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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

Case 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 SIX

C. Mitchell Brown  
William C. Wood, Jr.  
A. Mattison Bogan  
Miles E. Coleman  
Nelson Mullins Riley & Scarborough LLP  
Post Office Box 11070  
Columbia SC 29211  
(803) 799-2000

Robert C. Calamari  
NELSON MULLINS RILEY &  
SCARBOROUGH, LLP  
Post Office Box 3939  
Myrtle Beach, SC 29577-6412  
(843) 448-3500

Attorneys for Appellant/Respondent  
Harleysville Group Insurance, a  
Pennsylvania corporation

Laura Johnson Evans  
H. Michael Bowers  
Mary B. Ramsay  
SMITH MOORE LEATHERWOOD, LLP  
25 Calhoun Street, Suite 250  
Charleston, SC 29401  
(843) 300-6600

Karin McCarthy  
RIVKIN RADLER  
926 RXR Plaza  
Uniondale, NY 11556  
(516) 357-3000

Attorneys for Respondent National Surety  
Corp.

John P. Henry  
Philip C. Thompson  
THOMPSON & HENRY  
1300 Second Avenue, 3<sup>rd</sup> Floor  
Conway, SC 29528  
(843) 248-5741

Attorneys for Respondents/Appellants  
Magnolia North Horizontal Property  
Regime; Magnolia North Property Owners  
Assoc., Inc., a South Carolina  
corporation; Riverwalk at Arrowhead  
Country Club Horizontal Property  
Regime; and Riverwalk at Arrowhead  
Country Club Property Owners  
Association, Inc.

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

**CONSOLIDATED RECORD ON APPEAL**  
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Certificate of Counsel

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

HARLEYSVILLE GROUP INSURANCE, )  
A PENNSYLVANIA CORPORATION, )

Civil Action No. 2009-CP-26-11862

Plaintiff,

vs.

**MOTION FOR JUDGMENT AS A  
MATTER OF LAW AND FOR  
DIRECTED VERDICT**

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.

FILED  
HORRY COUNTY  
2012 SEP 12 PM 2:19  
MELANIE HUGGINS-WARD  
CLERK OF COURT

Plaintiff, Harleysville, herein makes and reiterates its Motion for Judgment as a Matter of Law and for Directed Verdict pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on all issues addressed in this trial in the pleadings, trial testimony, proposed Orders, pre-trial memoranda and other court submissions as set forth below:

This matter originated as a filed Circuit Court action. The matter was transferred to the Honorable John M. Milling as special referee with all rights of appeal preserved. The parties submitted pre-trial briefs with positions and requests for relief. The parties held three (3) days of hearings in which the testimony and requests for relief were made. The parties met and discussed the issues to be presented to Judge Milling for ruling. The parties, at the direction of

Judge Milling, submitted proposed orders as their demands for judgment. The Motion summarizes those positions set forth in the proposed orders seeking request for judgment. This Motion is against all defendants summarizes those positions set forth in the proposed orders seeking request for judgment. The proposed order is incorporated herein.

Harleysville Moves for the following relief:

1. Plaintiff Harleysville moves for judgment as a matter of law on the issue of the foreclosure of rights of the insureds. The insureds made no appearance in this matter and, therefore, their rights are foreclosed and forever ended. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that all rights of the insureds are foreclosed and forever ended.

2. Plaintiff Harleysville moves for judgment as a matter of law on the issue of the policies at issue. Harleysville filed a motion seeking a ruling that the final policy period of Harleysville ended on June 18, 2000. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the final policy period ended on June 18, 2000.

3. Plaintiff Harleysville moves for judgment as a matter of law on the issue of Occurrence. Specifically, Harleysville moves that this Honorable Court find that a construction defect cannot be an occurrence under the policy since it is not an accident in either the formation or application and that all damages stemming from faulty construction are not fortuitous in nature and the damages are reasonably expected when faulty workmanship is found. Harleysville ask this Honorable Court for an Order Granting Judgment as a matter of law that no occurrence has been shown and, therefore, no duty of indemnity exists.

4. Plaintiff Harleysville moves for judgment as a matter of law on the issue of allocation. Specifically, Harleysville moves that this Honorable Court allocate the actual damage verdict into categories of covered damages resulting from an occurrence, forming property damage, and occurring during the policy period. The underlying action resulted in a general damages verdict. As argued in the pleadings, pre-trial brief, at the testimony phase and in the proposed Orders, Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the damages be allocated into categories of (A) covered damages (those damage resulting from faulty workmanship) and (B) non-covered damages (those costs associated with repairing the defective workmanship).

5. Plaintiff Harleysville moves for judgment as a matter of law on the issue of property damage. Specifically, Harleysville moves that this Honorable Court find that no property damage has been show to fall within the policy period and therefore, there can be no recovery. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that no property damage has been shown and that no property damage has been shown within a policy period.

6. Plaintiff Harleysville moves for judgment as a matter of law on the issue of treating the three insured entities separately under each policy. Specifically, the three insured entities performed different tasks making the general insurance agreement requirements and exclusions applicable in different manners on a per policy basis. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the three insured entities and the accompanying policies to each, be treated separately and not one amalgamated entity.

7. Plaintiff Harleysville moves for judgment as a matter of law on the issue of exclusions. Specifically, as set forth in the pre-trial briefs, through testimony and in the proposed orders, Harleysville moves that this Honorable Court find that damages falling within the general insuring agreement are barred by the exclusions of (1) expected or intended; (2) your work exclusion; (3) your product exclusion; (4) impaired property exclusion; and (5) damage to property exclusion. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the exclusions bar recovery.

8. Plaintiff Harleysville moves for judgment as a matter of law on the issue of punitive damages. Specifically, Harleysville moves that this Honorable Court find that punitive damages are not a covered loss. The jury charge in the underlying action stated that the jury could only find punitive damages if the jury found supportive facts showing a conscious intent of wrongdoing and knowledge of wrongdoing during the act supporting the punitive damages. Since the jury necessarily found those facts, the punitive damages cannot satisfy the policy "occurrence" requirement. Likewise, even if the Court finds that the "occurrence" element is satisfied, said punitive damages are necessarily excluded by the "expected or intended" exclusion. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the punitive damages award be excluded from its duty of indemnity under the policy.

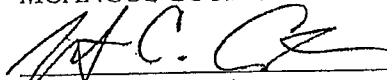
9. Plaintiff Harleysville moves for judgment as a matter of law on the issue of applying Time On Risk properly. Specifically, Harleysville moves that this Honorable Court find that Time On Risk is applicable to the damages in this matter; that Time On Risk should be applied on a per building basis; that Time On Risk should apply to any punitive damage award; and for a finding that no damages manifested themselves during

the policy period. Harleysville ask this Honorable Court for an Order Granting Judgment as a matter of law that Time On Risk be applied properly as stated herein.

Wherefore, Harleysville, in this Motion and in all previous submissions, pleadings, pretrial briefs, oral argument, oral motions, oral requests, post hearing discussion and in the proposed order requests judgment as set forth above.

We so Move.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Robert C. Calamari  
Post Office Box 1349  
Founders Centre, 2411 N. Oak St, Suite 401 (29577)  
Myrtle Beach, South Carolina 29578  
(843) 848-6000

ATTORNEYS FOR PLAINTIFF,  
HARLEYSVILLE INSURANCE GROUP

September 12, 2012

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

HARLEYSVILLE GROUP INSURANCE. )  
A PENNSYLVANIA CORPORATION, )

Civil Action No. 2009-CP-26-11862

Plaintiff,

vs.

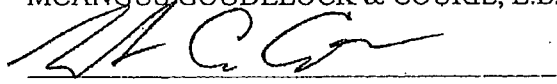
MEMORANDUM IN SUPPORT OF  
MOTION

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.

FILED  
HORRY COUNTY  
2012 SEP 12 PM 2:19  
MELANIE HUGHES-WARD  
CLERK OF COURT

MCANGUS, GOUDELOCK & COURIE, L.L.C.



Robert C. Calamari  
Post Office Box 1349  
Founders Centre, 2411 N. Oak St, Suite 401 (29577)  
Myrtle Beach, South Carolina 29578  
(843) 848-6000

ATTORNEYS FOR PLAINTIFF,  
HARLEYSVILLE INSURANCE GROUP

September 12, 2012

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF Horry )

IN THE COURT OF COMMON PLEAS

HARLEYSVILLE GROUP INSURANCE, )  
A PENNSYLVANIA CORPORATION, )

Civil Action No. 2009-CP-26-11862

Civil Action No. 2009-CP-26-10053

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 PROPERTY )  
OWNERS ASSOCIATION, INC., A )  
SOUTH CAROLINA CORPORATION, )  
AND NATIONAL SURETY CORP., )

HARLEYSVILLE'S  
PROPOSED ORDER

Defendants. )

HARLEYSVILLE 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. )

---

I. Introduction

This matter is before me as Special Referee appointed to issue a series of Declarations brought before the Court by the parties to this action. This matter involves insurance coverage issues relating to damages awarded to two (2) plaintiff property owners associations against developers and contractors in a construction defect litigation matter. Set forth below is an analysis of the claims before the Court as well as Declarations of the Rights and Obligations of the parties involved.

The plaintiff in these actions is Harleysville Insurance Group, a Pennsylvania Corporation ("Harleysville"). The defendants-insureds in this action are (1) Heritage Communities, Inc., A South Carolina Corporation ("Heritage"), (2) Heritage Magnolia North, Inc., A South Carolina Corporation ("Heritage Magnolia North"), (3) Heritage Riverwalk, Inc., A South Carolina Corporation ("Heritage Riverwalk") and (4) Buildstar Corporation, A South Carolina Corporation ("Buildstar"). The defendant-judgment holders in these actions are (1) Magnolia North Property Owners Association, Inc ("Magnolia North POA") and (2) Riverwalk at Arrowhead Country Club Property Owners Association ("Riverwalk POA"). The defendant-excess insurer in this action is National Surety Corp. ("National Surety").

The defendants-insureds have made no appearance in this action. There has been no responsive pleading or an appearance of any kind in this matter. The Court notes that

the parties duly notified the insured that the action was pending and of all court dates. Despite proper notice, no insured defendant appeared for any hearing or submitted any materials, written or otherwise, to the Court. The insured defendants were represented by counsel who was provided proper notice.

These lawsuits consist of the Complaints filed by Harleysville, Answers/Counterclaims filed by National Surety, an Answer/Counterclaim filed by Magnolia North POA and an Answer/Counterclaim filed by Riverwalk POA. A dispute has arisen between Harleysville and National Surety but those parties have agreed to preserve that issue for a proceeding outside of this matter.

## II. Record

The Official Record in this matter consists of (1) all documents in the underlying action including pleadings, discovery documents, depositions, expert reports, trial transcripts, court submissions and any other document used in the underlying action by the parties; and (2) documents specific to this action including the pleadings, pretrial briefs, trial exhibits, discovery documents, deposition transcripts and pictures admitted during the evidentiary phase. The Court excluded certain testimony and documents offered by Harleysville which was proffered and is part of the transcript for appellate purposes. A zip drive has been submitted containing the record.

## III. Factual Background

This declaratory judgment action addresses verdicts from two lawsuits styled *Riverwalk at Arrowhead Country Club Property Owners' Association, Inc. v. Heritage Communities, Inc., et al* (Case No. 2003-CP-267169)(Court of Common Pleas, Horry County, South Carolina) and *Tony L. Pope, et al. v. Heritage Communities, Inc., et al.*

(Case No. 2005-CP-26-2389) (Court of Common Pleas, Horry County, South Carolina) (together, the “Riverwalk Actions”) and *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Magnolia North and Buildstar Corporation* (C/A No. 2003-CP-26-3203) (the “Magnolia North Action”)<sup>1</sup> (collectively, the “Underlying Actions”).

### FACTUAL FINDINGS

The trial transcripts in the Underlying Actions were admitted and are found at TRIAL 00000001 through 00001848 (Riverwalk) and TRIAL 00005770 through 00007241 (Magnolia North). The facts adduced from the record of the Underlying Actions are set forth below and contain citations to the consecutively Bates-numbered trial record (“TRIAL”) provided to the Court with the parties’ proposed orders. A review of this evidence reveals the following:

#### THE RIVERWALK ACTION

1. Heritage Communities, Inc. (“Heritage”) was a general developer in Horry County, South Carolina and was in the business to develop, finance and sell condominiums. (TRIAL 00000925, ll. 13-16; 00001105-00001108).
2. Construction on the Riverwalk project (“Riverwalk”), began in June 1997 and was completed in December 1999. Riverwalk included 228 units in 19 buildings. (TRIAL 00005463; 00005477- 00005510).
3. Heritage was the overall developer of Riverwalk. Buildstar was the general contractor supervising all construction. Heritage Riverwalk was the Riverwalk-

---

<sup>1</sup> A companion class action lawsuit wherein homeowners sought to recover for loss of use during the repair of construction defects was filed. However, the class was decertified and is no longer a part of the *Magnolia North Action*.

specific development company. [TRIAL 0000929- 0000930; Pope v. Heritage Cmty., Inc., 717 S.E.2d 765, 768 (S.C. Ct. App. 2011)].

4. Heritage Riverwalk was created solely for the purpose of developing and selling the Riverwalk condominiums. (TRIAL 00001105-00001106).

5. Buildstar oversaw the subcontractors who performed the construction work for the Heritage projects. (TRIAL 00001106-00001108).

6. Heritage Riverwalk turned ownership of the common elements over to the Riverwalk POA in September 2002. (TRIAL 00000136-00000138; 00002316-00002318 and 00004733-00004735 (duplicative document)).

7. *Riverwalk at Arrowhead Country Club Property Owners' Association v. Heritage Communities, Inc. et al.*, C/A No. 2003-CP-26-7169 (the "Riverwalk POA Action"), was filed on December 5, 2003, by the Riverwalk POA, seeking to recover repair costs related to construction defects in the Riverwalk development. (TRIAL 00004928-00004939). Several amended complaints were filed thereafter. [TRIAL 00005001-00005017 (Second Amended); 00005071-00005083 (Third Amended); 00005191-00005204 (Fourth Amended)].

