**THE HEARING HELD BEFORE
HONORABLE JOHN M. MILLING
SPECIAL CIRCUIT COURT TRIAL JUDGE
HORRY COUNTY, SOUTH CAROLINA**

Monday, December 13, 2010 / 10:42 a.m. -- 4:26 p.m.

Tuesday, December 14, 2010 / 9:34 a.m. -- 11:21 a.m.

The following is the hearing held before Honorable
John M. Milling, Special Circuit Court Trial Judge for
South Carolina on Monday and Tuesday, December 13th and
14th, 2010.

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Consolidated ROA_0246

APPEARANCES:

FOR THE PLAINTIFFS:

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Donna H. Martin, CVR
Certified Verbatim Reporter

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Harleysville chart (policy/limit/aggregate remaining) (Subject to agreed-upon limitation that it is only offered as evidence of what Harleysville believes the aggregate remaining to be on each listed policy; National Surety will reserve its right to address the aggregate remaining issue in the bifurcated portion of the case)

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Riverwalk at Arrowhead Country Club,

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Magnolia North Property Owners' Association,

Inc., Civil Action Number 2003-CP-26-3203,

Verdict Form 212

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Consolidated ROA_0252

1 THE COURT: COUNSELORS, I DON'T THINK IT WILL BE A
2 PROBLEM BECAUSE WE'VE GOT MICROPHONES
3 IN THIS COURTROOM, BUT I FIND THAT FOR
4 SOME REASON I DON'T HEAR AS WELL AS I
5 DID AT ONE POINT IN MY TIME OR ONE
6 POINT IN MY LIFE. SO IF Y'ALL WILL,
7 BE CAREFUL ABOUT PROJECTING VOICES AND
8 IF WITNESSES WILL BE CAREFUL ABOUT
9 THAT, AS WELL, IT WOULD ENSURE THAT I
10 GET THE CORRECT INFORMATION, AND DONNA
11 DOESN'T HAVE ANY PROBLEM WITH HER
12 HEARING, BUT IT WILL HELP ENSURE THAT
13 SHE GETS A GOOD RECORD TO GO UP ON
14 APPEAL IF THAT BECOMES NECESSARY.

15 ALL RIGHT, MR. CALAMARI?

16 MR. CALAMARI: THANK YOU, YOUR HONOR. I THINK THAT
17 THE FIRST THING WE PROBABLY NEED TO DO
18 IS JUST IDENTIFY THE EXHIBITS THAT
19 WE'VE AGREED TO.

20 THE COURT: ALL RIGHT.

21 MR. CALAMARI: WE'VE PUT TOGETHER AN EXHIBIT LIST
22 THAT I'LL HAND UP, BUT IF I COULD JUST
23 READ THEM IN, EXHIBIT NUMBER 1 IS THE
24 ENTIRE TRIAL TRANSCRIPT OF THE
25 UNDERLYING TRIAL IN THE RIVERWALK

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Consolidated ROA_0253

1 MATTER.

2 EXHIBIT NUMBER 1

3 STIPULATED AND ADMISSIBLE BY ALL PARTIES

4 MR. CALAMARI: EXHIBIT NUMBER 2 ARE THE PLAINTIFF'S
5 EXHIBITS THAT WERE OFFERED IN THAT
6 CASE.

7 EXHIBIT NUMBER 2

8 STIPULATED AND ADMISSIBLE BY ALL PARTIES

9 MR. CALAMARI: EXHIBIT NUMBER 3 IS THE DEFENDANT'S
10 EXHIBITS THAT WERE OFFERED IN THE
11 CASE.

12 EXHIBIT NUMBER 3

13 STIPULATED AND ADMISSIBLE BY ALL PARTIES

14 MR. CALAMARI: EXHIBIT NUMBER 4 IS THE PLEADINGS OF
15 THE PARTIES IN THE UNDERLYING CASE.

16 EXHIBIT NUMBER 4

17 STIPULATED AND ADMISSIBLE BY ALL PARTIES

18 MR. CALAMARI: EXHIBIT NUMBER 5 IS THE R. V. BURIC
19 REPORT, INCLUDING ALL THE ATTACHMENTS,
20 EXHIBITS, WHICH INCLUDE PICTURES.

21 EXHIBIT NUMBER 5

22 STIPULATED AND ADMISSIBLE BY ALL PARTIES

23 MR. HENRY: BOB, I WANTED TO MAKE SURE WE'RE ON
24 THE SAME -- YOU SAID "OFFERED,"
25 ADMITTED. THEY WERE SOME EXHIBITS

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1 THAT WERE WITHDRAWN OR WE TRIED TO
2 ADMIT BUT DIDN'T. THE ADMITTED
3 EXHIBITS, IS THAT WHAT WE AGREED TO?
4 MR. CALAMARI: YES, SIR. AND THEN IN THE MAGNOLIA
5 NORTH, WE START WITH EXHIBIT NUMBER 6,
6 WHICH IS THE ENTIRE TRIAL TRANSCRIPT
7 IN THE MAGNOLIA NORTH MATTER.

8 **EXHIBIT NUMBER 6**

9 **STIPULATED AND ADMISSIBLE BY ALL PARTIES**

10 MR. CALAMARI: NUMBER 7 IS THE PLAINTIFF'S EXHIBITS
11 THAT WERE ADMITTED IN THE TRIAL.

12 **EXHIBIT NUMBER 7**

13 **STIPULATED AND ADMISSIBLE BY ALL PARTIES**

14 MR. CALAMARI: NUMBER 8 ARE THE DEFENDANTS' EXHIBITS
15 THAT WERE ADMITTED IN THE TRIAL.

16 **EXHIBIT NUMBER 8**

17 **STIPULATED AND ADMISSIBLE BY ALL PARTIES**

18 MR. CALAMARI: NUMBER 9 IS THE PLEADINGS.

19 **EXHIBIT NUMBER 9**

20 **STIPULATED AND ADMISSIBLE BY ALL PARTIES**

21 MR. CALAMARI: NUMBER 10 IS THE R. V. BURIC REPORT,
22 INCLUDING THE ATTACHMENTS, PICTURES,
23 OTHER THINGS THAT ARE ATTACHED TO IT,
24 AND WE'VE GOT COPIES OF ALL THESE
25 RIGHT HERE.

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EXHIBIT NUMBER 10

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: AND THEN THERE ARE DOCUMENTS THAT WE
BELIEVE ARE APPLICABLE TO BOTH CASES.
EXHIBIT NUMBER 11 IS A NOTEBOOK, WHICH
INCLUDES THE DEPOSITION TRANSCRIPTS OF
LEE WRIGHT, BRIAN TORMEY, AND DREW
BROWN, AND TORMEY IS T-O-R-M-E-Y.

EXHIBIT NUMBER 11

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: THEN NUMBER 12 IS AN EXHIBIT OF THE
HARLEYSVILLE POLICIES.

EXHIBIT NUMBER 12

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: NUMBER 13 IS THE NATIONAL SURETY
POLICY.

EXHIBIT NUMBER 13

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: NUMBER 14 ARE THE DISCOVERY RESPONSES
IN THESE TWO ACTIONS.

EXHIBIT NUMBER 14

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: NUMBER 15 IS A COMPILATION OF THE
RESERVATION OF RIGHTS LETTERS ISSUED
BY HARLEYSVILLE TO THE INSURED.

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EXHIBIT NUMBER 15

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: NUMBER 16 IS THE RESERVATION OF RIGHTS
LETTER FROM NATIONAL SURETY TO THE
INSUREDS.

EXHIBIT NUMBER 16

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: NUMBER 17 IS A CHART, AND IT'S A CHART
THAT IDENTIFIES ALL OF THE
HARLEYSVILLE POLICIES, AND IT'S
ATTACHED TO THE FRONT COVER OF THE
NOTEBOOK OF THE HARLEYSVILLE POLICIES,
GIVING THE POLICY PERIODS, THE FACE
AMOUNT OF THE POLICY, AND THE
AGGREGATE REMAINING ON THE POLICIES,
AND THERE'S ALSO A LIMITATION OF THAT
DOCUMENT THAT THIS IS SUBJECT TO
AGREED UPON LIMITATION, THAT IT IS
ONLY OFFERED AS EVIDENCE OF WHAT
HARLEYSVILLE BELIEVES THE AGGREGATE
REMAINING TO BE ON EACH LISTED POLICY,
NATIONAL SURETY WILL RESERVE ITS RIGHT
TO ADDRESS THE AGGREGATE REMAINING
ISSUE IN THE BIFURCATED PORTION OF
THIS MATTER.

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EXHIBIT NUMBER 17 - STIPULATED AND ADMISSIBLE BY
ALL PARTIES SUBJECT TO AGREED UPON LIMITATIONS

MR. CALAMARI: NUMBER 18 IS A DOCUMENT FROM NATIONAL
SURETY. IT'S NATIONAL
SURETY/FIREMAN'S FUND, 10/99,
CONTRACTORS SUPPLEMENTARY
QUESTIONNAIRE.

EXHIBIT NUMBER 18

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: NUMBER 19 IS FOUR COMMON FORMS OF THE
POLICIES. DURING THE DEPOSITION OF
MR. WRIGHT, WE DETERMINED THAT OF THE
27 POLICIES AT ISSUE IN THIS CASE,
THERE ARE REALLY ONLY FOUR FORMS. SO
WE'VE PUT IN THOSE FOUR COMMONS FORMS.
AND THEN THERE ARE A NUMBER OF
DOCUMENTS THAT HAVE NOT BEEN AGREED TO
BY THE PARTIES.

EXHIBIT NUMBER 19

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. CALAMARI: AND NUMBER 20 IS THE BAIDEN
CONSTRUCTION REPORT, WHICH WILL BE
SUBJECT TO AN OBJECTION THAT WE'LL
TALK ABOUT TOMORROW, AND THAT'S FOR
THE RIVERWALK MATTER.

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1 EXHIBIT NUMBER 20 - IDENTIFIED FOR THE RECORD
2 (NOT STIPULATED AS ADMISSIBLE BY ALL PARTIES AND
3 DESIGNATED AS PLAINTIFF EXHIBITS).

4 MR. CALAMARI: NUMBER 21 IS THE BAIDEN CONSTRUCTION
5 REPORT FOR MAGNOLIA NORTH.

6 EXHIBIT NUMBER 21 - IDENTIFIED FOR THE RECORD
7 (NOT STIPULATED AS ADMISSIBLE BY ALL PARTIES AND
8 DESIGNATED AS PLAINTIFF EXHIBITS).

9 MR. CALAMARI: NUMBER 22 IS THE TRANSCRIPT OF A RIVER
10 OAKS MOTION HEARING.

11 EXHIBIT NUMBER 22 - IDENTIFIED FOR THE RECORD
12 (NOT STIPULATED AS ADMISSIBLE BY ALL PARTIES AND
13 DESIGNATED AS PLAINTIFF EXHIBITS).

14 MR. CALAMARI: NUMBER 23 IS AN AFFIDAVIT OR STATEMENT
15 OF ROGER VAN WIE.

16 EXHIBIT NUMBER 23 - IDENTIFIED FOR THE RECORD
17 (NOT STIPULATED AS ADMISSIBLE BY ALL PARTIES AND
18 DESIGNATED AS PLAINTIFF EXHIBITS).

19 MR. CALAMARI: AND THEN THERE'S NUMBER 24, THAT'S NOT
20 ON HERE THAT'S ALSO OBJECTED TO, AND
21 THAT IS THE DEPOSITION TRANSCRIPT OF
22 JAMES GRAHAM.

23 EXHIBIT NUMBER 24 - IDENTIFIED FOR THE RECORD
24 (NOT STIPULATED AS ADMISSIBLE BY ALL PARTIES AND
25 DESIGNATED AS PLAINTIFF EXHIBITS).

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1 MR. CALAMARI: AND THOSE ARE THE EXHIBITS, AND I'LL
2 HAND UP THIS LIST OF THE EXHIBITS.
3 THANK YOU, YOUR HONOR.
4 THE COURT: AND THESE EXHIBITS THAT ARE IN THESE
5 BOXES HAVE BEEN APPROPRIATELY MARKED
6 SO THAT THEY ---
7 MR. HENRY: I DON'T BELIEVE WE'VE MARKED THEM YET,
8 YOUR HONOR.
9 MR. CALAMARI: THEY'RE IDENTIFIED ON THE OUTSIDE.
10 THEY JUST DON'T HAVE ---
11 MR. HENRY: THEY'RE IDENTIFIED AND ---
12 MR. CALAMARI: --- EXHIBIT 1, 2. WE'LL PUT THOSE ON.
13 MR. HENRY: --- BEFORE THE TRIAL IS COMPLETE, WE
14 WILL HAVE THEM MARKED. AND I TALKED
15 TO MR. CALAMARI ABOUT THIS, BUT IN
16 REFERENCE TO THE DISCOVERY RESPONSES,
17 YOUR HONOR, THOSE ARE SIMPLY
18 INTRODUCED, BUT THEY ARE INTRODUCED AS
19 POSITIONS OF THE PARTIES AND NOT AS
20 EVIDENCE IN THE TRIAL.
21 THE COURT: ALL RIGHT. BEFORE WE BEGIN WITH THE
22 TESTIMONY, IS THERE ANYTHING ELSE THAT
23 WE NEED TO COVER FROM THE UNDERLYING
24 PLAINTIFF'S STANDPOINT OR FROM
25 NATIONAL SURETY'S STANDPOINT?

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1 MR. CALAMARI: YOUR HONOR, THE ONLY THING, AS I THINK
2 THE PLAN, AS WE TALKED ABOUT A LITTLE
3 EARLIER BEFORE THE COURT REPORTER WAS
4 HERE, THAT WE'VE SUBMITTED BRIEFS TO
5 YOU ON THE ISSUES, SO WE'RE NOT HAVING
6 OPENING OR CLOSING STATEMENTS, AND
7 THIS IS THE TESTIMONY PHASE OF THE
8 MATTER, AND THERE ARE TWO MATTERS, TWO
9 DISTINCT MATTERS HERE, BUT THE
10 TESTIMONY IS COMMON IN BOTH, AND THEN
11 THE PLAN OF SUBMITTING BRIEFS AND
12 PROPOSED ORDERS TO YOU WITHIN 60 DAYS,
13 I BELIEVE, WILL PROBABLY, WE MIGHT AS
14 WELL JUST PICK FEBRUARY 15TH BECAUSE
15 THAT'S THE APPROXIMATE ---
16 MR. HENRY: THAT'S FINE.
17 MR. CALAMARI: --- DATE, AND THEN A 20-DAY PERIOD FOR
18 REBUTTAL BRIEFS; DOES THAT SOUND
19 APPROPRIATE?
20 MR. HENRY: I THOUGHT WE WERE JUST GOING TO JUST
21 SUBMIT ORDERS.
22 MR. CALAMARI: ORDERS OR BRIEFS, WHATEVER YOU'D LIKE.
23 THE COURT: PROPOSED ORDERS WITH CITATIONS WOULD
24 BE GOOD.
25 MR. CALAMARI: YES, OKAY, PROPOSED ORDERS. AND THEN

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1 WHAT ABOUT ANY REBUTTAL TO WHAT'S IN
2 THE ORDERS, MAYBE 20 DAYS TO POINT OUT
3 THINGS OR ---
4 MR. HENRY: I THINK THE ORDER WOULD BE IT.
5 MR. CALAMARI: THAT'S FINE.
6 MS. EVANS: I THINK THE ORDER'S FINE, YOUR HONOR.
7 MR. CALAMARI: SO, BY FEBRUARY 15TH, WE'LL SUBMIT
8 PROPOSED ORDERS.
9 MS. EVANS: AND NOTHING FURTHER FROM NATIONAL
10 SURETY, YOUR HONOR.
11 THE COURT: THANK YOU.
12 MS. EVANS: LAURA EVANS, E-V-A-N-S, FROM WILKES
13 BOWERS IN CHARLESTON, SOUTH CAROLINA,
14 AND WITH ME IS KARIN MCCARTHY FROM
15 RIVKIN AND RADLER IN NEW YORK, AND SHE
16 HAS BEEN ADMITTED PRO HAC VICE.
17 THE COURT: ALL RIGHT. MR. CALAMARI, I'LL BE GLAD
18 TO HEAR.
19 MR. CALAMARI: THANK YOU, YOUR HONOR. AT THIS TIME,
20 WE CALL JAMES LEE WRIGHT TO THE STAND.
21 AT THIS TIME, JAMES LEE WRIGHT, HAVING BEEN CALLED
22 TO THE STAND, WAS DULY SWORN AND TESTIFIED AS
23 FOLLOWS:
24 DIRECT EXAMINATION
25 BY MR. CALAMARI:

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Consolidated ROA_0262

1 Q: Mr. Wright, please state your full name.
2 A: James Lee Wright.
3 Q: And where do you work?
4 A: Harleysville Insurance.
5 Q: Are you here testifying as James Lee Wright or
6 are you here testifying because of your
7 affiliation with Harleysville?
8 A: Because of my affiliation with Harleysville.
9 Q: Are you here to give Harleysville's position in
10 this case?
11 A: Yes.
12 Q: And we brought declaratory judgment action; is
13 that correct?
14 A: Yes.
15 Q: In two separate cases?
16 A: Yes. That's correct.
17 Q: And your testimony is common for both cases?
18 A: Yes.
19 Q: Tell me about your job title with Harleysville.
20 A: I'm the construction defect litigation manager.
21 I'm, I'm responsible for all of our construction
22 defect cases nationwide.
23 Q: Okay. Give us an idea or give The Court an idea
24 of what it is that you do in your job.
25 A: I manage a unit of claim handlers that handle

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1 these cases every day. We have currently a
2 pending of a little over 600 of these cases and
3 have closed 2100 of them in the last seven years.
4 So we've been responsible for managing 2700
5 construction cases.

6 Q: When you say "manage a unit," is that a unit of
7 cases, a unit of people?

8 A: It's a unit of people.

9 Q: And I'd like you to just tell The Court, give him
10 a background of your work history since college.

11 A: Since college, that goes back a while. For the
12 last seven years, I've been at Harleysville.
13 Prior to that, I worked for Travelers in St.
14 Paul, either doing construction or transportation
15 cases. Prior to that, I was manager of a third-
16 party administrator, independent claims
17 organization, where I managed five locations
18 around Middle Tennessee. Prior to that, I worked
19 at a third-party administrator, again, in Los
20 Angeles that did primarily products case. We
21 did, handled packages of products, liability
22 claims for either self-insured manufacturers or
23 foreign insurers. Back before that, I worked for
24 Alliance Insurance, and prior to that, I started
25 with Auto Club of Southern California handling

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1 auto claims, in the mid '80s.
2 Q: Do you hold any certain licenses?
3 A: I have license, have adjustor's licenses in nine
4 or ten states, yeah.
5 Q: What are those states?
6 A: Wow, Arkansas, Georgia, Florida, North and South
7 Carolina, Connecticut, New Hampshire, Vermont,
8 and California.
9 Q: Now, as part of your job, are you involved in any
10 professional organizations?
11 A: I am. I'm currently in my second term as the
12 president of the Construction Defect Claim
13 Manager Association.
14 Q: And tell us about that. What is the name of that
15 ---
16 A: Construction Defect Claim Manager Association.
17 It is a national group of people who are in
18 similar position to what I'm in. It's primarily,
19 it's, it's set up for the benefit of the entire
20 construction defect industry to attempt to find
21 ways to resolve these cases in a better fashion
22 than what we do them now.
23 Q: And how many people are in that association?
24 A: I haven't -- We've, you know, we lose members and
25 gain members every year. I think we're probably

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1 to 43 or 44 right now.

2 Q: Are you involved in like an online discussion
3 type group for construction issues?

4 A: Yeah. I created and manage an online group,
5 discussion group of construction defect issues,
6 currently have 600 members worldwide.

7 Q: What about any professional designations?

8 A: Yes. I have a associate in management from the
9 Insurance Institute of America, a construction
10 risk and insurance specialist designation from
11 International Risk Management Institute, and I'm
12 a master certified arbitrator with Arbitration
13 Forums.

14 Q: I know you talked a little bit about the fact
15 that you've been involved in construction
16 defects, but can you give The Court a history of
17 your personal involvement in construction defect
18 litigation as far as liability and coverage and
19 just generally tell us?

20 A: I think the first construction defect case I
21 handled was probably in the late '80s, early
22 '90s. Like I said, I started my, my career in
23 California in construction defect cases. They're
24 certainly nothing new out there, been handling
25 them out there for a long time. So I've had them

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1 on and off throughout my career, have done
2 nothing but them for the last seven years.
3 Q: Now, tell The Court, are you familiar with
4 insurance policies?
5 A: Yes.
6 Q: And how is it that you're familiar with insurance
7 policies?
8 A: Well, you work for an insurance company, you have
9 to apply the coverage, they have to apply the
10 coverage of the, the policy to the claim at hand,
11 with every claim that comes in the door. I'm
12 familiar with personal auto policies, not so much
13 anymore with commercial auto policies, CGL
14 policies, but there are policies of all shapes
15 and sizes, policies for ocean marine and for work
16 comp, and for, you know, for some of those
17 things, I'm glad that there's somebody else
18 that's familiar with those.
19 Q: Now, as far as policies are concerned and the
20 various types, is it important for you to have a
21 knowledge of the law in different jurisdictions
22 relating to those policies?
23 A: Yes. It's always helpful.
24 Q: Please explain.
25 A: Well, like construction defect cases, I think

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1 there's, there's some of these issues that, in
2 fact, some of the issues that we're discussing
3 today are, are, are hotly debated throughout the
4 country, and oftentimes they come down to very
5 fact specific questions of what is an occurrence,
6 what is an accident, whether or not something
7 qualifies as property damage under the policy.
8 All those issues come up in these cases fairly
9 often, you know. With the 2700 cases that we've
10 had over the past seven years, you know, they
11 come up in a good portion, not every one of them,
12 but they come up in a good portion of the cases.

13 Q: You said case specific, does that mean you have
14 to look at the facts of each individual case?
15 Please elaborate.

16 A: I think, absolutely, you have to look at the
17 facts in each specific case, just like you would
18 in an auto accident. You can't say, "Well, you
19 know, I know that everybody that goes, goes
20 through this intersection is speeding," well, no,
21 you have to look at that specific case and you
22 have to apply the facts as you know them in that
23 case to the policy language that you have.

24 Q: And would you refer to some of those issues as
25 maybe gray areas?

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1 A: I don't know that it's a gray area. I think it's
2 probably more fact specific. It's, it's, it's
3 an, it's an issue of, say, an accident, what is
4 an accident? You know, most of the time,
5 everybody knows exactly what an accident is. In
6 fact, there's, say, a great case out of
7 Pennsylvania from the early '60s where the chief
8 justice of the Supreme Court says everyone knows
9 what an accident is until, of course, lawyers get
10 involved, and then we have to impanel a jury and
11 bring in, you know, 12 world-wise people and we
12 have to put it before them and you have to ask a
13 judge and the judge rules, and that's not enough,
14 you've got to take it to an appeals court. Well,
15 what he was saying was, you know, a lot of this
16 stuff is just common sense, you know an accident
17 when you see it.

18 Q: And, of course, you're not commenting on any of
19 the lawyers that are here in South Carolina.

20 A: Of course not.

21 Q: Okay. Can you identify some of the experiences
22 that you've had where there have been fact
23 specific issues in cases as it pertains to
24 insurance policies?

25 A: There are times, say, for -- Elaborate on that

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1 question a little bit for me.

2 Q: Actually, you know what? I'll move on to the

3 next one. Who is the Plaintiff in this case?

4 A: We are.

5 Q: Who are the Defendants in the case? Kind of

6 describe them in order.

7 A: Heritage Communities, Heritage Riverwalk, and

8 Heritage Magnolia North, Inc.

9 Q: What about BuildStar?

10 A: And BuildStar. I'm sorry.

11 Q: Are those the insureds on the, we're going to

12 talk about the policies later on, but are those

13 the insureds that are on the policies?

14 A: Yes. Those are the named insureds on the, on the

15 policies issued by Harleysville.

16 Q: Okay. Now, there are some other Defendants in

17 this action. Who are they?

18 A: They are the homeowners association at Riverwalk,

19 homeowners association at Magnolia North, and the

20 classes of homeowners at both of those locations.

21 Q: There's always a lot of talk about these types of

22 declaratory judgment actions because they're not

23 as common. What's the purpose of our action

24 involved in these two cases?

25 A: To determine our rights and responsibilities in

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1 relation to our, our insureds under the contracts
2 issued to them.

3 Q: And in these cases, what is the overall goal,
4 what are we asking The Court for in this
5 declaratory judgment action?

6 A: We're asking The Court to say that there was no
7 occurrence, that there is nothing that qualifies
8 as property damage, and that there is no, that
9 there, if there was any property damage, it
10 didn't occur within a policy period.

11 Q: Okay. What if The Court does find that there are
12 some things that are covered? Are we asking them
13 to conduct any sort of analysis?

14 A: Yes. I think that you do have to under the
15 second, the last Newman case, that the decision
16 of the Supreme Court says that the faulty
17 workmanship itself is not an occurrence and if
18 the faulty workmanship is not an occurrence, then
19 the faulty workmanship can't be paid for under
20 the policy. So we would have to allocate what is
21 an occurrence and what is not an occurrence.

22 Q: I'm going to move into a little different topic
23 here. It still relates to insurance. But I want
24 to ask you, in a general sense, what is
25 insurance, the term of art "insurance," what does

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1 that mean?

2 A: Insurance is simply one of many tools within the
3 concept of risk management. It is a specific
4 tool to perform risk transfer.

5 Q: Please explain risk transfer a little bit
6 further. Risk analysis, risk management, risk
7 transfer, what are you talking about? Give me
8 some examples.

9 A: Every, every commercial venture faces risk. We
10 all face risk. Every day, we face risk. I face
11 a risk that my house might burn down. In order
12 to transfer that risk on to somebody else, I
13 bought homeowner's insurance, but it's a specific
14 risk transferred under a, under a contract. I
15 didn't transfer every risk. I didn't transfer
16 the risk in, in that sense. I didn't transfer
17 the risk that one of my children would burn my
18 house down purposely. That's not covered under
19 the homeowner's policy. But if my home catches
20 fire accidentally, that's, that's a risk that I
21 have transferred to my insurance company.

22 Q: What are the types of insurance, generally, that
23 one can purchase?

24 A: Wow. There are as many types of insurance
25 products as there are businesses. Every business

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1 faces its own unique risk, and beyond that,
2 there's, there's more than that, because a good,
3 a prudent business will insure several parts of
4 their business. They will insure their business
5 property. They will insure against liability, as
6 in a CGL form. They will ---

7 Q: CGL is?

8 A: Commercial general liability form. They will
9 insure their commercial autos. They will insure
10 for Workers' Compensation. But those policies
11 all cover specific risks. Your Work Comp policy
12 doesn't cover what your CGL policy covers. Your
13 auto policy doesn't cover what your property
14 policy covers. They're, again, a tool to
15 transfer a specific section of, of the risk that
16 you would face.

17 Q: What is meant by first-party insurance?

18 A: First-party insurance is that which, which I buy
19 to protect me, my homeowner's policy, a property
20 policy on, you know, whether it's a commercial
21 property policy or what's called an inland marine
22 policy, which is kind of a business, a property
23 floater is what they used to refer to those as.
24 That's for property that's not, that you don't
25 keep in your possession all the time or at your

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1 location all the time. It's primarily for
2 contractors' tools and equipment, that type of
3 thing.

4 Q: And what about liability, there's first-party
5 insurance and then there's liability insurance,
6 tell me about liability insurance.

7 A: That's referred to as third-party insurance, but
8 it's, if I buy liability insurance, I am, I am
9 purchasing that for protection against,
10 protection from claims against me by a third
11 party that might claim that I'm legally
12 responsible for their damages.

13 Q: Okay. And when we talk about a commercial
14 general liability policy, is that what we have in
15 this case?

16 A: Yes. These are actually package policies that
17 cover both commercial property and commercial
18 general liability, but what's at issue here is
19 the commercial general liability side.

20 Q: Okay. And is an insurance policy a contract?

21 A: Yes, it is.

22 Q: Is it anything more than a contract?

23 A: No.

24 Q: Are the parties, are they required to enter into
25 commercial general liability policies?

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1 A: No.

2 Q: And there's some auto accident policies, the

3 state requires a minimum; is that correct?

4 A: Yes.

5 Q: So those are mandatory?

6 A: Those would be mandatory. If, if there's, if the

7 state legislates a certain minimum level of, of

8 insurance, then yes, I would be required to buy

9 insurance, but I wouldn't be required to buy

10 insurance from any particular company, you know.

11 There are obviously requirements that would, that

12 would apply and things that I would still have

13 freedom of choice on.

14 Q: And are there options, I mean, when you go in,

15 you say, "I need a commercial general liability

16 policy," or you go in and say, "I want this," and

17 tell me the options.

18 A: There is a standard, what's called an ISO,

19 insurance, insurance services office, policy that

20 is pretty much the backbone of most CGL policies.

21 There are plenty of manuscript policies out there

22 for, for people that need them, but there are

23 forms and endorsements and amendments of all

24 shapes and sizes that you can add on to that.

25 Q: Okay. And do some of the endorsements and

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1 additions increase and decrease the premium?

2 A: Yes.

3 Q: What would increase the premium?

4 A: Increased limits would, would increase the

5 premiums, coverage for things that normally

6 wouldn't be inside of a CGL policy, you could,

7 say you're, you have a risk that the insurance

8 company's not crazy about, for whatever that type

9 risk is, they might be willing to write it just

10 for a higher premium.

11 Q: Tell me about how the standard commercial general

12 liability policy applies to all the various types

13 of businesses. How do you have one policy that

14 applies to any number of businesses?