8. In addition to the *Riverwalk POA* Action, a putative class action, *Pope, et al. v. Heritage Communities, Inc. et al.*, C/A No. 2005-CP-26-3289 (the "*Pope Class Action*") was filed June 23, 2005, by unit owners Tony and Lynn Pope on behalf of similarly situated owners at Riverwalk seeking to recover damages for the "lost use" of the property during the time the units will be closed for repairs. (TRIAL 00005306-00005325). Several amended Complaints were filed thereafter. [TRIAL 00005326-00005346 (First Amended); 00005347-00005365 (Second Amended); 00005390-00005411 (Third Amended)].

9. The *Riverwalk POA* Action and the *Pope Class* Action (collectively “*Riverwalk* Actions”) were consolidated for trial by jury commencing on January 5, 2009. (TRIAL 00000001).

10. Plaintiffs in the *Riverwalk POA* Action sought to recover damages, based upon the following theories of liability: 1) negligence, 2) breach of express warranty, 3) breach of warranty of habitability, 4) breach of workmanlike service (against Buildstar, the general contractor defendant), and breach of fiduciary duty (against Heritage and. HR). Plaintiffs alleged that, under one or more of those theories, they were entitled to recover the cost of repairing various construction defects asserted numerous construction deficiencies which were violations of the standard building code, good construction practices and industry standards. (TRIAL 00005191-00005204).

11. The *Riverwalk POA* also asserted a derivative cause of action for breach of fiduciary duty alleging that the corporate defendants (collectively the “Heritage Entities”) willfully, wantonly and recklessly breached their fiduciary duty by turning over the common elements to the homeowners in a defective and deteriorated condition. (TRIAL 00005191-00005204).

12. In the *Pope Class* Action, the class (certified via an Order to Certify the Class, September 3, 2008) of plaintiffs sought to recover damages arising out of their loss of use of their condominiums, during the time of the required repairs. (TRIAL 00005390-00005411 ).

13. The *Riverwalk* Project had many construction defects amounting to code violations, violations of industry standards, and violations of good construction

practices which would require extensive repair and replacement of the defective systems. (TRIAL 00005461-00005769).

14. Plaintiffs' estimator, Al Best of PrimeSouth, estimated that it would cost \$8,511,425.00 in repair costs (TRIAL 00000973-00000974). This amount was in addition to the \$126,577.48 the Riverwalk POA had already paid to repair defects at the site. (TRIAL 00000427-00000439; 00002322-00002331).

15. Plaintiffs' expert estimated the economic damages arising out of the loss of the *Pope* Plaintiffs' use of their condominiums (for up to four months) while the construction defects were repaired, at \$928,215.00. (TRIAL 00001041).

#### Continuous Property Damage

16. Water intrusion causes damages occur at different rates, depending on the amount of exposure and severity of the construction deficiency. (TRIAL 00000650-00000651).

17. Plaintiffs' expert, Drew Brown, developed a scope of repair to fix the construction defects based upon his May 28, 2004 report. (TRIAL 00000701-00000717).

18. The scope of repair required at Riverwalk included removal and replacement of numerous components, such as the exterior brick veneer and siding, requiring destruction of undamaged portions of the buildings and surrounding landscaping. (TRIAL 00000715-00000717).

19. Some of the repair work to be done at Riverwalk involved removal of defective exterior components in areas where there was no damage to the building. (TRIAL 00012277; 00012297-00012300).

20. Drew Brown, the Riverwalk POA and putative class expert in the Underlying Action testified that it was not possible to determine separate costs to

repair defective work and costs to repair damaged work, nor did he attempt to do so at any time. (TRIAL 00012272-00012273; 00012277-00012278; 00012280-00012281; 00012304.

21. Drew Brown offered testimony to the jury in Riverwalk that damages had occurred prior to his visits, were occurring at the time of his visits and would continue to occur following his inspection. He used the words "hidden conditions" (p. 648), "damages occur at different rates" (p. 650), "decay process moves on out into time" (p. 651), "material is starting to deteriorate" (p. 662), "the damage we talked about will progress" (p. 663), "discoloration is starting to occur" (p. 676), "and keep in mind these buildings are very young . . . whether those damages have manifested themselves or not" (p. 733), "we don't see the end of that damage yet." (p. 750), "starting to discolor" (p. 756), and "no damage at this point in time" (p. 762).

22. Drew Brown testified regarding water stained wood: "Q: And in most of the locations did you see where water had stained the wood? A: I wouldn't say most. In more than one it was evident that water had come into contact with the wood." (p. 676-77).

23. Drew Brown further testified that during his inspection in 2003 he did not have anything in "structural distress." He said "Well, when we did our investigation in 2003 we even noted the bearing issue but really at that point in time I didn't see anything that was structurally in distress that would be a failure but since that time it has been reported that they had some stairs that actually fell and they had to replace." (p. 695). Later, he testified "and in my recent visits the softness in the middle of the decks is evident that water intrusion has occurred." (p. 749).

### Verdict and Appeal

24. At the end of the trial of the case, the trial judge directed a verdict for Respondents in both actions on their negligence claims. The Court held that the Heritage Entities were amalgamated in interest and jointly liable for purposes of any verdict. (TRIAL 00001640-00001641).

25. The Court instructed that punitive damages can only be awarded for willful, wanton and reckless conduct. (TRIAL 00001823-00001828).

26. The jury found against the defendants on the breach of fiduciary duties claims in the construction of the Riverwalk Condominiums and returned a verdict in the POA Action of \$4,250,000.00 actual damages and \$250,000.00 in punitive damages. (TRIAL 00013548-00013549). The trial judge granted a motion for set off, reducing the repair cost award to \$3,228,679. (Heritage, Heritage Riverwalk, and Buildstar's Post-Trial Motions, April 14, 2009).<sup>2</sup>

27. In the *Pope Class* Action, the jury returned a verdict of \$250,000.00 in actual damages and \$750,000.00 in punitive damages. (TRIAL 00013550-00013551).

28. On appeal, the South Carolina Court of Appeals affirmed the trial court's directed verdict in the POA action on negligence. *Pope v. Heritage Cmtys., Inc.*, 717 S.E.2d 765, 779 (S.C. Ct. App. 2011).

29. The jury's award of punitive damages was based upon a finding that the Riverwalk construction defects were caused by the amalgamated defendant entities' willful, wanton, and reckless conduct. *Pope*, 717 S.E.2d at 770.

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<sup>2</sup> The Heritage Entities have appealed the judgment in both the *Riverwalk* Action and the *Magnolia North*.

30. The *Riverwalk* appellate court upheld the punitive damage award based upon the factors outlined in *Gamble* stating:

As to Appellants' degree of culpability, the trial court found relevant Appellants' experts' admission of code and industry standard violations. The trial court also noted the relevancy of Appellants' admissions of selling defective condominiums. As to the factors of the duration of the conduct and Appellants' awareness, the trial court noted the sales of defective condominiums continued for several years, and Appellants admitted they were aware of the construction deficiencies. The trial court noted the admission of similar conduct in other developments in reviewing the factor of similar past conduct. The court also found the award reasonably related to the costs and losses the POA and the Class will incur as a result of the defective condominiums.

*Pope*, 717 S.E.2d at 782.

#### THE MAGNOLIA NORTH ACTION

31. Plaintiffs in the Magnolia North Action filed suit on May 28, 2003, entitled *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Magnolia North and Buildstar Corporation* (C/A No. 2003-CP-26-3203) (the "*Magnolia North Action*"), seeking to recover damages from the Heritage Entities relating to the cost of repair of construction defects at the *Magnolia Site*. (TRIAL 00011393-00011401). Several amended complaints were filed thereafter. [TRIAL 00011402-00011412 (First Amended); TRIAL 00011413-00011424 (Second Amended); TRIAL 00011425-00011437 (Third Amended); TRIAL 00011438-00011450 (Fourth Amended); (Fifth Amended Omitted); TRIAL 00011567-00011585 (Sixth Amended); TRIAL 00011609-00011623 (Seventh Amended); TRIAL 00011657-00011663 (Eighth Amended).

32. Plaintiffs Complaint alleged the following causes of action: 1) negligence (against all Heritage Entities), 2) breach of express warranty against Heritage 3) breach of

implied warranty of workmanlike service against Buildstar, and 4) breach of fiduciary duty against Heritage and Heritage Magnolia North ("HMN"). (TRIAL 00011657-00011663 ).

33. Experts testified that the Magnolia North Project exhibited faulty workmanship in violation of code, architect's specifications, and/or industry standards, and in need of repair, including: drainage, incorrectly installed controlled joints in the balcony ceilings, cracking drywall finish, water damage to ceilings caused by water intrusion from the decks and balconies, improperly installed and fastened handrails, improperly installed and sloped masonry, an uninstalled cavity wall system, improperly installed flashing, and corrosion at the window supports. (TRIAL 00006202-00006321; 00011845-00012223).

34. The *Magnolia North* Plaintiffs' damages resulted largely from defective construction and/or materials. Defective handrail attachments, defective trim product in areas not covered by walkways or overhangs, defective flashing, defects in the drywall, and defects in the common area parking lots and drives that the insured built all resulted in a need to replace the defectively installed components and repair any found damages. (TRIAL 00006202-00006321; 00011845-00012223).

#### Continuing Property Damage

35. Plaintiffs' expert, Drew Brown of R. Buric, included repair recommendations in his May 28, 2004 report based on his initial investigations. (TRIAL 00011845-00012223).

36. Plaintiffs' cost expert, Prime South, prepared initial cost estimates based investigation upon the May 28, 2004 Buric Report in June 2005. (TRIAL 00006344-00006345; 00008764-0008773).

37. Whether damage has occurred from continuous water intrusion, depends upon many factors, including the amount of water, the time of the exposure, and the orientation of the building to certain prevailing weather patterns. (TRIAL 00006466-00006471).

38. Damages from water intrusion will occur first in the areas that are most exposed and will be greatest in those areas “and the other areas will follow on.” (TRIAL 00006467).

39. Brown’s February 24, 2009 scope of repairs included the removal and replacement of the entirety of the defectively installed construction systems, including the brick veneer, windows and trim. (TRIAL 00009131-00009134).

40. Plaintiffs’ claimed that removal and replacement of the defective construction systems and undamaged portions of the buildings was necessary because the “defects will lead to high [moisture] readings in the future and damage and the same defects... will lead to damage into the future if not corrected.” (TRIAL 00006382)..

41. In charging the jury, the court instructed that Buildstar was the General Contractor for the Construction of the Magnolia North Condominiums, Heritage Magnolia North was the entity created to develop and sell the Magnolia North Condominiums and Heritage is the parent company to HMN and Buildstar. (TRIAL 00007213).

42. The court instructed that all three defendants should be treated as one for determining any liability. (TRIAL 00007213).

43. The court charged the jury that as a matter of law, the defendants were negligent and breached the implied warranty of workmanlike services in the construction of Magnolia North. (TRIAL 000007218; 000007230).

44. Based on the court's findings of liability, the court instructed the jury that they must award the plaintiffs damages proximately caused by the negligent construction. (TRIAL 000007218).

45. The court charged the jury that the general measure of actual damages to compensate plaintiffs for negligent construction is the cost to repair the units, past and future, including any other reasonably related costs incidental thereto proximately caused by the defendants' negligent construction. (TRIAL 000007221).

46. The court charged that the paramount purpose for awarding punitive damages is not to compensate the plaintiff, but to punish and set an example for others. "Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that Defendants action were willful, wanton, malicious, and in reckless disregard of the plaintiffs' rights or where defendants' actions were so grossly negligent as to imply a willfulness or wantonness. A conscious failure to exercise due care constitutes willfulness. It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the wrongdoer." (TRIAL 000007222-00007228).

47. The jury rendered a verdict against the defendants on the negligence, breach of warranty, and breach of fiduciary duty claims and awarded plaintiffs \$6,500,000.00 in actual damages and \$2,000,000.00 in punitive damages. The court granted defendants' post trial motion for set off based upon previous settlements with

sub-contractors, reducing the repair cost verdict to \$4,968,936.85, and denying all other motions, including a motion to set aside the punitive damages award. (TRIAL 00013552-00013553); Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation, Inc.'s Post-Trial Motions, May 29, 2009).<sup>3</sup>

48. In upholding the punitive damages award on post trial motions, the court found that the Underlying Defendants violated a legal duty to comply with the Southern Standard Building Code, that they were aware of the significant deficiencies at the complex and that they had repeatedly committed their injurious conduct in upholding the punitive damages award. In addition, the court found that there was also evidence of deceit inasmuch as underlying defendants knew of the substantial deficiencies in the units, yet continued to market them without any proactive program to inform potential purchasers that these substantial deficiencies existed. (Heritage Communities, Inc., Heritage Riverwalk, and Buildstar Corporation, Inc.'s Post-Trial Motions, April 14, 2009).

#### FACTS APPLICABLE TO BOTH RIVERWALK AND MAGNOLIA NORTH

##### Time on the Risk

49. It is impossible to determine what damages happened during each year since the Riverwalk and Magnolia North projects were constructed. (TRIAL 00013960; 00013986).

50. Property damage from water intrusion progresses over time and does not occur immediately upon the first water intrusion. (TRIAL 00013954; 00013958-00013961; 00013986).

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<sup>3</sup> The Heritage Entities have appealed the judgment and that appeal is still pending.

51. Repair costs for progressive property damage increase over time. (TRIAL 00013961).

#### IV. Policies

Heritage, Heritage Magnolia North, Heritage Riverwalk and Buildstar each purchased policies from Harleysville. Trial exhibits shows the policies and policy periods. Policies for each insured are discussed below.

Heritage was the overall developer for several projects. Heritage Magnolia North was the singular developer for the Magnolia North project. The entire project is the product or work of Heritage and Heritage Magnolia North. Heritage Riverwalk was the singular developer for the Riverwalk project. The entire project is the product or work of Heritage and Heritage Riverwalk.

In Crossmann v. Harleysville, 395 S.C. 40 (S.C. 2011) and Auto Owners v. Newman, 385 S.C. 187 (S.C. 2009) the Court addressed the issue of whether the entire project was viewed as a whole or in parts. The distinction was necessary because the claim was made in each that the entire project as a whole was the product or work of the insured. The Supreme Court determined that for a general contractor, who subcontracted the work, each building was a series of components. The same cannot be said for a developer.

The policies listed on the chart of policies entered into evidence issued to Heritage, Heritage Magnolia North and Heritage Riverwalk must be said to view each entire project as the single product or single work of the developer. As discussed below, the only damage triggering the duty of indemnity is damage, not to the work or product of the insured. Since the sole damage alleged in each action is wholly within the project,

there can be no recoverable damage under any policy issued to Heritage, Heritage Magnolia North or Heritage Riverwalk.

V. Purpose of the Declaratory Judgment Action

Harleysville filed this declaratory judgment action for the purpose of raising issues of insurance coverage and to ask the Court to determine its duty of indemnity. Harleysville provided a full defense to the insured in the underlying action. The duty of defense is not part of this lawsuit as it was provided. Harleysville defended these actions under a reservation of rights. The record shows that Harleysville kept in close contact with the insured throughout the handling of this matter.

The purpose of this action is as follows:

1. To determine if the facts and damages found in the underlying action meet the definition of "Occurrence" within the meaning of the policy.
2. If the definition of "Occurrence" has been met, to ask the Court to allocate the damages within the award between covered and non-covered losses.
3. To determine which portion, if any, of the damages in the underlying award meet the policy definition of "Property Damage."
4. If the definitions of "Occurrence" and "Property Damage" have been satisfied, to determine if any exclusions apply to void coverage.
5. To determine whether the punitive damages awarded in the

underlying action meet the definitions of “Occurrence”, “Property Damage” and, if so, are those punitive damages are excluded by the policy exclusions.

6. To conduct a Time-On-Risk analysis to determine what portion of the damages found by the Court to trigger the duty of indemnity fall within the coverage period of the policy.

Of particular note, this Court finds instructive the Newman and Crossmann decisions that stated that “it is not the purpose of *this* declaratory judgment action to relitigate the issue of damages.” Harleysville has made clear in its pleadings and at all times before this Court that it is not attempting to *relitigate the issue of damages*. It is, however, asking the Court to perform a function *for the first time* of allocating the damages between covered and non-covered losses. This Court will address this issue later in this Order.

#### VI. Insurance Relationship

An insurance policy is nothing more than a contract for the division of risk. Without insurance, an entity retains 100% of all risks. With insurance, certain specified risks are transferred. As to all claimants, the insurance company goals and the insured goals are the same – to defeat the claimant’s effort to recover against the insured.

From time to time, contract disputes arise regarding which risks and to what extent those risks are either kept by the insured or assigned to the insurance company. South Carolina has maintained consistently that no third party rights exist under an insurance policy relationship. Insurance is between the insured and insurer and is not in place for the benefit of the party seeking to recover against the insured.

All evidence submitted in this action showed that the insurance purchased from Harleysville by Heritage, Heritage Magnolia North, Heritage Riverwalk and Buildstar was for the purpose of protecting the insured against claims by third parties. The insurance was not for the purpose of protecting any rights of Magnolia North POA or Riverwalk POA. The sole evidence offered at trial on this issue was testimony from Harleysville. Magnolia North POA and Riverwalk POA never offered any witness testimony on this issue. The Court must find that this policy was solely in place to protect the insured and not for the purpose of providing any protection whatsoever to the third party claimants such as Magnolia North POA and Riverwalk POA.

Generally, a Commercial General Liability insurance policy ("GCL") provides insurance coverage for property damages that result from an occurrence taking place within the policy period. Each of those three elements (Occurrence, Property Damages, Policy Period) must be satisfied before any other analysis is necessary. Proof of these essential elements is always the burden of the insured. This burden never shifts to the insurance carrier. Once those essential elements are proven by the insured, then the Court must examine whether an exclusion applies to void coverage. Proof of avoidance by an exclusion is always the burden of the insurance company.

#### VII. Status of Insured

The insured was properly served with all pleadings and declined to make an appearance. The insured was represented by counsel and notified of all hearing dates. The insureds are not in business and have not transacted any business in approximately 10 years. Because the insureds are out of business, the judgment holders' only potential available relief is the policy proceeds which are disputed.

The judgment holders are Riverwalk POA, Tony Pope et. al. and Magnolia North POA. The insurance policies at issue each contain a provision mandating that a holder of a final judgment can pursue recovery of the judgment under the terms of policy up to the policy limits. The policy contains no third party rights but a judgment holder can step into the shoes of an insured in an effort to recover its judgment. The judgment holders herein have made claims to recover the money judgments under the policies. Harleysville and National Surety have agreed that the judgment holders are proper parties to seek the right of indemnity, subject to all policy conditions. See, Lee v. Gulf, 248 S.C. 296 (S.C. 1966).

Since the insureds, collectively, have declined to become part of this action and are no longer in business, any rights of the insureds are hereby foreclosed and ended by this Order. The real parties in interest to this action are the judgment holders, who are making claims to recover under the policies, and the insurance carriers.

#### VIII. Occurrence

An occurrence is defined by the policy as “an accident including continuous or repeated exposure to the same general harmful elements.” The South Carolina Supreme Court recently held that a construction defect producing property damage is an occurrence. Crossmann. Harleysville argued that the claims alleged in the underlying action do not meet the definition of occurrence because they are not accidental in nature as required by the definition of occurrence. Harleysville further argued that no damages occurred outside of the project and, pursuant to the occurrence definition in Crossman and Newman, there can be no occurrence for those damages. Our Supreme Court has waffled on this issue but has ultimately concluded that typical construction defects are

occurrences within the meaning of a standard CGL policy of insurance.

**IX. Property Damage**

**A. Definition**

Property damage is defined by the policy as “physical change to tangible property.” Magnolia North POA and Riverwalk POA presented evidence in the underlying actions that the buildings were damaged as a result of the defective workmanship of Buildstar. Crossmann mandates that upon the showing of property damage resulting from an occurrence, the duty of indemnity is triggered if damages are shown to occur during the policy period. Property damage does not include the cost or replacing defective work.

**B. Determination of Property Damage Amount**

Harleysville, as part of the purpose of this action, asked the Court to perform an analysis of the damages found in the underlying action to determine which portion, if any, triggers the duty of indemnity. The recent Crossmann decision mandates that only those damages relating to the repair cost for damaged portions of the buildings are potentially covered losses under the policy. Damages to repair defective work, shoddy workmanship, improper workmanship or to replace defective work not damaged, are not damages that are covered by the policy.

Harleysville offered testimony from a qualified expert general contractor who performed an analysis of the damages in Magnolia North and determined that of the 100% of repair cost damages awarded, 32.93% related to damaged portions of the building and the remainder related to the cost to correct the original construction work to make it code compliant. Harleysville offered testimony from a qualified expert general

contractor who performed an analysis of the damages in Riverwalk and determined that of the 100% of repair cost damages awarded, 17.82% related to damaged portions of the building and the remainder related to the cost to correct the original construction work to make it code compliant. No similar analysis was offered by any other party.

C. Evidentiary Issues

Originally, this Court sustained the objection by Magnolia North POA and Riverwalk POA to exclude any evidence that sought to analyze the verdicts to allocate into potentially covered and non-covered losses. Based on my review of the totality of the evidence, I now withdraw the sustaining of the objection and I admit into evidence the expert testimony offered by Harleysville as to the allocation of potentially covered versus non-covered damages.

D. A Party Can Only Be Prejudiced By An Action To Which It Was A Party.

In the trial of the underlying action, there was no effort by the trial court or parties to allocate damages. Harleysville and National Surety were not parties in the underlying action.

At the outset, it is a common principal of law, that an entity who is not a party to an action cannot be prejudiced by the result of that action. See, Robinson v. Harris, 389 S.C. 360 (S.C. 2010) (in which the court refused to apply res judicata citing the general rule that persons and entities are not bound by court rulings and proceedings to which they were not a party). A party must have the opportunity to participate in the action in which a ruling is held to be bound by the ruling. Every person or entity should be given its fair opportunity to be heard, cross examine witnesses and present evidence at the trial of issues that have a prejudicial effect upon it.

There are many examples of fairness in South Carolina law showing that before a judgment can affect the rights of a party, it must have an opportunity to present evidence. The South Carolina Declaratory Judgment Act (S.C. Code Ann. Section 15-53-10 et. seq.) mandates that a ruling only applies to parties in the action. The South Carolina Contribution Among Tortfeasors Act, Section 15-38-10 et. seq. allows for a post verdict breakdown of damages between tortfeasors. Contractual indemnity claims are often filed as separate lawsuits after the underlying action. The court in those matters determines which portion of the damages are recoverable under contractual indemnity provisions. See, Otis Elevator v. Hardin Construction, 316 S.C. 292 (S.C. 1994) (Otis Elevator was sued by the owner. Subsequent to the lawsuit, trial and settlement, Otis brought an indemnity action against Hardin. The court determined which portion of damages was recoverable under the contractual indemnity provision). The general principles of res judicata and collateral estoppel can only be used against a person or entity that was a party to the action where the ruling was held. See, Aaron v. Mahl, 381 S.C. 585 (S.C. 2009) (addressing the general principals of res judicata and collateral estoppel saying that res judicata bars subsequent actions by the same parties when the claims arise out of the same occurrence that was the subject of a prior action between those parties. Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action. Id.).

Only the principles of res judicata and collateral estoppel prevent a party from litigating an issue. In order to apply, those same parties must have had the fair opportunity to or actually litigated those issues in a prior action. In this matter, Harleysville was not a party and could not have litigated any of the coverage issues. It

cannot now be barred from litigating those issues, for the first time, in this action.

E. No Acceptable Method Exists To Allocate Damages In The Underlying Action

It is a practical impossibility for an insurance company to become so involved in the underlying action that it receives a fair opportunity to allocate damages for coverage issue purposes. The law at the time of the underlying trial was established by the first Supreme Court decision in Newman v. Auto Owners where the Court ruled that every dollar of construction defect damages triggered indemnity obligations under a standard commercial general liability policy. Essentially, there was no issue that any party could present at trial to allocate damages into seemingly unnecessary categories.

It has been argued by Magnolia North POA, and Riverwalk POA that Harleysville should have attempted to intervene into the underlying action. No evidence was presented of any carrier ever successfully intervening into a construction defect trial for the purpose of asking the court to allocate damages. On the contrary, Harleysville offered evidence of failed attempts. Harleysville further showed that it could not have asked to intervene for a purpose directly adverse to a then existing South Carolina Supreme Court ruling.

Problems exist when a carrier attempts to intervene. The act of intervention by the insurance carrier for a goal that is adverse to its insured is a dangerous proposition. This Court has been given no evidence of what Harleysville was supposed to do once it intervened. Argument was offered that it could have asked the trial court to allocate damages. There was no guidance offered. There was no indication of the effect on the current situation in this lawsuit if the court refused to allow Harleysville to participate or if the court otherwise failed to properly allocate.

Forcing an insurance carrier to intervene will necessarily result in an adversarial relationship between insured and insurer. In this matter, one example is found in the testimony of Jim Graham in the Riverwalk action. Mr. Graham was offered by plaintiff to show that he informed Buildstar that it was improperly installing Betterbilt windows. Obviously, Buildstar would argue that it installed the windows properly. Harleysville would have been forced to agree with Mr. Graham and further assert that Buildstar, its insured, thereafter intentionally installed all windows improperly.

Harleysville offered testimony that it would have needed to become a party to the underlying action and present the same expert testimony that it presented herein. I find that if it had presented testimony in the underlying action, numerous judicial rules would have been violated. The actions of Harleysville would have revealed the presence of liability insurance. The South Carolina Rules of Evidence bar evidence of liability insurance. Harleysville would have taken a position directly adverse to its insured. Harleysville would have necessarily argued to the jury that the acts of the insureds were intentional and improper. I cannot imagine a judicial rule mandating that an insurance carrier must intervene and take a position that potentially increases a judgment against its insured and then leave the insured without policy benefits. Overall, I find it impossible for an insurance carrier to intervene and meaningfully participate without seriously injuring the insured and violating numerous judicial rules.

The South Carolina Supreme Court has supported the above view and ruled that when the insurance carrier and insured have divergent interests, the proper place for resolution of those disputes is in a post trial action relating to coverage. See, Sims v. Nationwide, 247 S.C. 82 (1965); Cowan v. Insurance Co. of N. America, 22 Ill. App. 3d.

883 (1974) both ruling that if divergent interest exist and the issue is not litigated in the underlying action, it is appropriate for the carrier to raise the issue along with any new evidence in a subsequent action.

Other jurisdictions have encountered this problem and supported the method of resolving coverage issues in a separate and subsequent legal action.

**F. Other Jurisdictions Support a Post Trial Action to Allocate Damages.**

This Court finds opinions from other jurisdictions instructive on the method to allocate between covered and non-covered actions. In MedMarc v. Forest Healthcare, 359 Ark. 495, 199 S.W.3d 58 (2004) the court faced the issue of having a general verdict and the obligation to allocate damages into covered and non-covered categories. Implicit in its ruling that the lower court should perform an allocation was a fairness platform. In MedMarc, the court was faced with a jury verdict in the undivided amounts of \$350,000 for ordinary negligence, \$500,000 in damages for medical malpractice and \$5000 in damages for breach of contract. A dispute had arisen as to what portion of the verdict was covered and what portion was not covered. MedMarc brought an action seeking a declaration that no part of the verdict was covered or, in the alternative, that the court should allocate damages between losses covered and not covered under its policy.

The trial court in the coverage action ruled that twenty five percent (25%) of the verdict was covered. The appellate court ruled that the court must have a sufficient basis for allocating the verdict and remanded for an evidentiary finding to reveal the method and evidence used to allocate the jury's verdict. The court stated:

While the circuit court did not allocate the judgment in this case, it provided no basis for its apportioning to MedMarc twenty-five percent of the liability for the Thurmond judgment. We believe that providing the reasoning and basis for the particular allocation in the form of findings of

fact and conclusions of law is essential. (citations omitted). A proper allocation in this case, while perhaps difficult, is certainly not impossible. Indeed, other courts have said it can be done. (citing Duke v. Hoch) (citations omitted). Because we conclude that a proper allocation is necessary and because the circuit court provided no reason for allocating twenty-five percent of the liability to MedMarc, we reverse and remand the matter with directions for the circuit court to proceed with allocation in accordance with this opinion.

MedMarc, at 503.