15 A: Well, it's, it's primary purpose is to protect

16 against claims of either bodily injury or

17 property damage that arise out of an occurrence

18 that fall within the property period, and then

19 there are, it's subject, obviously, to

20 exclusions. There, there is another section,

21 there are two, two more sections of, of coverage

22 to the policy. They hardly ever get dealt with,

23 but it's personal and advertising injury, it's

24 Section B, and Section C is medical payments.

25 Medical payments are, it's a no liability, no

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1 negligence issue. If I have, if I have medical
2 payments on my policy and you come on to my
3 property, you slip and fall, the policy pays for
4 it up to certain limits.

5 Q: Now, how do these commercial general liability
6 policies fit into a situation for a condominium
7 project and all its various phases?

8 A: It depends on what your role in the, in the
9 condominium project is. If you're the
10 contractor, you, you have purchased a CGL form in
11 your general work. Your CGL form would cover if
12 you drove a piece of your equipment into
13 somebody's car, if you, if you are a plumber and
14 you're thawing a frozen pipe and you catch the
15 framing behind it on fire. You know, there,
16 there are many different types of accidents that
17 can occur and damages that can arise as a result
18 of those accidents on behalf of a contractor. If
19 your, if your client comes to your office and
20 trips on the doorstep and they sue you, well, the
21 CGL policy would, would respond to that.

22 Q: As far as the general contractor, and we're
23 talking in these cases about construction and
24 construction issues, what is available for
25 purchase to a general contractor?

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1 A: There are -- Primarily, they're going to buy the
2 CGL, but there are certain contractors, painting
3 contractors, for an easy example, that have the
4 potential of environmental liability, as well,
5 and they can buy an environmental policy that
6 goes, that's an amendment to the CGL policy.
7 Again, there, there are almost endless
8 possibilities, depending on what your particular
9 niche in the commercial, you know, venture is,
10 that you might need coverage for something that
11 the guy working on the, or working on the project
12 next to you doesn't need.

13 Q: Now, we've talked a lot about insurance policies,
14 but what about other documents, other contracts
15 that can be entered into between the person who
16 is the insured and someone else in assignment of
17 risk, are there any other types of contracts?

18 A: In terms of constructing, or in terms of
19 construction in general, absolutely. There are
20 various types of performance bonds or surety
21 bonds, one, performance bond, payment bonds.
22 They could have purchased a, you know, builder's
23 risk policy to protect portions of that. They
24 could have purchased a -- There's a very common
25 product out there called a 2-10 home warranty

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1 that would protect against warranty claims.

2 Q: And explain the 2-10 warranty, tell me about
3 that.

4 A: 2-10 warranty, it's a very common product in the
5 market. You can buy it from either the
6 standpoint of the builder or from the buyer, and
7 it covers various items of your, of your home for
8 various periods of time, and for structural
9 issues, it covers up to ten years.

10 Q: When you say structural issues, covers up to ten
11 years, and I don't mean to be too much of a
12 lawyer, as you mentioned earlier, but when we
13 talk about structural issues, we've all looked in
14 these cases and we understand, please explain in
15 more detail what that warranty would cover.

16 A: A structural issue would be an issue that would,
17 that could affect the integrity of the building
18 envelope that, that could ultimately lead to the
19 building collapsing. Think about it that way,
20 that if the condition went on long enough, the
21 building would be in danger of collapsing. If
22 your roof or if your walls were built improperly
23 and they were beginning to fail, then that
24 warranty would take care of those things.

25 Q: If you don't have that in the policy?

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1 A: It doesn't exist. It either, it either exists or
2 it doesn't exist.
3 Q: What is a performance bond?
4 A: A performance bond is a bond that is taken out at
5 the time that a contract is awarded that simply
6 says that someone else, usually an insurance
7 company, guarantees that this contractor will
8 perform this contract as it's written, they will,
9 they will fulfill all the duties of this
10 contract, "If they don't, we'll step in. We'll
11 fulfill those duties and we'll worry about
12 getting our money back later."
13 Q: That's different from an insurance policy?
14 A: Absolutely.
15 Q: Okay. Now I want to talk a little bit about
16 insurance policies in general. Who are the
17 parties, in general, to an insurance policy?
18 A: For a CGL policy?
19 Q: Yes.
20 A: The insurance company and the business taking
21 that out.
22 Q: Anyone else?
23 A: No.
24 Q: Is anyone else a party to that contract?
25 A: No.

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1 Q: What about the people who claim injury?

2 A: They are not, they're not parties to that
3 contract. They, in fact, they are, the people
4 that make claims under that policy are precisely
5 why the policy was purchased in the first place.

6 Q: What are the duties of each party to an insurance
7 contract?

8 A: The insurance company has a duty to deal in fair,
9 in, in good faith with the insured. It has a
10 duty to defend claims that might possibly come
11 within the coverage. It has a duty to indemnify
12 claims that absolutely do come within the
13 coverage. It has a duty to ultimately not do
14 anything that would harm their insured in the
15 case.

16 Q: I want to talk a little bit about assignment of
17 risk. I know you touched on it earlier, but I'd
18 like you to talk in general terms about a
19 business and what effect a policy has on the
20 risks of that business.

21 A: Well, prior to engaging in risk management
22 practices, a business faces a myriad of risks,
23 and they face it completely on their own.
24 Everybody faces risks. Retailers face a risk
25 that their, they stock their shelves hoping that

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1 someone will come, want to come buy their
2 product. They face a risk that nobody's going to
3 buy it.

4 Lawyers take cases on contingency, taking
5 a risk that the case may last a long time, they
6 may not get as much in verdict as they thought
7 they might get, whatever, but it's a risk, and
8 there are all kinds of risks that you take. You
9 take a risk if you have people driving for you.
10 If they're on an errand during, during the
11 workday and they get in an accident and you don't
12 insure that, that's on you.

13 So prior to, to engaging in your risk
14 management, you face total risk. A CGL policy
15 transfers a very small portion of that risk from
16 you to an insurance company. In essence, you're
17 trading a guaranteed loss of, of the amount that
18 you're paying for the premium in exchange for
19 removing the risk of a much larger loss.

20 Q: I've heard discussion of gambling, that every
21 business is gambling. What effect does the
22 insurance policy and assignment of risk have on
23 gambling?

24 A: Well, there's, it's, it's interesting, that
25 there's an article I read on insurance coverage

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1 that says that insurance is the opposite of
2 gambling. If that's true, then the flip side of
3 that argument is, is also true, that to fail to
4 insure is to take a gamble, and it is. I mean,
5 it's a risk.

6 Again, you take, you transfer certain
7 risks. You say, "I will retain this risk." You
8 can, you can choose to retain risks. There are
9 people who are self-insured. There are companies
10 that are large enough that they self-insure for a
11 million dollars or more. They say, "Until a loss
12 gets beyond a million dollars, we'll take it,"
13 and that's; that's, in their mind, a sound risk
14 management decision.

15 Q: Now, how do you determine what risks are assigned
16 and what risks are kept by the insured?

17 A: It's spelled out in the policy.

18 Q: And elaborate on that further.

19 A: The policy has -- The policy language starts off
20 with an insuring agreement, and it, in coverage
21 A, for bodily injury and property damage, it
22 agrees that we will pay for, we will pay those
23 sums that the insured becomes legally obligated
24 to pay as a result of bodily injury or property
25 damage that are the result of an occurrence that

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1 occurred during the policy period, subject, of
2 course, to certain exclusions that are found
3 later on in the policy.

4 Q: Okay. Why don't you give The Court an example?
5 I'm trying to highlight here what we are talking
6 about. Just tell us a business and tell us the
7 risks that would be taken by the insurance
8 company under a policy and the risks that are
9 kept with the business. Just use any example to
10 illustrate for The Court's needs.

11 A: In terms of, let's, let's use a contractor.
12 Let's say that I'm the contractor that is
13 supposed to put up the building wrap and the
14 building wrap is simply either felt, tarpaper
15 type material or it's these composite building
16 wraps, and as I'm putting it up, part of that
17 process requires that I take a knife to it at
18 some point.

19 Now, if I mistakenly cut flashing that
20 was put on the building, and it was put on
21 properly by someone else and I, and I cut it
22 mistakenly on one, on one window, it's an
23 accident, and if property damage results from
24 water coming into that later on, that's, that
25 satisfies all of those, as long as, as long as

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1 the water comes in during my policy period, then
2 that satisfies those three things: It's as a
3 result of an accident. It is property damage.
4 In fact, if water doesn't even come in, doesn't
5 have to come in, if I slice that, if I slice
6 someone else's property with that accidentally,
7 then they would pay to replace the flashing that
8 I cut.

9 Q: You used the word "accidentally," explain.

10 A: It gets back to what, what is and what is not an
11 accident. An occurrence is defined as an
12 accident.

13 MR. HENRY: YOUR HONOR, WE WOULD OBJECT TO ANY
14 INTERPRETATION HE HAS TO THE TERMS
15 OF THE POLICIES THAT ARE IN ISSUE IN
16 THIS LAWSUIT. IF HE'S TESTIFYING
17 GENERALLY, OKAY, BUT IF HE'S
18 TESTIFYING AS TO WHAT THESE POLICIES
19 WOULD COVER OR NOT COVER, HE'S
20 INTERPRETING THE POLICY, WHICH WE
21 WOULD CONTEND WOULD BE UP TO THE
22 COURT, AND HE WOULD NOT BE QUALIFIED
23 OR ALLOWED, SHOULD NOT BE ALLOWED TO
24 INTERPRET, GIVE HIS OPINION AS TO
25 THE INTERPRETATION OF THE COVERAGE

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1 UNDER THE POLICY.

2 MR. CALAMARI: YOUR HONOR, I THINK THAT IN THIS
3 CASE, AND HE'S ALREADY TESTIFIED
4 THAT EVERY -- AND RIGHT NOW, WE'RE
5 JUST TALKING IN GENERAL TERMS.
6 WE'VE NOT GOTTEN TO IT, BUT WE WILL,
7 AND HE'S TESTIFIED AND IT'S VERY
8 CLEAR THAT EVERY INCIDENT IS A FACT
9 SPECIFIC ANALYSIS AND I THINK, AS
10 THE PLAINTIFF IN THIS CASE IN THE
11 DECLARATORY JUDGMENT ACTION, HE HAS
12 THE ABILITY TO COME IN AND SAY,
13 "THIS PARTICULAR FACT SETTING, WE
14 DON'T THINK SATISFIES THE
15 REQUIREMENTS OF OUR POLICY." I
16 THINK HE HAS THE OPPORTUNITY TO SAY
17 THAT AND THE RIGHT TO SAY THAT.

18 THE COURT: AT THIS PARTICULAR POINT IN TIME,
19 WE'RE TALKING ABOUT GENERAL POLICY
20 LANGUAGE. SO I WILL ALLOW HIS
21 TESTIMONY. IF IT GETS TO THESE
22 PARTICULAR POLICIES, APPLICABLE TO
23 THIS CASE, THEN LET'S MAKE AN
24 OBJECTION AND I'LL MAKE A RULING AT
25 THAT TIME.

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1 MR. HENRY: THANK YOU, YOUR HONOR,
2 MR. CALAMARI: THANK YOU, YOUR HONOR.
3 Q: Mr. Wright, are there differences to different
4 kinds of businesses?
5 A: In terms of what is an accident and what is not
6 ---
7 Q: What risks are assigned and what risks are kept?
8 A: Certain businesses have varying degrees of risk.
9 As in your law office, you have people, you have
10 clients that come to your office, but you don't
11 have the same level of foot traffic in your
12 office that, say, a Wal-Mart has. So while,
13 while the risk is the same, the, the level of
14 that risk is certainly different and, and will
15 vary among any of the, any of the millions of
16 different types of businesses out there.
17 Q: Okay. I want to move into a little different
18 section now. When something happens to an
19 insured, such as a lawsuit or a claim, how does
20 the insurance company get involved?
21 A: We will get notice of claims from various ways.
22 Sometimes, we'll get it from other insurance
23 companies who are already involved. Sometimes,
24 we get it directly from our, most of the time we
25 get it directly from our insured, who says, "I've

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1 been in an accident. I had somebody fall on my
2 property. Hey, I just got, got a copy of this
3 thing, somebody's suing me. I didn't have any
4 idea what this thing is," whatever, but once we
5 get notice of that, then we would start the
6 process of, of comparing the claim to the policy,
7 investigating the claim, doing those types of
8 things.

9 Q: Okay. And what exactly does the insurance
10 company do when they get a claim?

11 A: In the case of a lawsuit and for South Carolina
12 claims, you would, South Carolina applies what's
13 called the eight corner rule. You take the
14 complaint as it's, as it's stated and the policy
15 as it sits and compare and try to fit what's in
16 the complaint within the policy. In terms of
17 duty to defend that action, if there's any chance
18 that what's in the complaint might fit within the
19 policy, then you'd be required to defend that.

20 Q: Okay. So you get a call, I'm an insured, and I
21 call you and I say, "Hey, I've been sued," what
22 do you do, what does the insurance company do?

23 A: We, we would start dealing with you to try to get
24 all of -- We'd get the complaint, say you've been
25 sued, get a copy of the complaint. We'd pull up

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1 your policy. We would start working with you to
2 try to get all of your documents and arrange for
3 you to try to put all that stuff together for us,
4 and some of these cases, you know, construction
5 cases, they can go a long time, and there can be
6 a long time between when anything happened, when
7 the buildings were done, to the time the claim is
8 brought. South Carolina just changed its Statute
9 of Repose from 13 to eight years, but there are
10 other places that have them just as long.

11 Alabama has a 13-year Statute of Repose. So the
12 cases can, can be a long way out before they ever
13 even become a lawsuit. So there's a lot of time
14 spent just putting together documents, putting
15 together, you know, what, what was this, you
16 know, "What was your role in this and how do I
17 defend you?"

18 Q: Okay. Let's say I'm an insured and I call up and
19 I say, "Hey, so and so said they were injured by
20 me. I don't think it happens, but I have this
21 insurance, so you have to pay them," what's wrong
22 with that?

23 A: Well, you still have to fit it within the other
24 parameters. I mean, it could be an accident
25 that, we don't know that yet, until we figure out

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1 what the claim is. They have to be making a
2 claim for something that would qualify for
3 property damage that, under the definition of
4 property damage or bodily injury, and that would
5 have to be within our policy period. If you no
6 longer are insured with us and you call me up,
7 you know, ten years later and say, "Hey,
8 something just happened," well, frankly, a day
9 after the policy lapses, if you call me up and
10 say, "Hey, something just happened."

11 I say, "Well, you know, I'm sorry to hear
12 that, but your policy with us has lapsed."

13 Q: Okay. Let me phrase it a little differently.
14 Let's say I'm injured and I go to the person who
15 I think injured me and they say, "No, that's not
16 my fault," they say, "My insurance company's
17 Harleysville," and I call you and I say, "Hey, I
18 was injured. You need to pay me," do you have
19 any rights to that person?

20 A: No.

21 Q: Explain?

22 A: My, my duties are to our named insured, and they
23 purchased a policy to protect against those
24 claims. Part of the risk of being in business is
25 the litigation of claims. You know from these

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1 underlying claims that these have taken thousands
2 and thousands of man hours, and trust me,
3 defending them has taken, and defending Heritage
4 in all of these cases has cost us hundreds of
5 thousands of dollars. Just that alone could put
6 businesses under.

7 Q: When you see a contractor or any type of business
8 and they say, "We're licensed and insured,"
9 oftentimes the general perception is, "Okay, if
10 anything happens, they've got insurance for me,"
11 explain.

12 A: No. The CGL policy is, is written to protect the
13 people who purchase it. It's written to protect
14 against claims from someone else.

15 Q: As you said before, it's just a division of the
16 risks?

17 A: Yes, absolutely.

18 Q: Tell me about the duty of defense.

19 A: Duty of defense is much broader. There are
20 basically two duties under the policy, several
21 duties, actually. There's the duty to defend and
22 the duty to indemnify. Now, within those, is,
23 obviously, a duty to act in good faith towards
24 your insured and several other duties that come
25 along with the policy, but in broad terms, in

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1 terms of what we will pay, is the duty to defend
2 and the duty to indemnify.

3 Duty to indemnify is, is much narrower
4 than the duty to defend. If, if you read the
5 complaint and there's any chance, if you take it
6 at face value and you believe every word that the
7 plaintiff is saying, say, if they prove all of
8 this, if there's any of that that might be
9 covered under the policy, that might trigger a
10 duty to defend; then you have a duty to
11 indemnify. If there is no chance that it will,
12 for any duty to indemnify, then there's no duty
13 to defend.

14 Oftentimes, you don't know as cases
15 develop, like in construction cases or any large
16 case, large complicated case, you don't know all
17 the facts going into it. Facts develop over
18 time, and you may think that you have, early on,
19 you may even think you have a duty to indemnify,
20 but the facts arise during the case that you say,
21 "No. We're going to defend this, but we're not
22 going to pay for this at the end of the day."

23 Q: Okay. And duty of defense, what all does that
24 involve, you just call up the other side and say,
25 "Hey, I disagree," do you hire a lawyer, what is

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1 it you do?

2 A: Because that duty is transferred to insurance
3 companies, insurance companies have become pretty
4 good at, at managing litigation. When I say
5 managing litigation, it's, because we have a duty
6 to our insured and the relationship with defense
7 counsel is a three part relationship, I would
8 actually say that what we do more than manage
9 litigation is consult on litigation.

10 We can help attorneys discussing, you
11 know, which witnesses they think, you know, we
12 think will make the most impact on a case, we can
13 help them get experts in the field because we do
14 it so much more than, you know, most, like I
15 said, you know, I don't know how many cases any
16 particular attorney in South Carolina has had in
17 terms of construction, but over the last seven
18 years, I've had 2700 of them.

19 Q: That's a lot.

20 A: That's a lot.

21 Q: When you hire a lawyer, is the lawyer's job to
22 get in and sort through the facts, find out who's
23 right or wrong or is their job to defend the
24 insured?

25 A: They're job's to defend the insured.

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1 Q: What about the carrier, what's their job, to find
2 out who's right or wrong, pay the party that they
3 think is right or is it to defend the insured?

4 A: Defend the insured. And we pay based on, if we
5 pay a loss, it is, A, a covered loss or it's made
6 for business decisions, you know, where it's,
7 ultimately it's, it's less expensive to pay the
8 loss than it is to defend it, we make an economic
9 decision, or we make, make the decision that
10 there's a chance of losing the case, then you
11 make, make a business decision, ultimately, and
12 that duty is, we're protecting them. That's all
13 we're worried about.

14 Q: Now, let's say you get involved in a case, and
15 I'm sure, you're adjustors, you determine that
16 your insured is wrong. Do you call the insured
17 and say, "Hey, you're wrong. I'm calling the
18 other side and telling them they're going to
19 win"?

20 A: Don't have to. We do ---

21 Q: Would that be what you should do ---

22 A: Yes. We're not required to. We are, as, as part
23 of that risk transfer, the agreement is that we
24 get to settle cases as we see fit. However,
25 there are cases where we call our insured, and

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1 there are certain types of policies where you
2 have to call your insured. Say it's on a medical
3 malpractice policy or even, we even had realtors'
4 malpractice policies where you had to call them
5 and get their permission to settle the case, the
6 CGL policy is not that way. We do talk with them
7 often, though.

8 Q: What if you called the insured and said, "Look,
9 we've analyzed this. We think you're wrong.
10 We're going to call the other side and tell them
11 that they're right."

12 And the insured says, "Don't you dare.
13 The policy says you defend me, and I want you to
14 defend me to the end. I don't care if I'm right
15 or wrong. You defend," what do you say to them?

16 A: As long as we, as long as we obtain their release
17 from the case, they really don't have anything to
18 say about that. If they push that, they always
19 have the right to say, "Okay, you know what? I'm
20 not submitting this case under this policy. I
21 don't, I don't want the benefits of this
22 contract. I'd rather defend it on my own."

23 At that point we'd say, "You certainly
24 have the right to do that. You can take that
25 risk back. However, you also accept the risk of

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1 any verdict coming down, that you face that, and
2 if you feel that strongly about it, that it's up
3 to you."

4 Q: Now, if I was an insured and I told my carrier
5 that this is what I wanted to have happen and
6 they said, "No. We're going to call the other
7 side and settle the case. Don't you dare do
8 that," how is it that you're able to do that?

9 A: That is a transfer of risk within the policy, as
10 well. It's a transfer of rights and duties
11 within the policy.

12 Q: Is it because it's written in the policy?

13 A: Yes.

14 Q: So the policy governs the relationship between
15 the two?

16 A: Yes.

17 Q: Tell The Court what an adjustor is.

18 A: Well, an adjustor is, it's funny because I saw,
19 in the old days, you used to get things faxed
20 around, you know, little funny pieces faxed
21 around, before e-mail was, was so prevalent, and
22 saw one of them one time that said an adjustor
23 has to be an expert in the law, medicine,
24 engineering, and it went down this long list of
25 things, and it said, "And since the only one who

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1 has ever fit those qualifications died 2,000
2 years ago, I have to resign."

3 An adjustor has to do a lot of things.
4 We have to, you have to have a pretty good
5 understanding of a lot of different areas in
6 terms of the law and of damages in cases to
7 ultimately make the call of, "This is a case that
8 we win. This is a case we don't win. This is a
9 case where it makes economic sense to get out of
10 it right now."

11 Ultimately, though, in, in terms of just
12 day-to-day what they do, they're going to pick up
13 the file and they're going to work with their
14 insured and they're going to investigate it and
15 they're going to do everything they can do defend
16 their insured from the claims being made against
17 them.

18 If they come across information that
19 says, you know, that, in their mind, says, "Oops,
20 there's a conflict here. I have, I've, I've come
21 across information that makes it look like this,
22 that this claim isn't covered," we'll split the
23 file and another adjustor will handle those
24 coverage issues. But the adjustor that's
25 assigned that case for the defense, he's working

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1 for the insured. He's not -- He's, he's employed
2 by Harleysville at that point, but he's working
3 for the insured.

4 Q: How did they get the name adjustor; where does
5 that come from?

6 A: Kind of an esoteric thing, but you would, you
7 would, the common reference to is that you adjust
8 estimates, that you make an adjustment as to,
9 they send in an estimate and they says it's this,
10 and you make adjustments here and there,
11 ultimately coming to a number that is reasonable
12 and can, you know, everybody can live with.

13 Q: And you've testified that the exclusive interest
14 is the insured's, who is protected by the
15 insurance company.

16 A: Uh-huh (affirmative response).

17 Q: Okay. In the defense, can the insurance company
18 get involved and do something that hurts the
19 insured?

20 A: No.

21 Q: Explain.

22 A: We owe them the duty to defend them in good
23 faith. How can we possibly be defending them in
24 good faith and then step into the middle of it
25 and do something that would hurt them? We can't

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1 do that.

2 Q: For example, if you felt that the insured was
3 doing something intentional, forget about whether
4 it's covered under the policy or not, but you
5 thought the insured was doing something
6 intentional, could you tell the -- could the
7 adjustor call the defense lawyer and say, "Hey,
8 my moral fiber tells me that I want it known that
9 this guy did it intentionally, because he told
10 us," can you do that?

11 A: No. There are cases where you may, and I'm sure,
12 as lawyers, you've had the same kind of issues,
13 there are cases where you come across it and you
14 know your insured probably did this, that it's
15 probably, he probably did this intentionally.
16 The adjustor handling defense, he can't do
17 anything about that. He's got to defend that
18 insured in good faith. Now, if it, if it is
19 intentional, then we're going to split that file,
20 because he's got, he would have a conflict. He
21 can't do that. He can't do both. He can't serve
22 two masters. So we would split that file, and
23 there would be another adjustor who would be
24 working to protect Harleysville's interest under
25 that policy.

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1 Q: I think I speak for the lawyers in the room, that
2 our clients have always done the right thing, my
3 attempt at humor. You say that the file is
4 split. How does that work, what do you mean, the
5 file is split?

6 A: We actually create a new claim that is a
7 companion to the defense claim, that is handled
8 by another adjustor. The term is Chinese wall,
9 that you have to, you have to kind of split the,
10 the handling of those, and one can't be involved
11 in the other, that, that as far as the defense
12 goes, again, the defense, the person handling the
13 defense claim has a duty to the insured to
14 protect the insured, and he can't do anything to
15 harm them under that file.

16 Now, when you split the file, we create
17 another case that is, deals with those coverage
18 issues, because we can't do it in the underlying
19 case. We can't, we can't be helping and hurting
20 at the same time. We have to help and then we
21 have to deal with the other issues that we have
22 separately with them.

23 Q: Okay. Well, how do you do it?

24 A: It's difficult. It's extremely difficult, and,
25 and states have fits over this one. They just --

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1 There's very few who have addressed the best way
2 to get this done. If there are such simple
3 things as -- The simple case would be, "Hey, I
4 think you misrepresented this to me." Now, is it
5 a misrepresentation and it was an innocent
6 misrepresentation, a mistake that you
7 misrepresented it to me or was it a lie? And if
8 the plaintiff says it was either done
9 negligently, it was either a negligent
10 misrepresentation or it was fraud, well, in that
11 case, maybe, maybe we can ask the jury to, or ask
12 for special interrogatories from the jury, "Do
13 you think this was a case of a mistake or do you
14 think this was fraud?"

15 In this case, or in these types of cases,
16 there are too many of those types of things where
17 we would have had to, where the insurance company
18 would be put in a position to, in essence, argue
19 for the plaintiff and against our insured on so
20 many points that there's no possible way we could
21 do that in any shape, or any type of good faith.

22 Q: Okay. What happens in a case when, let's say the
23 insured tells the lawyer that was hired for them,
24 "Hey," we'll use an example, "I did this on
25 purpose."

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1 A: Right.

2 Q: "I don't think it's covered. I did it on

3 purpose. Don't tell the carrier," what does the

4 lawyer tell the carrier?

5 A: Nothing.

6 Q: It's confidential?

7 A: It's confidential.

8 Q: Would it be wrong for that lawyer to tell the

9 insurance company?

10 A: Yes.

11 Q: Why?

12 A: And that's what -- In fact, the lawyers are in

13 the same position. The lawyer is in the same

14 position as the adjustor who's assigned the

15 defense file. It's his job to defend the

16 insured. It's not his job to either -- It's

17 certainly not his job to harm that insured, but

18 his, his job is to defend the insured against the

19 claims against them. He's not asked to either

20 procure or to, certainly not to put, put his

21 clients in a position to have their insurance

22 company -- or coverage denied. It's just not his

23 issue. Just like if, if a client came to you for

24 an auto accident and then asked you about their

25 divorce, I mean, "You didn't retain me for your

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Consolidated ROA_0302

1 auto accident. If you want to talk to me about
2 your divorce, well, I'll look at it. Maybe I've
3 got a conflict there, maybe I don't," but it's a
4 separate issue that, that will be dealt with
5 separately.

6 Q: In general terms, because we're talking about
7 contracts now and policies of insurance, but
8 could there be a provision put in a policy that
9 says, "If we're defending you and we find out
10 reasons to mean that things aren't covered, we're
11 going to tell the other side and they're not
12 going to be covered," could we have put that in
13 the policy?

14 A: No, no.

15 Q: Why not?

16 A: I don't think so. It defeats the purpose of the
17 policy.

18 Q: Does the policy have such language?

19 A: No.

20 Q: What does the policy say?

21 A: The policy just says that, the policy says that
22 we will defend you against those claims, in very
23 general terms. The, the duties of good faith and
24 fair dealing all dictate that that simply
25 couldn't be done.

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1 Q: Okay. We've gone through a bunch, and we're
2 closing up the general section here, but tell me,
3 what are the three main elements of a liability
4 insurance policy in general?

5 A: There are three things that an, that an insured
6 must do to bring the claim within coverage. It
7 must be damages for property damage or bodily
8 injury as defined in the policy, those damages
9 must arise as the result of an occurrence, and
10 they must occur within the policy period.

11 Q: And how is an occurrence defined in the policy?

12 A: An occurrence is an accident, including
13 substantially, exposure to the substantially
14 same, similar or harmful conditions. That is,
15 however, not a definition of accident in and of
16 itself. It's ---

17 MR. HENRY: YOUR HONOR, I WANT TO MAKE SURE,
18 NOW, HE'S SPEAKING GENERALLY AND NOT
19 AS TO THE POLICIES IN ISSUE BECAUSE
20 HE'S GETTING INTO THE INTERPRETATION
21 OF INSURANCE POLICIES, AND IT'S MY
22 POSITION THAT THAT IS AN ISSUE FOR
23 THE COURT. HE'S GETTING READY TO
24 EXPLAIN WHAT ACCIDENT MEANS, WHAT
25 OCCURRENCE MEANS. THAT'S AN ISSUE

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1 FOR THE COURT AND NOT FOR MR.
2 WRIGHT. THE POLICY SAYS WHAT IT
3 SAYS. IT DEFINES OCCURRENCE, SAYS
4 WHAT IT SAYS, AND WHAT HIS
5 INTERPRETATION OF THAT IS IS WHAT
6 HAS BEEN ASSIGNED TO THE COURT TO DO
7 AND NOT MR. WRIGHT.

8 THE COURT: MR. CALAMARI?

9 MR. CALAMARI: WE'RE JUST TALKING IN GENERAL TERMS.
10 IN FACT, WHAT I WAS THINKING, I HAVE
11 TWO MORE QUESTIONS IN THIS GENERAL
12 AREA, THEN I WAS HOPING MAYBE WE
13 COULD TAKE ABOUT A TEN MINUTE BREAK
14 AND I'D GET INTO SOME OTHER THINGS,
15 AND WE CAN ADDRESS THOSE AT THAT
16 TIME.

17 THE COURT: THIS WILL JUST BE GENERAL TERMS AT
18 THIS TIME AND NOT AS IT RELATES TO
19 THESE UNDERLYING POLICIES.

20 A: The exposure to the substantially same or
21 substantially similar harmful conditions is not a
22 definition of an accident in and of itself. It
23 was actually put in the policies in order to give
24 the insureds a benefit. Prior to that, the
25 insured had the responsibility of showing with

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1 specificity, when the occurrence took place. Now
2 you have to show that an occurrence took place,
3 and that occurrence doesn't exactly have to be
4 at, you know, 12:15 on January 15th, 1985, or
5 something.

6 Q: Okay. I want to talk a little bit in general
7 now, we've talked about the duty of defense,
8 we've talked about policies in general. You have
9 a duty of defense. Let's say you lose. What is
10 the duty of indemnity, how is that different from
11 the other?

12 A: Well, you talked about the case where, say, the
13 insured told defense counsel that he did it on
14 purpose. Well, defense counsel knows it, but he
15 can't tell us, but say, through our
16 investigation, we found, find out that he did do
17 it on purpose. We know he did it on purpose.
18 We've done an investigation on the other side of
19 the case. We know that, and we say, "No. This
20 doesn't qualify for indemnity under the policy.
21 We've defended you because there was a chance
22 that it could be found that you didn't do this on
23 purpose," but certainly, if a jury said they did
24 it on purpose, no indemnity. Again, the duty to
25 indemnify is much narrower than the duty to, to

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1 defend. It's usually put in cases the opposite
2 way around, as that the duty to defend is much
3 broader than the duty of indemnity, but if that's
4 true, then obviously the corollary is also true.

5 MR. CALAMARI: YOUR HONOR, AT THIS TIME, I'D LIKE
6 TO TAKE ABOUT A TEN MINUTE BREAK
7 JUST BECAUSE I WANT TO GRAB SOME
8 DOCUMENTS AND THINGS.

9 THE COURT: THAT WOULD BE GREAT.

10 *****OFF THE RECORD*****

11 (ON THE RECORD)

12 THE COURT: YOU MAY PROCEED.

13 MR. CALAMARI: THANK YOU, YOUR HONOR.

14 MR. CALAMARI CONTINUES:

15 Q: Mr. Wright, we're going to get into the policies
16 now, and what I'd like to hand you is an Exhibit
17 that's been previously marked, and it's policy
18 forms, trial Exhibits, policy forms, and these
19 are the four forms. What I'd like you to do is
20 just leaf through those and tell me, explain to
21 The Court what we're talking about, policy forms.

22 MR. HENRY: WHAT EXHIBIT IS THAT, BOB? I'M
23 SORRY. EXHIBIT 19, ---

24 MR. CALAMARI: YES, 19, EXHIBIT 19.

25 MR. HENRY: HAS IT BEEN MARKED? WHY DON'T YOU

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1 HAVE HER MARK IT?

2 MR. CALAMARI: WE'LL MARK EXHIBIT NUMBER 12, AS
3 WELL, WHICH IS THE NOTEBOOK OF THE
4 HARLEYSVILLE POLICIES, AND THEN THAT
5 SHEET.

6 PLAINTIFF'S EXHIBIT NUMBER 12

7 PLAINTIFF'S EXHIBIT NUMBER 17

8 PLAINTIFF'S EXHIBIT NUMBER 19

9 MARKED FOR IDENTIFICATION

10 Q: Mr. Wright, I'm going to hand you Exhibit Number
11 12, which also has Exhibit Number 17, and what
12 I'd like you to do is explain to The Court what
13 is that three ring binder with 27 policies in it.

14 THE COURT: MR. CALAMARI, BEFORE HE ANSWERS THAT
15 QUESTION, THIS IS SOMETHING THAT
16 JUST SLIPPED MY MIND, BUT WE WERE
17 TALKING PREVIOUSLY ABOUT THE PARTIES
18 AND THE FACT THAT HOMEOWNERS
19 ASSOCIATIONS ARE HERE, REPRESENTED
20 BY MR. HENRY, BUT I THINK YOU
21 INDICATED YOU HAD GIVEN NOTICE TO
22 THE ACTUAL POLICYHOLDERS' ATTORNEY,
23 AS WELL, OF THE DATE, TIME, AND
24 LOCATION OF THIS HEARING AND THAT
25 THESE POLICYHOLDERS, THOUGH HAVING

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1 NOTICE, CHOSE NOT TO BE PRESENT?
2 MR. CALAMARI: YES, SIR, YOUR HONOR. AND I THINK
3 MR. HENRY AND I HAVE, YOU KNOW, I
4 THINK WE'VE BOTH TALKED TO THEM
5 THROUGHOUT THE HANDLING OF THESE
6 CASES. THEY'VE NEVER SUBMITTED
7 ANSWERS. THEY JUST, ALL FOUR OF
8 THEM HAVE CHOSEN NOT TO PARTICIPATE.
9 MR. HENRY: WELL, THE INSUREDS ARE OUT OF
10 BUSINESS, YOUR HONOR. THEY'VE BEEN
11 OUT OF BUSINESS FOR YEARS, AND SO I
12 ASSUME THERE'S NOBODY THERE TO PAY
13 THE ATTORNEY TO COME TO COURT. SO
14 THEY ARE NOT HERE. BUT THE INSUREDS
15 ARE OUT OF BUSINESS AND INSOLVENT.
16 THE COURT: BUT THEY HAD THE OPPORTUNITY TO
17 APPEAR AND ADDRESS THESE ISSUES IF
18 THEY HAD CHOSEN TO DO SO?
19 MR. HENRY: ABSOLUTELY.
20 MR. CALAMARI: YES, SIR.
21 THE COURT: VERY GOOD. YOU MAY PROCEED.
22 Q: Mr. Wright, I handed you two Exhibits, actually.
23 One is the notebook of policies, Number 12, and
24 then Number 17 is the compilation, it's just a
25 chart that you made, and what I'd like you to do

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1 is explain for The Court those policies and the
2 information on the chart.
3 A: 17 is a list of policies issued to Heritage
4 Communities; BuildStar; Heritage Riverwalk; and
5 Heritage Magnolia North that might be applicable
6 to these claims.
7 Q: What do you mean by "might be applicable"?
8 A: Just because the policy is -- Well, give an easy
9 example, you could have an auto, an auto policy
10 and a personal umbrella policy. Well, until the
11 auto policy gets over its limits, the personal
12 umbrella policy wouldn't kick in. So even though
13 it otherwise might be applicable to that loss, in
14 that case it would not be, and policies can be
15 applicable and non-applicable for a number of
16 reasons.
17 Q: Okay. And I guess that would be The Court's
18 determination, of whether they're applicable or
19 not, but are those the policies that are
20 potentially ---
21 A: Yes.
22 Q: --- applicable?
23 A: Yes.
24 Q: And there were other policies issued to some of
25 the insureds, but are they not even potentially

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1 applicable?

2 A: Not even potentially.

3 Q: So go down the list and explain to me what

4 policies are in the notebook, what the aggregate

5 limits are, who they're issued to, and what the

6 policy periods are.

7 A: The first one is policy number MPA3D9529, with

8 effective dates of 8/3/97 to 8/3/98, issued to

9 Heritage Communities, and we have paid losses on

10 that policy so that what's remaining on that, the

11 aggregate limit of that policy is \$856,554.72.

12 Q: Let me just interject right there that the

13 aggregate remaining, we've agreed, with National

14 Surety, has nothing to do with our bifurcated

15 action window?

16 A: Right.

17 Q: Okay. Continue.

18 A: The next policy on the list is BEC3D9529,

19 effective the same dates, 8/3/97 to 8/3/98.

20 It's, it's a four million dollar limit policy

21 which we've made no payments under, so that

22 there's a four million dollar aggregate

23 remaining. MPA3D9529 is a package policy issued

24 to Heritage Communities. It's effective 8/3/98

25 to 8/3/99, and it has \$196,824.56 left on the

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1 policy.

2 BEC3D9529, effective 8/3/98 to '99, was
3 also issued to Heritage Communities. It was a
4 four million dollar policy; however there is,
5 payments have been made, so there's \$3,796,545.64
6 left on the aggregate. The next one is OP3D9529,
7 effective from 8/3/99 to 8/3/2000, a one million
8 dollar limit with a two million dollar aggregate,
9 and there is nothing remaining on that policy.

10 BEC3D9529, from 8/3/99 to 11/29/99, it's
11 a four million dollar policy, but payments have
12 been made, the remaining aggregate is
13 \$3,357,413.24. CB1D6198 was issued to BuildStar
14 Corp. for the period of 4/1/97 to 4/1/98,
15 payments have been made under that policy so that
16 the remaining aggregate is \$1,482,924.74.

17 There was a BEC or a blanket excess
18 policy issued for the same period, BEC1D6198,
19 effective 4/1/97 to 4/1/98, with a million
20 dollars remaining on that aggregate. CB1D6198,
21 issued to BuildStar Corp. for the period of
22 4/1/98 to 4/1/99, has a one million, or has
23 payments made on it, has \$1,053,649.06 left on
24 the aggregate. BEC1D6198 is the excess to that
25 policy, 4/1/98 to 4/1/99, and it has a million

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1 dollars left on the aggregate.

2 CB1D6198, issued to BuildStar Corp. for
3 4/1/99 to 4/1/2000, a one million dollar policy
4 with a two million dollar aggregate, has been
5 completely eroded, there is nothing left on that
6 policy. BEC1D6198, for the period of 4/1/99 to
7 4/1/2000, was a million dollar excess policy, it
8 has been completely eroded.

9 CB1D6198, from 4/1/2000 to 8/1/2000, was
10 a million dollar policy with a two million dollar
11 aggregate, remaining on that aggregate is
12 \$1,285,241.34. BuildStar Corp., BEC1D6198,
13 4/1/2000 to 8/1/2000, is the umbrella or excess
14 over that, the last policy, it's got a million
15 dollars left on the aggregate.

16 A policy issued to Heritage Riverwalk,
17 Inc., MPA4D4650, it's effective 6/18/97 to
18 6/18/98, has a one million dollar limit with a
19 two million dollar aggregate. None of the
20 remaining policies have, have had any payments,
21 so I'm just, I won't ---

22 Q: Okay.

23 A: --- go over that. Heritage Riverwalk, MPA4D4650,
24 for the period of 6/18/98 to 6/18/99, is a one
25 million dollar policy. two million dollar

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1 aggregate, MPA4D4650, 6/18/99 to 6/18/2000, same
2 limits. MPA4D4650, from 6/18/2000 to 6/18/2001,
3 is a one million, two million. Heritage
4 Riverwalk, BEC4D4650, 6/18/97 to 6/18/98, is a
5 four million per occurrence, four million dollar
6 aggregate policy.

7 Heritage Riverwalk, Inc., BEC4D4650,
8 6/18/98 to 6/18/99, is a four million, four
9 million. BEC4D4650, 6/18/99 to 6/18/2000, is
10 four million, four million. BEC4D4650, 6/18/2000
11 to 6/18/2001, is four million and four million.
12 Heritage Magnolia North, MPA0E4290, 9/1/98 to
13 9/1/99, is a one million dollar per occurrence,
14 two million dollar general aggregate policy.

15 Heritage Magnolia North, MPA0E4290,
16 9/1/99 to 5/19/2000, is a one million, two
17 million aggregate. BE0E4290 issued to Heritage
18 Magnolia North for the period of 9/1/98 to
19 9/1/99, four million, four million, Heritage
20 Magnolia North BE0E4290, 9/1/99 to 9/1/2000, four
21 million, four million, and BE0E4290 issued to
22 Magnolia North for 9/1/2000 to 11/30/2000, four
23 million, four million.

24 Q: Thank you, Mr. Wright. I think it will please
25 everyone to know we're not going to read through

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1 those policies. Mr. Wright, during your analysis
2 and particularly in the deposition Mr. Henry
3 took, I think it was determined that there were
4 four forms; is that correct?

5 A: Yes.

6 Q: You have a copy of Court's Exhibit 19, and does
7 that contain the four forms that are found in
8 that book?

9 A: Yes.

10 Q: Explain that to The Court. What does that mean?

11 A: Well, the, the core policy or the core form of
12 many policies is a standardized policy, and they,
13 there are various issues of those forms, and the
14 forms are updated over time and they have
15 different, you know, different issue dates,
16 different additions. These are four policy forms
17 issued by ISO, Insurance Services Office, that
18 are standardized CGL forms, commercial general
19 liability forms. Two of them are, one's a
20 commercial umbrella, one's a commercial blanket
21 excess.

22 Q: I'm going to hand you my copy, and that way you
23 can hand this copy to Judge Milling, and if you
24 don't mind, what I want you to do is go in order.
25 These forms have an exhibit number on them.

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1 A: Yes.

2 Q: If you could, start with Number 27, and I don't
3 want you at this time to get into anything other
4 than the policy language that's applicable. I'm
5 going to ask you what is necessary to make the
6 policy applicable to the claim, and I want you to
7 go through the language in the policy that you
8 believe to be applicable, and then we'll talk
9 later about more specifics.

10 MR. HENRY: EXCUSE ME. YOU REFERRED TO THAT AS
11 27 OR 26. WOULD YOU MAKE CLEAR FOR
12 THE RECORD THAT THAT IS THE NUMBERS
13 IN HIS DEPOSITION THAT HAS BEEN
14 ENTERED INTO EVIDENCE?

15 MR. CALAMARI: YES. AND JUST FOR THE RECORD'S
16 PURPOSES, THESE FOUR FORMS WERE
17 ENTERED AS EXHIBITS IN MR. WRIGHT'S
18 DEPOSITION TAKEN BY MR. HENRY. SO
19 WHEN HE REFERS TO THE FIRST ONE AS
20 27, THAT'S FROM THE DEPOSITION. AS
21 FAR AS THIS CASE IS CONCERNED,
22 THEY'RE ALL ONE EXHIBIT. THE FOUR
23 FORMS ARE ONE EXHIBIT BY THEMSELVES.

24 Q: Okay. Mr. Wright, talk to us, just read the
25 language in the insurance contract that is

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1 required to prove the claim.

2 A: The first policy is the Contractor's Business
3 Owner's Policy, and the -- it starts off with the
4 property coverage section. So I've got to find
5 the, the liability section here. It's actually
6 on page 23 of the policy. "We will pay those sums
7 that the insured becomes legally obligated to pay
8 as damages because of bodily injury, property
9 damage, personal injury, or advertising injury to
10 which this insurance applies. No other
11 obligation or liability to pay sums or perform
12 acts or services is covered unless explicitly
13 provided for under coverage extension
14 supplementary payments. This insurance applies
15 only to bodily injury or property damage that
16 occurs during the policy period and that is
17 caused by an occurrence. The occurrence must
18 take place in the coverage territory."

19 Q: Mr. Wright, can you turn and read the definition
20 of occurrence?

21 A: "'Occurrence' means an accident, including
22 continuous or repeated exposure to substantially
23 the same general harmful conditions."

24 THE COURT: THAT IS FROM WHAT PAGE?

25 MR. WRIGHT: PAGE 34.

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1 THE COURT: 44.
2 MR. WRIGHT: 34, I'M SORRY.
3 Q: And the definition, does it have a letter by it
4 identifying ---
5 A: It's number nine in the definitions.
6 Q: Are there exclusions within that policy?
7 A: Yes, there are.
8 Q: Please read the exclusions section.
9 A: All of it? There are ---
10 Q: Read the exclusions you believe to be applicable
11 to this case in the event The Court finds damages
12 fall within the insuring agreement.
13 MR. HENRY: YOUR HONOR, NOW, HE'S GIVING AN
14 OPINION ABOUT WHAT EXCLUSIONS APPLY
15 AND WHAT DON'T APPLY. THAT'S FOR
16 THE COURT TO DETERMINE ON THESE
17 POLICIES, AND HIS OPINION AS TO
18 WHAT'S COVERED AND NOT COVERED, HIS
19 READING OF THE POLICY, THEY'RE
20 ALREADY IN EVIDENCE, THOSE ARE
21 MATTERS FOR THE COURT TO DETERMINE
22 AND NOT MR. WRIGHT.
23 THE COURT: MR. CALAMARI?
24 MR. CALAMARI: YOUR HONOR, I THINK MR. WRIGHT CAN
25 DESIGNATE WHICH ONES HE THINKS

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1 APPLY, AND HE'S NOT GOING TO, AT
2 THIS TIME, HE'S NOT GOING TO GIVE
3 ANY INPUT ON THEM. I'M GOING TO ASK
4 HIM LATER, AND I'M SURE THAT'S
5 SUBJECT TO AN OBJECTION, BUT I
6 THINK, IF ANYTHING, HE'S ELIMINATING
7 ONES HE DOESN'T -- I CAN HAVE HIM
8 READ THE WHOLE SECTION. I'M JUST
9 TRYING TO HAVE HIM NOT TAKE UP THE
10 TIME TO READ THE WHOLE SECTION.
11 THAT'S ALL I'M ASKING FOR HERE.
12 THE COURT: WELL, OBVIOUSLY, I CAN READ. I
13 THINK WHAT I'M GOING TO DO, MR.
14 HENRY, IS MR. WRIGHT HAS TESTIFIED
15 THIS IS A CONTRACT, AND HE HAS
16 CERTAIN OBLIGATIONS TO HIS INSURED,
17 THOUGH THEY HAVE CHOSEN NOT TO BE
18 HERE AND IT MAY NOT LEGALLY EXIST
19 ANYMORE, DEPENDING ON THE NATURE OF
20 THE ACTION THAT'S BEEN TAKEN BY THE
21 SECRETARY OF STATE, BUT THERE MAY BE
22 SOME UNDERLYING RIGHTS THAT THESE
23 INSUREDS WOULD HAVE. IF THERE'S A
24 CONTRACT, THERE'S STILL THAT
25 OBLIGATION OF GOOD FAITH AND FAIR

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1 DEALING, AND AS TO WHETHER THERE
2 WOULD BE A POTENTIAL SUIT HEREAFTER
3 AS TO WHY, INSTEAD OF INDEMNIFYING
4 AUTOMATICALLY THE INSURED, THIS
5 ACTION HAS BEEN BROUGHT FOR
6 CLARIFICATION. SO TO THE EXTENT
7 THAT THEY MAY RELATE TO THE ISSUE OF
8 WHETHER OR NOT HARLEYSVILLE IS
9 ACTING IN GOOD FAITH AND WITH FAIR
10 DEALING TOWARDS ITS INSURED, I WILL
11 LET THEM COME IN FROM THAT
12 STANDPOINT, BUT I AGREE WITH YOUR
13 POSITION THAT, ULTIMATELY, I'VE GOT
14 TO MAKE THE DECISION, HAS AN
15 OCCURRENCE HAPPENED, HAS AN ACCIDENT
16 HAPPENED, AND WHAT LIABILITY, IF
17 ANY, EXISTS BY HARLEYSVILLE.

18 MR. HENRY: THANK YOU, YOUR HONOR.

19 Q: Okay. Mr. Wright, please read the exclusions you
20 believe applicable to this case.

21 THE COURT: AND IDENTIFY FOR ME WHERE YOU'RE
22 READING FROM.

23 A: Page 24, Section B, "Exclusions Applicable to
24 Business Liability Coverage, This insurance does
25 not apply to bodily injury or property damage

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1 expected or intended from the standpoint of the
2 insured. Exclusion does not apply to bodily
3 injuries resulting from the use of reasonable
4 force to protect persons or property, bodily
5 injury or property damage for which the insured
6 is obligated to pay damages by reason of the
7 assumption of liability in a contract or
8 agreement. Exclusion does not apply to liability
9 for damages assumed in a contract or agreement
10 that's an insured contract or that the insured
11 would have in the absence of the contract or
12 agreement. Property damage to property you own,
13 rent or occupy. Premises you sell, give away or
14 abandon, if the 'property damage' arises out of
15 any part of those premises. Property" ---

16 Q: Mr. Wright, what page are you on?

17 A: Page 26. Section five, "That particular part of
18 real property on which you or any contractor or
19 subcontractor working directly or indirectly on
20 your behalf are performing operations, if the
21 'property damage' arises out of the operations;
22 or that particular part of any property that must
23 be restored, repaired or replace because 'your
24 work' was incorrectly performed on it. 'Property
25 damage' to 'your work' arising out of it or any

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1 part of it included in the 'products-completed
2 operations hazard.'" Section N, Property Damage
3 to Impaired Property or Property That's Not Been
4 Physically Injured; "arising out of: A defect,
5 deficiency, inadequacy or dangerous condition in
6 'your product' or 'your work'; or A delay or
7 failure by you or anyone acting on your behalf to
8 perform a contract or agreement in accordance
9 with its terms." And I think, if we get to the
10 exclusions, that would be that for that form.

11 Q: Are there any different ones or any different
12 language in the other forms or is the language
13 substantially similar?

14 A: It's substantially similar. It's very -- It, it
15 addresses the same type of issues.

16 Q: Okay. Mr. Wright, I think there's been some
17 testimony regarding, you had said earlier that
18 you have an obligation to the insured under the
19 contract, a duty to them.

20 A: Yes.

21 Q: Okay. In the insurance setting, I think you've
22 used the words "bad faith" or "fiduciary duty."
23 Explain that to me.

24 A: Well, we have the duty to defend them in such a
25 way as not to harm them. We, we, again, we can't

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1 -- You can't serve two masters. You can't help
2 them and harm him -- them at the same time.

3 Q: Okay. We've been through that, but what I'm
4 getting at is, under the duty of indemnity, and
5 as His Honor just mentioned, the duty of good
6 faith and fair dealing, do you believe it's
7 important to explain your positions that you're
8 taking in this case as far as your insured is
9 concerned?

10 A: Yes.

11 MR. CALAMARI: YOUR HONOR, AT THIS TIME, I'M GOING
12 TO GET INTO THE TESTIMONY OF HIS
13 EXPLANATION OF THESE PARTICULAR
14 TERMS, AND I KNOW THAT MR. HENRY'S
15 GOING TO HAVE AN OBJECTION, SO I
16 THINK THIS IS THE APPROPRIATE TIME
17 TO DETERMINE WHETHER I OFFER IT OR
18 PROFFER IT.

19 MR. HENRY: YOUR HONOR, WE WOULD OBJECT TO ANY
20 INTERPRETATION OF THE TERMS OF THE
21 INSURANCE CONTRACT. THAT IS SIMPLY
22 A MATTER FOR THE COURT, AND WHAT HE
23 BELIEVES THE POLICY MEANS OR SAYS IS
24 IRRELEVANT AND IT'S NOT ADMISSIBLE
25 IN THIS DECLARATORY JUDGMENT ACTION.

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THEY HAVE NOT ALLEGED THAT ANYTHING
IN THE POLICY IS AMBIGUOUS, AND
THEREFORE, IT IS SIMPLY A MATTER FOR
THE COURT.

MR. CALAMARI: AND, YOUR HONOR, IN RESPONSE, IF I
MAY, THIS ACTION IS SOMEWHAT
ATYPICAL IN THE FACT THAT THE
INSURED DOESN'T CARE. YOU KNOW,
THIS IS BETWEEN, AS MR. WRIGHT HAS
TESTIFIED, THIS ACTION IS BETWEEN
HARLEYSVILLE AND THE INSURED AS TO
WHAT THESE POLICIES TRIGGER IN THE
DUTY OF INDEMNITY. THEY DON'T SEEM
TO CARE. NOW, MR. HENRY HAS
INDICATED AND THERE'S A POLICY
PROVISION WHERE HE SAYS HE STEPS
INTO THE SHOES OF THE INSURED AND
CAN ASK FOR THE DUTY OF INDEMNITY,
BUT AS YOU POINTED OUT, YOU KNOW,
THEY MAY COME ALONG LATER AND SAY,
"YOU SHOULD HAVE DONE THIS," OR
THERE MIGHT BE SOME ASSIGNMENT, WHO
KNOWS WHAT WILL HAPPEN? SO I THINK
IT'S IMPERATIVE FOR MR. WRIGHT TO
EXPLAIN HIS POSITIONS ON THOSE

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1 ISSUES. I THINK IF THE INSURED WERE
2 HERE -- THE FACT THAT THEY'RE OUT OF
3 BUSINESS SHOULDN'T MATTER. IF THE
4 INSURED WERE HERE, THEY WOULD BE
5 SAYING, "I BETTER GET A GOOD
6 EXPLANATION FROM YOU AS TO WHY
7 YOU'RE NOT PAYING IN THIS CASE,
8 BECAUSE I THINK YOU SHOULD PAY," OR
9 THEY MIGHT BE SAYING, "WE AGREE WITH
10 YOU. YOU SHOULDN'T PAY IN THESE
11 CASES," BUT THE CONTRACT IS BETWEEN
12 HARLEYSVILLE AND THE INSUREDS. IT'S
13 NOT BETWEEN HARLEYSVILLE AND THESE
14 HOMEOWNERS ASSOCIATIONS. SO I THINK
15 IT'S NOT ONLY RELEVANT, BUT I THINK
16 IT'S IMPORTANT FOR MR. WRIGHT TO
17 STATE HIS POSITIONS ON THE RECORD AS
18 TO WHY THEY'VE TAKEN THESE ACTIONS
19 AND WHY THEY'RE ASKING THE COURT TO
20 RULE ON THIS MATTER.

21 MR. HENRY: YOUR HONOR, HE COULD CERTAINLY STATE
22 THAT, "WE DID NOT AGREE TO INDEMNIFY
23 THEM BECAUSE WE BELIEVE THAT THERE
24 WERE POLICY EXCLUSIONS THAT EXCLUDED
25 COVERAGE," BUT FOR HIM TO INTERPRET

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1 WHAT THE POLICY SAYS IN THIS
2 DECLARATORY JUDGMENT ACTION, THAT
3 MAY BE RELEVANT IF THERE'S A BAD
4 FAITH ACTION BROUGHT AND HE SAYS,
5 "WELL, I READ THIS AND TO INTERPRET
6 IT THIS WAY, AND THAT'S THE WAY
7 WE'VE ALWAYS INTERPRETED IT," BUT IN
8 THIS ACTION, WHICH IS A DECLARATORY
9 JUDGMENT ACTION AS TO THE RIGHTS AND
10 DUTIES UNDER THE POLICY, WHAT HE
11 THINKS THEY ARE HAS ABSOLUTELY NO
12 RELEVANCE.

13 THE COURT:

14 I AM GOING TO ALLOW HIM TO TESTIFY
15 SOLELY AS IT WOULD BE VIS-À-VIS AN
16 EXPLANATION TO HIS POLICYHOLDER AS
17 TO WHY INDEMNITY WAS NOT OFFERED. I
18 AM NOT CONSIDERING IT AT ALL IN
19 CONNECTION WITH HIS LIABILITY AS
20 DETERMINED BY THIS COURT, IF ANY.
21 INASMUCH AS THERE IS NO ASSERTION AT
22 THIS TIME BY ANYONE THAT IT IS GOING
23 TO IN ANY WAY ARISE TO THE LEVEL OF
24 BAD FAITH OR UNFAIR DEALING BETWEEN
25 THE POLICYHOLDER AND THE INSURANCE
CARRIER, I'M GOING TO HAVE IT

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1 SUBMITTED AS A PROFFER SO THAT THE
2 RECORD IS PROTECTED SHOULD MR.
3 WRIGHT OR ANY OF US WHO ARE HERE
4 FIND OURSELVES UNAVAILABLE, FOR SOME
5 REASON SHOULD THERE BE AN ACTION
6 BROUGHT IN THE FUTURE, THAT HIS
7 TESTIMONY IS PRESERVED ON THIS ISSUE
8 BY WAY OF THIS TRANSCRIPT, BUT SINCE
9 THAT IS NOT AN ISSUE BEFORE THIS
10 COURT, THE COURT WILL NOT RULE ON
11 IT. THIS WILL BE SUBMITTED AS A
12 PROFFER.

13 MR. HENRY: THANK YOU, YOUR HONOR.

14 MR. CALAMARI: THANK YOU, YOUR HONOR.

15 Q: All right. Mr. Wright, we are now proffering the
16 evidence here, and I understand this is all part
17 of the objection.

18 MR. CALAMARI: AND, YOUR HONOR, AS A PRACTICAL
19 MATTER, DO WE LET YOU KNOW WE'RE
20 CONCLUDED WITH THIS SO THE PROFFER
21 WOULD BE OVER?

22 THE COURT: PLEASE.

23 MR. CALAMARI: OKAY, THANK YOU.

24 Q: So, Mr. Wright, what is an occurrence?

25 A: An occurrence is an accident, very simply.

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Consolidated ROA_0327

1 Q: Explain what an accident is.

2 A: Back to the point where everybody knows what an

3 accident is. An accident is something that, that

4 happens, some of the, some of the definitions are

5 that it happens without design or expectation.

6 Q: Okay. Now, occurrence, the definition of

7 occurrence is accident and then the other

8 language?

9 A: Right.

10 Q: Just focusing on that language, an occurrence is

11 an accident, there's also an exclusion for

12 intended or expected; is ---

13 A: Right.

14 Q: --- that correct? Highlight for The Court the

15 difference between those two.

16 A: It has to be an accident to get within, within

17 the grant of coverage at all. However, there are

18 things that may on the surface be an accident

19 that turn out not to be or turn out that you

20 could have expected the result to, to have

21 occurred or you should reasonably have expected

22 the result to occur or you created, you designed

23 the, the condition that would normally and

24 naturally lead to that.

25 Q: Okay. In the first part, for occurrence, is it

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1 accident and the opposite of that being
2 intentional act or is it accident and non-
3 accident?
4 A: Accident and non-accident.
5 Q: Okay. In the expected or intended, is it either
6 accident or it's got to be proven that it was
7 intentional?
8 A: No.
9 Q: Explain.
10 A: Well, one, it's -- The exclusions are put in the
11 policy once you get past the insuring agreement.
12 To use an exclusion to define the insuring
13 agreement or, or to create coverage is a little
14 bit like standing outside of your house, knowing
15 you're locked out, seeing your keys on the,
16 through the window on the kitchen table and
17 saying, "Well, I'll just go in and get them."
18 None of the exclusions matter if you don't meet
19 the insuring agreement.
20 Q: Okay. Let me ask it a little different way. In
21 order to show that something is not covered, what
22 do you merely need to show for occurrence?
23 A: That, that it wasn't an accident.
24 Q: Do you need to show that they intended the harm
25 that resulted?