In Duke v. Hoch, the appellate court reasoned that for practical purposes the best way to address allocation was to remand the issue to the trial court for an allocation of damages within the jury's verdict. In Duke, the court stated in a section titled "Remand" the court stated:

In the District Court, a threshold question is whether at the merits trial insurer's counsel, by some means not revealed in the present record, discharged his responsibility of notifying the insureds of their interest in the form of the verdict. If the insurer cannot show that it did, the court will face the issue of attempting retrospectively to allocate the damages awarded. In saying that Duke is relieved of his burden, we refer to the "risk of non-persuasion" IX Wigmore, *The Law of Evidence* Section 2485 (3<sup>rd</sup> ed.). Duke continues to have the burden of producing "a quantity of evidence fit . . . to form a reasonable basis for the judgment." *Id.* at Section 24587, at 279. The primary source of evidence will be, of course, the transcript of the merits trial, containing the evidence on which the jury based its verdict. The trial judge, as trier of fact, will be in the position of establishing as best he can the allocation which the jury would have made had it been tendered the opportunity to do so. If it is impossible for the court to make a meaningful allocation based on only the transcript, Duke should have the right to adduce additional evidence and Home to present evidence in rebuttal.

Duke, at 984.

Restor-A-Dent v. Certified Alloy, 725 F.2d 871 (2d Cir. 1984) addressed the impracticability of intervention by a carrier. Attempts to intervene for the limited purpose of requesting that the trial court have the jury specify the basis of any verdict in favor of the plaintiff by way of a special verdict or answers to interrogatories have generally been

unsuccessful. See Christopher Lyle McIlwain, *Clear as Mud: An Insurer's Rights and Duties Where Coverage Under a Liability Policy is Questionable*, 27 Cumb. L. Rev. 31 (1997). This is mainly because state supreme courts have held that liability insurers have no absolute right to intervene, and that the trial court has the virtually irreversible discretion to grant or deny intervention. *Id.*

In Restor-A-Dent, Unigard, the insurance carrier, was denied on its request to intervene. The court ruled that the critical inquiry regarding Unigard's right to intervene under *Rule 24(a)(2)* was whether Unigard had an "interest" relating to the property or transaction which was the subject matter of the action. Restor-A-Dent noted that the Supreme Court has found that the interest must be "significantly protectable." See Donaldson v. United States, 400 U.S. 517, 537 (1971). The Supreme Court has said that such an interest must be direct, as opposed to remote or contingent. See, e.g., Air Line Stewards and Stewardesses Ass'n v. American Airlines, Inc., 455 F.2d 101, 105 (7<sup>th</sup> Cir. 1972); In re Penn Central Commercial Paper Litigation, 62 F.R.D. 341, 346-47 (S.D.N.Y. 1974), *aff'd* without opinion, 515 F.2d 505 (2d Cir. 1975). The court found that the interest asserted by Unigard was dependant upon two contingencies, a jury verdict for Restor-A-Dent and a finding in a separate litigation between Unigard and Certified that Unigard was not responsible for indemnification of certain types of losses under the terms of the policy. *Id.* at 875.

In United States Fidelity & Guaranty Co. v. Adams, et al., 485 So. 2d 720, 1986 Ala. LEXIS 3453 (1986) the court held that intervention in the construction setting is improper. The court noted that, in the event a verdict, USF&G may determine its liability by subsequent litigation. *Id.* at 721.

In Connecticut, an insurance company sought permissive intervention. Hunter v.

Peters, 2001 Conn. Super. LEXIS 3761 (2001), Unreported Decision. The court denied the motion reasoning that allowing such intervention could create a potential conflict of interest for the attorney furnished by the insurance company. In denying the motion, the court opined that “[f]actual questions left unanswered in the pending action may have to be answered in a second action.” *Id.* at 3.

In Maine an Insurance company, defendant physician’s professional liability insurer, had undertaken his defense but also sought to participate as a party to protect its interest in establishing whether the basis for liability was covered by the physician’s policy. Donna v. Kalamaras, 485 A.2d 222 (Me. 1984). The appellate court affirmed the lower court’s denial of Medical Mutual Insurance Company’s motion to intervene. The court stated that an insurer can litigate coverage questions in a subsequent action, explaining that its reasoning in Marston<sup>4</sup> “cannot rationally be interpreted as meaning that a general verdict will preclude the insurer from later litigating its coverage questions.” *Id.* At 224. In rejecting Medical Mutual’s contrary interpretation of Marston, the court noted that “in the absence of special findings of fact, our decision may necessitate a second trial on the duty to indemnify.” *Id.*

In Florida, an insurance company sought to intervene. Emp. Ins. Of Wausau v. Lavender, et. al., 506 So.2d 1166, 12 Fla. L. Weekly 1240 (1987). In denying the insurer’s motion to intervene before the verdict, the court noted that the question of insurance coverage can be determined in a subsequent litigation. 506 So.2d at 1167, 12 Fla. L. Weekly at 1240.

In Indiana, an insurer petitioned to intervene. Allstate Ins. Co. v. Keltner, 842 N.E.2d 879 (Ind. Ct. App. 2006). In affirming the lower courts denial of the motion, the court

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<sup>4</sup> Marston v. Merchants Mutual Ins. Co., 319 A.2d 111 (Me. 1974) discussed an insurer’s duty to defend and held that, where an insurance company refused to defend it will be bound by the judgment in that action, as to issues which were or might have been litigated in that action, in a subsequent suit by the injured person for recourse to the policy.

disagreed with insurer's assumption that if there was a general verdict against its insured that did not distinguish between covered and uncovered damages, there would be no later opportunity to make that distinction. *Id.* at 883. The court explained that the insurer would be permitted to bring a subsequent action to raise its policy defense against paying the full amount of any general judgment against its insured. *Id.* At this later action the coverage issue "might be determined by examining the evidence and argument of counsel presented during the underlying trial or by the presentation of additional evidence." *Id.*

In Illinois, insurers sought to intervene in the action to obtain a declaratory judgment that the insurers had no obligation to indemnify insureds for any judgment entered against them. Davila v. Arlasky, 141 F.R.D. 68 (N.D. Ill. 1991). In denying the motion to intervene, the court explained that the insurers could not obtain a judgment on coverage until after the underlying dispute was settled. *Id.*

For the reasons stated above, and supported by the South Carolina Supreme Court in Sims, I find it impracticable and impermissible to intervene and further find that this declaratory judgment action is the best forum for analysis and resolution of the damage allocation issue.

G. Allocation of Damages

Harleysville presented expert testimony for the Magnolia North project showing a repair cost percentage breakdown of 32.93% of costs relating to repairing damaged portions of the building. The total actual damage award in this matter, after set off, is \$4,968,937 million dollars. Since only 32.93% of the damages relate to damaged portions of the building, the total potentially recoverable amount of damages under the insurance policies is \$1,636,271.

Harleysville presented expert testimony for the Riverwalk project showing a repair cost percentage breakdown of 17.82% of costs relating to repairing damaged portions of the building. The total actual damage award in this matter, after set off, is \$3,228,679 million dollars. Since only 17.82% of the damages relate to damaged portions of the building, the total potentially recoverable amount of damages under the insurance policies is \$575,351.

**X. Exclusions**

Harleysville asserted exclusions to defeat coverage. Because this Court has ruled that no property damages occur during policy periods and therefore, no duty of indemnity is triggered, this Court need not address the exclusions.

However, since the issue of exclusions was raised, in order to properly preserve those issues, the Court will address exclusions.

The Harleysville Policy contains the following exclusions, relevant to this action, which are incorporated into the NSC Policy:

a. Expected or Intended Injury,

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured.

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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.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage to Premises Rented to You as described in Section III – Limits of Insurance.

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.

[TRIAL 00012750-00012753).

Definitions

- 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.  
\* \* \*
- 16. "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:
    - (2) Work that has not yet been completed or abandoned. . . .
- 17. "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 . . . .
- 22. "Your work":
  - a. Means:
    - (1) Work or operations performed by you or on your behalf;
    - and
    - (2) Materials, parts or equipment furnished in connection with such work or operations.
  - b. Includes
    - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
    - (2) The providing of or failure to provide warnings or instructions.

(TRIAL 00013206; 00013231-00013234).

The insureds in this matter fall into three (3) categories. Heritage is a developer for the various projects. Heritage Riverwalk and Heritage Magnolia North are developers for the specific projects. Buildstar is the general contractor. Each is addressed below.

There is no evidence in the underlying transcripts to support a claim that Heritage,

Heritage Riverwalk or Heritage Magnolia North were involved in the construction phase. The sole entity involved in the construction phase was Buildstar, the general contractor.

A. Expected or Intended

The record is replete with the notion that Buildstar intended the work to be performed in the manner it was performed. Areas of defect were brought to the attention of Buildstar during construction. Buildstar, instead, chose to continue the current status of the construction methods. The Jim Graham deposition reveals that Buildstar was aware of the construction problems.

The punitive damages awarded in each action required a burden of proof that the insureds sold the condominium units with a conscious intention of wrongdoing. Since the jury awarded punitive damages against each insured on all claims, it cannot be said that the insured did not expect or intend the damage. On that basis, all damages are excluded and there is no duty of indemnity.

B. Your Work Exclusion

The policies issued to Buildstar contain a subcontractor exception excluding damage to "your work." The recent ruling in Newman concludes that the "your work" exclusion is inapplicable to general contractors such as Buildstar. Harleysville still took the position that the entire project is the work of the general contractor. There was no allegation or evidence of any damage occurring outside of the project. Despite Harleysville's position, this Court must follow the law as established by Newman and decline that the "your work" exclusion applies to Buildstar.

Heritage, Heritage Magnolia North and Heritage Riverwalk were entities formed as developers. There were no subcontractors of these insureds. The entire project was

their "work." All of the work on the project falls into the category of "your work" since it cannot be argued that the entire project was not the "work" of Heritage, Heritage Magnolia North and Heritage Riverwalk. As such, the "your work" exclusion results in no duty of indemnity being triggered for any policy issued to Heritage, Heritage Magnolia North and Heritage Riverwalk.

C. Your Product Exclusion

The recent ruling in Newman concluded that the "your product" exclusion is inapplicable to general contractors such as Buildstar. Harleysville still took the position that the entire project is the product of the general contractor. There was no allegation or evidence of any damage occurring outside of the project. Despite Harleysville's position, this Court must follow the law as established by Newman and decline that the "your work" exclusion applies to Buildstar.

Heritage, Heritage Magnolia North and Heritage Riverwalk were entities formed as developers. All of the work on the project falls into the category of "your product" since it cannot be argued that the entire project was not the "product" of Heritage, Heritage Magnolia North and Heritage Riverwalk. As such, the "your product" exclusion results in no duty of indemnity being triggered for any policy issued to Heritage, Heritage Magnolia North and Heritage Riverwalk.

D. Impaired Property Exclusion

The policies involved in this matter each contained an "impaired property" exclusion. The evidence in the underlying action reveals that problems existed with the project at the time of sale. Building codes and industry standard practices were not followed. The result is that any damage alleged was to a product that was already

damaged or “impaired.” The “impaired property” exclusion acts to defeat any duty of indemnity on any policy.

**E. Damage to Property**

The policies involved in this matter each contained a “damage to property” exclusion. Pursuant to this exclusion any property owned, rented or occupied. At the time of all damage taking place during any policy period, if any, the common elements continued to be owned by Heritage, Heritage Magnolia North and Heritage Riverwalk. (See, Factual Background). It was not until well after the final policy period that the ownership of the common elements was transferred to the individual property owner’s associations. Since the property experiencing damage during the policy period was owned by the insureds, there can be no indemnity triggered under the policy for any damage occurring during a policy period.

**XI. Punitive Damage Issue**

The parties seek a declaration as to whether the punitive damage award in each case is covered.

**A. Jury Instructions**

As is noted above, in the Riverwalk POA and Pope consolidated trials, the trial court instructed that punitive damages could only be awarded for willful, wanton and reckless conduct or where a defendant’s actions “were so grossly negligent as to imply a willfulness or wantonness”. (TRIAL 00001824). Specifically, the trial court charged the jury that punitive damages were “imposed as punishment” and were “not intended to compensate”. (TRIAL 00001823-00001824). The court further charged that punitive damages were awarded to punish a “defendant’s recklessness, willfulness, wantonness, or

malicious conduct". (TRIAL 00001823). The trial court clearly instructed the jury that, in order to recover punitive damages, a plaintiff must prove acts beyond mere negligence. (TRIAL 00001825). With that charge given, the jury returned a verdict for the POA which included \$250,000.00 in punitive damages. (TRIAL 00013548-00013549). In the Pope Class Action, the jury returned a verdict which included \$750,000.00 in punitive damages. (TRIAL 00013550-00013551). As noted by the South Carolina Court of Appeals in its opinion affirming the verdicts, the jury's award of punitive damages was based upon a finding that the Riverwalk construction defects were caused by the amalgamated defendant entities' willful, wanton, and reckless conduct. Pope, 717 S.E.2d at 770. In performing its analysis of the punitive damage awards under Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), the Court of Appeals relied upon the defendants' experts' admissions of code and industry standard violations, defendants' admissions regarding the continued sale of defective units with knowledge of the units' defects, and evidence of similar conduct in other developments. Pope, 717 S.E.2d at 782.

In the Magnolia North Action, the trial court likewise charged the jury that the paramount purpose for awarding punitive damages is not to compensate the plaintiff, but to punish and set an example for others. As the trial court instructed

[p]unitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that Defendants action were willful, wanton, malicious, and in reckless disregard of the plaintiffs' rights or where defendants' actions were so grossly negligent as to imply a willfulness or wantonness. A conscious failure to exercise due care constitutes willfulness. It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the wrongdoer.

(TRIAL 000007222-00007228). With that charge given, the jury rendered a verdict which included \$2,000,000.00 in punitive damages. (TRIAL 00013552-00013553).

**B. Post Trial Review of Punitive Damages**

In upholding the punitive damages award on post trial motions, the trial court found that the defendants violated a legal duty to comply with the Southern Standard Building Code, that they were aware of the significant deficiencies at the complex and that they had repeatedly committed their injurious conduct. In addition, the court found that there was evidence of deceit inasmuch as underlying defendants knew of the substantial deficiencies in the units, yet continued to market and sell them without any proactive program to inform potential purchasers that these substantial deficiencies existed. (Heritage Communities, Inc., Heritage Riverwalk, and Buildstar Corporation, Inc.'s Post-Trial Motions, April 14, 2009).

**C. Appellate Court Review**

In affirming the verdict, the South Carolina Court of Appeals found that the trial court properly applied Gamble and Mitchell v. Fortis Insurance Co., 385 S.C. 570, 584-89, 686 S.E.2d 176, 183-86 (2009), in reviewing the jury's award of punitive damages.<sup>5</sup> Magnolia North Prop. Owners' Assoc., Inc. v. Heritage Communities, Inc., et al., Slip Opinion No. 4943 (Feb. 15, 2012).

**D. Policy Application Shows that the Punitive Damages Awards in these Actions are Not Covered Losses**

For the reasons set forth below, I find that no part of the punitive damages awards described above meets the definition of "bodily injury" or "property damage" as defined

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<sup>5</sup> The *Mitchell* "guideposts" include the "reprehensibility" of defendant's conduct. 385 S.C. at 584-89, 686 S.E.2d at 183-86. The *Gamble* factors are: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) existence of similar past conduct; (5) likelihood of deterring the defendant or others from similar conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. 305 S.C. at 111-12, 406 S.E.2d at 354.

in the various Harleysville policies and/or any policies which follow form.<sup>6</sup> Even if the punitive damage awards constituted “bodily injury” or “property damage”, the acts underlying the damages awards cannot be defined as an “occurrence” under the applicable policies. Finally, even if an “occurrence” existed which resulted in “bodily injury” or “property damage”, the “expected or intended” exclusion acts to void any potential duty of indemnity.

1. No Bodily Injury or Property Damage

Punitive damages are not “bodily injury” or “property damage” under the policies. (TRIAL 00012750). A “bodily injury” is defined as “injury, sickness or disease sustained by a person, including death resulting from any of these at any time. (TRIAL 00012758). “Property damage” is defined by the policies as “physical injury to tangible property, including all resulting loss of use of that property” and/or “loss of use of tangible property that is not physically injured.” (TRIAL 00012761). This Court must interpret these definitions as they are “understood in their plain, ordinary, and popular sense.” B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 514 S.E.2d 327, 330 (S.C. 1999).

In Riverwalk and Pope, the trial court charged the jury that punitive damages were “imposed as punishment” and were “*not intended to compensate*”. (TRIAL 00001823-00001824). Likewise, in Magnolia North, the trial court charged the jury that the paramount purpose for awarding punitive damages *is not to compensate the plaintiff*, but to punish and set an example for others. (TRIAL 000007222-00007228). To hold

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<sup>6</sup> It is only after “property damage” has been alleged that the question of “occurrence” is reached. Crossman II, 395 S.C. 40; 717 S.E.2d 589; 2011 S.C. LEXIS 277, \*12.

that damages awarded as “punishment” and not as “compensation” for “bodily injury” or “property damage” would be torturing the language of the policies. S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, 390 S.C. 125, 700 S.E.2d 258, 261 (S.C. Ct. App. 2010)

2. No Occurrence

Even if covered “property damage” or “bodily injury” existed, the acts underlying the punitive damage awards do not constitute an “occurrence” under the Harleysville policies and/or the policies which follow form. Under the Harleysville policies, “occurrence” is defined as an “accident, including continuous or repeated exposure to substantially the same harmful conditions.” (TRIAL 00012761). It is important to note that the analysis of whether an “occurrence” exists for the purposes of punitive damages should be distinct from the analysis of whether an “occurrence” exists for negligence damages due to “continuous or repeated exposure to substantially the same general harmful conditions” as defined in *Crossman II*. Therefore, the court must consider whether the acts underlying the punitive damages verdict were an “accident”.

Under South Carolina law, in the absence of a prescribed policy definition, an “accident” is defined as an “unexpected happening or event, which occurs by change and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt.” Green v. Ins. Co. of America, 254 S.C. 202 (S.C. 1970). “An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen [circumstance exists or] happening occurs which produces or brings about” the injury. Manufacturers and Merchants Mut. Ins. Co. v. Harvey, et al., 330 S.C. 152, 498 S.E.2d 222 (S.C. App. 1998) (citing Vermont Mutual Insurance Company v. Malcolm, 128 N.H. 521, 523-24, 517 A.2d 800, 802 (1986)).

The transcript testimony in the Riverwalk, Pope, and Magnolia North cases clearly demonstrate that the jury believed either: (1) the underlying defendants acted in a willful, wanton, and malicious manner, with reckless disregard of the plaintiffs' rights and/or (2) the underlying defendants' actions were so grossly negligent as to imply a willfulness or wantonness. The above-cited jury instructions on punitive damages demonstrate that the evidence necessary to support punitive damages is intentional conduct. The juries came back with punitive damages verdicts, which were upheld on appeal. For purposes of its analysis, this Court is required to conclude that the juries followed the instructions given to them. Intentional conduct is not an "unexpected happening or event". In fact, the juries based their punitive awards, in part, based on the underlying defendants' admitted violation of code and industry standards, continued sale of defective units with knowledge of the units' defects, and evidence of similar conduct in other developments. These acts cannot be deemed "unexpected". By awarding punitive damages, the jury was, in effect, ruling by clear and convincing evidence that the conduct of the insured was not accidental.

3. Excluded by Expected or Intended Exclusion

Finally, even if an "occurrence" existed which resulted in "bodily injury" or "property damage", the "expected or intended act" exclusion bars coverage. The Harleysville policies specifically exclude from coverage "bodily injury" or "property damage" which is "expected or intended from the standpoint of the insured." (TRIAL 00012750). Although the South Carolina appellate courts have not interpreted the "expected and intended" exclusion in the context of commercial general liability policies, it is valid public policy that contracts of insurance should not be construed to indemnify

an insured for damages resulting from its own intentional misconduct. See, Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1187 (7th Cir.), *cert. denied*, 449 U.S. 1033, 66 L. Ed. 2d 495, 101 S. Ct. 608 (1980). To allow coverage for intentional or willful acts is a license for an insured to commit harmful, wanton, or malicious acts.

Based upon the evidence in the underlying transcripts, the charges to the jury, and the verdicts rendered, the acts upon which the punitive damage awards were based were clearly intentional. As well, because the evidence in the cases showed that the defendants were aware of the same or substantially recurring defects and subsequent damages at various projects prior to the full development of the Riverwalk and Magnolia North projects, for defendants to continue constructing the buildings in the same manner, while knowing it was incorrect, and continuing to sell the units with the knowledge that they were defective, the defendants surely understood the damages that might occur from their intentional acts.

For the above reasons, no part of any punitive damage award in these actions triggers the duty of indemnity under any relevant policy.

## XII. Time-On-Risk Analysis

### A. Standard Application

The South Carolina Supreme Court adopted the time on risk method for allocation of damages in the Crossmann opinion. It is this Court's duty to determine what portions of the damages fall within policy periods and which portions of the damages fall outside of the damages periods.

Crossmann addressed time-on-risk and established the calculation rules. It addressed concerns and stated as follows:

An ideal application of the “time-on-risk” approach would require the finder of fact to determine precisely how much of the injury-in-fact occurred during each policy period and precisely what quantum of the damage award in the underlying suit was attributable to *that* injury. Unfortunately, it often “both scientifically and administratively impossible” to make such determinations. (citations omitted)

In cases where it is impossible to know the exact measure of damages attributable to the injury that triggered each policy, courts have looked to the total loss incurred as a result of all of the property damage and then devised a formula to divide that loss in a manner that reasonably approximates the loss attributable to each policy period. The basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.

Crossmann at 15.

Crossmann provided that this Court has discretion to view evidence that might suggest when the damages occur and to apportion those damages into certain time periods. The damages in these matters are typical progressive construction defect damages that naturally flow from continuous water intrusion. Damages form over a long period of time. The expert testimony offered by each plaintiff in the underlying action supports a long and progressive damage period flowing from shortly after the certificate of occupancy was issued through the verdict date. Since the jury was informed that damages were continuing, the end date should be the verdict date. There was no effort in the underlying action to signify the precise date when damages began to occur or when they stopped occurring. To the contrary, my view of the evidence suggests that damages began at some undisclosed point in time after construction and are continuing today. The POAs’ best evidence offered in the declaratory judgment trial indicated that damages *likely* began at the first *significant* rain event following the issuance of the certificates of occupancy. No specific evidence was offered as to which part of the alleged damages

began at that time. Testimony in the underlying trial indicated that property damages first manifested in 2003-2004 when the expert hired by each POA inspected and documented the property damage. The damage, according to the same expert, continued through the date of trial. Plaintiff's expert testified that damages are progressive and that the condition of the buildings would worsen over time and that significant structural damages had manifested themselves between his visits in 2003 and the time of trial. (See, Factual Background in this Order).

This Court needs to choose a start date and an end date for the time on risk calculation. Opinion evidence was offered showing that no damage manifested itself as of the date of the certificates of occupancy. In fact, had evidence suggested the manifestation of damages at certificate of occupancy, much of the claims brought by Magnolia North POA and Riverwalk POA would have been barred by the statute of limitations. It is counterintuitive for Magnolia North POA or Riverwalk POA to claim in the underlying trials that they did not know of damages until well into 2000 in order to meet the statutory limitations requirement when the Complaint was filed in late 2003 and, in contrast, to now claim that damages manifested themselves in 1998 and 1999 shortly after the first certificates of occupancy in December of 1998. A party cannot have it both ways.

Crossmann provided for a default method of calculating time on risk periods. The court used a stipulated 30 days following the certificate of occupancy and settlement date. Using those dates allowed the Court to set forth a fair and reasonable period for allocation of damages.

The attached chart shows the time on risk analysis taking into consideration the

recoverable damages, applicable policy periods, progressive period in which damages accrued and total damages recoverable under the policy. The total repair cost property damage figure recoverable in the Magnolia North action is \$220,102.60. The total repair cost property damage figure recoverable in the Riverwalk action is \$101,784.21.

**B. Alternatives to Standard Damage Period**

Crossmann, as set forth above, utilized a damage period of the respective certificates of occupancy plus 30 days and the date of the settlement. The Crossmann court defined this as the “default method” for calculating time-on-risk.

In this action, an alternative method to the standard method results in zero covered damages. If the verdict date is not used, the court can consider using other dates. However, out of judicial fairness, if the Court is using a date sooner than the verdict date, it must necessarily use a starting date later than the certificate of occupancy date. The start date under such a scenario is likely after the expiration of the final policy period.

Testimony was offered at trial by expert witnesses. Harleysville offered expert testimony indicating that damages typically do not manifest themselves to the point necessitating repair until several years after the building has been in existence. Contrarily, the judgment holders’ expert offered opinion testimony that damages begin immediately. The technical evidence submitted in the underlying trial and made part of this record supports Harleysville’s position. Pictures were offered of conditions taken in 2003 and 2004 showing areas where damages had not yet occurred. The evidence offered by each POA in the underlying actions, however, was that damages had increased over time. Evidence was further offered that damages had worsened. Drew Brown indicated that much of the damage was to come in the future. (See, Factual Background

herein and trial testimony of Drew Brown).

If I were to significantly shorten the damage period by moving up the "end" date of the damages, I would also be compelled to choose a later "start" date for the damage period. Since the insurance ceased to provide any policy period beyond August of 2000, there would be no damages occurring in any policy period.

### XIII. Loss of Use

Loss of use was only awarded in the Riverwalk action. The policies at issue address damages awarded for loss of use. Obviously, the loss of use claims have not yet occurred, even at the time of this Order, since the evidence offered to support loss of use in the underlying action related to the time when the repairs are being performed and the unit owners are required to vacate the premises. Evidence in this action suggested that repairs have not yet begun and no unit owner has vacated the building. Evidence was offered for the cost of alternate housing to support the claim. The jury awarded actual damages of \$250,000 and punitive damages of \$750,000. Loss of use was not presented in the Magnolia North action.

The policy provides for loss of use damages in "property damage" which is defined as: "(a.) Physical injury to tangible property, including all resulting loss of use of that property; or (b.) Loss of use of tangible property that is not physically injured." The policy further explains that "Property damage that is loss of use of tangible property that is not physically injured will be deemed to occur at the time of the occurrence that caused it."

No testimony was offered supporting any claim pursuant to section (a). The sole claim for loss of use is found under section (b). The Court must, pursuant to section (b)

determine the date of the occurrence to the property that caused the loss of use.

Crossmann made clear that no occurrence exists until property damage is shown. The property damage necessitating the unit owners to vacate their units has not occurred as of the date of this Order. To the contrary, all testimony indicates that no unit owner has yet to vacate his or her unit. Until property damage is sufficient to necessitate moving out of the units, there is no loss of use. There can be no loss of use deemed to occur during the policy period.

If this Court were to determine that the occurrence happened at an earlier event, it would need to analyze the record to make such a determination. The insured and judgment holder offered no evidence sufficient to make such a determination. The Court could follow an analysis similar to the time-on-risk analysis. As discussed above and with the Crossmann decision, damages in a construction project are progressive in nature. The evidence presented in the underlying action was that much of the damage to the buildings is hidden. Even as of 2010, Baiden's testimony showed that no more than 17.82% of the repair costs are related to property damage. Since the damages are progressive, it is difficult to believe that the loss of use is caused by *assumed* damages that are minimal at best occurring prior to 2001. The property damage necessitating the repair resulting in causing unit owners to vacate, did not occur until well after the last potential policy expired. While the Court could conduct the same time-on-risk analysis, it is clear that the property damage necessitating the loss of use did not occur during any policy period.

No part of the loss of use or the occurrence causing the loss of use, took place during the policy periods and therefore, there is no duty of indemnity for the loss of use

verdict in the Riverwalk action.

**XIV. Effect of Appellate Decision on Underlying Action**

The underlying action (Magnolia North POA v. Heritage, Buildstar and Heritage Magnolia North & Pope et. al. v Heritage, Buildstar and Heritage Magnolia North) are currently on appeal. In the event that the appellate court remands for a new trial or any other issue affecting damages, this Order will either be declared null and void or modified as necessary. Following the final ruling on the appeal, if necessary, either party is granted leave by this Order to petition this Court for a modification of this Order.