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1 A: No.

2 Q: Okay. Now let's fast forward to the exclusion.

3 What's needed to show, what do you need to show

4 proof-wise in order for something to be excluded

5 by the expected or intended exclusion?

6 A: That they either intended, either intended or

7 expected the damages to occur.

8 Q: Okay. So there's a difference. Explain that to

9 The Court. Explain the difference between what's

10 necessary for proof for occurrence and what's

11 necessary for proof for expected or intended.

12 A: On the, on, on the exclusion, you have to prove

13 that -- Well, intent is, is difficult to prove in

14 any, in any sense. It's a more subjective

15 argument, that you'd have to kind of climb inside

16 somebody's head and prove that, you know, that

17 there's a reason to believe that they either

18 expected or intended this. The other is just

19 whether or not this is an accident.

20 Q: And explain, if they intended to do something, is

21 that an accident? Explain that to The Court.

22 Explain what we're talking about with an accident

23 and a non-accident. Give us some examples.

24 A: I think we talked earlier about a plumber. A

25 plumber gets called to the house to thaw out

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1 frozen pipes, and he uses a torch, and he's
2 thawing the frozen pipe. That's an intentional
3 action, and he has an, has an unintentional
4 result by maybe setting the drapes on fire.
5 It's, it's an intentional act. He meant to do
6 what he was doing, but he had an accident as a
7 result of that.

8 Q: Okay. What about, give an example of installing
9 a window but not putting in flashing, accident or
10 not?

11 A: Installing or not installing a component on a
12 product or a house or anything else is a choice.
13 It's pattern and practice. It's, it's, it's a
14 conscious decision. It's the antithesis of
15 accident.

16 Q: So you need to explain maybe in a little clearer
17 terms. Is that an accident or not and why?

18 A: No. It's not an accident. It's a conscious
19 decision to either put something on the house or
20 not.

21 Q: What about property damage; explain to The Court
22 the meaning of property damage?

23 A: Property damage means physical injury to tangible
24 property, and in the, in the broad sense, it's,
25 it's exactly -- Again, a lot of common sense

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1 here, was it damaged before this or, or was it
2 in, always in this type of condition or was it,
3 did something happen to this to create a change
4 in the condition. If it's something that's just
5 going to -- Property damage isn't wear and tear.
6 It's not rot, degradation, whatever. There's a
7 -- One of the cases out of North Carolina said
8 that property damage in the policy isn't, isn't
9 what's contemplated by -- or poor work isn't
10 what's contemplated by, by property damage. It
11 has to be, at some point, in undamaged condition.

12 Q: Okay. Can you have damage that's not property
13 damage?

14 A: Absolutely, yes.

15 Q: Explain.

16 A: You can have damage that's not property damage.
17 Injunctive relief doesn't qualify as property
18 damage. We have cases, got a case going on right
19 now in Pennsylvania where what is sought
20 ultimately is that, it's a runoff case where they
21 want their land fixed. They want, they want the
22 drainage fixed, but what needs to be fixed is not
23 damage to their property. It's, it's, it's a
24 pipe on somebody else's property, and what they
25 want The Court to say is, "We want them to change

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1 that condition." Well, under the policy, all we
2 can do is respond with money in the right case.
3 We can't, we can't go out and grab a shovel and
4 fix something for the insured. We can only, you
5 know, we can only write a check at the end of the
6 day, and there are damages that, that simply
7 don't qualify as property damage.

8 Q: Tell The Court the meaning of the policy period,
9 where the policy talks about the damage has to
10 occur within the policy period. Explain what
11 that means.

12 A: There is nothing clearer about an insurance
13 policy than the fact that it's issued for a
14 specific period of time. Now, the grand majority
15 of policies are written for a year. They can be
16 cancelled short, as some of these were, for
17 failure to pay premiums or for, you know, other
18 reasons, but the policy is effective for a
19 certain period of time. No -- Outside of that,
20 the policy's not a valid contract. It's just
21 not, it, it doesn't exist, for all intents and
22 purposes. If I have a, if I have a policy that's
23 effective this year, that policy, for all intents
24 and purposes, doesn't exist next year.

25 MR. CALAMARI: YOUR HONOR, I THINK THOSE WOULD BE

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1 THE QUESTIONS THAT WE WOULD ASK FOR
2 THE PROFFER AT THIS PARTICULAR TIME.
3 THE COURT: MR. HENRY, HE HAS COMPLETED HIS
4 PROFFER.
5 MR. HENRY: OKAY.
6 Q: Mr. Wright, how is a premium determined?
7 A: Premiums are -- Part of it is, is through ISO.
8 They have kind of what you would call a book
9 rate. Each, each industry or each type of, of
10 commercial enterprise out there fits to, into one
11 of thousands of, of commercial categories. They
12 will decide, you know, what, what is it that you
13 do, what category does that fit into, and based
14 on their actuarial studies, what the typical
15 risks of something like that would be. They will
16 use payroll size, receipts, various number of,
17 of, you know, general questions that you would
18 ask in order to come up with what ultimately is
19 the rate for that.
20 Q: Do you have any knowledge of the premiums in this
21 case?
22 A: I've seen them at one point.
23 Q: What are they?
24 A: Not much. I think the, the ---
25 MR. HENRY: YOUR HONOR, I DON'T SEE WHERE THE

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Consolidated ROA_0334

1 AMOUNT OF PREMIUMS THAT WERE PAID ON
2 THESE POLICIES HAS ANY RELEVANCY
3 WHATSOEVER TO THE ISSUES IN THIS
4 CASE.

5 MR. CALAMARI: YOUR HONOR, I THINK IT GOES TO WHAT
6 THE INTENT OF THE PARTIES WAS WHEN
7 THEY ENTERED INTO THIS CONTRACT. I
8 THINK WE'VE TALKED THE ASSIGNMENT OF
9 RISK, AND I UNDERSTAND THE COURT'S
10 RULING THAT THE INTERPRETATION OF
11 CONTRACT IS A MATTER OF LAW, BUT I
12 THINK IT GOES TO THE INTENT OF THE
13 PARTIES, AS TO WHAT THEY THOUGHT
14 THEY WERE ASSIGNING AT THE TIME, AND
15 I KNOW OUR SUPREME COURT'S LOOKED AT
16 THAT, ASKED THOSE QUESTIONS DURING
17 ORAL ARGUMENT, WHAT, WHAT WAS THE
18 INTENT OF THE PARTIES AT THE TIME,
19 AND I THINK THE AMOUNT OF THE
20 POLICIES IS RELEVANT. IN FACT, THE
21 ARGUMENT USED TO BE, BY A LOT OF THE
22 LAWYERS IN THE GENERAL COMMUNITY,
23 THAT THAT'S WHY THEY PAY HUNDREDS OF
24 THOUSANDS OF DOLLARS FOR THESE
25 POLICIES, IT SHOULD BE COVERED,

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1 UNTIL WE TOLD THEM THAT, WELL, IN
2 SOME OF THESE CASES, THEY'RE FIVE,
3 \$600 PER MILLION DOLLARS.
4 MR. HENRY: YOUR HONOR, THE INTENT OF THE
5 PARTIES WOULD ONLY COME INTO PLAY IF
6 SOMEBODY SAID THE CONTRACTS OR
7 POLICIES WERE AMBIGUOUS.
8 THE COURT: I DON'T SEE WHERE THE, AT THIS
9 PARTICULAR JUNCTURE, THE POLICY
10 PREMIUMS ARE RELEVANT AS TO WHETHER
11 THEY PAID \$600 FOR A PARTICULAR
12 POLICY OR WHETHER THEY PAID \$6,000.
13 SO I'M GOING TO EXCLUDE IT, BUT I'LL
14 LET YOU ASK THE QUESTION AS A PART
15 OF THE PROFFER.
16 MR. CALAMARI: OKAY.
17 Q: Mr. Wright, as part of our proffer, please
18 explain to The Court your knowledge as to the
19 amount of premiums charged to the insureds in
20 this case?
21 A: I think, for the, the policies that we have at
22 hand here today, I think the most they paid for
23 one was 30,000, 31,000, something like that, and
24 the least they paid was \$524 or something. That
25 -- I don't have the numbers right in front of me.

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Consolidated ROA_0336

1 So that's from my best recollection.
2 Q: Did you calculate an average?
3 A: I did at one point. I think the average was ten
4 or \$11,000 a year.
5 MR. CALAMARI: THAT WOULD CONCLUDE THE PROFFER ON
6 THE PRICE OF THE POLICIES.
7 THE COURT: THANK YOU.
8 Q: Mr. Wright, is the fact that some of the cases
9 for these particular insureds, the fact that
10 they've been settled, does that have any bearing
11 on what we're doing in this action?
12 A: No.
13 Q: In the policies that you're looking at, is there
14 a provision dealing with the rights of the
15 judgment holder? And just please let us know
16 which policy you're looking at, if it's 28, 29.
17 A: That was rights ---
18 Q: Rights of a judgment creditor, judgment holder.
19 A: On Exhibit 28 here, ---
20 THE COURT: EXHIBIT 28 IS PART OF EXHIBIT 19?
21 MR. WRIGHT: YES, YES.
22 A: It would be on page nine of 13, section three,
23 legal action against us.
24 Q: Please read that language to The Court.
25 A: "A personal organization may sue us to recover on

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Consolidated ROA_0337

1 an agreed settlement or on a final judgment
2 against an insured obtained after an actual
3 trial, but we will not be liable for damages that
4 are not payable under the terms of this coverage
5 part or that are in excess of the applicable
6 limit of insurance. An agreed settlement means a
7 settlement and release of liability signed by us,
8 the insured and the claimant or the claimant's
9 legal representative."

10 Q: Mr. Wright, tell us about the Riverwalk project.
11 What is it?

12 A: It's a project consisting of, I believe, 17 or 19
13 condominium buildings, other side of the
14 waterway.

15 Q: Okay. And tell us about the Magnolia North
16 project.

17 A: Magnolia North is north, or, well, it's Myrtle
18 Beach, not too far from Broadway on the Beach
19 area. I think that's 23 buildings as
20 constructed, only, I think it's only 21 of which
21 were constructed by Heritage.

22 Q: Okay. And who is Heritage Communities?

23 A: Heritage, Heritage Communities was a group of
24 local businessmen in Myrtle Beach who got
25 together to, to form a real estate development

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1 corporation.

2 Q: And who are the principal people in that
3 corporation?

4 A: Roger Van Wie, his wife Patty, and Dr. Jack
5 Green.

6 Q: And who is BuildStar Corporation?

7 A: BuildStar is a general contracting company that
8 was started, again, by those same principals.

9 Q: And who is Heritage Riverwalk?

10 A: Heritage Riverwalk is a corporation that, and
11 it's not uncommon in real estate development
12 circles to create what we would refer to as a
13 site specific development company, it really
14 helps, more than anything else, to keep the books
15 clean as to knowing what money is going in and
16 out for that specific project.

17 Q: And who is Heritage Magnolia North?

18 A: It was the site specific development company for
19 Magnolia North.

20 MR. CALAMARI: YOUR HONOR, AT THIS TIME, I
21 UNDERSTAND THE COURT'S RULING ON
22 THOSE ISSUES, AND IF IT'S AGREEABLE
23 TO EVERYONE ELSE, I THINK IT MIGHT
24 BE A GOOD TIME TO TAKE A LUNCH
25 BREAK, THEN I CAN STREAMLINE SOME OF

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1 THE INFORMATION THAT I HAVE, IF THAT
2 WOULD BE ACCEPTABLE.
3 MR. HENRY: THAT'S FINE.
4 THE COURT: THAT WILL BE SATISFACTORY. DO YOU
5 NEED AN HOUR?
6 MR. CALAMARI: I THINK, AN HOUR, HOUR AND 15
7 MINUTES WILL BE FINE.
8 THE COURT: WE'LL BE BACK THEN AT A QUARTER TO
9 TWO.
10 *****OFF THE RECORD*****
11 (ON THE RECORD)
12 THE COURT: ALL RIGHT, MR. CALAMARI?
13 MR. CALAMARI: THANK YOU, YOUR HONOR. WE'LL
14 CONTINUE THE DIRECT EXAMINATION OF
15 LEE WRIGHT.
16 MR. CALAMARI CONTINUES:
17 Q: Mr. Wright, I want to ask you about reservation
18 of rights letters. What are they?
19 A: Reservation of rights letter is essentially a
20 preliminary statement to the insured that we have
21 questions on the coverage or concerns about
22 coverage in a case, just tells them, "We're
23 reserving all of our rights to dispute coverage
24 and, we don't want you to give up any of your
25 rights on that issue either."

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Consolidated ROA_0340

1 MR. CALAMARI: YOUR HONOR, THESE ARE RESERVATION OF
2 RIGHTS LETTERS THAT ARE EXHIBIT 15,
3 AND THERE'S FIVE, FIVE RESERVATION
4 OF ---

5 PLAINTIFF'S EXHIBIT NUMBER 15
6 IDENTIFIED FOR THE RECORD

7 THE COURT: THANK YOU.

8 Q: Mr. Wright, I'm going to hand you a copy of five
9 reservation of rights letters. Those have been
10 previously entered into evidence by agreement.
11 Tell me generally, what are those letters, who
12 are they to, who are they from, what are they
13 for?

14 A: Well, they're from Frank Chmielewski of our home
15 office.

16 Q: He's with Harleysville?

17 A: Yes. He's at ---

18 Q: The letter ---

19 A: --- the Harleysville home office. It went to,
20 addressed to Roger Van Wie, Patty Van Wie, Jack
21 Green, Allen Jeffcoat, Heritage Communities,
22 Jimmy Watson and Heritage Communities, Susan
23 Hinton, and Robert F. Anderson. And the letter
24 is basically a letter to tell them, talks about
25 the complaint that we got, or the, the suit

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1 that's been filed against them, the policies that
2 we were looking at initially, parts of those
3 policies that we think may be applicable to the,
4 any potential coverage dispute, and then just
5 makes a general statement about, "We reserve our
6 rights to contest coverage down the road."

7 Q: And please read the language in that letter that
8 addresses the last issue you mentioned.

9 A: "Nothing contained in this letter should be
10 deemed a waiver of the terms or conditions of the
11 HMIC policy. HMIC expressly reserves the right
12 to rely upon any term or condition of the
13 insurance contract or any other ground which may
14 be found to limit or preclude coverage. In the
15 event that it is determined that there is no
16 coverage for this action under the HMIC policy,
17 HMIC expressly reserves the right to recover the
18 amounts incurred in the defense of this action
19 from you or any of your other insurers that may
20 be liable for these costs."

21 Q: What is the date of that letter?

22 A: December 11th, 2003.

23 Q: What are the dates of the five letters in that?

24 A: December 12th, 2003; January 23rd, 2004; January
25 27th, 2004; February 9th, 2004.

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1 Q: Okay. I want to go through and make sure that we
2 have the reservation of rights letters. There
3 are three insureds per project; is that correct?
4 A: Yes.
5 Q: So in Heritage Magnolia North -- or in Magnolia
6 North, is there a reservation of rights letter
7 sent to Heritage Communities, Inc.?
8 A: Yes.
9 Q: Is there a reservation of rights letter sent to
10 BuildStar?
11 A: It's not here, no. I'm sure there is. I'm sure
12 we sent one.
13 Q: Is there a reservation of rights letter sent to
14 Heritage Magnolia North?
15 A: Yes.
16 Q: Now, in the Riverwalk action, is there a
17 reservation of rights letter sent to Heritage
18 Communities, Inc.?
19 A: Yes.
20 Q: Is there a reservation of rights letter sent to
21 BuildStar?
22 A: Yes.
23 Q: Is there a reservation of rights letter sent to
24 Heritage Riverwalk?
25 A: Yes.

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1 Q: Now, in the Pope action, is there a reservation
2 of rights letter sent to Heritage Communities,
3 Inc.?
4 A: It's not here.
5 Q: What about, in the Pope action, is there a
6 reservation of rights letter sent to BuildStar?
7 A: None of these specifically reference the Pope
8 action.
9 Q: And in the Pope action, is there a reservation of
10 rights letter sent to Heritage Riverwalk, Inc.?
11 A: Not, not among these five letters.
12 Q: Where did these letters originate, from what
13 office?
14 A: From Harleysville in Pennsylvania.
15 Q: Okay. And where were these files held and where
16 were they managed out of at this time?
17 A: At that time, out of, out of our home office in
18 Pennsylvania.
19 Q: Were they later and subsequently transferred to
20 another office?
21 A: Yes, they were.
22 Q: Where is that office?
23 A: In Nashville.
24 Q: Okay. And the Nashville office, are you in that
25 office now?

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Consolidated ROA_0344

1 A: I am.
2 Q: Okay. The Nashville office that they were
3 transferred to originally, is that the office
4 where you work now or is it a different location
5 in Nashville?
6 A: It's a different location now.
7 Q: I don't know if the court reporter got that.
8 A: It's a different location now than it was at that
9 time.
10 Q: And you subsequently moved to a new location in
11 Nashville?
12 A: Yes.
13 Q: Okay. This particular insured has been involved
14 in a number of lawsuits; is ---
15 A: Yes.
16 Q: --- that correct?
17 A: Yes, they have.
18 Q: And that's all in the underlying transcript.
19 Have these files been shuffled around and moved?
20 A: Many times.
21 Q: Explain.
22 A: Just by virtue of the fact that they were handled
23 in Harleysville at one time, by the fact that
24 we've moved in Nashville twice, we have
25 reinsurers who require the, require the files to

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1 review. So these things have been shifted back
2 and forth between Nashville and Pennsylvania
3 probably six or seven times.
4 Q: And then they've been shipped back and forth to
5 my office, as well?
6 A: A couple of times, yes.
7 Q: I think I've moved three times. There are
8 reservation of rights letters that are not
9 included in there; is that correct?
10 A: That is correct.
11 Q: Do those reservation of rights letters exist?
12 A: Yes.
13 Q: Any doubt in your mind they don't exist?
14 A: No.
15 Q: I want to talk to you a little bit about your
16 communication with the insureds, and I'm talking
17 about you, Harleysville communicating with the
18 insureds in this action. Did that take place?
19 A: Yes.
20 Q: Are the letters, is that one form of
21 communication?
22 A: The letters are one form of the communication,
23 yes.
24 Q: What about person-to-person meetings between you
25 and the insureds?

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Consolidated ROA_0346

1 A: Yes. That has occurred, as well.
2 Q: Okay. Now, was it meetings to discuss coverage
3 issues, was it meetings to discuss trial issues?
4 A: Both.
5 Q: Okay. And I don't want to get into any of the
6 trial issues because that would be
7 attorney/client privilege, correct?
8 A: Yes.
9 Q: So I'd like to talk to you about the
10 communications that you had with the insureds as
11 it relates to coverage issues.

12 A: Okay.
13 Q: Please explain.

14 A: We met with ---

15 MR. HENRY: YOUR HONOR, WE WOULD OBJECT TO ANY
16 TESTIMONY AS TO ANY CONVERSATIONS
17 BETWEEN MR. WRIGHT AND THE INSURED.
18 THAT WOULD CLEARLY BE HEARSAY.

19 MR. CALAMARI: YOUR HONOR, THE INSURED'S A PARTY IN
20 THIS ACTION. THEY HAVEN'T APPEARED,
21 BUT THEY'RE A PARTY IN THE ACTION.
22 SO WE DON'T THINK IT'S HEARSAY.
23 ALSO, WE CAN CERTAINLY TALK ABOUT
24 WHAT MR. WRIGHT HAS SAID TO, OR WHAT
25 THE SUBSTANCE OF THOSE DISCUSSIONS

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1 WAS FROM MR. WRIGHT'S PERSPECTIVE.

2 THE COURT: I WILL ALLOW YOU TO ASK HIM
3 QUESTIONS ABOUT WHAT HE RELATED TO
4 THE INSURED.

5 Q: Mr. Wright, tell us what you relayed to the
6 insureds during these meetings.

7 A: We let them know that we had coverage issues with
8 some of these cases or with all of these cases,
9 as a matter of fact, and that we didn't think
10 that there was any way that we could handle those
11 until we got to this phase after the trials. We
12 told them our plan for doing that. We let them
13 know that there were coverage issues. We talked
14 to them about whether they were dissatisfied in
15 any way with the way that we were defending the
16 cases, met with them periodically throughout the
17 handling of the underlying cases.

18 Q: As in a lot of construction cases, was there ever
19 any innuendo or statements by the Plaintiff's
20 counsel that somehow Harleysville was not
21 fulfilling its obligations?

22 A: There has been in every one of these cases, it
23 seems, and in many other cases, where plaintiff
24 attorneys have claimed that we were in bad faith
25 to our insured. That's always kind of baffled

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1 me, frankly, because if my insured is unhappy,
2 why would anyone else care?

3 Q: And as a result of you learning that knowledge,
4 did you then have meetings specifically with the
5 insureds to address those concerns?

6 A: Had a specific meeting with Roger Van Wie, flew
7 down to Florida to speak with him about that,
8 addressed that issue specifically, asked him,
9 "Are you dissatisfied? Do you think that we've
10 done you wrong in any way, shape, or form? Do
11 you think that we've defended these properly?"

12 And he said, "No." ---

13 MR. HENRY: OBJECT, YOUR HONOR. HE JUST DID
14 WHAT HE WAS INSTRUCTED NOT TO DO,
15 AND THAT IS TESTIFY AS TO WHAT ---

16 THE COURT: I THINK HE UNDERSTANDS, AND HE WAS
17 JUST, GOT PAST HIMSELF.

18 MR. CALAMARI: YOUR HONOR, I THINK, AT THIS TIME,
19 I'D LIKE TO PROFFER THE EVIDENCE,
20 BECAUSE I THINK, AS A PARTY, IT'S
21 NOT HEARSAY, AND I THINK IT HAS
22 INDEPENDENT LEGAL SIGNIFICANCE AS TO
23 THE MINDSET OF HARLEYSVILLE AT THE
24 TIME. I THINK THIS IS ALL ABOUT THE
25 POLICY BETWEEN INSURED AND INSURER.

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1 SO I THINK ---
2 THE COURT: I WILL ALLOW YOU TO PROFFER IT AS
3 BETWEEN INSURED AND INSURER BUT NOT
4 FOR ANY PURPOSES -- WITHOUT THEM
5 BEING HERE, I'LL JUST HAVE TO TAKE
6 IT AT FACE VALUE.
7 MR. CALAMARI: OKAY. SO, YOUR HONOR, JUST TO BE
8 CLEAR ON THE RULING, YOU'RE ALLOWING
9 THE PROFFER FOR EVERYTHING, BUT
10 YOU'RE ONLY ADMITTING IT FOR
11 PURPOSES OF BETWEEN INSURED OR
12 INSURER?
13 THE COURT: AND I'M NOT ADMITTING THE INSURED'S
14 -- HIS TESTIMONY AS TO THE INSURED'S
15 ANSWER AS ANY EVIDENCE IN THIS CASE
16 VIS-À-VIS WHETHER OR NOT COVERAGE
17 EXISTS TO THE JUDGMENT HOLDERS.
18 MR. CALAMARI: OKAY.
19 Q: So we'll proffer the evidence then of the
20 information relayed back to you from Mr. Van Wie.
21 A: He said that he was happy with the defense. He
22 was -- He seemed to think that from his
23 perspective, that the Plaintiffs had put him out
24 of business and, and didn't want to see them get
25 anything, so he was glad we were defending it.

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1 Q: And as part of the proffer, as a result of that
2 meeting, did Mr. Van Wie draft an affidavit and
3 submit it?
4 A: He did.
5 MR. CALAMARI: YOUR HONOR, I KNOW THIS, I'M GOING
6 TO MOVE TO ADMIT THIS INTO EVIDENCE.
7 I KNOW MR. HENRY HAS AN OBJECTION.
8 MR. HENRY: YOUR HONOR, IT'S NOT EVEN AN
9 AFFIDAVIT.
10 THE COURT: IT'S NOT SWORN TO?
11 MR. HENRY: IT'S NOT SWORN TO. IT'S A
12 STATEMENT. IF HE CAN BRING A
13 STATEMENT IN FROM SOMEBODY ELSE, I'M
14 GOING TO GO GET ME SOME.
15 THE COURT: I NOTICED IT WAS NOT AN AFFIDAVIT,
16 AS WELL. I'M GOING TO ALLOW IT TO
17 BE INTRODUCED. I'M SUSTAINING THE
18 OBJECTION, JUST BUILDING THE RECORD.
19 MR. HENRY: THANK YOU, YOUR HONOR.
20 MR. CALAMARI: WE'LL PROFFER IT. I'D LIKE TO HAND
21 IT TO MR. WRIGHT AT THIS POINT, AND
22 WE'LL MARK IT AS 23.
23 PLAINTIFF'S EXHIBIT NUMBER 23
24 OFFERED AS A PROFFER
25 MR. CALAMARI: AND, YOUR HONOR, IT'S JUST A NOTE.

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1 WE FEEL LIKE IF IN THE EVENT THAT
2 THE INSURED EVER, AS PART OF THE
3 PROFFER, THE REASON FOR THIS WAS WE
4 WENT AND TALKED TO HIM BECAUSE OF
5 THESE ALLEGATIONS OF BAD FAITH, AND
6 WE WENT TO SAY, "DO YOU HAVE ANY
7 PROBLEM WITH WHAT WE'RE DOING AND
8 WOULD YOU MIND PUTTING THAT IN
9 WRITING?" SO THAT WAS THE PURPOSE,
10 BUT ---

11 MR. HENRY: YOUR HONOR, WILL YOU SWEAR MR.
12 CALAMARI IN? HE'S TESTIFYING.

13 MR. CALAMARI: IT'S PART OF THE PROFFER. I THINK,
14 AS PART OF THE PROFFER, I JUST
15 EXPLAIN ---

16 THE COURT: MR. HENRY, OBVIOUSLY, WE DON'T NEED
17 PEOPLE TO BE SWORN. WE HAVE THIS
18 EXHIBIT.

19 Q: Mr. Wright, as part of the proffer, in your
20 meeting with Mr. Van Wie, was an affidavit
21 developed?

22 A: Yes.

23 Q: And did we initially draft an affidavit and give
24 it to Mr. Van Wie?

25 A: Yes. There was an affidavit that was taken to

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1 the meeting. He wanted to review it, said he
2 would review it and get back with us. He said he
3 wanted to maybe talk with his attorney about it.
4 This is what we got back from him.
5 Q: Okay. Did he make changes to the affidavit we
6 gave him?
7 A: Yes. This, this isn't in the same condition it
8 was when we sent it, when we ---
9 Q: And in fact, there's a statement in there saying
10 that we drafted it for him and he made changes
11 and agrees to it?
12 A: Right.
13 Q: And is that document notarized?
14 A: No.
15 Q: Did we attempt to have it notarized while we were
16 there?
17 A: Yeah. We offered to do that, and he said he
18 wanted to review it and have time to think about
19 it afterwards.
20 Q: And when it came back, it did not have ---
21 A: No.
22 Q: And Mr. Van Wie, just to go back, what is his
23 position with Heritage Communities?
24 A: He was president.
25 Q: He was the owner?

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1 A: He was, for all intents and purposes, the, the,
2 he was Heritage.
3 Q: And I think there's plenty of evidence to that in
4 the transcript; is that correct?
5 A: Yeah.
6 MR. CALAMARI: YOUR HONOR, WE'LL PROFFER THE
7 AFFIDAVIT AND THE SUBSTANCE OF IT.
8 THE COURT: MINE HAS EXHIBIT 23. IS THAT WHAT
9 THE PROPER EXHIBIT NUMBER IS OR ---
10 MR. CALAMARI: I BELIEVE SO.
11 Q: Okay. That proffer is concluded. Did you have
12 any meetings with Mr. Green?
13 A: I did.
14 Q: And who is Mr. Green?
15 A: Dr. Green is a local orthodontist.
16 Q: How many meetings were held with Dr. Green?
17 A: Personally, I had personally one meeting with
18 him. I met with Allen Jeffcoat prior to that, as
19 well, his attorney, and I know that other people
20 that work for Harleysville have also met with
21 him. We've probably met with him three or four
22 times over the course of these cases.
23 Q: And you mentioned Mr. Jeffcoat. Who is Mr.
24 Jeffcoat?
25 A: He has always represented Mr. -- or Dr. Green.

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1 Q: Was he acting as his personal attorney for
2 coverage issues in this matter?
3 A: Yes.
4 Q: Was he involved?
5 A: Yes.
6 Q: Was he kept abreast of what was going on by you
7 or others at Harleysville?
8 A: Yes.
9 Q: What was said to him to keep him abreast of the
10 activities that were taking place?
11 A: We would generally talk about, you know,
12 periodically talk about the cases, tell him that
13 we had, you know, that we continue to have
14 coverage issues with the cases, but we were going
15 to defend him through the trial.
16 MR. CALAMARI: YOUR HONOR, GIVEN YOUR PREVIOUS
17 RULING, AND I WANT TO BE CAREFUL
18 THAT I UNDERSTAND, SO I'LL AT THIS
19 TIME PROFFER SOME INFORMATION ABOUT
20 WHAT WE CONTEND WAS MR. GREEN'S
21 UNDERSTANDING.
22 MR. HENRY: YOUR HONOR, ---
23 THE COURT: I'LL RULE. IT'S BEEN OBJECTED TO AS
24 HEARSAY AND NOT RELEVANT?
25 MR. HENRY: YES, YOUR HONOR.

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Consolidated ROA_0355

1 THE COURT: AND I WILL ALSO MAKE THE SAME
2 RULING. I WILL SUSTAIN MR. HENRY'S
3 OBJECTION AND LET YOU MAKE THIS
4 PROFFER.