**XV. Court Order and Declarations**

Based on the foregoing, I hereby ORDER the following declarations:

1. The judgment holders are the real parties in interest to assert the claims to satisfy their respective judgments. The insureds declined to participate and all rights of the insureds are foreclosed.
2. The construction defects allege in the underlying actions are occurrences.
3. The verdicts in the underlying action consist of damages relating to repairing defective workmanship and repairing damaged portions of the buildings.
4. In Magnolia North, the total actual damage award, after set-off, of \$4,968,937 dollars consists of \$1,636,271 dollars relating to repairing damaged portions of the building.
5. The total damage award meeting the policy definition of property damage in the Magnolia North action is \$1,636,271 dollars.
6. The verdict in the Magnolia North action awarded punitive damages in the

amount of \$2 million dollars. Those damages, based on the evidence and jury instruction, necessarily were awarded for willful actions of the insured and therefore are not accidents under the definition of occurrence. Said punitive damages would also be excluded pursuant to the Expected or Intended exclusion.

7. The time-on-risk calculation, because there is no credible evidence to show when damages began or ended, utilizes a damages period beginning at the certificate of occupancy and ending at the date of the verdict.
8. The policies issued to Heritage and Heritage Magnolia North are not triggered because no damage is alleged in this action or the underlying action to have occurred outside of the Magnolia North project. The Magnolia North project is the entire product or work of the developers, Heritage and Heritage Magnolia North.
9. The policies issued to Buildstar are triggered.
10. The time-on-risk calculation in Magnolia North reveals, absent the application of exclusions or a finding that damages did not occur inside of an policy period, that Harleysville owes \$220,102.60 to Magnolia North POA.
11. The time-on-risk calculation in Riverwalk reveals, absent the application of exclusions or a finding that damages did not occur inside of a policy period, that Harleysville owes \$101,784.21.
12. No part of the loss of use verdict in the Riverwalk action triggers indemnity because the Court finds that no physical damage necessitating

the loss of use occurred during any policy period.

13. In Riverwalk, the total actual damage award, after set-off, of \$3,228,679 dollars consists of \$575,351 dollars relating to repairing damaged portions of the building.
14. The total damage award meeting the policy definition of property damage in the Riverwalk action is \$575,351 dollars.
15. The verdict in the Riverwalk action awarded punitive damages in the amount of \$250,000 for the repair cost estimate and \$750,000 for the loss of use claim. Those damages, based on the evidence and jury instruction, necessarily were awarded for willful actions of the insured and therefore are not accidents under the definition of occurrence. Said punitive damages would also be excluded pursuant to the Expected or Intended exclusion.
16. The time-on-risk calculation, because there is no credible evidence to show when damages began or ended, utilizes a damages period beginning at the certificate of occupancy and ending at the date of the verdict.
17. The policies issued to Heritage and Heritage Riverwalk are not triggered because no damage is alleged in this action or the underlying action to have occurred outside of the Riverwalk project. The Riverwalk project is the entire product or work of the developers, Heritage and Heritage Riverwalk.
18. The policies issued to Buildstar are triggered.
19. The time-on-risk calculation in Riverwalk reveals, absent the application

of exclusions or a finding that damages did not occur inside of a policy period, that Harleysville owes \$101,784.21.

20. No part of the loss of use verdict in the Riverwalk action triggers indemnity because the Court finds that no physical damage necessitating the loss of use occurred during any policy period.
21. In the event that the appeal of the underlying action involves changes to the judgments, any party to this action is granted leave to petition this Court for voidance or modifications to this Order.

It is So Ordered.

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John M. Milling  
Special Referee

April \_\_\_\_, 2012

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. )

MOTION FOR JUDGMENT AS A )  
MATTER OF LAW AND FOR )  
DIRECTED VERDICT )

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  
HURRY COUNTY  
2012 SEP 12 PM 2:17  
MELANIE HUGGINS-WARD  
CLERK OF COURT

Plaintiff, Harleysville, herein makes and reiterates its Motion for Judgment as a Matter of Law and for Directed Verdict pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on all issues addressed in this trial in the pleadings, trial testimony, proposed Orders, pre-trial memoranda and other court submissions as set forth below:

This matter originated as a filed Circuit Court action. The matter was transferred to the Honorable John M. Milling as special referee with all rights of appeal preserved. The

parties submitted pre-trial briefs with positions and requests for relief. The parties held three (3) days of hearings in which the testimony and requests for relief were made. The parties met and discussed the issues to be presented to Judge Milling for ruling. The parties, at the direction of Judge Milling, submitted proposed orders as their demands for judgment. This Motion is against all defendants summarizes those positions set forth in the proposed orders seeking request for judgment. The proposed order is incorporated herein.

Harleysville Moves against all defendants for the following relief:

1. Plaintiff Harleysville moves for judgment as a matter of law on the issue of the foreclosure of rights of the insureds. The insureds made no appearance in this matter and, therefore, their rights are foreclosed and forever ended. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that all rights of the insureds are foreclosed and forever ended.

2. Plaintiff Harleysville moves for judgment as a matter of law on the issue of the policies at issue. Harleysville filed a motion seeking a ruling that the final policy period of Harleysville ended on June 18, 2000. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the final policy period ended on June 18, 2000.

3. Plaintiff Harleysville moves for judgment as a matter of law on the issue of Occurrence. Specifically, Harleysville moves that this Honorable Court find that a construction defect cannot be an occurrence under the policy since it is not an accident in either the formation or application and that all damages stemming from faulty construction are not fortuitous in nature and the damages are reasonably expected when faulty workmanship is found. Harleysville ask this Honorable Court for an Order

Granting Judgment as a matter of law that no occurrence has been shown and, therefore, no duty of indemnity exists.

4. Plaintiff Harleysville moves for judgment as a matter of law on the issue of allocation. Specifically, Harleysville moves that this Honorable Court allocate the actual damage verdict into categories of covered damages resulting from an occurrence, forming property damage, and occurring during the policy period. The underlying action resulted in a general damages verdict. As argued in the pleadings, pre-trial brief, at the testimony phase and in the proposed Orders, Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the damages be allocated into categories of (A) covered damages (those damage resulting from faulty workmanship) and (B) non-covered damages (those costs associated with repairing the defective workmanship).

5. Plaintiff Harleysville moves for judgment as a matter of law on the issue of property damage. Specifically, Harleysville moves that this Honorable Court find that no property damage has been show to fall within the policy period and therefore, there can be no recovery. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that no property damage has been shown and that no property damage has been shown within a policy period.

6. Plaintiff Harleysville moves for judgment as a matter of law on the issue of treating the three insured entities separately under each policy. Specifically, the three insured entities performed different tasks making the general insurance agreement requirements and exclusions applicable in different manners on a per policy basis. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of

law that the three insured entities and the accompanying policies to each, be treated separately and not one amalgamated entity.

7. Plaintiff Harleysville moves for judgment as a matter of law on the issue of exclusions. Specifically, as set forth in the pre-trial briefs, through testimony and in the proposed orders, Harleysville moves that this Honorable Court find that damages falling within the general insuring agreement are barred by the exclusions of (1) expected or intended; (2) your work exclusion; (3) your product exclusion; (4) impaired property exclusion; and (5) damage to property exclusion. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the exclusions bar recovery.

8. Plaintiff Harleysville moves for judgment as a matter of law on the issue of punitive damages. Specifically, Harleysville moves that this Honorable Court find that punitive damages are not a covered loss. The jury charge in the underlying action stated that the jury could only find punitive damages if the jury found supportive facts showing a conscious intent of wrongdoing and knowledge of wrongdoing during the act supporting the punitive damages. Since the jury necessarily found those facts, the punitive damages cannot satisfy the policy "occurrence" requirement. Likewise, even if the Court finds that the "occurrence" element is satisfied, said punitive damages are necessarily excluded by the "expected or intended" exclusion. Harleysville asks this Honorable Court for an Order Granting Judgment as a matter of law that the punitive damages award be excluded from its duty of indemnity under the policy.

9. Plaintiff Harleysville moves for judgment as a matter of law on the issue of applying Time On Risk properly. Specifically, Harleysville moves that this Honorable Court find that Time On Risk is applicable to the damages in this matter; that Time On


Risk should be applied on a per-building basis; that Time On Risk should apply to any punitive damage award; that Time On Risk should apply to the loss of use damage award; and for a finding that no damages manifested themselves during the policy period.

Harleysville ask this Honorable Court for an Order Granting Judgment as a matter of law that Time On Risk be applied properly as stated herein.

Wherefore, Harleysville, in this Motion and in all previous submissions, pleadings, pretrial briefs, oral argument, oral motions, oral requests, post hearing discussion and in the proposed order requests judgment as set forth above.

We so Move.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Robert C. Calamari  
Post Office Box 1349  
Founders Centre, 2411 N. Oak St, Suite 401 (29577)  
Myrtle Beach, South Carolina 29578  
(843) 848-6000

ATTORNEYS FOR PLAINTIFF,  
HARLEYSVILLE INSURANCE GROUP

September 12, 2012

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.

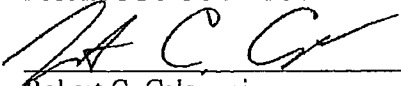
MEMORANDUM IN SUPPORT OF  
MOTION

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  
HURRY COUNTY  
2012 SEP 12 PM 2:18  
MELANIE HIGGINS-WARD  
CLERK OF COURT

MCANGUS GOUDELOCK & COURIE, L.L.C.



Robert C. Calamari  
Post Office Box 1349  
Founders Centre, 2411 N. Oak St, Suite 401 (29577)  
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ATTORNEYS FOR PLAINTIFF,  
HARLEYSVILLE INSURANCE GROUP

September 12, 2012

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

HARLEYSVILLE GROUP INSURANCE, )  
A PENNSYLVANIA CORPORATION, )

Civil Action No. 2009-CP-26-11862

Civil Action No. 2009-CP-26-10053

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 PROPERTY )  
OWNERS ASSOCIATION, INC., A )  
SOUTH CAROLINA CORPORATION, )  
AND NATIONAL SURETY CORP., )

HARLEYSVILLE'S  
PROPOSED ORDER

Defendants. )

HARLEYSVILLE 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. )

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**I. Introduction**

This matter is before me as Special Referee appointed to issue a series of  
 Declarations brought before the Court by the parties to this action. This matter involves  
 insurance coverage issues relating to damages awarded to two (2) plaintiff property  
 owners associations against developers and contractors in a construction defect litigation  
 matter. Set forth below is an analysis of the claims before the Court as well as  
 Declarations of the Rights and Obligations of the parties involved.

The plaintiff in these actions is Harleysville Insurance Group, a Pennsylvania  
 Corporation ("Harleysville"). The defendants-insureds in this action are (1) Heritage  
 Communities, Inc., A South Carolina Corporation ("Heritage"), (2) Heritage Magnolia  
 North, Inc., A South Carolina Corporation ("Heritage Magnolia North"), (3) Heritage  
 Riverwalk, Inc., A South Carolina Corporation ("Heritage Riverwalk") and (4) Buildstar  
 Corporation, A South Carolina Corporation ("Buildstar"). The defendant-judgment  
 holders in these actions are (1) Magnolia North Property Owners Association, Inc  
 ("Magnolia North POA") and (2) Riverwalk at Arrowhead Country Club Property  
 Owners Association ("Riverwalk POA"). The defendant-excess insurer in this action is  
 National Surety Corp. ("National Surety").

The defendants-insureds have made no appearance in this action. There has been  
 no responsive pleading or an appearance of any kind in this matter. The Court notes that

the parties duly notified the insured that the action was pending and of all court dates. Despite proper notice, no insured defendant appeared for any hearing or submitted any materials, written or otherwise, to the Court. The insured defendants were represented by counsel who was provided proper notice.

These lawsuits consist of the Complaints filed by Harleysville, Answers/Counterclaims filed by National Surety, an Answer/Counterclaim filed by Magnolia North POA and an Answer/Counterclaim filed by Riverwalk POA. A dispute has arisen between Harleysville and National Surety but those parties have agreed to preserve that issue for a proceeding outside of this matter

## II. Record

The Official Record in this matter consists of (1) all documents in the underlying action including pleadings, discovery documents, depositions, expert reports, trial transcripts, court submissions and any other document used in the underlying action by the parties; and (2) documents specific to this action including the pleadings, pretrial briefs, trial exhibits, discovery documents, deposition transcripts and pictures admitted during the evidentiary phase. The Court excluded certain testimony and documents offered by Harleysville which was proffered and is part of the transcript for appellate purposes. A zip drive has been submitted containing the record.

## III. Factual Background

This declaratory judgment action addresses verdicts from two lawsuits styled *Riverwalk at Arrowhead Country Club Property Owners' Association, Inc. v. Heritage Communities, Inc., et al* (Case No. 2003-CP-267169)(Court of Common Pleas, Horry County, South Carolina) and *Tony L. Pope, et al. v. Heritage Communities, Inc., et al.*



specific development company. [TRIAL 0000929- 0000930; Pope v. Heritage Cmty., Inc., 717 S.E.2d 765, 768 (S.C. Ct. App. 2011)].

4. Heritage Riverwalk was created solely for the purpose of developing and selling the Riverwalk condominiums. (TRIAL 00001105-00001106).

5. Buildstar oversaw the subcontractors who performed the construction work for the Heritage projects. (TRIAL 00001106-00001108).

6. Heritage Riverwalk turned ownership of the common elements over to the Riverwalk POA in September 2002. (TRIAL 00000136-00000138; 00002316-00002318 and 00004733-00004735 (duplicative document)).

7. *Riverwalk at Arrowhead Country Club Property Owners' Association v. Heritage Communities, Inc. et al.*, CIA No. 2003-CP-26-7169 (the "*Riverwalk POA Action*"), was filed on December 5, 2003, by the Riverwalk POA, seeking to recover repair costs related to construction defects in the Riverwalk development. (TRIAL 00004928-00004939). Several amended complaints were filed thereafter. [TRIAL 00005001-00005017 (Second Amended); 00005071-00005083 (Third Amended); 00005191-00005204 (Fourth Amended)].

8. In addition to the *Riverwalk POA Action*, a putative class action, *Pope, et al. v. Heritage Communities, Inc. et al.*, CIA No. 2005-CP-26-3289 (the "*Pope Class Action*") was filed June 23, 2005, by unit owners Tony and Lynn Pope on behalf of similarly situated owners at Riverwalk seeking to recover damages for the "lost use" of the property during the time the units will be closed for repairs. (TRIAL 00005306-00005325). Several amended Complaints were filed thereafter. [TRIAL 00005326-00005346 (First Amended); 00005347-00005365 (Second Amended); 00005390-00005411 (Third Amended)].