5 Q: Mr. Wright, please tell us about the discussions
6 with Mr. Green and what his responses were and
7 understanding.

8 A: We sat at a table with, with Dr. Green and, and
9 Allen Jeffcoat for several hours one morning,
10 talking about cases in general, what our response
11 would be, that we would defend them through the,
12 through trial, that we did have coverage issues
13 with these, that, that, that the Supreme Court of
14 South Carolina had ruled on, on some of these
15 issues, and that in our mind, that there was
16 likely not going to be coverage for a grand
17 majority of these, of these damages. He seemed
18 to understand where, what our position was. He,
19 you know, he, he didn't, he didn't take any real
20 issue with it. He just said, you know, "We'll
21 leave that for later."

22 Q: What was the reasoning that you explained to him
23 as to why it was not covered?

24 A: The, the Supreme Court has said that the, that
25 faulty workmanship in and of itself cannot be

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Consolidated ROA_0356

1 considered an occurrence.
2 Q: And occurrence meaning?
3 A: Accident.
4 Q: And is it your testimony that Mr. Green and Mr.
5 Van Wie understood this?
6 A: Yes.
7 Q: Did you talk to Mr. Green or Mr. Van Wie about
8 the handling of the trials?
9 A: As far as what aspect of the handling?
10 Q: What role Harleysville would play in regards to
11 these coverage issues.
12 A: In regard to the coverage issues, we, we talked
13 about that, how we would, that we would reserve
14 the, the addressing of the coverage issues until
15 after the, the underlying trials, feeling that
16 the only way that we could properly address those
17 would be in a subsequent action, that we
18 couldn't, we didn't want to go into a situation,
19 come into trial and be forced into a situation
20 where we would have to agree with the plaintiff
21 in many cases. We can't say, "Yes, they knew
22 that," and that supports the damages, but it
23 doesn't support coverage. We would, we would've
24 been in a position that we just simply couldn't
25 put ourselves in. They understood that.

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1 Q: Was there an agreement between yourself and the
2 insureds in this case relating to when coverage
3 issues would be handled?

4 A: Yes.

5 Q: Please explain in full detail to The Court.

6 A: After discussing it with, with Dr. Green, we told
7 him that -- we gave him our plan, that the idea
8 was to go into the trials in lockstep with him,
9 agree with everything that he has to say, make
10 the, the numbers that came out, if there was a
11 verdict, we both had the goal of making that
12 verdict as low as it could possibly be, and then
13 if there was a dispute over who paid how much of
14 that, we should have that at that time.

15 I've tried to come up with an easy
16 analogy, but all I can, the only one I can think
17 of that comes anywhere close is, is a couple of
18 kids that have to eat brussel sprouts or
19 something and, and they've been told they have to
20 eat their brussel sprouts. Well, the two kids
21 get together, and they say, "Well, let's make
22 that plate as small as we can, and then we can
23 talk about who eats how many later," and that's
24 what we were trying to do.

25 MR. CALAMARI: THAT CONCLUDES THE PROFFER ON THAT

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1 ISSUE.

2 THE COURT: THANK YOU.

3 Q: Mr. Wright, what was Harleysville's understanding
4 of coverage law at the time the Riverwalk trial
5 was reached in, I guess, January of 2009?

6 A: Newman one stood as the law at that time.
7 Newman, the first Newman came out and said
8 everything's covered, everything, the bad work is
9 covered, the repair is covered, investigating
10 even if there is no resulting damage is covered.
11 It was, it was a pretty extreme position.

12 Q: What about, was that the same when the Magnolia
13 North case was tried, I believe, in May of 2009?

14 A: Yes, it is.

15 Q: What is Harleysville's understanding of, if there
16 was a change in the Newman decision -- Was there
17 a change in the Newman decision?

18 A: Not at the time, no. I mean, there was a change
19 after the trials, yes.

20 Q: Tell me, what was the change?

21 A: The change after the trial ---

22 MR. HENRY: YOUR HONOR, I'M GOING TO HAVE TO
23 OBJECT TO -- YOUR HONOR IS PERFECTLY
24 CAPABLE, I THINK, OF DETERMINING
25 WHAT THE NEWMAN CASES SAID OR DIDN'T

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Consolidated ROA_0359

1 SAY. WHAT MR. WRIGHT'S OPINION
2 ABOUT WHAT THE CASES SAY HAS
3 ABSOLUTELY NO RELEVANCE TO ANYTHING.
4 IT WOULD BE THE SAME AS PUTTING MR.
5 CALAMARI UP THERE AND ASKING HIM HIS
6 INTERPRETATION OF NEWMAN.

7 MR. CALAMARI: I THINK IT HAS A LOT OF RELEVANCE.
8 I DON'T THINK WE'RE OFFERING MR.
9 WRIGHT TO OPINE AS TO WHAT THE
10 NEWMAN DECISION SAYS. I THINK A LOT
11 OF PEOPLE HAVE DIFFERENCES OF
12 OPINION ON WHAT ALL THESE, L-J'S AND
13 THE NEWMAN CASES SAY, AS WELL AS
14 OTHER CASES, BUT I THINK IT'S
15 RELEVANT TO SHOW WHAT HARLEYSVILLE'S
16 THINKING WAS AND WHETHER IT WAS
17 REASONABLE FOR THEM, FOR THE ACTIONS
18 THAT THEY TOOK AT THE TIME INSOFAR
19 AS THEIR INVOLVEMENT IN THE
20 UNDERLYING ACTION. SO I THINK THE
21 POINT IS IN THIS CASE THAT IF MR.
22 WRIGHT SAID, "EVERYTHING IS
23 COVERED," AND THE COMPLAINT FROM MR.
24 HENRY AS FAR AS THE PLEADINGS ARE,
25 "YOU SHOULD HAVE INTERVENED," I

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Consolidated ROA_0360

1 THINK IT'S VERY IMPORTANT NOW AND
2 RELEVANT TO KNOW WHAT HARLEYSVILLE'S
3 WAS THINKING AT THE TIME AND THE
4 REASONS TO DETERMINE, THE APPELLATE
5 COURTS OR YOUR COURT TO DETERMINE
6 WHETHER THEY WERE REASONABLE IN THE
7 ACTIONS THAT THEY TOOK AND WHAT THE
8 CONSEQUENCES SHOULD BE. I'M NOT
9 SAYING THAT HE'S RIGHT ABOUT THE
10 NEWMAN DECISION. I'M JUST SAYING
11 THAT THIS IS HIS UNDERSTANDING, AND
12 I THINK THE COURT SHOULD LOOK TO
13 DETERMINE WHETHER OR NOT HIS
14 KNOWLEDGE WAS A REASONABLE
15 UNDERSTANDING OF THE RULES AND THE
16 ---
17 THE COURT: FOR PURPOSES OF DETERMINING WHAT,
18 REASONABLE UNDERSTANDING OF THE
19 RULES FOR PURPOSES OF DETERMINING
20 WHAT?
21 MR. CALAMARI: WHETHER MR. HENRY'S CORRECT, THAT WE
22 SHOULD HAVE INTERVENED. WE DON'T
23 THINK WE COULD HAVE INTERVENED
24 BECAUSE ---
25 THE COURT: WELL, I THINK HE TESTIFIED THAT AT

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1 THE TIME, HE DID NOT THINK THAT HE
2 COULD INTERVENE BASED UPON OTHER
3 CASES. BUT NEWMAN TWO CAME OUT
4 AFTER THE TRIAL.
5 MR. CALAMARI: YES, SIR.
6 THE COURT: SO IT WOULDN'T HAVE ANYTHING TO DO
7 WITH WHETHER HE HAD INTERVENED
8 DURING THE TRIAL OR BEFORE THE
9 TRIAL, SO I WOULD SUSTAIN THE
10 OBJECTION AS TO ITS BEING RELEVANT.
11 IF YOU WOULD LIKE TO MAKE A PROFFER,
12 I'LL BE GLAD TO HEAR FROM YOU.
13 MR. CALAMARI: OKAY. I THINK, BASED ON THAT
14 RULING, MY UNDERSTANDING OF WHAT YOU
15 MENTIONED, I DON'T THINK WE NEED TO
16 MAKE A FURTHER PROFFER.
17 THE COURT: ALL RIGHT.
18 Q: Mr. Wright, I think that was a good segue to lead
19 into our next section, which is your testimony as
20 to the claim in this case from the judgment
21 holders that we should have intervened.
22 MR. CALAMARI: ARE YOU GOING TO OBJECT?
23 MR. HENRY: NOT YET.
24 Q: Mr. Wright, what was the goal of the defense in
25 the underlying action?

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Consolidated ROA_0362

1 A: Is to provide the best possible defense to our
2 insureds.
3 Q: Was that goal held jointly by Harleysville and
4 the insureds?
5 A: Yes.
6 Q: And counsel was hired by Harleysville to protect
7 the insureds?
8 A: Yes.
9 Q: And at the same time, you also had counsel to
10 protect Harleysville?
11 A: Yes.
12 Q: But they weren't the same lawyers?
13 A: No.
14 Q: What is meant by the tripartite relationship?
15 A: It, it means that there is, by virtue of the fact
16 that the insurance company is hiring counsel for
17 the insured, that there is a relationship, you
18 can't get away from the, from the fact that there
19 is a relationship between our defense attorneys
20 and us, and we hire those defense attorneys to
21 defend many of our insureds. So there is a
22 business relationship there, but their primary
23 relationship -- and there's also a business
24 relationship between us and our insureds,
25 obviously, and, and our insureds and their

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1 defense counsel. However, the prime client or
2 the one that they really have to look out for,
3 from the defense counsel's standpoint, is our
4 insured. You know, they obviously want to, you
5 know, do a good job for that and, do a good job
6 at that, and that serves both masters. If they
7 defend our insureds well, then we're happy with
8 their defense and we keep hiring them to hire
9 other, to defend other people.

10 Q: And under the duty of the defense, the goals are
11 identical; is that not correct?

12 A: Yes.

13 Q: Explain to The Court why the goals are identical
14 under the contractual obligations for the duty of
15 defense.

16 A: Because if, if our, if defense counsel provides a
17 great defense for the insured and the insured is,
18 is found not to be liable, then Harleysville
19 doesn't have to write a check for that. We pay
20 for the defense, obviously, but our goal is, on
21 both of our behalves, to make that number as low
22 as it can possibly be.

23 Q: And in the Riverwalk and Magnolia North matters,
24 was there any restriction placed on defense
25 counsel ---

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1 A: No.

2 Q: --- in defending the insureds?

3 A: No.

4 Q: Were experts hired?

5 A: Yes.

6 Q: Were tests performed?

7 A: Yes.

8 Q: Under the contract of insurance, would it have

9 been proper for Harleysville to become involved

10 to present evidence to defeat coverage in the

11 underlying action?

12 A: No.

13 Q: You believe that would have violated the duty of

14 defense requirements?

15 A: Clearly. It would, it would've put us in, it

16 would've put us in direct opposition to our

17 insureds. We simply can't do that.

18 Q: What in this case -- Give us some examples in the

19 underlying trials, start with Riverwalk, of what

20 Harleysville would have been required to do if

21 they were going to present coverage issues in the

22 underlying action.

23 A: Well, you have someone in Riverwalk testifying

24 that they were told that the windows were going

25 to leak, that they were installing them

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1 improperly and that they were going to leak. If
2 we were involved in that case, we would've had to
3 stand up and say, "We, we agree. They were told.
4 They knew they were going to leak." We can't do
5 that.

6 Q: Are you talking about Jim Graham?

7 A: I am talking about Jim Graham, yes.

8 Q: Talk to The Court a little bit about Jim Graham's
9 testimony and what was proposed, the direct
10 examination from the transcript, the cross, and
11 then what we would have had to do or Harleysville
12 would have had to do had they been involved in
13 the case.

14 A: I don't have, obviously, I don't have the
15 transcript in front of me, but there was a
16 discussion on the record about whether or not Mr.
17 Gibbons could testify ---

18 MR. HENRY: EXCUSE ME. IF HE'S GOING TO
19 INTERPRET MR. GRAHAM'S TESTIMONY, I
20 WOULD OBJECT TO THAT. THE TESTIMONY
21 IS IN THE RECORD. I DON'T THINK HE
22 CAN GIVE HIS OPINION ABOUT WHAT MR.
23 GRAHAM TESTIFIED TO. IT'S IN THE
24 RECORD.

25 THE COURT: WHAT WERE YOU PROPOSING TO HAVE HIM

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Consolidated ROA_0366

1 TESTIFY ABOUT, MR. CALAMARI?
2 MR. CALAMARI: ACTUALLY, IT WAS THE LATTER PART OF
3 WHAT HARLEYSVILLE'S WOULD HAVE HAD
4 TO DO, AND I THINK JUST FOR
5 ILLUSTRATIVE PURPOSES OF THE COURT,
6 TO SAY, "OKAY, HERE'S WHAT HE
7 TESTIFIED TO," WHETHER IT'S RIGHT OR
8 WRONG, IT'S IN THE TRANSCRIPT, THEN,
9 "HERE'S WHAT THE CROSS EXAMINATION
10 WAS," AND TO POINT OUT THAT THEN
11 HARLEYSVILLE WOULD HAVE HAD TO COME
12 IN AND ASK BASICALLY THE SAME
13 QUESTIONS THE PLAINTIFF ASKED.
14 THAT'S ALL I WANT HIM TO TALK ABOUT,
15 BUT AS FAR AS THE TRUTH OF WHAT WAS
16 TESTIFIED TO AT THE TIME, IT'S IN
17 THE TRANSCRIPT. WE'RE NOT TRYING TO
18 MISCHARACTERIZE ---
19 THE COURT: WHO WAS MR. GRAHAM; HE WAS AN EXPERT
20 FOR THE UNDERLYING PLAINTIFFS,
21 UNDERLYING DEFENDANTS?
22 MR. CALAMARI: WELL, THERE WAS ACTUALLY A DISPUTE
23 ABOUT WHETHER HE COULD TESTIFY AS AN
24 EXPERT, BUT HE WAS THE MAN FROM
25 BETTERBILT WINDOWS, AND WE HAD HOPED

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Consolidated ROA_0367

1 TO GET HIM HERE. THAT WILL BE THE
2 SUBJECT TO AN ISSUE TOMORROW, BUT HE
3 WAS FROM BETTERBILT WINDOWS. HE
4 CAME DOWN ---
5 THE COURT: HE'S THE FELLOW WHO SUPPOSEDLY TOLD
6 THEM, "YOU'RE DOING IT THE WRONG
7 WAY. YOU'RE DOING IT THE WRONG
8 WAY"?
9 MR. CALAMARI: YES, SIR. IT'S THE LATTER PART
10 THAT'S IMPORTANT. I JUST ASKED THE
11 QUESTION IN A MANNER THAT WOULD
12 ALLOW THE COURT TO SEE THE
13 DIFFICULTY BETWEEN WHEN MR. HENRY
14 ASKED HIM THE QUESTIONS AND THE
15 ANSWER IS, "THEY'RE BAD. THEY'RE
16 BAD. THEY'RE BAD." THE DEFENSE
17 ASKED QUESTIONS, "THEY'RE GOOD.
18 THEY'RE GOOD. THEY'RE GOOD," AND
19 THEN TO ILLUSTRATE THAT HARLEYSVILLE
20 THEN WOULD HAVE HAD TO COME BACK AND
21 SAY, "NO, NO, NO. THEY'RE BAD.
22 THEY'RE BAD. THEY'RE BAD," JUST TO
23 SHOW THE DIFFERENCE. THAT'S ALL
24 WE'RE TRYING TO DO. I THINK I CAN
25 ---

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1 THE COURT: MR. HENRY, WOULD YOU AGREE THAT IF
2 PRESENTED DURING THE LIABILITY PART
3 OF THE TRIAL AND NOT AFTER THE
4 LIABILITY HAD BEEN DETERMINED, THAT
5 IT MIGHT HAVE BEEN DIFFICULT FOR THE
6 CARRIER TO ASK QUESTIONS OF ITS
7 INSURED TO TRY AND TAKE THE COVERAGE
8 AWAY?

9 MR. HENRY: I WOULD AGREE TO THAT, YOUR HONOR,
10 THAT THAT WOULD HAVE BEEN DIFFICULT,
11 BUT THERE ARE OTHER WAYS THAT IT CAN
12 BE HANDLED. THERE ARE A NUMBER OF
13 OTHER WAYS THAT HARLEYSVILLE COULD
14 HAVE HANDLED THIS RATHER THAN HAVE
15 GOTTEN INVOLVED IN THE TRIAL. AS
16 MR. WRIGHT HAS TESTIFIED, THEY HAD
17 NUMBERS OF MEETINGS WITH THEIR
18 INSUREDS. AT SOME POINT IN TIME,
19 THEY HAD A LOT OF DUTIES THAT THEY
20 LET FALL BY THE WAYSIDE, ONE OF
21 WHICH WAS TO EXPLAIN TO THEIR
22 INSUREDS THAT, "SOME OF THESE CLAIMS
23 MAY BE COVERED, SOME OF THEM MAY
24 NOT, AND IF YOU GET A GENERAL
25 VERDICT, WE'RE GOING TO DENY

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1 COVERAGE," OR AT LEAST, "WE'RE GOING
2 TO FIGHT YOU ON COVERAGE FOR THE
3 GENERAL VERDICT."
4 THE COURT: WELL, LET ME ASK YOU THIS QUESTION.
5 DO YOU INTEND TO EXAMINE MR. WRIGHT
6 ABOUT SOME OF THESE ISSUES AFTER
7 HE'S FINISHED HIS TESTIMONY ON
8 DIRECT?
9 MR. HENRY: I DO, YOUR HONOR, SINCE HE'S GONE
10 INTO THAT.
11 THE COURT: TO THE EXTENT THAT IT HAS ANY
12 BEARING, AND I'M NOT SURE THAT IT
13 WILL OR NOT, BUT I'M GOING TO
14 OVERRULE YOUR OBJECTION, AND I WILL
15 LET HIM TESTIFY AS TO WHY HE THOUGHT
16 THE ONLY WAY IT COULD BE DONE WOULD
17 BE IN A WAY THAT WOULD BE
18 DETRIMENTAL TO HIS CLIENT.
19 MR. CALAMARI: THANK YOU, YOUR HONOR.
20 Q: All right. Mr. Wright, please explain.
21 A: Well, during trial, Jim Graham got up and said
22 that he had been to Magnolia Place, that he had
23 been to Riverwalk, that he saw that they were
24 installing the windows improperly, and that he
25 told Heritage that they were doing it improperly

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Consolidated ROA_0370

1 and if they continued to do that, the windows
2 would leak. Well, ---
3 Q: And what did the defense stand up and say, in
4 summary. We're not looking for ---
5 A: The defense to that was, "Yes, but they also told
6 you that they didn't think your windows worked,"
7 and that they threatened to change window
8 manufacturers if, if, over that issue.
9 Q: Now, if Harleysville had intervened in the
10 underlying action, what evidence would you have
11 liked to offer or questions would you have liked
12 to ask at the time and what would have been your
13 goal?
14 A: Oh, we would have had to go into questions with
15 Mr. Graham about, "Well, tell us exactly when you
16 told them, and how did you tell them, and were
17 you clear with that, and who did you tell it at
18 Heritage and how many times did you tell them?"
19 those types of things, "How, how sure are you
20 that they understood your message that these
21 windows were going to, that the window
22 installation was improper?"
23 Q: The next area of questions that I want to talk to
24 you about deals with the mental thought process
25 of Harleysville regarding whether it was

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Consolidated ROA_0371

1 reasonable or the right decision to intervene,
2 okay? And that's the light I want you to talk
3 about, from Harleysville's perspective. So the
4 first question I have to ask is, in these
5 Heritage actions, there are a number of them, and
6 the transcript's filled with this and the five
7 other projects, in any of the other actions that
8 went to trial, did Harleysville make an attempt
9 to intervene?

10 A: Yes.

11 Q: And what was their attempt?

12 A: We, we attempted to intervene in the Gardens at
13 Cypress Bay case.

14 MR. HENRY: YOUR HONOR, I HATE TO KEEP
15 OBJECTING. I REALLY DO, BUT WHAT
16 THEY DID IN ANOTHER CASE HAS
17 ABSOLUTELY NO RELEVANCE TO WHAT THEY
18 DID IN THIS CASE. THEY NEVER FILED
19 A MOTION TO INTERVENE. WHAT
20 RELEVANCE DOES IT HAVE THAT IN
21 ANOTHER CASE, THEY COULDN'T
22 INTERVENE OR THE JUDGE DENIED IT?
23 THERE MIGHT BE 10,000 DIFFERENT
24 REASONS THAT THE JUDGE DENIED A
25 MOTION TO INTERVENE, BUT I DON'T

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1 EVEN BELIEVE THEY MADE A MOTION TO
2 INTERVENE IN THE OTHER CASE. THEY
3 MAY HAVE. I DON'T KNOW. BUT
4 WHATEVER WENT ON IN THAT OTHER CASE,
5 DO I HAVE TO CALL JUDGE BAXLEY TO
6 TESTIFY AS TO WHY HE DENIED THEIR
7 MOTION OR ANYTHING? I JUST, I SEE
8 NO RELEVANCE WHATSOEVER IN, YOU
9 KNOW, WHAT HAPPENED IN ANOTHER CASE.
10 THE COURT: MR. CALAMARI?
11 MR. CALAMARI: YOUR HONOR, I THINK ALL OF THIS, I
12 MEAN, ONE OF THEIR ALLEGATIONS IS,
13 "YOU SHOULD HAVE INTERVENED," AND
14 HE'S MADE LEGAL ARGUMENTS THAT IN
15 OTHER STATES AND IN OUR STATE FOR
16 CAUSES OF ACTION, WHICH WE THINK ARE
17 DIFFERENT, THAT, "YOU SHOULD HAVE
18 INTERVENED." I HAVE A LIST OF NINE
19 OR TEN THINGS, REASONS TO SHOW WHY
20 IT WAS IMPOSSIBLE FOR US TO
21 INTERVENE, AND THIS HAS BEEN KIND OF
22 A POINT OF CONTENTION THROUGHOUT THE
23 HANDLING OF THIS CASE, SHOULD WE
24 HAVE INTERVENED, AND I THINK THE
25 COURT NEEDS TO KNOW THE REASONS

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1 BEHIND WHETHER OR NOT WE SHOULD HAVE
2 INTERVENED. THIS IS A COVERAGE
3 ACTION ABOUT THE ACTIONS OF
4 HARLEYSVILLE, ABOUT WHETHER THINGS
5 ARE COVERED BY THE POLICY, AND I
6 THINK THE COURT NEEDS TO MAKE A
7 RULING OR AT LEAST A FINDING OF FACT
8 AS TO WHETHER IT WAS REASONABLE FOR
9 HARLEYSVILLE TO TAKE THE ACTION THAT
10 THEY TOOK IN NOT BEING ABLE TO
11 INTERVENE IN THIS ACTION.

12 THE COURT: WELL, I DON'T THINK IT'S RELEVANT AS
13 TO WHAT'S GOING ON HERE. I'M GOING
14 TO LET YOU MAKE A PROFFER AS TO WHY
15 THEY DID NOT. I HAVE SELDOM SEEN A
16 DEFENSE WHERE PUNITIVE DAMAGES HAVE
17 BEEN CLAIMED THAT THE ISSUE OF THE
18 CONSTITUTIONALITY OF PUNITIVE
19 DAMAGES HASN'T BEEN ENTERED AS A
20 DEFENSE, AND I DON'T KNOW OF ANYBODY
21 WHO'S WON ON IT. WE'VE HAD THE
22 VENUE ISSUE WITH CSX RAILROAD IN
23 HAMPTON COUNTY, AND I MYSELF WHILE
24 ON THE BENCH KEPT THEM IN HAMPTON
25 COUNTY FOR MANY AN OCCASION WHEN THE

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1 SUPREME COURT THEREAFTER DETERMINED
2 THAT THIS MOTION THAT SOMEBODY
3 CONTINUED TO FILE DID HAVE SOME
4 MERIT TO IT AND REWROTE THE VENUE
5 STATUTE. SO I THINK, IF I
6 UNDERSTAND THE -- IT IS AGREED THAT
7 THEY DID NOT INTERVENE; IS THAT
8 CORRECT?

9 MR. CALAMARI: WE DID NOT FILE A MOTION TO
10 INTERVENE.

11 THE COURT: DID NOT FILE A MOTION TO INTERVENE.
12 WELL, I'M GOING TO LET YOU, AS A
13 PROFFER, ASK QUESTIONS ABOUT THE
14 INTENT.

15 MR. CALAMARI: YOUR HONOR, AND I UNDERSTAND THE
16 COURT'S RULING, BUT I JUST WANTED TO
17 ADD THAT IN THE EXAMPLE THAT YOU
18 GAVE WITH PUNITIVE DAMAGES, NO
19 PENALTY, NO PENALTY FOR INCLUDING
20 THAT. WE THINK HERE, IN THE
21 TESTIMONY THAT WE'RE GOING TO
22 PROFFER, IS GOING TO SHOW THAT HAD
23 WE INTERVENED, WE THINK THERE WAS A
24 PRETTY SIGNIFICANT PENALTY THAT
25 WOULD HAVE HAPPENED TO HARLEYSVILLE.

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Consolidated ROA_0375

1 BUT THAT'S THE ONLY DIFFERENCE. BUT
2 I UNDERSTAND THE COURT'S RULING.
3 THE COURT: I WOULD NEVER PENALIZE SOMEBODY FOR
4 A MOTION TO INTERVENE OR FOR THE
5 DESIRE TO MAKE A PROFFER. I WOULD
6 HATE TO THINK THAT YOU WOULD BE
7 PENALIZED JUST FOR HAVING ASSERTED
8 SOMETHING TO PROTECT YOUR CLIENT'S
9 RIGHTS, BUT GO AHEAD.
10 MR. CALAMARI: OKAY.
11 Q: Mr. Wright, when Harleysville attempted to
12 intervene in the Gardens at Cypress Bay case,
13 what was the reaction of the insured and the
14 Plaintiffs?
15 A: Both of them threw fits. Neither one of them
16 wanted us in that case in any way, shape, or
17 form.
18 Q: And why is that?
19 A: For many of the same reasons that we, that we've
20 discussed, that it would have hurt the defense of
21 the insured, and one, it violates having the
22 issue of insurance in, in the courtroom in the
23 first place. Nobody could see a way how we could
24 do that without screwing up that trial.
25 Q: And was Harleysville led to believe that there

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Consolidated ROA_0376

1 would be a penalty of a possible bad faith
2 action?
3 A: Oh, we were definitely threatened with a bad
4 faith action if we did it.
5 Q: Explain.
6 A: We were threatened, we were told on both sides.
7 One defense counsel told us, "You can't do it.
8 If you do it, you're in bad faith," two,
9 plaintiffs said, "If you're in for a penny,
10 you're in for a pound, and I'll get the
11 assignment of the bad faith." So we were, we
12 were threatened on both sides of that.
13 Q: And are you saying that would have been a penalty
14 to Harleysville if you were permitted to
15 intervene in that action?
16 A: Well, certainly threatened that we were going to
17 have a penalty.
18 Q: In response to those claims from the insured,
19 defense counsel, and plaintiff's counsel, what
20 did Harleysville do?
21 A: We had several discussions with the defense
22 counsel in both the Gardens case and, who is the
23 same firm that handled the Riverwalk case, and we
24 had discussions with the firm that handled the
25 Magnolia North case, as well as talking

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1 internally on. "How do we do this the best way
2 possible? How do we protect the interest of our
3 insureds without giving up all of our rights?"
4 Ultimately, this is the way that we came up with
5 it, that we didn't think that there was any other
6 way to protect the insured fully through trial,
7 and not give up everything that, every right that
8 we had to discuss whether something is covered
9 under the policy or not.
10 Q: What happened at the beginning of the Gardens at
11 Cypress Bay case in regards to The Court's
12 demeanor towards Harleysville at this time?
13 A: Judge Baxley wanted to know why a representative
14 of Harleysville wasn't at the trial and
15 threatened to fine us \$10,000 a day.
16 Q: Did we eventually comply with his request and ---
17 A: Yes.
18 Q: --- bring someone? Who came to the trial?
19 A: John Young.
20 Q: Who else was there?
21 A: You were.
22 Q: Okay. Along these same lines and continuing on
23 the proffer, had we intervened in the underlying
24 actions in Riverwalk and Magnolia North, what
25 would we have asked The Court to do?

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1 A: We would have had to ask The Court to split out
2 not only, not only causes of action, on warranty
3 versus negligence, we would've had to ask them
4 whether any of this was an accident. We would've
5 had to ask them to allocate damages into time
6 periods. We would've had to ask them to allocate
7 damages from bad work and resulting damage.

8 Q: Was there any evidence of the allocation of
9 damages between the improper work and the work
10 damaged as a result of improper work?

11 A: No, no. Nobody, nobody in the underlying case
12 had any, had any reason to do that. In fact,
13 they had, they would have a disincentive to do
14 that.

15 Q: You've seen the deposition of Drew Brown, which
16 is entered into evidence. He was the Plaintiff's
17 expert in that case?

18 A: Yes.

19 Q: What did he say about whether or not he divided
20 up damages?

21 A: He said he wasn't asked to do that.

22 Q: Did any of the witnesses divide up damages?

23 A: No.

24 Q: And you've already testified that your
25 understanding of the law at that time was?

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Consolidated ROA_0379

1 A: Under Newman one, everything was covered.

2 Q: Would we have been able to walk into the
3 courtroom and ask the trial judge to do something
4 directly against what the Supreme Court had just
5 said?

6 A: I don't believe so, no.

7 Q: Explain.

8 A: We would've had to, we would've had to come in
9 and say, in essence, "Your Honor, we believe that
10 the Supreme Court went too far in their Newman
11 decision. We want to break these damages up into
12 categories."

13 And the response would've been something
14 to the effect of, "What categories?"

15 "Well, we don't have any idea, but we
16 don't think that they're going to stay where they
17 are."

18 Q: Are you aware, since you work all across the
19 country, are you aware of any other jurisdictions
20 prior to these two trials that actually divide up
21 damages between covered and non-covered with
22 respect to the cost to repair the improper
23 workmanship versus the cost to repair the damages
24 to the building?

25 A: There isn't another case nationwide that puts it

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1 in the same terms that the Newman court has.

2 Q: How would you have been able to do this if you
3 intervened?

4 A: I have no idea.

5 Q: Would you have been able to do it?

6 A: I don't think so, no.

7 Q: Give me an example with -- Several highlights in
8 the underlying trials dealt with windows, the
9 installation, balconies, and brickwork. Give me
10 examples in those cases of what you would have
11 had to do had you intervened in the underlying
12 action, and when I say "you," I mean
13 Harleysville.

14 A: We would have had to go through each and every
15 one of those and talking about, "Okay, so this is
16 wrong. The bricks, the bricks were applied
17 incorrectly, and the bricks need to be redone
18 whether or not there is any other damage,
19 correct?"

20 "Correct." And we would've had to, in a
21 sense, we would have been reinforcing the
22 plaintiff's position that, yes, this was done
23 improperly, but it wasn't an accident, it was
24 done exactly the way they meant to do it, and it
25 needed to be redone regardless of whether or not

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1 anything else needed to be redone.

2 Ultimately, we would have been, arguably,
3 increasing the damages levied against our insured
4 and not only increasing the award against our
5 insured but making sure that very little of that
6 was covered. It would have been the worst of
7 both worlds for our insured.

8 Q: Explain to The Court the difference between an
9 insured who is -- I guess that completes the
10 proffer on that issue. Explain to The Court the
11 difference between an insured who is completely
12 out of business and an insured who has a viable,
13 operating business.

14 A: None. It doesn't matter. In terms of the
15 insurance contract, it doesn't matter.

16 Q: Are they treated any differently?

17 A: No.

18 Q: Any extra coverage for ones that are out of
19 business?

20 A: No.

21 Q: Does the allocation of risk still apply?

22 A: Yes.

23 Q: Any language in the policy that deals in any
24 respect with an insured who's out of business?

25 A: It just says that bankruptcy won't affect our

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1 responsibility to uphold the contract.

2 Q: And why is that?

3 A: Because it doesn't matter, that, you know,
4 companies can go into, you know, a
5 reorganization, and we still have to protect
6 their interest, regardless. We made that, we
7 made that agreement when they took out the
8 policy.

9 Q: I want to talk to you a little bit about the
10 allocation issue in the Newman case. In the
11 event that this court finds an occurrence, are
12 there damages in this case; as offered by the
13 experts, to repair the defective work?

14 A: Yes.

15 Q: Are there damages in this case offered by the
16 experts to repair the work damaged as a result?
17 And this is only if we find accidental contact.

18 A: Yes.

19 Q: Or if The Court finds.

20 A: The grandmajority of what's here is to correct
21 bad work or other bad work damaged by other bad
22 work.

23 Q: Do you feel that Harleysville, pursuant to the
24 terms of the policy, should have the opportunity
25 to perform an allocation of those damages?

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Consolidated ROA_0383

1 A: Absolutely. It's only fair.
2 Q: And how would you go about doing that?
3 A: I think we can easily look at, look at the
4 damages that are claimed, look at the, the repair
5 estimates, and see what portion of those repair
6 estimates are for bad work and what is even
7 potentially for work that was done properly in
8 the first place that was damaged by other bad
9 work.
10 Q: Is this something that was done in the underlying
11 action or is it a completely new task that we're
12 asking The Court to do here?
13 A: It's a completely new task.
14 Q: Explain to The Court about being a ---
15 A: Again, we couldn't have done it in the underlying
16 case without damaging our insured, and it was
17 never, the Plaintiffs in the underlying case
18 didn't have any desire to do it, the defense in
19 the underlying case wouldn't have done it had we
20 asked them to do it, so this is the only venue
21 where it's possible.
22 MR. CALAMARI: YOUR HONOR, AT THIS TIME, I WANT TO
23 GO THROUGH DREW BROWN'S REPORTS, BUT
24 I NEED TO GRAB THEM AND PULL THEM
25 OUT. CAN WE TAKE A FIVE MINUTE

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1 BREAK?

2 THE COURT: WE'RE IN RECESS FOR FIVE MINUTES.

3 *****OFF THE RECORD*****

4 (ON THE RECORD)

5 MR. CALAMARI: THERE'S ONE THING I LEFT OUT OF THE
6 PROFFER, I NOTICED AT THE BREAK,
7 THAT WE'D LIKE TO PROFFER AT THIS
8 TIME IN ADDITION TO THE OTHER
9 REASONS WHY WE DID NOT INTERVENE,
10 AND THAT WAS THE RIVER OAKS
11 TRANSCRIPT. I UNDERSTAND ---

12 MR. HENRY: WE OBJECT TO THAT, YOUR HONOR, AS
13 BEING IRRELEVANT TO THIS PROCEEDING.

14 THE COURT: I WILL SUSTAIN THE RULING BUT ALLOW
15 IT AS A PROFFER.

16 PLAINTIFF'S EXHIBIT NUMBER 22

17 ADMITTED AS A PROFFER

18 MR. CALAMARI CONTINUES:

19 Q: Mr. Wright, did you have occasion to review the
20 deposition testimony and expert report of Drew
21 Brown?

22 A: Yes.

23 Q: Tell me, what stands out in those reports?

24 A: There's a lot of deficiencies and next to nothing
25 in terms of a result of those deficiencies other

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1 than the fact that there's just a lot of bad work
2 out there.

3 MR. HENRY: YOUR HONOR, HE WAS NOT PROFFERED AS
4 AN EXPERT WITNESS.

5 THE COURT: WHO WAS NOT?

6 MR. HENRY: MR. WRIGHT WAS NOT PROFFERED AS AN
7 EXPERT WITNESS, AND WE WOULD OBJECT
8 TO HIS OPINING ON WHAT MR. BROWN'S
9 REPORT CONTAINS. THE TESTIMONY MR.
10 BROWN GAVE, TWO DAYS OF TESTIMONY IN
11 THE UNDERLYING CASE ABOUT THE
12 DAMAGES AND WHAT IS IN HIS REPORT,
13 HE HAS NOT BEEN PROFFERED AS AN
14 EXPERT WITNESS TO GIVE AN OPINION
15 ABOUT WHETHER MR. BROWN'S REPORT
16 CONTAINS EVIDENCE OF DAMAGE TO
17 PROPER WORK, IMPROPER WORK,
18 RESULTING DAMAGES, CONSEQUENTIAL
19 DAMGES. HE IS NOT QUALIFIED AS AN
20 EXPERT OR IS HE QUALIFIED TO GIVE
21 THAT OPINION.

22 THE COURT: ALL RIGHT. MR. CALAMARI?

23 MR. CALAMARI: YOUR HONOR, HE'S NOT GIVING AN
24 OPINION. HE'S GOING TO HIGHLIGHT --
25 THE EVIDENCE IS THE EVIDENCE. HE'S

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Consolidated ROA_0386

1 GOING TO HIGHLIGHT SOME OF THE
2 EVIDENCE, REALLY, WE'RE GOING TO GO
3 THROUGH THE MATRIX AND POSSIBLY SOME
4 PICTURES JUST TO HIGHLIGHT TO THE
5 COURT NOT JUST THE ONE OR TWO --
6 IT'S NOT A ONE OR TWO EVENT. IT'S
7 TO SAY THAT THESE ARE CONSISTENT,
8 PERVASIVE THROUGHOUT, WHICH MR.
9 BROWN TESTIFIES TO. HE'S JUST GOING
10 TO HIGHLIGHT THE EVIDENCE THAT'S
11 ALREADY IN EVIDENCE. THERE'S SIX
12 BANKERS' BOXES FOR YOU TO READ. I
13 DON'T THINK IT'S UNREASONABLE TO
14 JUST BRING SOME OF THOSE TO THE
15 ATTENTION TO THE COURT AT THIS TIME
16 DURING THE HEARING.

17 MR. HENRY: YOUR HONOR, IF I MAY, ---

18 THE COURT: YES, SIR.

19 MR. HENRY: --- HE COULD HAVE BROUGHT MR. BROWN
20 HERE TO TESTIFY AS TO WHAT HIS
21 REPORT CONTAINS, WHAT IT MEANS, WHAT
22 IT SAYS. HE'S -- JUST LIKE
23 HIGHLIGHTING THE POLICY AND TELLING
24 YOU WHAT THE POLICY MEANS. HE CAN'T
25 TESTIFY AS TO WHAT -- WE WOULD

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1 OBJECT TO HIS TESTIFYING ABOUT WHAT
2 MR. BROWN'S REPORT CONTAINS OR WHAT
3 IT MEANS OR WHETHER PART OF IT'S,
4 YOU KNOW, CONSEQUENTIAL DAMAGE OR
5 NOT.
6 THE COURT: TO THE EXTENT THAT HE GIVES ME A
7 SUMMARY OF WHAT THE REPORT SAYS, I
8 THINK HE CAN TESTIFY TO THAT. NOT
9 BEING AN EXPERT, TO THE EXTENT THAT
10 HE TRIES TO GIVE ME TESTIMONY AS TO
11 WHAT IT MEANS, I DON'T THINK HE'S
12 QUALIFIED TO TESTIFY ABOUT THAT. TO
13 THE EXTENT THAT HE TRIES TO ALLOCATE
14 AS TO WHAT IS BETWEEN CONSEQUENTIAL
15 DAMAGES AND DAMAGES TO THE DIRECT
16 WORK ITSELF, HE'S NOT BEEN QUALIFIED
17 TO TESTIFY ABOUT THAT, PLUS THE FACT
18 THAT I THINK THE TESTIMONY HAS BEEN
19 THAT THESE EXPERTS THAT TESTIFIED
20 WERE NOT AT ANY TIME ATTEMPTING
21 THEMSELVES TO DIFFERENTIATE BETWEEN
22 WHAT DAMAGES WERE WHAT. SO I DON'T
23 THINK HE COULD TESTIFY AS TO THAT
24 INTERPRETATION EITHER.
25 MR. HENRY: RIGHT.

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1 THE COURT: BUT IF HE WANTS TO GIVE ME A SUMMARY
2 CHART OF WHAT THE TESTIMONY SAID,
3 AND I'M ASSUMING THE TESTIMONY DID
4 SAY THERE WAS BAD WORK, HE CAN DO
5 THAT, AS LONG AS HE DOESN'T
6 MISCHARACTERIZE ---
7 MR. HENRY: THANK YOU, YOUR HONOR. AND I WOULD
8 BRING THE COURT'S ATTENTION, AND I
9 KNOW YOU'VE READ THE NEWMAN CASE IN
10 WHICH THEY ATTEMPTED TO ASK THE
11 COURT TO DO THE SAME THING, IS TO
12 ALLOCATE DAMAGES, IN THE DJ ACTION,
13 THE COURT SAID, "YOU MISSED YOUR
14 OPPORTUNITY."
15 THE COURT: HE HAS TOLD ME THAT HE WOULD LIKE
16 FOR THIS COURT TO ALLOCATE DAMAGES.
17 MR. HENRY: RIGHT.
18 THE COURT: AND THAT'S THE EXTENT THAT HE'S
19 COVERED THAT ISSUE AT THIS
20 PARTICULAR POINT.
21 MR. HENRY: THANK YOU, YOUR HONOR.
22 MR. CALAMARI: THANK YOU, YOUR HONOR. YOUR HONOR,
23 THE DREW BROWN REPORTS ARE ALREADY
24 ADMITTED INTO EVIDENCE, I BELIEVE,
25 AS NUMBER 5 IN RIVERWALK AND 10, AND

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1 REALLY, WHAT WE'RE LOOKING AT NOW IS
2 -- WE'LL LOOK AT MAGNOLIA NORTH
3 FIRST, AND I'VE OPENED IT UP FOR
4 YOUR EASE.

5 Q: Mr. Wright, we're just going to summarize some of
6 the testimony and essentially what this matrix of
7 issues is in the Magnolia North case. The
8 questions I have for you, I'd like you to
9 summarize, go down and explain to The Court A
10 through R so The Court has an understanding of
11 what these are, and I'd like you to tell me, are
12 these isolated events according to the summary or
13 are they consistent, pervasive, and repeated?

14 MR. HENRY: YOUR HONOR, I WANT TO MAKE SURE THAT
15 MY OBJECTION IS IN THE RECORD. HE
16 IS GIVING AN OPINION ON WHETHER
17 THESE ARE ISOLATED EVENTS OR NOT
18 ISOLATED EVENTS. HE HAS NOT BEEN
19 QUALIFIED AS AN EXPERT, AND I OBJECT
20 TO HIS TESTIFYING AND SUMMARIZING
21 MR. BROWN'S TESTIMONY AND WHAT IT
22 MEANS.

23 MR. CALAMARI: YOUR HONOR, I THINK THAT'S LIKE
24 LOOKING AT A JAR OF MARBLES AND
25 SAYING, "ARE THERE A LOT OF MARBLES

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1 IN THERE OR ONE IN THERE?" AND,
2 ALSO, IT'S IN DREW BROWN'S
3 DEPOSITION THAT WE'VE ALREADY
4 ADMITTED. I WAS JUST TRYING TO
5 HIGHLIGHT SOME OF THE EVIDENCE HERE.
6 I JUST WANT HIM TO GO THROUGH THE
7 MATRIX AND SAY, YOU KNOW, THE
8 EVIDENCE IN THIS TRIAL IS IT'S NOT
9 ONLY IN THIS PROJECT, IT'S IN EVERY
10 PROJECT. THESE THINGS ARE
11 CONSISTENT, PERVASIVE, REPEATED
12 FAILURES TO MAKE CONSTRUCTION
13 PRACTICES, INDUSTRY STANDARDS,
14 THAT'S THROUGHOUT THE TRANSCRIPT.
15 ALL I WANT TO DO IS HAVE THIS
16 WITNESS HIGHLIGHT THAT FOR THE NEXT
17 TEN MINUTES, FIVE MINUTES.
18 MR. HENRY: YOUR HONOR, THERE'S TESTIMONY IN THE
19 RECORD BY THE ATTORNEYS, PRESENTED
20 BY THE ATTORNEYS FOR
21 HARLEYSVILLE/INSUREDS WHICH SAY THAT
22 THERE WAS NO REPEATED, PERVASIVE
23 PROBLEMS. FOR EXAMPLE, ALSO, WHILE
24 WE'RE ON THE SUBJECT, THEIR DEFENSE
25 WAS THAT THEY HIRED COMPETENT

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Consolidated ROA_0391

1 SUBCONTRACTORS TO DO THIS WORK AND
2 RELIED ON THEM, THEY GOT A CHARGE TO
3 THE JURY TO THIS EFFECT, AND THAT
4 WAS THE PROBLEM. I MEAN, I JUST
5 DON'T THINK DREW BROWN'S MATRIX OF
6 ISSUES AND TO ISOLATE THAT AND TO
7 LET HIM SUMMARIZE THAT, FIRST OF
8 ALL, HE'S NOT QUALIFIED TO DO THAT
9 AND, SECONDLY, THE INTERPRETATION OF
10 THE EVIDENCE THAT'S IN THE RECORD IS
11 FOR THE COURT, NOT FOR HIM TO GIVE
12 HIS OPINION ABOUT WHAT DREW BROWN
13 SAYS, AND I JUST, I WANT THAT IN THE
14 RECORD, YOUR HONOR, AND I GUESS I
15 NEED A RULING ON THAT BECAUSE I WANT
16 TO PRESERVE THE RECORD ON THAT
17 ISSUE. THEY'RE TRYING TO RE-
18 LITIGATE DAMAGES HERE IN THIS DJ
19 ACTION, WHICH IS NOT PERMISSIBLE.
20 MR. CALAMARI: YOUR HONOR, THIS HIGHLIGHTS THE
21 WHOLE REASON WHY YOU CAN'T INTERVENE
22 IN THESE UNDERLYING CASES, BECAUSE
23 IN THE UNDERLYING ACTION, MR.
24 HENRY'S WORDS AND THE WORDS OF DREW
25 BROWN IN HIS DEPOSITION, THESE ARE

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1 CONSISTENT, PERVASIVE FAILURES NOT
2 ONLY ON THIS PROJECT BUT ON EVERY
3 OTHER PROJECT. IT'S THE SAME OVER
4 AND OVER AND OVER AGAIN, THOUSANDS
5 OF WINDOWS, THOUSANDS OF BALCONIES,
6 ALL THOSE THINGS, AND THE DEFENSE IN
7 THE CASE IS, "NO. WE DON'T THINK
8 IT'S THAT BAD." NOW, HARLEYSVILLE
9 COMES TO THIS ACTION AND SAYS, "YES.
10 WE WANT TO SAY THIS IS A CONSISTENT,
11 PERVASIVE FAILURE," AND MR. HENRY
12 SAID, "I DISAGREE." IT MAKES THIS A
13 VERY DIFFICULT ACTION, AND FOR
14 PURPOSES OF WHAT WE'RE OFFERING
15 HERE, IT'S IN EVIDENCE. I MEAN,
16 THESE ARE ALL IN EVIDENCE, WHETHER
17 WE SUMMARIZE IT IN THE POST-TRIAL
18 BRIEF, AS WE DID IN THE PRE-TRAIL
19 BRIEF, OR MR. WRIGHT TESTIFIES TO IT
20 NOW, I DON'T THINK THERE'S ANYBODY
21 WHO DOESN'T THINK THAT THERE ARE NOT
22 THOUSANDS AND THOUSANDS OF WINDOWS
23 MISSING HEAD FLASHING AND ALL THE
24 BALCONIES ARE SLOPED INCORRECTLY AND
25 THERE'S GAPS IN FLASHING. THIS ---

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1 MR. HENRY: THAT'S NOT WHAT HARLEYSVILLE'S
2 ATTORNEYS TOLD THE COURT, AND NOW
3 THEY'RE CHANGING HORSES.
4 MR. CALAMARI: WE'RE NOT CHANGING HORSES. WE'RE
5 HARLEYSVILLE. WE'VE BEEN SAYING
6 FROM DAY ONE, THE HORSE CHANGING IS
7 THE PLAINTIFFS IN THE UNDERLYING
8 ACTION AND NOW -- THIS HIGHLIGHTS
9 THE EXACT PROBLEM IN THESE CASES,
10 AND I THINK YOU HIT IT RIGHT ON THE
11 HEAD EARLIER. YOU SAID, "IF
12 COVERAGE WAS AN ISSUE AND WE KNEW
13 ABOUT THIS FOR NEWMAN TWO, IF WE
14 KNEW ABOUT IT AT THE TIME," MR.
15 HENRY WOULD HAVE TRIED THE CASE
16 DIFFERENTLY.
17 THE COURT: AS WOULD Y'ALL.
18 MR. CALAMARI: WE WOULD HAVE, YES. AND IT'S A
19 FAIRNESS ISSUE, AND WE'RE ASKING THE
20 COURT SIMPLY TO ALLOCATE, BUT RIGHT
21 NOW, ALL WE'RE ASKING IS JUST TO GO
22 OVER THESE ISSUES THAT ARE IN
23 EVIDENCE.
24 MR. HENRY: IF I MAY, YOUR HONOR, ---
25 THE COURT: I THINK THAT -- I'M GOING TO ALLOW

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1 YOU TO DO IT AS A PROFFER. I THINK
2 THAT IF IT'S IN EVIDENCE, THEN THE
3 PROPER WAY TO SUMMARIZE WHAT THIS
4 EXPERT'S TESTIMONY MEANS WOULD BE
5 THROUGH A FINAL ARGUMENT, BUT I
6 THINK TO ASK ME NOW TO CONSIDER THIS
7 EVIDENCE IN SUCH A WAY WHERE I AM
8 IMPOSING MY DETERMINATION ON AN
9 ALLOCATION THAT'S ALREADY BEEN MADE
10 BY A JURY WOULD BE INAPPROPRIATE. I
11 THINK THE NEWMAN CASE INDICATES
12 THAT, AND THOUGH IT WAS NOT A
13 CONSTRUCTION CASE, THE CASE THAT
14 CAME OUT, I THINK IT'S THE JENKINS
15 VERSUS FEW CASE. IS THAT THE ONE?

16 MR. HENRY:

YES, YOUR HONOR.

17 THE COURT:

18 OR SUCH THAT THEY INDICATE THAT IT
19 IS IMPROPER TO GO BACK AND TRY TO
20 ALLOCATE THE JUDGMENT, AS WAS SAID
21 IN JENKINS VERSUS FEW, THAT BECAUSE
22 THE VERDICT WAS A GENERAL VERDICT,
23 IT IS IMPOSSIBLE TO DETERMINE HOW
24 THE JURY ALLOCATED DAMAGES BETWEEN
25 CIVIL CONSPIRACY, CONVERSION, AND
TRESPASS TO PERSONAL PROPERTY. I

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1 THINK IT WOULD BE EQUALLY IMPOSSIBLE
2 FOR ME TO DETERMINE HOW THE JURY HAS
3 ALLOCATED THE ISSUES IN THIS CASE
4 BETWEEN THOSE THAT MIGHT BE COVERED
5 VERSUS THOSE THAT MIGHT NOT BE
6 COVERED IN THE WAY OF DAMAGES. SO
7 I'M GOING TO SUSTAIN MR. HENRY'S
8 OBJECTION, AND I'LL ALLOW YOU TO
9 MAKE A PROFFER.

10 MR. HENRY: THANK YOU, YOUR HONOR.

11 MR. CALAMARI: THANK YOU, YOUR HONOR. AND, YOUR
12 HONOR, JUST TO PRESERVE MY POSITION
13 ON IT, AND I UNDERSTAND THE COURT'S
14 RULING, BUT WE DISTINGUISH THOSE
15 CASES THAT ARE SUGGESTED BECAUSE
16 THEY TALK ABOUT CAUSES OF ACTION,
17 KNOWING AT THE TIME THE CASE WAS
18 TRIED TO BE COVERED OR NOT COVERED.
19 IF THE CARRIER DOESN'T BREAK THE
20 DAMAGES DOWN PER CAUSE OF ACTION, WE
21 AGREE, BUT IN THIS CASE, WE JUST
22 DON'T THINK WE HAVE. SO WE JUST
23 WANT TO PRESERVE THAT ARGUMENT FOR
24 APPEAL ---

25 THE COURT: CERTAINLY. AND I UNDERSTAND THAT,

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1 AND IT JUST LOOKS LIKE, PARTICULARLY
2 IN THE NEWMAN CASE, THAT THE COURT
3 INDICATED THAT CERTAIN DAMAGES WERE
4 NOT COVERED BUT DIDN'T TELL YOU HOW
5 TO GO ABOUT FINDING OUT WHAT THOSE
6 WERE, AND I DON'T THINK THAT AT THIS
7 STAGE OF THE GAME THAT I'M IN A
8 POSITION TO DO SO EITHER.

9 MR. CALAMARI: OKAY. THANK YOU, YOUR HONOR. YOUR
10 HONOR, AT THIS TIME, THEN, WE'LL
11 ENTER INTO A PROFFER, AND I'LL LET
12 EVERYONE KNOW WHEN WE'RE DONE.

13 Q: Mr. Wright, can you look at the matrix of issues
14 for Magnolia North? Is that what you have?

15 A: Uh-huh (affirmative response).

16 Q: What is the first issue?

17 A: Control joint improper or not installed in
18 gypsum.

19 Q: Okay. And what is that in the underlying
20 testimony, the deposition of Drew Brown, and the
21 report of Drew Brown?

22 A: There's a joint that's supposed to have a gap
23 between the gypsum boards under the walkways
24 where, if you butt them up against each other,
25 they, they can expand and contract in, in

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1 differing relation, ---
2 THE COURT: MR. CALAMARI, LET ME PUT SOMETHING
3 ELSE ON IT BEFORE YOU GET IN TOO
4 DEEP WITH MR. WRIGHT. NOT ONLY DO I
5 FEEL IT'S NOT PROPER TO TRY AND
6 ALLOCATE THIS JURY'S VERDICT IN THIS
7 FASHION, BUT ALSO, MR. WRIGHT HAS
8 NOT BEEN OFFERED AS AN EXPERT
9 WITNESS IN THIS FIELD, AND
10 THEREFORE, I DO NOT THINK THAT HE IS
11 QUALIFIED TO MAKE THESE TYPES OF
12 ALLOCATIONS, AS WELL.
13 MR. CALAMARI: AND WE'RE NOT OFFERING, WE AGREE, WE
14 HAVEN'T OFFERED HIM AS AN EXPERT.
15 Q: Okay. Mr. Wright, please continue.
16 A: Regardless, it was something that wasn't
17 installed in the, in the gypsum.
18 Q: Is that an accident?
19 A: To install something or not install something?
20 Q: Yes, sir.
21 A: No.
22 Q: What about B?
23 A: Adhesive/cohesive failures and
24 inadequate/improper installation of sealant.
25 Q: What does that mean ---

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Consolidated ROA_0398

1 A: Again, means that there was, there was something
2 that they should have done that they didn't do
3 properly.

4 Q: And relating to adhesives, what is that,
5 caulking?

6 A: It looks to be, yes.

7 Q: Is that an accident?

8 A: I would say no.

9 Q: What about C, flashing improperly or not
10 installed?

11 A: Flashing goes around windows and any area that
12 goes, there's sill flashing. It's basically
13 intended to keep water out or channel it out.

14 Q: Take this opportunity to explain to The Court the
15 difference between whether improper flashing is
16 accidental or improper flashing is put in the way
17 it was intended, just incorrectly. Please
18 explain to The Court.

19 A: Well, if you do something the way -- I don't
20 think there's anyone in these cases who has ever
21 said they didn't get the buildings that they
22 intended to build. These buildings were built
23 exactly the way they intended to build them.
24 They didn't, they didn't say, "Well, you know, we
25 meant to put flashing on," but 6700 windows

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1 later, there isn't any.

2 Q: What about improper flashing, and I guess that

3 would be flashing that channels water into the

4 building, is that the way they intended to

5 install it?

6 A: Well, if it's there and it's there the way that

7 they put it on there, then yes, that's the way

8 they intended to do it.

9 Q: Any evidence otherwise?

10 A: No.

11 Q: What about D, what is that?

12 A: Drainage provision not installed at masonry wall,

13 that; that sounds like weep holes to me.

14 Q: And is that an accident?

15 A: Again, you either install it or you don't install

16 it. It's -- That's not accidental. It's

17 something that it's within your means and control

18 to either do or not do.

19 Q: E is brick improperly installed.

20 A: Again, it's, it's just done improperly.

21 Q: Are we talking about, in all of these, and I

22 guess we'll go A through R, are we talking about

23 an isolated incident?

24 A: No. All of these buildings for all of the

25 Heritage projects are the same plans, and they

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Consolidated ROA_0400

1 were all built the same way, and there's
2 testimony that the, that the deficiencies and
3 defects in these buildings are substantially the
4 same across the board.

5 Q: How would you describe that, if it's not an
6 isolated, what is it?

7 A: It's pattern and practice. It's a conscious
8 decision.

9 Q: What about F?

10 A: Brick improperly and inadequately sloped.

11 Q: From your view of the evidence that's already in
12 evidence, what is that?

13 A: I think he's talking there about the brick
14 rowlocks around the windows or under the windows.

15 Q: What about them?

16 A: They have to be, the testimony is that they have
17 to be sloped away from the building to, to let
18 water, to channel water away from the building,
19 and some of them were actually negatively sloped.

20 Q: Is that an accident?

21 A: I don't know.

22 Q: You just said, "I don't know," ---

23 A: No, no, no, no. I was trying to say I don't
24 think so, but no, it's not an accident. They,
25 they, they got what they meant to get.

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Consolidated ROA_0401

1 Q: What about G?
2 A: Mortar and brick, mortar and/or brick installed
3 in masonry cavity.
4 Q: Is that an accident?
5 A: No.
6 Q: What about H?
7 A: Brick lintel improperly installed, again, they
8 had the opportunity, they had the time, they had,
9 had all day to do it right, and they just didn't
10 do it right.
11 Q: What was the problem with the brick lintel in
12 Magnolia North?
13 A: That was the, the testimony there was that it was
14 the issue over the, the curved windows.
15 Q: That might be Riverwalk.
16 A: Is that Riverwalk? The brick lintel is the area
17 above the windows. It was improperly installed
18 here.
19 Q: Is that an accident?
20 A: No.
21 Q: What about gap hole in trim cladding, I?
22 A: I do a lot of woodwork. If you leave a gap
23 there, you meant to leave a gap there. You
24 didn't, you, you, you -- You looked at it and you
25 said, "Good enough," and you walked away.

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Consolidated ROA_0402

1 Q: Is it an accident?
2 A: No.
3 Q: What about J?
4 A: Non-treated sheathing wood exposed on, on
5 exterior.
6 Q: What is that?
7 A: Wood is either pressure treated for exposure to
8 the weather or not, and this is saying that the
9 wood that's exposed on the exterior is non-
10 treated.
11 Q: Just common sense-wise, can you think of a
12 contractor who accidentally puts in non-treated
13 wood when it should be treated?
14 A: No. There isn't, there isn't anybody that works
15 around wood that has, that has ever looked at
16 treated wood and mistaken it for non-treated, or
17 the other way.
18 Q: What about K?
19 A: Wood trim improperly sloped or attached.
20 Q: Is that an accident?
21 A: No.
22 Q: What about L?
23 A: Deck, deck membrane improperly installed, again,
24 they got what they meant to get.
25 Q: What about M?

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1 A: Handrail improperly installed.

2 Q: Is that an accident?

3 A: No.

4 Q: What about the grade traps water and/or directs
5 water to building, N?

6 A: You know, this is one that they have a long time
7 to, to figure out whether they're going to fix,
8 and in fact, it was, you know, this, this
9 condition was probably created before they even
10 started on the building, but it's, no, they got
11 what they intended to get.