9. The *Riverwalk POA* Action and the *Pope Class* Action (collectively “*Riverwalk Actions*”) were consolidated for trial by jury commencing on January 5, 2009. (TRIAL 00000001).

10. Plaintiffs in the *Riverwalk POA* Action sought to recover damages, based upon the following theories of liability: 1) negligence, 2) breach of express warranty, 3) breach of warranty of habitability, 4) breach of workmanlike service (against Buildstar, the general contractor defendant), and breach of fiduciary duty (against Heritage and. HR). Plaintiffs alleged that, under one or more of those theories, they were entitled to recover the cost of repairing various construction defects asserted numerous construction deficiencies which were violations of the standard building code, good construction practices and industry standards. (TRIAL 00005191-00005204).

11. The *Riverwalk POA* also asserted a derivative cause of action for breach of fiduciary duty alleging that the corporate defendants (collectively the “*Heritage Entities*”) willfully, wantonly and recklessly breached their fiduciary duty by turning over the common elements to the homeowners in a defective and deteriorated condition. (TRIAL 00005191-00005204).

12. In the *Pope Class* Action, the class (certified via an Order to Certify the Class, September 3, 2008) of plaintiffs sought to recover damages arising out of their loss of use of their condominiums, during the time of the required repairs. (TRIAL 00005390-00005411 ).

13. The *Riverwalk Project* had many construction defects amounting to code violations, violations of industry standards, and violations of good construction

practices which would require extensive repair and replacement of the defective systems. (TRIAL 00005461-00005769).

14. Plaintiffs' estimator, Al Best of PrimeSouth, estimated that it would cost \$8,511,425.00 in repair costs (TRIAL 00000973-00000974). This amount was in addition to the \$126,577.48 the Riverwalk POA had already paid to repair defects at the site. (TRIAL 00000427-00000439; 00002322-00002331).

15. Plaintiffs' expert estimated the economic damages arising out of the loss of the *Pope* Plaintiffs' use of their condominiums (for up to four months) while the construction defects were repaired, at \$928,215.00. (TRIAL 00001041).

#### Continuous Property Damage

16. Water intrusion causes damages occur at different rates, depending on the amount of exposure and severity of the construction deficiency. (TRIAL 00000650-00000651).

17. Plaintiffs' expert, Drew Brown, developed a scope of repair to fix the construction defects based upon his May 28, 2004 report. (TRIAL 00000701-00000717).

18. The scope of repair required at Riverwalk included removal and replacement of numerous components, such as the exterior brick veneer and siding, requiring destruction of undamaged portions of the buildings and surrounding landscaping. (TRIAL 00000715-00000717).

19. Some of the repair work to be done at Riverwalk involved removal of defective exterior components in areas where there was no damage to the building. (TRIAL 00012277; 00012297-00012300).

20. Drew Brown, the Riverwalk POA and putative class expert in the Underlying Action testified that it was not possible to determine separate costs to

repair defective work and costs to repair damaged work, nor did he attempt to do so at any time. (TRIAL 00012272-00012273; 00012277-00012278; 00012280-00012281; 00012304.

21. Drew Brown offered testimony to the jury in Riverwalk that damages had occurred prior to his visits, were occurring at the time of his visits and would continue to occur following his inspection. He used the words "hidden conditions" (p. 648), "damages occur at different rates" (p. 650), "decay process moves on out into time" (p. 651), "material is starting to deteriorate" (p. 662), "the damage we talked about will progress" (p. 663), "discoloration is starting to occur" (p. 676), "and keep in mind these buildings are very young . . . whether those damages have manifested themselves or not" (p. 733), "we don't see the end of that damage yet." (p. 750), "starting to discolor" (p. 756), and "no damage at this point in time" (p. 762).

22. Drew Brown testified regarding water stained wood: "Q: And in most of the locations did you see where water had stained the wood? A: I wouldn't say most. In more than one it was evident that water had come into contact with the wood." (p. 676-77).

23. Drew Brown further testified that during his inspection in 2003 he did not have anything in "structural distress." He said "Well, when we did our investigation in 2003 we even noted the bearing issue but really at that point in time I didn't see anything that was structurally in distress that would be a failure but since that time it has been reported that they had some stairs that actually fell and they had to replace." (p. 695). Later, he testified "and in my recent visits the softness in the middle of the decks is evident that water intrusion has occurred." (p. 749).

### Verdict and Appeal

24. At the end of the trial of the case, the trial judge directed a verdict for Respondents in both actions on their negligence claims. The Court held that the Heritage Entities were amalgamated in interest and jointly liable for purposes of any verdict. (TRIAL 00001640-00001641).

25. The Court instructed that punitive damages can only be awarded for willful, wanton and reckless conduct. (TRIAL 00001823-00001828).

26. The jury found against the defendants on the breach of fiduciary duties claims in the construction of the Riverwalk Condominiums and returned a verdict in the POA Action of \$4,250,000.00 actual damages and \$250,000.00 in punitive damages. (TRIAL 00013548-00013549). The trial judge granted a motion for set off, reducing the repair cost award to \$3,228,679. (Heritage, Heritage Riverwalk, and Buildstar's Post-Trial Motions, April 14, 2009).<sup>2</sup>

27. In the Pope *Class* Action, the jury returned a verdict of \$250,000.00 in actual damages and \$750,000.00 in punitive damages. (TRIAL 00013550-00013551).

28. On appeal, the South Carolina Court of Appeals affirmed the trial court's directed verdict in the POA action on negligence. Pope v. Heritage Cmty's., Inc., 717 S.E.2d 765, 779 (S.C. Ct. App. 2011).

29. The jury's award of punitive damages was based upon a finding that the Riverwalk construction defects were caused by the amalgamated defendant entities' willful, wanton, and reckless conduct. Pope, 717 S.E.2d at 770.

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<sup>2</sup> The Heritage Entities have appealed the judgment in both the *Riverwalk* Action and the *Magnolia North* .

30. The *Riverwalk* appellate court upheld the punitive damage award based upon the factors outlined in *Gamble* stating:

As to Appellants' degree of culpability, the trial court found relevant Appellants' experts' admission of code and industry standard violations. The trial court also noted the relevancy of Appellants' admissions of selling defective condominiums. As to the factors of the duration of the conduct and Appellants' awareness, the trial court noted the sales of defective condominiums continued for several years, and Appellants admitted they were aware of the construction deficiencies. The trial court noted the admission of similar conduct in other developments in reviewing the factor of similar past conduct. The court also found the award reasonably related to the costs and losses the POA and the Class will incur as a result of the defective condominiums.

*Pope*, 717 S.E.2d at 782.

#### THE MAGNOLIA NORTH ACTION

31. Plaintiffs in the Magnolia North Action filed suit on May 28, 2003, entitled *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Magnolia North and Buildstar Corporation* (C/A No. 2003-CP-26-3203) (the "*Magnolia North Action*"), seeking to recover damages from the Heritage Entities relating to the cost of repair of construction defects at the *Magnolia Site*. (TRIAL 00011393-00011401). Several amended complaints were filed thereafter. [TRIAL 00011402-00011412 (First Amended); TRIAL 00011413-00011424 (Second Amended); TRIAL 00011425-00011437 (Third Amended); TRIAL 00011438-00011450 (Fourth Amended); (Fifth Amended Omitted); TRIAL 00011567-00011585 (Sixth Amended); TRIAL 00011609-00011623 (Seventh Amended); TRIAL 00011657-00011663 (Eighth Amended)].

32. Plaintiffs Complaint alleged the following causes of action: 1) negligence (against all Heritage Entities), 2) breach of express warranty against Heritage 3) breach of

implied warranty of workmanlike service against Buildstar, and 4) breach of fiduciary duty against Heritage and Heritage Magnolia North ("HMN"). (TRIAL 00011657-00011663).

33. Experts testified that the Magnolia North Project exhibited faulty workmanship in violation of code, architect's specifications, and/or industry standards, and in need of repair, including: drainage, incorrectly installed controlled joints in the balcony ceilings, cracking drywall finish, water damage to ceilings caused by water intrusion from the decks and balconies, improperly installed and fastened handrails, improperly installed and sloped masonry, an uninstalled cavity wall system, improperly installed flashing, and corrosion at the window supports. (TRIAL 00006202-00006321; 00011845-00012223).

34. The *Magnolia North* Plaintiffs' damages resulted largely from defective construction and/or materials. Defective handrail attachments, defective trim product in areas not covered by walkways or overhangs, defective flashing, defects in the drywall, and defects in the common area parking lots and drives that the insured built all resulted in a need to replace the defectively installed components and repair any found damages. (TRIAL 00006202-00006321; 00011845-00012223).

#### Continuing Property Damage

35. Plaintiffs' expert, Drew Brown of R. Buric, included repair recommendations in his May 28, 2004 report based on his initial investigations. (TRIAL 00011845-00012223).

36. Plaintiffs' cost expert, Prime South, prepared initial cost estimates based investigation upon the May 28, 2004 Buric Report in June 2005. (TRIAL 00006344-00006345; 00008764-0008773).

37. Whether damage has occurred from continuous water intrusion, depends upon many factors, including the amount of water, the time of the exposure, and the orientation of the building to certain prevailing weather patterns. (TRIAL 00006466-00006471).

38. Damages from water intrusion will occur first in the areas that are most exposed and will be greatest in those areas "and the other areas will follow on." (TRIAL 00006467).

39. Brown's February 24, 2009 scope of repairs included the removal and replacement of the entirety of the defectively installed construction systems, including the brick veneer, windows and trim. (TRIAL 00009131-00009134).

40. Plaintiffs' claimed that removal and replacement of the defective construction systems and undamaged portions of the buildings was necessary because the "defects will lead to high [moisture] readings in the future and damage and the same defects... will lead to damage into the future if not corrected." (TRIAL 00006382)..

41. In charging the jury, the court instructed that Buildstar was the General Contractor for the Construction of the Magnolia North Condominiums, Heritage Magnolia North was the entity created to develop and sell the Magnolia North Condominiums and Heritage is the parent company to HMN and Buildstar. (TRIAL 00007213).

42. The court instructed that all three defendants should be treated as one for determining any liability. (TRIAL 00007213.)

43. The court charged the jury that as a matter of law, the defendants were negligent and breached the implied warranty of workmanlike services in the construction of Magnolia North. (TRIAL 000007218; 000007230).

44. Based on the court's findings of liability, the court instructed the jury that they must award the plaintiffs damages proximately caused by the negligent construction. (TRIAL 000007218).

45. The court charged the jury that the general measure of actual damages to compensate plaintiffs for negligent construction is the cost to repair the units, past and future, including any other reasonably related costs incidental thereto proximately caused by the defendants' negligent construction. (TRIAL 000007221).

46. The court charged that the paramount purpose for awarding punitive damages is not to compensate the plaintiff, but to punish and set an example for others. "Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that Defendants action were willful, wanton, malicious, and in reckless disregard of the plaintiffs' rights or where defendants' actions were so grossly negligent as to imply a willfulness or wantonness. A conscious failure to exercise due care constitutes willfulness. It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the wrongdoer." (TRIAL 000007222-00007228).

47. The jury rendered a verdict against the defendants on the negligence, breach of warranty, and breach of fiduciary duty claims and awarded plaintiffs \$6,500,000.00 in actual damages and \$2,000,000.00 in punitive damages. The court granted defendants' post trial motion for set off based upon previous settlements with

sub-contractors, reducing the repair cost verdict to \$4,968,936.85, and denying all other motions, including a motion to set aside the punitive damages award. (TRIAL 00013552-00013553); Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation, Inc.'s Post-Trial Motions, May 29, 2009).<sup>3</sup>

48. In upholding the punitive damages award on post trial motions, the court found that the Underlying Defendants violated a legal duty to comply with the Southern Standard Building Code, that they were aware of the significant deficiencies at the complex and that they had repeatedly committed their injurious conduct in upholding the punitive damages award. In addition, the court found that there was also evidence of deceit inasmuch as underlying defendants knew of the substantial deficiencies in the units, yet continued to market them without any proactive program to inform potential purchasers that these substantial deficiencies existed. (Heritage Communities, Inc., Heritage Riverwalk, and Buildstar Corporation, Inc.'s Post-Trial Motions, April 14, 2009).

#### FACTS APPLICABLE TO BOTH RIVERWALK AND MAGNOLIA NORTH

##### Time on the Risk

49. It is impossible to determine what damages happened during each year since the Riverwalk and Magnolia North projects were constructed. (TRIAL 00013960; 00013986).

50. Property damage from water intrusion progresses over time and does not occur immediately upon the first water intrusion. (TRIAL 00013954; 00013958-00013961; 00013986).

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<sup>3</sup> The Heritage Entities have appealed the judgment and that appeal is still pending.

51. Repair costs for progressive property damage increase over time. (TRIAL 00013961).

#### IV. Policies

Heritage, Heritage Magnolia North, Heritage Riverwalk and Buildstar each purchased policies from Harleysville. Trial exhibits shows the policies and policy periods. Policies for each insured are discussed below.

Heritage was the overall developer for several projects. Heritage Magnolia North was the singular developer for the Magnolia North project. The entire project is the product or work of Heritage and Heritage Magnolia North. Heritage Riverwalk was the singular developer for the Riverwalk project. The entire project is the product or work of Heritage and Heritage Riverwalk.

In Crossmann v. Harleysville, 395 S.C. 40 (S.C. 2011) and Auto Owners v. Newman, 385 S.C. 187 (S.C. 2009) the Court addressed the issue of whether the entire project was viewed as a whole or in parts. The distinction was necessary because the claim was made in each that the entire project as a whole was the product or work of the insured. The Supreme Court determined that for a general contractor, who subcontracted the work, each building was a series of components. The same cannot be said for a developer.

The policies listed on the chart of policies entered into evidence issued to Heritage, Heritage Magnolia North and Heritage Riverwalk must be said to view each entire project as the single product or single work of the developer. As discussed below, the only damage triggering the duty of indemnity is damage, not to the work or product of the insured. Since the sole damage alleged in each action is wholly within the project,

there can be no recoverable damage under any policy issued to Heritage, Heritage Magnolia North or Heritage Riverwalk.