12 Q: What about O?

13 A: Poor quality workmanship, we would, we would
14 agree with that.

15 Q: And he doesn't break down what that is in this

16 ---

17 A: No.

18 Q: What about P?

19 A: Porch balcony ceilings not vented.

20 Q: What does Drew Brown talk about for that?

21 A: He says that they needed vents, but if you needed
22 something, if it's not there, it's not there.

23 Q: Is that accidental?

24 A: No.

25 Q: What about Q?

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Consolidated ROA_0404

1 A: Improper column bearing, again, they built the
2 columns the way that they intended to build them.
3 They weren't proper, but they built it the way
4 they meant to build it.

5 Q: What about R?

6 A: Firewall improperly installed, I think they're
7 talking, what he's talking about there is the
8 separation between the units in the attic space,
9 and it just wasn't done properly.

10 Q: Now, that's in Magnolia North. In Riverwalk, we
11 have a similar matrix, and you're familiar with
12 the similar matrix ---

13 A: Yes.

14 Q: --- in Riverwalk? Since this is a proffer, is
15 your testimony identical, that items A through U
16 are not accidents?

17 A: Yes.

18 Q: What about the pictures in the book, since this
19 is a proffer, could we take two hours and go
20 through the pictures in the book to highlight
21 what's not an accident?

22 A: I'm sure we could, yes.

23 MR. CALAMARI: AND, AGAIN, THIS IS A PROFFER, SO
24 IT'S BEEN EXCLUDED. WE WOULD OFFER
25 THAT AS PART OF OUR PROFFER.

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1 Q: Mr. Wright, I want to talk to you a little bit
2 about whether or not damages have been shown to
3 occur within the policy periods, and again, we're
4 looking at the evidence and looking at the
5 policies. Do the damages fall within the policy
6 periods?

7 MR. CALAMARI: AND THE PROFFER IS OVER. I'M SORRY.
8 THIS IS A NEW SECTION.

9 Q: Let me ask it again so I make sure it's after the
10 proffer. We're talking about policy periods.
11 Are you here to testify about whether the damages
12 claimed in this case fall within policy periods?

13 A: Yes.

14 MR. HENRY: YOUR HONOR, WE WOULD OBJECT. THAT'S
15 ANOTHER OPINION, THAT HE HAS NOT
16 BEEN OFFERED AS AN EXPERT. HE HAS
17 NO QUALIFICATION TO TESTIFY AS TO
18 WHEN THE DAMAGES OCCURRED. I MEAN,
19 HE HASN'T SAID THAT HE MADE ANY
20 STUDIES OR ANYTHING. IT'S ALL IN
21 THE RECORD. IT'S ALL IN THE RECORD
22 IN THE UNDERLYING CASE ABOUT WHEN
23 DAMAGES OCCURRED. I DON'T KNOW HOW
24 HE CAN TESTIFY THAT HE KNOWS WHEN
25 DAMAGE OCCURRED. HE HASN'T EVEN

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1 LAID A FOUNDATION FOR IT. HE JUST
2 SAYS, "CAN YOU TESTIFY WHEN DAMAGES
3 OCCURRED?"
4 MR. CALAMARI: YOUR HONOR, I THINK TO THE EXTENT
5 THAT. -- AND I HOPE, I DIDN'T MEAN TO
6 INTERRUPT. ARE YOU DONE?
7 MR. HENRY: YES.
8 MR. CALAMARI: I THINK TO THE EXTENT THAT HE CAN
9 SAY, "HERE ARE THE POLICY PERIODS
10 AND HERE IS WHEN THE DAMAGES
11 OCCURRED ACCORDING TO THE RECORD,
12 AND THEY DON'T MATCH UP," I THINK HE
13 CAN STATE THAT. I DON'T THINK THAT
14 REQUIRES EXPERT TESTIMONY. IT'S
15 ANOTHER AREA THAT'S IN THE RECORD,
16 AND MR. WRIGHT CAN TAKE FIVE MINUTES
17 AND SAY, "I HAVEN'T SEEN ANYTHING IN
18 THE RECORD SHOWING DAMAGES OCCURRING
19 WITHIN THE POLICY PERIODS." IT'S
20 PART OF OUR CLAIM IN THE CASE.
21 THE COURT: IS THERE ANY TESTIMONY THAT
22 PINPOINTS WHEN DAMAGES BEGAN?
23 MR. CALAMARI: NOT FROM MR. WRIGHT. I MEAN, HE CAN
24 TALK ABOUT ---
25 THE COURT: I MEAN, IS THERE ANY SUCH TESTIMONY

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1 IN THE RECORD WHERE MR. BROWN OR
2 SOME OTHER EXPERT SAYS, "THESE
3 DAMAGES BEGAN OCTOBER THE 15TH,
4 1997"?

5 MR. CALAMARI: THERE'S SOME TESTIMONY THAT WE'LL
6 HIGHLIGHT FOR YOU IN THE PROPOSED
7 ORDER, SAYING WHEN THEY WERE FIRST
8 DISCOVERED. SO THAT WOULD BE WHEN
9 THEY FIRST MANIFESTED THEMSELVES.

10 THE COURT: IS THERE ANY TESTIMONY AS TO HOW
11 MUCH DAMAGE OCCURRED IN YEAR ONE,
12 TWO, THREE, OR FOUR?

13 MR. CALAMARI: I DON'T BELIEVE SO.

14 MR. HENRY: THERE'S NO QUANTIFIED DAMAGE. THERE
15 IS TONS OF TESTIMONY IN THE RECORD
16 ABOUT DAMAGE OCCURRING SHORTLY AFTER
17 THESE BUILDINGS WERE CONSTRUCTED,
18 AND THEN IT CONTINUED ON INTO, WAY
19 INTO THE PROJECT IN 2000, THEY WERE
20 STILL OUT THERE TRYING TO REPAIR
21 THIS WATER INTRUSION, STOP THIS
22 WATER INTRUSION DAMAGE, AND THAT
23 SORT OF THING.

24 THE COURT: I'M GOING TO SUSTAIN THE OBJECTION,
25 FINDING THAT MR. WRIGHT IS NOT

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1 QUALIFIED TO OFFER THIS OPINION AND
2 THAT IT WOULD REQUIRE ME TO TRY TO
3 ALLOCATE TIME FRAMES THAT HAVE NOT
4 BEEN TOUCHED ON IN THE JURY VERDICT
5 AND THAT THAT WOULD BE IMPROPER FOR
6 ME TO DO. I DON'T THINK THERE'S ANY
7 TESTIMONY, FROM WHAT'S BEEN SAID,
8 AND I'LL HAVE TO LOOK AT IT, BUT IF
9 THERE IS, YOU CAN BRING IT TO MY
10 ATTENTION IN PROPOSED ORDERS, BUT
11 EVEN IF THERE'S ONGOING DAMAGE, I
12 DON'T KNOW THAT ANYBODY CAN OR HAS
13 TRIED TO SAY THAT, "THIS MUCH DAMAGE
14 OCCURRED DURING THE POLICY PERIOD.
15 THIS MUCH OCCURRED OUTSIDE OF THE
16 POLICY PERIOD," OR WHETHER, "THIS
17 DAMAGE THAT DID OCCUR WITHIN THE
18 POLICY PERIOD WAS SEVERE ENOUGH THAT
19 WHAT WE HAD TO DO WOULD HAVE HAD TO
20 HAVE BEEN DONE ANYHOW, WHETHER IT
21 OCCURRED IN YEAR TWO OR OCCURRED IN
22 YEAR TEN. IT HAD GOTTEN BAD ENOUGH
23 IN THE FIRST TWO YEARS, THAT WE HAD
24 TO MAKE THESE REPAIRS TO IT." SO
25 I'M GOING TO SUSTAIN THE OBJECTION

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1 AND LET IT BE OFFERED AS A PROFFER.

2 MR. CALAMARI: OKAY.

3 Q: Mr. Wright, we're offering this, again, as a
4 proffer. Is there damage that occurred during
5 the policy periods?

6 A: I don't believe so. I haven't seen any evidence
7 of it.

8 Q: So you would say that the damage occurred within
9 the policy period or outside ---

10 A: Outside.

11 Q: Explain.

12 A: Water damage is a slow process. I can throw a
13 piece of wood into my pool today, and it's not
14 damaged today. Even if water was getting in
15 today, that, that process takes time to occur.
16 It's the insureds responsibility to meet the
17 insuring agreement. They have to show that it
18 was an occurrence, that it qualifies as property
19 damage, and that it falls within the policy
20 period. Nobody to date has shown that.

21 MR. CALAMARI: THAT WOULD CONCLUDE OUR PROFFER ON
22 THAT ISSUE. YOUR HONOR, WE ONLY
23 HAVE A COUPLE MORE ISSUES TO
24 DISCUSS.

25 Q: Mr. Wright, I want you to look at the policy

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1 chart. What is the first policy for Heritage
2 Communities, Inc., what's the first policy
3 period?
4 A: 8/3/97 to 8/3/98.
5 Q: When is the last policy period for Heritage
6 Communities, Inc.?
7 A: 8/3/98 to 8/3 -- I'm sorry, 8/3, for Heritage
8 Communities, 8/3/99 to 8/3/2000.
9 Q: What about BuildStar, when is their first policy
10 period?
11 A: 4/1/97, 4/1/98.
12 Q: You say 4/1/98 is their last policy period?
13 A: No. 4/97 to 4/1/98 is the first one.
14 Q: When is the last policy period?
15 A: 4/1/2000 to 8/1/2000.
16 Q: What about the Heritage Magnolia North policy?
17 A: 9/1 ---
18 Q: When is the first one and when is the last one?
19 A: 9/1/98, '99, and the last one is 9/1/2000 to
20 11/30/2000.
21 Q: Okay. Again about Heritage Riverwalk, when is
22 the first policy and when is the last policy?
23 A: 6/18/97, '98, and the last one is 6/18/99, 2000.
24 Q: What happened to Heritage Communities, Inc., what
25 status did they run into after 8/3 of 2000?

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1 A: They went out of business.
2 Q: As far as whether they were insured or uninsured.
3 A: Well, they didn't have any insurance after that.
4 Q: What about BuildStar, what was their insured
5 status after 8/1/2000?
6 A: No insurance.
7 Q: So they were uninsured?
8 A: Uninsured.
9 Q: What about Heritage Magnolia North as of
10 11/30/2000?
11 A: Again, uninsured.
12 Q: What about Heritage Riverwalk after 6/18 of 2000?
13 A: Uninsured.
14 Q: So if these companies continued on uninsured, was
15 the damage occurring after that?
16 A: At least that's the claim, yes.
17 Q: And they did not have insurance at that time?
18 A: No.
19 Q: I'm going to move into the next area.
20 MR. CALAMARI: I WANT TO MAKE SURE THAT THE LAST
21 SECTION I PUT IN WAS NOT UNDER A
22 PROFFER. I'M GETTING A LITTLE
23 CONFUSED AS TO WHAT'S UNDER A
24 PROFFER AND WHAT'S NOT, BUT THE LAST
25 SECTION, WHEN I TALKED ABOUT WHEN

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Consolidated ROA_0412

1 THE POLICIES END, WAS THAT UNDER A
2 PROFFER OR NOT? I HAD ENDED THE
3 PROFFER, RIGHT?
4 MR. HENRY: YOU HAD ENDED THE PROFFER.
5 Q: I want to move into a new section, certainly not
6 under any proffer. I want to talk to you about
7 punitive damages. Do the policies applicable in
8 this case specifically exclude punitive damages?
9 A: No..
10 Q: Are punitive damages covered under those
11 policies?
12 A: In this, in these cases, I would say no.
13 Q: Why not?
14 A: Because the ---
15 MR. HENRY: YOUR HONOR, HE'S AGAIN INTERPRETING
16 THE POLICIES. THAT IS FOR YOUR
17 HONOR TO DETERMINE, AND WE WOULD
18 OBJECT TO ANY TESTIMONY FROM HIM
19 ABOUT WHAT'S COVERED AND WHAT ISN'T
20 COVERED, BECAUSE HE'S GOT TO MAKE A
21 POLICY INTERPRETATION.
22 MR. CALAMARI: I'LL WITHDRAW THAT QUESTION, AND I
23 THINK I CAN ASK IT A DIFFERENT WAY.
24 Q: What is the stated language in the policy as to
25 damages that come within the policy?

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Consolidated ROA_0413

1 A: Again, we're talking about the, the, there has to
2 be property damage or bodily injury. It has to
3 result from an occurrence during the policy
4 period.

5 Q: And we've already gone over, what's the
6 definition of occurrence?

7 A: It's an accident.

8 Q: In the transcript in Magnolia North, beginning on
9 page 18, 20, is the jury charge for punitive
10 damages, and the transcript's already in
11 evidence, and I believe the jury charge is the
12 same in Riverwalk and Magnolia North. Beginning
13 on line 11 of page 18, 20 in the Magnolia North
14 case, read the jury's charge.

15 A: "In this case, the Plaintiff seeks punitive
16 damages in addition to actual damages. Punitive
17 damages, also known as exemplary damages, are
18 imposed as punishment. They are not intended to
19 compensate. Punitive damages are allowed in the
20 interest of society in the nature of punishment
21 and as a warning and example to deter the
22 wrongdoer and others from committing like
23 offenses in the future. Moreover, they serve to
24 vindicate a private right by requiring the
25 wrongdoer to pay money to the damaged party.

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1 "Punitive damages serve at least three
2 important purposes, punishment of the Defendant's
3 recklessness, willfulness, wantonness, or
4 malicious conduct, the deterrence of similar
5 future conduct by Defendant or others and
6 compensation for the reckless and willful
7 invasion of the Plaintiff's rights. The
8 paramount purpose for awarding punitive damages,
9 the paramount," -- "The paramount purpose for
10 awarding punitive damages is not to compensate
11 the Plaintiffs but to punish and set an example
12 for others.

13 "Now, what would justify an award of
14 punitive damages? As you consider the issues of
15 punitive damages, the highest burden of proof
16 known to the civil law is applicable. Section
17 15-13-135 of the South Carolina Code provides
18 that in any civil action where punitive damages
19 are claimed the Plaintiffs have the burden of
20 proving such damages by clear and convincing
21 evidence.

22 "Punitive damages can only be awarded
23 where the Plaintiffs prove by clear and
24 convincing evidence that Defendant's actions were
25 willful, wanton, malicious, and in reckless

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1 disregard of the Plaintiff's rights or where
2 Defendant's actions were so grossly negligent as
3 to imply a willfulness or wantonness. A
4 conscious failure to exercise due care
5 constitutes willfulness. It is the present
6 consciousness of wrongdoing that justifies the
7 assessment of punitive damages against the
8 wrongdoer.

9 "Punitive damages will be allowed even
10 when a Defendant does not realize it is invading
11 the Plaintiff's rights so long as the act is
12 committed in such a manner that a person of
13 ordinary prudence would conclude that it was done
14 in reckless disregard of the rights of another.

15 "The Plaintiffs cannot recover punitive
16 damages based on negligent conduct. Negligence
17 is the doing of some act which a person of
18 ordinary prudence would not have done under
19 similar circumstances or failure to do what a
20 person of ordinary prudence would have done under
21 similar circumstances. Mere negligence will not
22 support a punitive damages award.

23 "To recover punitive damages, the
24 Plaintiffs must prove by clear and convincing
25 evidence that the Defendant's actions were

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1 willful, wanton, or reckless or so grossly
2 negligent as to imply a willfulness or
3 wantonness. The word recklessness, willfulness,
4 and wantonness are synonymous. The terms are
5 used to describe a conscious failure to exercise
6 and observe reasonable or due care. Recklessness
7 is distinguished from negligence. Negligence is
8 the failure to use due care. Negligence is
9 carelessness, as mentioned earlier. Negligence
10 is a failure by omission or commission to
11 exercise due care as a person of ordinary reason
12 and prudence would exercise in the same
13 circumstances. Recklessness is a higher degree
14 of culpability and responsibility. Recklessness
15 signifies a conscious failure to exercise due
16 care. Reckless is a conscious indifference to
17 the rights of the Plaintiffs or a reckless
18 disregard of the rights of the Plaintiffs.
19 Recklessness is an awareness of wrongful conduct
20 and continuation to act regardless of
21 consequences. Gross negligence is the
22 intentional conscious failure to do something
23 which is incumbent upon one to do or the doing
24 of," -- "or the doing of a thing intentionally
25 that one ought not to do. Negligence is the

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1 failure to exercise due care, while gross
2 negligence is the failure to exercise even the
3 slightest care. Gross negligence is a relative
4 term and means the absence of care that is
5 necessary under the circumstances.

6 "Punitive damages are recoverable for
7 negligence so gross or reckless of consequences
8 as to imply or to assume the nature of
9 wantonness, willfulness, or recklessness, but
10 punitive damages may not be awarded for mere
11 gross negligence. The test for determining,
12 whether a tort may be deemed reckless, willful,
13 or wanton is whether it has been committed in
14 such a manner and under such circumstances that a
15 person of ordinary reasonable prudence would have
16 been conscious of it as an invasion of the rights
17 of the party suffering damage.

18 "There is no formula or standard that can
19 be used as a measure for assessing punitive
20 damages. However, factors relevant to your
21 consideration of punitive damages are the
22 character of the Defendant's act, the nature and
23 extent of the harm to the Plaintiffs which
24 Defendant caused or intended to cause, the
25 Defendant's degree of culpability, the punishment

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1 that should be imposed, the duration of the
2 conduct, the Defendant's awareness or
3 concealment, the existence of similar past
4 conduct, the likelihood the award will deter the
5 Defendant and others from like harm, whether the
6 award is reasonably related to the harm likely to
7 result from such conduct, and the Defendant's
8 wealth or ability to pay.

9 "Now, the financial condition of the
10 Defendant is a factor you should consider in
11 awarding punitive damages. However, there is no
12 requirement that the Defendant be a person of
13 means before you are justified in awarding
14 punitive damages. While the wealth of the
15 Defendant is a relative factor in assessing
16 punitive damages, it is not necessarily
17 controlling. In other words, the financial worth
18 of the Defendant is a fact properly to be
19 considered by you in determining the amount to be
20 awarded as punitive damages, but evidence of net
21 worth is not a prerequisite to a punitive damage
22 award.

23 "Now, if under proper allegations a
24 Plaintiff proves by clear and convincing evidence
25 a willful, wanton, reckless, or malicious

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1 violation of his rights, it is not only the right
2 but the duty of the jury to award punitive
3 damages. Accordingly, if you should find that
4 the Plaintiffs are entitled to recover punitive
5 damages in addition to actual damages, it would
6 be your duty to include such damages in your
7 verdict and award such amount, such an amount as
8 you may deem reasonable and proper in light of
9 the facts and circumstances."

10 Q: Okay. I think that's where the punitive damages
11 part stops. Mr. Wright, were punitive damages
12 awarded in the Riverwalk matter?

13 A: Yes.

14 Q: Were punitive damages awarded in the Pope matter?

15 A: Yes.

16 Q: And were punitive damages awarded in the Magnolia
17 North matter?

18 A: Yes.

19 Q: What's the definition of occurrence?

20 A: An accident.

21 Q: Thank you, Mr. Wright. Those are the questions I
22 have for you.

23 THE COURT: COUNSEL, ANY QUESTIONS?

24 MR. HENRY: YES, YOUR HONOR. I HAVE JUST A FEW.

25 CROSS EXAMINATION

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Consolidated ROA_0420

1 BY MR. HENRY:

2 Q: Mr. Wright, were you involved at all in the
3 writing of these policies?

4 A: No.

5 Q: You became involved, if I understand it
6 correctly, you became involved with the issues
7 after the litigation began; is that correct?

8 A: No. That would not be correct.

9 Q: When did ---

10 A: I've been involved in these cases since I took
11 this job in, since I came, since I came to
12 Harleysville, yeah.

13 Q: I think what I was asking was, did you become
14 involved after the lawsuit was filed or were you
15 in some way involved with these projects before
16 the lawsuits were filed?

17 A: No, not until we -- We wouldn't get notice of, we
18 wouldn't get notice of a case that was, of a
19 building that was built properly.

20 Q: Okay. So when did you first become involved,
21 when the first complaint, the Riverwalk complaint
22 was filed, is that when you became involved in
23 these cases? I'm not talking about the other
24 Heritage ---

25 A: June 2003, probably.

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1 Q: Okay. And that's when the Riverwalk case was
2 filed?
3 A: Somewhere around that time. You filed it. So
4 I'll ---
5 Q: Right.
6 A: I'll take your word for that.
7 Q: Okay. Prior to that time, had you had any
8 dealings with Roger Van Wie or Dr. Green?
9 A: No.
10 Q: And after the Heritage cases were filed, your
11 main contact, from what I understand your
12 testimony to be, was Roger Van Wie?
13 A: I don't know that I would say main. We talked
14 with, with Dr. Green, as well.
15 Q: Okay. And I think you said that Roger Van Wie,
16 and I quote you, was Heritage?
17 A: That, I think that's the general conception, is,
18 and that's certainly the way he's been painted.
19 He did have other partners. His wife was a
20 partner, and Dr. Green was a partner, as well.
21 Q: But can we agree that when I ask you about
22 Heritage entities, we're talking about your
23 insureds in both cases?
24 A: Heritage Communities, BuildStar, Heritage
25 Magnolia North, and Heritage Riverwalk in these

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1 cases, yes.

2 Q: Now, have you read the transcript?

3 A: In both of these cases?

4 Q: Yes.

5 A: I have read through them. Have I read it front
6 to back?

7 Q: Right.

8 A: No.

9 Q: Okay. At what point did Harleysville determine
10 that there was no coverage under these policies?

11 A: Oh, we, that was developed over time. We became
12 more and more convinced that there was absolutely
13 no accident here during the pendency of these
14 cases.

15 Q: Do you have your file with you?

16 A: You've probably got copies of it here.

17 Q: Do you have a letter in your file where you
18 advised the insureds in these cases that there
19 was no coverage?

20 A: Oh, we reserved our rights obviously.

21 Q: I didn't ask you that.

22 A: And then we've had conversations with them about
23 just this, that we didn't think there was
24 coverage for these losses.

25 Q: Do you have a letter to your insureds telling

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1 them that there was no coverage and why there was
2 no coverage?

3 A: That would have been impossible to write.

4 Q: Why?

5 A: The landscape has changed in case law for that
6 several times since then.

7 Q: Okay. But at some point Harleysville determined
8 under what they considered or what their lawyers
9 advised them there was no coverage, correct? Or
10 had you determined that ---

11 A: That's what we're here for today, to determine
12 whether, to determine whether there's coverage.

13 Q: So you haven't determined up until today that
14 there is no coverage?

15 A: Is that not the purpose of this, of the
16 declaratory judgment action?

17 Q: Mr. Wright, listen to my question and answer.
18 It's not ---

19 A: I am attempting to, Mr. Henry.

20 Q: Well, you're not.

21 A: I am.

22 Q: You are not answering my question. Listen to it
23 and then answer. Have you determined, when I say
24 "you," Harleysville, have you determined as of
25 today that there is absolutely no coverage under

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1 these policies?

2 A: That is not my position to take or that is not my

3 position to decide that. The court gets to

4 decide that.

5 Q: Okay.

6 A: We don't believe there is, and that is the

7 purpose for this action.

8 Q: So have you ever written to your insureds no

9 matter when, no matter if it was this morning or

10 yesterday or whenever, have you ever written a

11 letter to the insureds and said there's no

12 coverage?

13 A: A letter, no. We have communicated that to them

14 several times.

15 Q: And when did you communicate that to them?

16 A: During meetings with both Dr. Green and Roger Van

17 Wie.

18 Q: Prior to the lawsuit or after the lawsuit?

19 A: After the lawsuit.

20 Q: After the lawsuit?

21 A: Yes.

22 Q: You told them absolutely there was no coverage?

23 A: We told them we did not believe there was any

24 coverage under these policies.

25 Q: Okay. And did you tell them why?

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Consolidated ROA_0425

1 A: Yes.

2 Q: And what did you tell them?

3 A: That the Supreme Court has said that this isn't

4 an accident.

5 Q: Okay. And when you sent the reservation of right

6 letter did you advise -- Well, first of all, let

7 me ask you about the reservation of rights

8 letter. There is no reservation of rights letter

9 in the record for BuildStar and Magnolia,

10 correct?

11 A: Correct.

12 Q: What have you done since your deposition, and you

13 said you didn't have one but you would look for

14 it, what have you done to find that letter?

15 A: We've looked through -- You've seen the, how much

16 paper there is here. We've looked through what

17 we have. We haven't been able to find it since

18 then, doesn't mean that it doesn't exist. We

19 just can't lay our hands on it.

20 Q: You didn't write any of these letters, did you?

21 A: In this case, no, I didn't write the letters.

22 Q: Okay. So you can't sit here and testify for a

23 fact that there is a reservation of rights letter

24 in the Pope class action or for BuildStar and

25 Magnolia North?

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1 A: Absolutely, positively, with one hundred percent,
2 I haven't seen it, but I absolutely believe it
3 exists.
4 Q: But you haven't seen it?
5 A: I haven't seen it.
6 Q: Okay. Did you ask your insureds if they received
7 it?
8 A: Specifically, no. We've, we've had many
9 conversations over coverage.
10 Q: Have you ever advised your insureds that you had
11 a conflict of interest with them?
12 A: We never did in the underlying case.
13 Q: Okay.
14 A: In fact, that was, that was the agreement. We,
15 we made the, the decision with the insured that
16 we would not intervene in the underlying case
17 because that would create that conflict of
18 interest.
19 Q: Did you ever advise your insureds prior to the
20 litigation as to why you were denying coverage?
21 A: Yes.
22 Q: And what did you tell them?
23 A: We told them that the, that the Supreme Court of
24 South Carolina has said that this is not an
25 occurrence, that there were several things in, in

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1 these cases that we didn't think met the, met the
2 definition of occurrence and we would, we would
3 handle those in this action.

4 Q: Did you tell them also that there were some
5 things in the litigation that would be an
6 occurrence?

7 A: No. We never, we never, we never said that we
8 think that there is anything that's an
9 occurrence. We've said that we don't think this
10 meets that level.

11 Q: All right. Did you tell the insureds what claims
12 were being made that would cause there not to be
13 coverage or there was an exclusion to exclude
14 coverage?

15 A: I think you've asked three questions there. I'm
16 not sure what you mean by that.

17 Q: What I'm trying to find out is, did you ever
18 detail the facts of the claims that would cause a
19 denial of coverage?

20 A: Yes. We had, we had long conversations with
21 Roger.

22 Q: Where is that documentation?

23 A: It's a long conversation with our insured.

24 Q: So you never put that in writing?

25 A: No.

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1 Q: Did you ever give your insureds a complete
2 detailed explanation of why each policy provision
3 may exclude coverage?

4 A: We're not talking about exclusions. In, in the
5 grand majority of this -- Before we get through
6 whether or not this is an occurrence, exclusions
7 don't matter.

8 Q: Well, let's suppose that you detailed all the
9 exclusions that were in the policy ---

10 A: And they're in the letters, too. They're in the
11 reservation of rights letter.

12 Q: Right. That's what I'm saying. You detailed
13 them all in the reservation of rights letter ---

14 A: Uh-huh (affirmative response).

15 Q: --- without any explanation of why those
16 exclusions may exclude coverage. What I'm asking
17 you is, did you ever go back to your insureds and
18 say, "Okay, after investigating these facts, we
19 have determined that this exclusion applies, this
20 exclusion applies, and this is why they apply"?

21 A: Yeah. We've had, again, we've had conversations
22 with the insureds about it.

23 Q: Where is it in writing?

24 A: Why does it have to be in writing?

25 Q: I didn't say it did. I said, do you have any

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1 writing?

2 A: No.

3 Q: Did you ever tell your insureds in a letter,
4 correspondence, e-mail of what investigation
5 Harleysville would do to determine whether or not
6 there was coverage or whether or not coverage
7 would not be available?

8 A: The investigation, they were kept up to date on
9 the handling of the cases all along. They knew
10 what type of investigation was going on.

11 Q: Did you ever tell them, explain that to them in a
12 letter?

13 A: No. If you're insisting that this communication
14 be in a letter form, then no, then, then.
15 conferences and meetings and conversations.

16 Q: Did Harleysville ever advise their insureds when
17 an ultimate decision on coverage would be made?

18 A: Yes. We discussed that, as a matter of fact. We
19 talked very, very clearly about that and that,
20 and that we both agreed that the time for that
21 was now.

22 Q: And is there any writing to that effect?

23 A: No. There's not, there isn't a signed agreement
24 to do that. There is, there is a understanding
25 that that was the way it was going to be handled.

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Consolidated ROA_0430

1 Q: Did you ever supplement -- You agree with me that
2 your reservation of rights letter contains
3 basically every exclusion in the policy?
4 A: Oh, I don't know that that's true.
5 Q: Well, look at it and see.
6 A: Which reservation of rights letter are we talking
7 about?
8 Q: I think they're all the same.
9 A: No. I mean, it doesn't -- Yeah, it says A, B, J.
10 So, obviously, it doesn't, it doesn't contain
11 every exclusion in the policy.
12 Q: Okay. Are there some in the reservation of
13 rights now that you believe that if The Court
14 determines there's an occurrence, any that you
15 had in the reservation of rights letter that
16 would not apply?
17 A: They could all potentially apply.
18 Q: Okay. What was your involvement with these cases
19 prior to the actual trial of the case?
20 A: I managed the unit that they were handled in.
21 Q: You hired the lawyers?
22 A: Not me personally. Harleysville did, yes.
23 Q: Okay. When I say "you," I'm sorry, I mean
24 Harleysville. Harleysville hired the lawyers?
25 A: Yes.

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Consolidated ROA_0431

1 Q: And these are lawyers that they hire on a regular
2 basis?
3 A: Yes.
4 Q: And Harleysville worked with the lawyers, as you
5 say, to be in lockstep with the insureds?
6 A: Yes.
7 Q: Okay. And that included Harleysville approving
8 fees of experts?
9 A: We never turned down any request the defense
10 attorney asked us ---
11 Q: I did not ask you if you ever turned down one,
12 did I? Did I ask you that? I asked you if
13 Harleysville approved the fees of experts.
14 A: Yes.
15 Q: Thank you. Harleysville approved the attorneys'
16 fees?
17 A: Yes.
18 Q: Harleysville got reports from the lawyers from
19 the insureds about the status of the case?
20 A: Yes.
21 Q: Did the attorneys hired by Harleysville share
22 those reports with the insureds?
23 A: I assume they did.
24 Q: Do you know?
25 A: I know that they've had discussions with them.

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1 Whether they gave those reports to the insured or
2 not, I don't know.

3 Q: We'll get through this a lot quicker if you'll
4 answer my questions ---

5 A: I am trying, Mr. Henry. I really am trying to
6 answer your questions.

7 Q: Mr. Wright, I asked you if you knew whether or
8 not Harleysville's attorneys, representing your
9 insureds, shared those reports with the insureds.

10 A: That's a question you would have to ask them. I
11 don't know. I assume they did.

12 Q: You assume it, but I didn't ask you if you
13 assumed it. I asked you if you knew that they
14 did.

15 A: No.

16 Q: Thank you. And I believe you've agreed that you
17 made a conscious decision not to intervene in
18 these cases; is that correct?

19 A: Correct. We believe that, that, that intervening
20 would have harmed our insureds.

21 Q: All right. And from what Mr. Calamari has
22 answered in his interrogatories, the form of the
23 verdict, Harleysville never discussed the form of
24 the verdict with its insureds?

25 A: No. There was no need to. The agreement

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1 obviously was that we would handle this post.
2 Q: Okay. Now, let's talk about during the trial.
3 You attended the trial, did ---
4 A: I did.
5 Q: --- you not? Sir?
6 A: I did, yes.
7 Q: And you attended along with Mr. Calamari?
8 A: Uh-huh (affirmative response). He was here for
9 several of those days, yes.
10 Q: And during the breaks, you would confer with the
11 attorneys for the insureds?
12 A: I don't know that you'd say confer. We talked
13 several times. They would ask me what they
14 thought of a witness or that type of thing.
15 Q: Right. The insureds were not present at the
16 trial?
17 A: No.
18 Q: Did you talk to the insureds ---
19 A: Well, let me clarify that. Lynn Anderson was at
20 one of the trials.
21 Q: Right. And Lynn Anderson is who?
22 A: She was at one, she was at one point a president
23 of, of Heritage.
24 Q: And you've testified that all of these, and this
25 is subject to my objection, Your Honor, you've

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1 testified that all of these issues on a matrix
2 are not accidents because they were intended
3 conduct, correct?

4 A: Correct.

5 Q: But you also testified in your deposition that
6 you have no evidence as to what the insureds'
7 intent was in reference to the construction of
8 these buildings?

9 A: I'm not sure that's true.

10 Q: All right. Well, let's look at your ---

11 A: I'd be glad to.

12 Q: You want to look at your deposition? Let me read
13 the question I asked you, and then you can read
14 your answer, "Do you have any evidence that
15 BuildStar or any of your insureds hired
16 subcontractors and intended that they negligently
17 perform the work?" and what did you, how did you
18 answer that?

19 A: "I don't have any evidence other than," or, "have
20 any evidence that they hired subcontractors other
21 than the fact that, that somebody else did the
22 work. There's no contracts or anything. I don't
23 have any evidence to show what their intent was."

24 Q: Okay. All of this work was done by
25 subcontractors, correct?

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Consolidated ROA_0435

1 A: Yes.

2 Q: And you have no evidence at all that your

3 insureds intended that the construction be done

4 in a negligent manner and that water intrusion

5 occurred?

6 A: No. That's not true. I think there's plenty of

7 evidence. I think there's a mountain of evidence

8 that they got exactly what they intended to get,

9 that ---

10 Q: That's not what I asked you.

11 A: And that they, they built on the cheap and they

12 did this purposely.

13 Q: Please answer my question. Do you have any

14 evidence to show that your insureds intended not

15 only that the work was done negligently and

16 intended that there be water damage to these

17 units?

18 A: Intended that there be water damage?

19 Q: Yes.

20 A: I don't think that that's a requirement under the

21 policy, ---

22 Q: No, sir. I didn't ask you if that was a

23 requirement ---

24 A: But do I ---

25 Q: --- under the policy.

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1 A: Have I, have I gotten inside Roger's head and
2 said, and have evidence that he said or that he
3 thought, "You know what? I'm going to build
4 these so that they are, so that they get water
5 damaged," no, I don't think anyone will ever have
6 that.

7 Q: So the answer to my question, that you don't have
8 any evidence that your insureds intended the
9 damage that occurred to these buildings, you
10 don't have any of that evidence, do you?

11 A: I think that's a different question.

12 Q: Well, let me ask it again and see if you can
13 answer it. Do you have any evidence whatsoever,
14 that you heard in trial or anywhere else, that
15 your insureds intended there to be water
16 intrusion and damage to these units?

17 A: No. I think there's plenty of evidence to say
18 that they intended to build substandard
19 buildings. Whether they, whether they intended,
20 consciously intended to create a situation that
21 water damage would occur, I don't have that.

22 Q: Now, these cases were filed in 2003, correct?

23 A: Correct.

24 Q: Did you ever give any consideration to filing a
25 DJ action at the time you wrote those reservation

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1 of rights letters?
2 A: Yes, considered.
3 Q: But decided not to do that?
4 A: There was no reason to.
5 Q: Why?
6 A: No verdicts. There's no, there's no, there's no
7 dispute between us and the insured. As long as
8 we're defending, there's no dispute between us
9 and the insured until there is a potential duty
10 to indemnify.
11 Q: But you did consider it?
12 A: Thought about it, but it didn't make any sense.
13 Q: Okay. Now, I was interested in your description
14 of an accident, and you were testifying in
15 general terms as to an accident, and you
16 testified, if I got your testimony correct, that
17 if a subcontractor were placing a house wrap on
18 and he cut the house wrap and, unknown to him, he
19 cuts the flashing behind it, that's an accident?
20 A: If that, if the flashing wasn't part of his
21 contract in the first place, it can be an
22 accident. One time, yeah, I can buy that as an
23 accident. There's 134 buildings here with 6700
24 windows, all installed exactly the same way.
25 That's no accident.

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1 Q: Let me give you another general scenario and ask
2 you, just in general terms, if you think it's an
3 accident. A sheetrock subcontractor's putting up
4 sheetrock.

5 A: Okay.

6 Q: He drives a nail through the sheetrock, misses
7 the stud and hits a water line, and it bursts and
8 floods the walls in the unit. Is that an
9 accident?

10 A: Again, if he does it once, yeah, I can buy that
11 as an accident. If he does it 6700 times, at
12 that point, you've got to believe that he's
13 trying to do it.

14 Q: In reference to the windows, in reference to the
15 windows, there was a dispute between your
16 insureds and BetterBilt as to whether or not the
17 windows were themselves leaking or the
18 installation of the windows was causing leaks;
19 isn't that correct?

20 A: Well, that was their, that was one of the
21 defenses raised to the claims about the, the
22 window installation, yes.

23 Q: And in fact, your insureds changed window
24 manufacturers, did they not?

25 A: Well, changing window manufacturers ---

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1 Q: Answer my question.
2 A: Yes. They changed window manufacturers.
3 Q: Thank you. I want to make sure I understand.
4 You have never written your insureds and told
5 them there was no coverage?
6 A: If you're, again, insisting that this
7 communication be in a letter, then no.
8 Q: Have you talked to Mr. Green, Dr. Green about ---
9 A: Yes.
10 Q: --- this case?
11 A: Yes.
12 Q: Did you ask him to drive across the waterway and
13 verify ---
14 A: He's a Defendant in this case ---
15 Q: --- all these conversations -- What?
16 A: He's a Defendant in this ---
17 Q: Wait, wait just a minute. I'm not through
18 asking. Did you ask Dr. Green to come over here
19 and verify all these conversations you had with
20 him?
21 MR. CALAMARI: YOUR HONOR, I OBJECT TO THE
22 RELEVANCE.
23 THE COURT: I'M SORRY. WHAT WAS THAT?
24 MR. CALAMARI: YOUR HONOR, I OBJECT TO THE
25 RELEVANCE OF WHETHER WE ASKED DR.

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1 GREEN TO APPEAR AT A TRIAL WHERE HIS
2 COMPANY IS A NAMED DEFENDANT. HE
3 HAD KNOWLEDGE OF THE TRIAL. WHAT'S
4 THE RELEVANCE? ONE, IS A PLAINTIFF
5 REQUIRED TO SECURE THE ATTENDANCE OF
6 THE ADVERSE PARTIES AND HOW CAN THAT
7 BE RELEVANT TO THE ISSUES IN THIS
8 CASE?

9 MR. HENRY: I'LL WITHDRAW THE QUESTION, YOUR
10 HONOR. THAT'S ALL I HAVE.

11 THE COURT: THANK YOU. MR. CALAMARI?

12 MR. CALAMARI: THANK YOU, YOUR HONOR. YOUR HONOR,
13 AT THIS TIME, I'D MOVE TO VACATE THE
14 SUSTAINING OF THE OBJECTIONS THAT
15 MR. HENRY TALKED ABOUT AS TO THE
16 REASONS WHY HARLEYSVILLE BELIEVES
17 THESE ARE NOT COVERED. I THINK, ON
18 CROSS EXAMINATION, HE OPENED THE
19 DOOR FOR ALL THE REASONS TO COME IN.
20 IN FACT, QUESTION NUMBER 26 ON MY
21 LIST SAYS, HE GAVE MR. WRIGHT AN
22 EXAMPLE AND SAID, "A PERSON
23 INSTALLING SHEETROCK DRIVES A NAIL
24 THROUGH THE SHEETROCK AND HITS A
25 PIPE. IS THAT AN ACCIDENT?" HE'S

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Consolidated ROA_0441

1 ASKING HIM TO INTERPRET WHETHER
2 THINGS ARE ACCIDENTS OR NOT, AND I
3 THINK WHEN I TRIED TO DO THAT, HE
4 OBJECTED AND SAID, "YOU CAN'T DO
5 IT," ---

6 THE COURT: I THINK HE SAID, SUBJECT TO HIS
7 RESERVATIONS, HE WAS ASKING THESE
8 QUESTIONS.

9 MR. HENRY: ALSO, YOUR HONOR, I SAID, "SPEAKING
10 IN GENERAL TERMS," BECAUSE HE WAS
11 ALLOWED TO TESTIFY AS TO HIS
12 INTERPRETATION OF AN ACCIDENT,
13 SPEAKING IN GENERAL TERMS. THERE
14 WAS NO OBJECTION UNTIL WE GOT TO HIS
15 INTERPRETATION OF THESE POLICIES.
16 IF YOU'LL RECALL, HE WAS ALLOWED TO
17 TESTIFY IN REFERENCE TO GENERAL
18 TERMS WHAT HARLEYSVILLE BELIEVES AN
19 ACCIDENT IS AND ALL THAT, BUT WHEN
20 WE GOT TO WHAT HE WAS GOING TO
21 INTERPRET THE POLICIES IN ISSUE,
22 THEN THAT'S WHEN MY OBJECTION CAME.

23 MR. CALAMARI: YOUR HONOR, I THINK THE STATEMENT
24 THAT HE MADE ABOUT, "THIS IS SUBJECT
25 TO MY OBJECTION," I DON'T KNOW THAT

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1 THAT HAS ANY EFFECT ON THIS, BUT
2 PRIOR TO ASKING THAT QUESTION, HE
3 SAID, "WHAT DID YOU TELL THE
4 INSURED AS TO WHY IT'S NOT
5 COVERED?" MR. WRIGHT SAID, "WE
6 TALKED ABOUT IT." HE SAID, "WHAT
7 WERE YOUR REASONS?" AND THEN CUT HIM
8 OFF. I THINK HE OPENED THE DOOR TO
9 ALL THOSE ISSUES, AND I'D MOVE TO
10 VACATE THE SUSTAINING OF THE
11 OBJECTIONS.

12 THE COURT: I'M GOING TO OVERRULE YOUR REQUEST.
13 I THINK, IN THE DIRECT TESTIMONY,
14 MR. WRIGHT HAD TESTIFIED AS TO THE
15 REASONS, I DIDN'T ALLOW HIM TO
16 TESTIFY AS TO WHAT THE INSURED SAID
17 IN RESPONSE, BUT I ALLOWED MR.
18 WRIGHT TO TESTIFY AS TO THE
19 DISCUSSIONS HE HAD WITH THE INSURED
20 ABOUT WHY THEY WERE NOT GOING TO
21 PROVIDE COVERAGE AND HOW THE
22 COVERAGE ISSUES WOULD BE HANDLED IN
23 A SEPARATE ACTION AND THAT THIS WAS
24 AGREED TO. I THINK I DID THAT
25 WITHOUT IT BEING A PROFFER.

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1 MR. CALAMARI: IT WAS A LITTLE CONFUSING AS TO
2 WHAT, AND I DIDN'T TAKE NOTES, AS TO
3 WHAT WAS AND WAS NOT A PROFFER, AND
4 NO FAULT OF ANYBODY, BUT I THINK A
5 QUESTION PRIOR TO MR. HENRY SAYING,
6 "SUBJECT TO AN OBJECTION," OF COURSE
7 HE ONLY SAID THAT FOR ONE QUESTION,
8 BUT HE SAID, "WHY DID YOU DENY
9 COVERAGE?" NOW, I THINK MR. WRIGHT
10 COULD HAVE THE OPPORTUNITY, IN
11 PARTICULAR, THIS WAS PROFFERED, WHEN
12 I WENT THROUGH THE MATRIX OF ISSUES
13 WITH MAGNOLIA NORTH, TO SAY, THE
14 QUESTION HE ASKED LATE WAS, "IS THIS
15 AN ACCIDENT? I'M GOING TO GIVE YOU
16 AN EXAMPLE. IS THIS AN ACCIDENT?"
17 WELL, MR. WRIGHT'S JUST LOOKING AT
18 INFORMATION FROM THE FILE, AND I
19 THINK I CAN ASK HIM, THAT'S BEEN MY
20 POSITION ALL ALONG, I CAN ASK HIM,
21 "IS THIS AN ACCIDENT?" ALL OF HIS
22 CROSS EXAMINATION WAS, "IS THIS
23 COVERED?" AND, "DID YOU TELL THE
24 INSURED WHY YOU BELIEVE IT'S NOT
25 COVERED?" AND THERE WAS NO

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1 STATEMENT, FOR ONE QUESTION THERE
2 WAS A STATEMENT OF, "THIS IS SUBJECT
3 TO MY OBJECTION," BUT I THINK MR.
4 WRIGHT CAN TESTIFY TO THAT. I THINK
5 HE COULD TESTIFY TO BEGIN WITH, BUT
6 I THINK MR. HENRY OPENED THE DOOR ON
7 THOSE ISSUES, AND I UNDERSTAND THE
8 COURT'S RULING, BUT I DO MOVE TO
9 VACATE THE EARLIER SUSTAINED
10 OBJECTIONS.

11 THE COURT: MR. HENRY?

12 MR. HENRY: YOUR HONOR, I ASKED HIM ABOUT HIS
13 DESCRIPTION OF WHAT AN ACCIDENT WAS
14 BECAUSE HE WAS TALKING IN GENERAL
15 TERMS. WHEN WE WERE TALKING IN
16 GENERAL TERMS, WE LET HIM GIVE HIS
17 OPINION ON EVERYTHING, BUT MY
18 OBJECTION CAME WHEN HE WAS GOING TO
19 INTERPRET THESE POLICIES, WHICH IS
20 FOR THE COURT. I MEAN, WHETHER
21 THERE WAS AN ACCIDENT IS AN
22 INTERPRETATION FOR THE COURT. IT
23 MAKES NO DIFFERENCE WHATSOEVER WHAT
24 HE BELIEVES, I BELIEVE, OR BOB
25 BELIEVES OR LAURA BELIEVES AN

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1 ACCIDENT IS UNDER THESE POLICIES.
2 IT HAS NO BEARING ON THAT. HE
3 TESTIFIED IN GENERAL TERMS, I GUESS,
4 WHAT'S CONSIDERED IN THE INSURANCE
5 INDUSTRY TO BE AN ACCIDENT. BUT
6 WHETHER OR NOT THERE WAS ACTUALLY AN
7 ACCIDENT IN THIS CASE, HE CAN'T
8 TESTIFY TO. THAT'S MY OPINION.
9 MR. CALAMARI: "DID YOU DETAIL THE REASONS FOR
10 DENIAL, DID YOU GIVE A DETAILED
11 EXPLANATION OF WHY IT IS NOT
12 COVERED, DID YOU SAY WE DETERMINED
13 THAT EXCLUSIONS APPLY AND THIS IS
14 WHY?" HE ASKED MR. WRIGHT THESE
15 QUESTIONS ---
16 THE COURT: I THINK HE ASKED HIM WHETHER OR NOT
17 HE HAD EVER GIVEN HIM ANY WRITTEN --
18 IF THE INSURED HAD EVER BEEN GIVEN
19 ANY WRITTEN EXPLANATION. MR. WRIGHT
20 SAID, "NO. BUT WE DISCUSSED THESE
21 THINGS ON NUMEROUS OCCASIONS." I
22 THINK THAT'S DIFFERENT THAN HAVING
23 HIM COME IN AND OFFER ME AN OPINION
24 ABOUT WHETHER OR NOT THE ITEMS A
25 THROUGH R, LISTED IN A MATRIX OF

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Consolidated ROA_0446

1 ISSUES, CONSTITUTE MATTERS THAT
2 EITHER BRING COVERAGE IN OR TAKE
3 COVERAGE OUT IN THIS PARTICULAR
4 ISSUE. I REMEMBER MR. HENRY'S
5 QUESTION ABOUT EXAMPLES. ONE OF THE
6 EXAMPLES WAS WHETHER OR NOT IT'D BE
7 AN ACCIDENT IF YOU INADVERTENTLY CUT
8 THE MEMBRANE WHEN YOU WERE DOING
9 SOMETHING ELSE, AND MR. WRIGHT SAID,
10 "IF IT HAPPENED ONE TIME, NO, IF IT
11 HAPPENED 6700 TIMES, YES. IF YOU
12 HAMMER A NAIL AND YOU MISS YOUR STUD
13 AND YOU HIT THE WATER PIPE," HE
14 SAYS, "ONE TIME, YES, 6700, NO," BUT
15 HE DID NOT ASK HIM ANY OF THOSE
16 QUESTIONS ABOUT WHETHER THE ITEMS
17 THAT WERE SHOWN IN THE MATRIX WERE
18 IN FACT EVIDENCE OF AN OCCURRENCE OR
19 AN ACCIDENT. I THINK, IF HE HAD
20 DONE THAT, WE MIGHT BE IN A
21 DIFFERENT BALLPARK, BUT I THINK HE
22 STAYED AWAY FROM ASKING HIM ABOUT
23 THESE THINGS IN THE MATRIX. SO I AM
24 GOING TO RESPECTFULLY DENY YOUR
25 REQUEST.

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Consolidated ROA_0447

1 MR. CALAMARI: THANK YOU, YOUR HONOR.

2 RE-DIRECT EXAMINATION

3 BY MR. CALAMARI:

4 Q: Mr. Wright, I have a few questions on re-direct.

5 You were asked a question about driving a nail
6 through sheetrock that hit a water pipe, was that
7 an accident, and you responded to the question.
8 Can you give us any other examples, in general
9 terms, as to what is an accident and what is not
10 an accident?

11 A: We talked earlier about the, the plumber that
12 gets called out to, to thaw a frozen pipe and he
13 breaks out his torch to do that. Again, if he's
14 thawing a frozen pipe and accidentally catches the
15 drapes on fire once, maybe that's an accident.
16 If he does it every time, it's not an accident.
17 It's a fact specific question, and it comes down
18 to is this fortuitous, is this something that he
19 had the means and methods to control. The
20 attorney that argued the first L-J for the
21 insurance carrier has a phrase that he likes to
22 use, that he said, "Fortuity is determined by the
23 bounds of the contract." If it's within your
24 contract and you've agreed to do it a certain way
25 and you don't do it that way, it's never an

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1 accident.
2 Q: Mr. Henry asked you a lot of questions about your
3 discussions with the insureds, and did you have
4 discussions with the insureds?
5 A: Yes.
6 Q: Did you have discussions with the insureds'
7 personal attorney?
8 A: Yes.
9 Q: And was he apprised of all the coverage issues?
10 A: Yes.
11 Q: Did he attend trial?
12 A: Was Allen Jeffcoat here? I honestly don't
13 remember if he showed up at all.
14 Q: Was he aware that the cases were going to trial?
15 A: Yes.
16 Q: Was there a discussion with him just prior to
17 those trials?
18 A: Yes.
19 Q: Did he have a free opportunity to come to the
20 courthouse and appear with his insureds?
21 A: Yes, he did.
22 Q: Do you know if he did or not?
23 A: I don't think they ever, I don't think anybody
24 from Heritage showed up. Oh, Lynn Anderson was
25 here for Riverwalk.

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1 Q: And Mr. Henry made clear that you were at those
2 trials?

3 A: Yes.

4 Q: Did anyone from Heritage Riverwalk, Heritage
5 Magnolia North, or BuildStar or anyone on their
6 behalf approach The Court and ask for these
7 issues to be addressed at the time of trial?

8 A: No.

9 Q: Mr. Henry asked you, "Did you make a conscious
10 decision to not intervene?" why?

11 A: For all the reasons we talked about. It would
12 have been, in my opinion, it would have been in
13 bad faith to intervene in this case and put out
14 evidence that agreed with Mr. Henry and saying,
15 "Yes, they knew exactly what they were doing,"
16 and there's several comments on the record just
17 to that effect from, from Mr. Henry and from his,
18 from his witnesses. So we couldn't have done it
19 without committing bad faith.

20 Q: Was there any law in South Carolina that
21 allocated damages?

22 MR. HENRY: YOUR HONOR, HE CAN'T TESTIFY AS TO
23 WHAT THE LAW IS IN SOUTH CAROLINA.
24 GEE WHIZ, BOB, COME ON.

25 MR. CALAMARI: I'M JUST ASKING THE SAME QUESTION

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1 MR. HENRY ASKED. I'M FOLLOWING UP
2 ON IT, BECAUSE HE EXCLUDED OUR
3 REASONS FOR NOT INTERVENING, AND HE
4 SAID, "DID YOU MAKE A CONSCIOUS
5 DECISION TO NOT INTERVENE?"
6 MR. HENRY: I JUST ASKED HIM IF THERE'S ANY
7 CASES IN SOUTH CAROLINA -- COME ON,
8 ---
9 MR. CALAMARI: I THINK THAT ---
10 MR. HENRY: I'LL OBJECT TO THAT.
11 THE COURT: ASK HIM THE QUESTION. IF HE KNOWS
12 SOME, I'M SURE I'LL SEE IT IN A
13 PROPOSED ORDER.
14 MR. CALAMARI: I THINK THE COURT CAN TAKE NOTICE
15 THAT NEWMAN TWO DIDN'T COME OUT
16 UNTIL AFTER THESE AND THAT NEWMAN
17 ONE PROVIDED FOR COVERAGE.
18 Q: Any other reasons why you had the conscious
19 decision not to intervene, as Mr. Henry puts it?
20 A: I believe it's the Sloan case that, that, in
21 which there's, someone tries to intervene and
22 they're told that it's, that they can't and that
23 they are supposed to do it in a, in a follow-up
24 action.
25 Q: Mr. Henry asked you a question as to why you

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1 didn't intervene -- or didn't file a DJ action
2 prior to the case going to trial, why?
3 A: Again, there's no dispute between us and the
4 insured until there is at least a potential for
5 the duty to indemnify. Until, until the insured
6 comes to us and says, "I have this verdict. I
7 want you to indemnify me for it," there's no,
8 there's no dispute over that issue. We were
9 defending them, no, it's not right, we were
10 defending them all the way through these cases.
11 Q: How do you know it's not right?
12 A: There are several cases to that effect. There's
13 ---
14 Q: We don't have to get in the -- Do you believe
15 it's right to file a declaratory judgment action
16 prior to the time of verdict?
17 A: No. There are too many issues that it can't
18 address at that point.
19 Q: Mr. Henry asked you if all the work was performed
20 by subs. Do you have personal knowledge of that?
21 A: Other than they, they claim that it was.
22 Q: That would come from the transcript, correct?
23 A: Right.
24 Q: Mr. Henry asked if you had any discussion with
25 the lawyers about the verdict form, and your

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1 answer was no. Do you know if the insured had
2 any discussion with the lawyers about the verdict
3 form?

4 A: No. I don't know that. I assume they didn't. I
5 would, I would say, though, I would characterize
6 it as, Mr. Henry asked me the question if, if I
7 had the conversations with my lawyers. They
8 were, they were the insureds' lawyers. We were
9 paying their bills, but they were the insureds
10 lawyers.

11 Q: Why not?

12 A: We'd already had that discussion in Gardens, and
13 we were told in no uncertain terms, "If you ever
14 ask me this question, I will tell you no. If you
15 ever ask me to support your intervention in the,
16 in the case or if you ever ask me to submit
17 special interrogatories or break down these
18 damages in any way that it would hurt my client,
19 I will tell you no."

20 Q: The insurance policy is a contract?

21 A: Yes.

22 Q: Are you free to work out a deal with the other
23 party to that contract to avoid a harsh result to
24 one of those parties?

25 A: Absolutely.

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1 Q: And what is that agreement?

2 A: That agreement, that agreement in this case was
3 that neither one of us, neither Heritage or
4 Heritage Riverwalk, BuildStar, Heritage Magnolia
5 North, none of those entities, and Harleysville,
6 of course, none of those entities benefitted from
7 Harleysville being in the middle of the
8 underlying trials, and the, and the decision was
9 that those, all of those coverage issues involved
10 in those cases would be decided in a subsequent
11 action.

12 Q: Mr. Henry asked you, "Did you make a conscious
13 decision to not intervene?" To your
14 understanding of his question, what did he mean
15 by "conscious"?

16 A: Did we knowingly make that decision.

17 Q: Was it an intended act by you?

18 A: Yes.

19 Q: Thank you.

20 MR. HENRY: WE'VE AGREED, YOUR HONOR, THAT ALL
21 THIS WORK WAS DONE BY
22 SUBCONTRACTORS.

23 THE COURT: ANYTHING FURTHER FROM MR. WRIGHT?

24 MR. CALAMARI: NOTHING FROM THE PLAINTIFF, YOUR
25 HONOR.

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1 THE COURT: AND I BELIEVE, MS. EVANS, UNDER
2 Y'ALLS PRIOR AGREEMENT, YOU WOULD
3 RESERVE ANY QUESTIONS FOR MR.
4 WRIGHT, ANY FURTHER ACTION THAT
5 MIGHT BE NECESSARY.
6 MS. EVANS: YES, SIR, YOUR HONOR.
7 MR. HENRY: NOTHING FURTHER FROM THE DEFENDANTS,
8 YOUR HONOR.
9 THE COURT: THANK YOU VERY MUCH. YOU MAY STEP
10 DOWN. I'VE BEEN TOLD THAT,
11 PROBABLY, THE COURTHOUSE CLOSSES IN
12 THE 5:00 TIME FRAME, AND THOUGH, BY
13 HABIT, I OFTEN WORKED UNTIL 5:30 OR
14 SIX WHEN I WAS ACTIVELY ON THE
15 BENCH. I THINK I SHOULD NOT IMPOSE
16 ON ANYBODY TO DO THAT IN THIS CASE
17 UNLESS WE REALLY GET STRETCHED ON
18 TIME. HAVE WE GOT ANYTHING ELSE WE
19 CAN TAKE UP IN THE WAY OF WITNESS OR
20 ANYTHING ELSE WE NEED TO DO BETWEEN
21 NOW AND 5:00?
22 MR. CALAMARI: YOUR HONOR, I'D PREFER NOT TO. I
23 KIND OF HAD TODAY SLOTTED FOR MR.
24 WRIGHT, AND THERE ARE SOME ISSUES
25 THAT MR. HENRY AND I NEED TO DISCUSS

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1 TOMORROW MORNING.

2 THE COURT: WELL, THIS GIVES YOU THE OPPORTUNITY
3 TO DISCUSS SOME OF THOSE ISSUES THAT
4 WE HAD BROUGHT UP EARLIER IN THE
5 BEGINNING OF THE DAY. THANK YOU
6 VERY MUCH. WE'LL ADJOURN UNTIL 9:30
7 IN THE MORNING. WE'LL START AT
8 9:30.

9 *****OFF THE RECORD*****

10 (ON THE RECORD)

11 MR. HENRY: YOUR HONOR, WE THOUGHT THESE WERE IN
12 THE TRANSCRIPT, AND I DON'T BELIEVE
13 THEY ARE. SO WE'VE STIPULATED AS TO
14 THE JURY VERDICT FORMS.

15 THE COURT: OKAY. I HAVE, IN THE MATERIAL YOU
16 SENT ME, I HAVE JURY VERDICT FORMS
17 THAT HAVE BEEN SIGNED.

18 MR. HENRY: RIGHT. EXHIBIT 25 WILL BE THE
19 RIVERWALK AT ARROWHEAD COUNTRY CLUB,
20 CIVIL ACTION NUMBER 03-CP-26-7169,
21 VERDICT FORM.

22 EXHIBIT NUMBER 25

23 STIPULATED AND ADMISSIBLE BY ALL PARTIES

24 MR. HENRY: 26 WILL BE THE TONY L. POPE AND LYNN
25 S. POPE VERDICT FORM, 05-CP-26-3289.

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