V. Purpose of the Declaratory Judgment Action

Harleysville filed this declaratory judgment action for the purpose of raising issues of insurance coverage and to ask the Court to determine its duty of indemnity. Harleysville provided a full defense to the insured in the underlying action. The duty of defense is not part of this lawsuit as it was provided. Harleysville defended these actions under a reservation of rights. The record shows that Harleysville kept in close contact with the insured throughout the handling of this matter.

The purpose of this action is as follows:

1. To determine if the facts and damages found in the underlying action meet the definition of "Occurrence" within the meaning of the policy.
2. If the definition of "Occurrence" has been met, to ask the Court to allocate the damages within the award between covered and non-covered losses.
3. To determine which portion, if any, of the damages in the underlying award meet the policy definition of "Property Damage."
4. If the definitions of "Occurrence" and "Property Damage" have been satisfied, to determine if any exclusions apply to void coverage.
5. To determine whether the punitive damages awarded in the

underlying action meet the definitions of “Occurrence”, “Property Damage” and, if so, are those punitive damages are excluded by the policy exclusions.

6. To conduct a Time-On-Risk analysis to determine what portion of the damages found by the Court to trigger the duty of indemnity fall within the coverage period of the policy.

Of particular note, this Court finds instructive the Newman and Crossmann decisions that stated that “it is not the purpose of *this* declaratory judgment action to relitigate the issue of damages.” Harleysville has made clear in its pleadings and at all times before this Court that it is not attempting to *relitigate the issue of damages*. It is, however, asking the Court to perform a function *for the first time* of allocating the damages between covered and non-covered losses. This Court will address this issue later in this Order.

#### VI. Insurance Relationship

An insurance policy is nothing more than a contract for the division of risk. Without insurance, an entity retains 100% of all risks. With insurance, certain specified risks are transferred. As to all claimants, the insurance company goals and the insured goals are the same – to defeat the claimant’s effort to recover against the insured.

From time to time, contract disputes arise regarding which risks and to what extent those risks are either kept by the insured or assigned to the insurance company. South Carolina has maintained consistently that no third party rights exist under an insurance policy relationship. Insurance is between the insured and insurer and is not in place for the benefit of the party seeking to recover against the insured.

All evidence submitted in this action showed that the insurance purchased from Harleysville by Heritage, Heritage Magnolia North, Heritage Riverwalk and Buildstar was for the purpose of protecting the insured against claims by third parties. The insurance was not for the purpose of protecting any rights of Magnolia North POA or Riverwalk POA. The sole evidence offered at trial on this issue was testimony from Harleysville. Magnolia North POA and Riverwalk POA never offered any witness testimony on this issue. The Court must find that this policy was solely in place to protect the insured and not for the purpose of providing any protection whatsoever to the third party claimants such as Magnolia North POA and Riverwalk POA.

Generally, a Commercial General Liability insurance policy ("GCL") provides insurance coverage for property damages that result from an occurrence taking place within the policy period. Each of those three elements (Occurrence, Property Damages, Policy Period) must be satisfied before any other analysis is necessary. Proof of these essential elements is always the burden of the insured. This burden never shifts to the insurance carrier. Once those essential elements are proven by the insured, then the Court must examine whether an exclusion applies to void coverage. Proof of avoidance by an exclusion is always the burden of the insurance company.

#### **VII. Status of Insured**

The insured was properly served with all pleadings and declined to make an appearance. The insured was represented by counsel and notified of all hearing dates. The insureds are not in business and have not transacted any business in approximately 10 years. Because the insureds are out of business, the judgment holders' only potential available relief is the policy proceeds which are disputed.

The judgment holders are Riverwalk POA, Tony Pope et. al. and Magnolia North POA. The insurance policies at issue each contain a provision mandating that a holder of a final judgment can pursue recovery of the judgment under the terms of policy up to the policy limits. The policy contains no third party rights but a judgment holder can step into the shoes of an insured in an effort to recover its judgment. The judgment holders herein have made claims to recover the money judgments under the policies.

Harleysville and National Surety have agreed that the judgment holders are proper parties to seek the right of indemnity, subject to all policy conditions. See, Lee v. Gulf, 248 S.C. 296 (S.C. 1966).

Since the insureds, collectively, have declined to become part of this action and are no longer in business, any rights of the insureds are hereby foreclosed and ended by this Order. The real parties in interest to this action are the judgment holders, who are making claims to recover under the policies, and the insurance carriers.

#### VIII. Occurrence

An occurrence is defined by the policy as “an accident including continuous or repeated exposure to the same general harmful elements.” The South Carolina Supreme Court recently held that a construction defect producing property damage is an occurrence. Crossmann. Harleysville argued that the claims alleged in the underlying action do not meet the definition of occurrence because they are not accidental in nature as required by the definition of occurrence. Harleysville further argued that no damages occurred outside of the project and, pursuant to the occurrence definition in Crossman and Newman, there can be no occurrence for those damages. Our Supreme Court has waffled on this issue but has ultimately concluded that typical construction defects are

occurrences within the meaning of a standard CGL policy of insurance.

**IX. Property Damage**

**A. Definition**

Property damage is defined by the policy as “physical change to tangible property.” Magnolia North POA and Riverwalk POA presented evidence in the underlying actions that the buildings were damaged as a result of the defective workmanship of Buildstar. Crossmann mandates that upon the showing of property damage resulting from an occurrence, the duty of indemnity is triggered if damages are shown to occur during the policy period. Property damage does not include the cost or replacing defective work.

**B. Determination of Property Damage Amount**

Harleysville, as part of the purpose of this action, asked the Court to perform an analysis of the damages found in the underlying action to determine which portion, if any, triggers the duty of indemnity. The recent Crossmann decision mandates that only those damages relating to the repair cost for damaged portions of the buildings are potentially covered losses under the policy. Damages to repair defective work, shoddy workmanship, improper workmanship or to replace defective work not damaged, are not damages that are covered by the policy.

Harleysville offered testimony from a qualified expert general contractor who performed an analysis of the damages in Magnolia North and determined that of the 100% of repair cost damages awarded, 32.93% related to damaged portions of the building and the remainder related to the cost to correct the original construction work to make it code compliant. Harleysville offered testimony from a qualified expert general

contractor who performed an analysis of the damages in Riverwalk and determined that of the 100% of repair cost damages awarded, 17.82% related to damaged portions of the building and the remainder related to the cost to correct the original construction work to make it code compliant. No similar analysis was offered by any other party.

C. Evidentiary Issues

Originally, this Court sustained the objection by Magnolia North POA and Riverwalk POA to exclude any evidence that sought to analyze the verdicts to allocate into potentially covered and non-covered losses. Based on my review of the totality of the evidence, I now withdraw the sustaining of the objection and I admit into evidence the expert testimony offered by Harleysville as to the allocation of potentially covered versus non-covered damages.

D. A Party Can Only Be Prejudiced By An Action To Which It Was A Party.

In the trial of the underlying action, there was no effort by the trial court or parties to allocate damages. Harleysville and National Surety were not parties in the underlying action.

At the outset, it is a common principal of law, that an entity who is not a party to an action cannot be prejudiced by the result of that action. See, Robinson v. Harris, 389 S.C. 360 (S.C. 2010) (in which the court refused to apply res judicata citing the general rule that persons and entities are not bound by court rulings and proceedings to which they were not a party). A party must have the opportunity to participate in the action in which a ruling is held to be bound by the ruling. Every person or entity should be given its fair opportunity to be heard, cross examine witnesses and present evidence at the trial of issues that have a prejudicial effect upon it.

There are many examples of fairness in South Carolina law showing that before a judgment can affect the rights of a party, it must have an opportunity to present evidence. The South Carolina Declaratory Judgment Act (S.C. Code Ann. Section 15-53-10 et. seq.) mandates that a ruling only applies to parties in the action. The South Carolina Contribution Among Tortfeasors Act, Section 15-38-10 et. seq. allows for a post verdict breakdown of damages between tortfeasors. Contractual indemnity claims are often filed as separate lawsuits after the underlying action. The court in those matters determines which portion of the damages are recoverable under contractual indemnity provisions. See, Otis Elevator v. Hardin Construction, 316 S.C. 292 (S.C. 1994). (Otis Elevator was sued by the owner. Subsequent to the lawsuit, trial and settlement, Otis brought an indemnity action against Hardin. The court determined which portion of damages was recoverable under the contractual indemnity provision). The general principles of res judicata and collateral estoppel can only be used against a person or entity that was a party to the action where the ruling was held. See, Aaron v. Mahl, 381 S.C. 585 (S.C. 2009) (addressing the general principals of res judicata and collateral estoppel saying that res judicata bars subsequent actions by the same parties when the claims arise out of the same occurrence that was the subject of a prior action between those parties. Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action. Id.).

Only the principles of res judicata and collateral estoppel prevent a party from litigating an issue. In order to apply, those same parties must have had the fair opportunity to or actually litigated those issues in a prior action. In this matter, Harleysville was not a party and could not have litigated any of the coverage issues. It

cannot now be barred from litigating those issues, for the first time, in this action.

E. No Acceptable Method Exists To Allocate Damages In The Underlying Action

It is a practical impossibility for an insurance company to become so involved in the underlying action that it receives a fair opportunity to allocate damages for coverage issue purposes. The law at the time of the underlying trial was established by the first Supreme Court decision in Newman v. Auto Owners where the Court ruled that every dollar of construction defect damages triggered indemnity obligations under a standard commercial general liability policy. Essentially, there was no issue that any party could present at trial to allocate damages into seemingly unnecessary categories.

It has been argued by Magnolia North POA and Riverwalk POA that Harleysville should have attempted to intervene into the underlying action. No evidence was presented of any carrier ever successfully intervening into a construction defect trial for the purpose of asking the court to allocate damages. On the contrary, Harleysville offered evidence of failed attempts. Harleysville further showed that it could not have asked to intervene for a purpose directly adverse to a then existing South Carolina Supreme Court ruling.

Problems exist when a carrier attempts to intervene. The act of intervention by the insurance carrier for a goal that is adverse to its insured is a dangerous proposition. This Court has been given no evidence of what Harleysville was supposed to do once it intervened. Argument was offered that it could have asked the trial court to allocate damages. There was no guidance offered. There was no indication of the effect on the current situation in this lawsuit if the court refused to allow Harleysville to participate or if the court otherwise failed to properly allocate.

Forcing an insurance carrier to intervene will necessarily result in an adversarial relationship between insured and insurer. In this matter, one example is found in the testimony of Jim Graham in the Riverwalk action. Mr. Graham was offered by plaintiff to show that he informed Buildstar that it was improperly installing Betterbilt windows. Obviously, Buildstar would argue that it installed the windows properly. Harleysville would have been forced to agree with Mr. Graham and further assert that Buildstar, its insured, thereafter intentionally installed all windows improperly.

Harleysville offered testimony that it would have needed to become a party to the underlying action and present the same expert testimony that it presented herein. I find that if it had presented testimony in the underlying action, numerous judicial rules would have been violated. The actions of Harleysville would have revealed the presence of liability insurance. The South Carolina Rules of Evidence bar evidence of liability insurance. Harleysville would have taken a position directly adverse to it insured. Harleysville would have necessarily argued to the jury that the acts of the insureds were intentional and improper. I cannot imagine a judicial rule mandating that an insurance carrier must intervene and take a position that potentially increases a judgment against its insured and then leave the insured without policy benefits. Overall, I find it impossible for an insurance carrier to intervene and meaningfully participate without seriously injuring the insured and violating numerous judicial rules.

The South Carolina Supreme Court has supported the above view and ruled that when the insurance carrier and insured have divergent interests, the proper place for resolution of those disputes is in a post trial action relating to coverage. See, Sims v. Nationwide, 247 S.C. 82 (1965); Cowan v. Insurance Co. of N. America, 22 Ill. App. 3d.

883 (1974) both ruling that if divergent interest exist and the issue is not litigated in the underlying action, it is appropriate for the carrier to raise the issue along with any new evidence in a subsequent action.

Other jurisdictions have encountered this problem and supported the method of resolving coverage issues in a separate and subsequent legal action.

F. Other Jurisdictions Support a Post Trial Action to Allocate Damages.

This Court finds opinions from other jurisdictions instructive on the method to allocate between covered and non-covered actions. In MedMarc v. Forest Healthcare, 359 Ark. 495, 199 S.W.3d 58 (2004) the court faced the issue of having a general verdict and the obligation to allocate damages into covered and non-covered categories. Implicit in its ruling that the lower court should perform an allocation was a fairness platform. In MedMarc, the court was faced with a jury verdict in the undivided amounts of \$350,000 for ordinary negligence, \$500,000 in damages for medical malpractice and \$5000 in damages for breach of contract. A dispute had arisen as to what portion of the verdict was covered and what portion was not covered. MedMarc brought an action seeking a declaration that no part of the verdict was covered or, in the alternative, that the court should allocate damages between losses covered and not covered under its policy.

The trial court in the coverage action ruled that twenty five percent (25%) of the verdict was covered. The appellate court ruled that the court must have a sufficient basis for allocating the verdict and remanded for an evidentiary finding to reveal the method and evidence used to allocate the jury's verdict. The court stated:

While the circuit court did not allocate the judgment in this case, it provided no basis for its apportioning to MedMarc twenty-five percent of the liability for the Thurmond judgment. We believe that providing the reasoning and basis for the particular allocation in the form of findings of

fact an conclusions of law is essential. (citations omitted). A proper allocation in this case, while perhaps difficult, is certainly not impossible. Indeed, other courts have said it can be done. (citing Duke v. Hoch) (citations omitted). Because we conclude that a proper allocation is necessary and because the circuit court provided no reason for allocating twenty-five percent of the liability to MedMarc, we reverse and remand the matter with directions for the circuit court to proceed with allocation in accordance with this opinion.

MedMarc, at 503.

In Duke v. Hoch, the appellate court reasoned that for practical purposes the best way to address allocation was to remand the issue to the trial court for an allocation of damages within the jury's verdict. In Duke, the court stated in a section titled "Remand" the court stated:

In the District Court, a threshold question is whether at the merits trial insurer's counsel, by some means not revealed in the present record, discharged his responsibility of notifying the insureds of their interest in the form of the verdict. If the insurer cannot show that it did, the court will face the issue of attempting retrospectively to allocate the damages awarded. In saying that Duke is relieved of his burden, we refer to the "risk of non-persuasion" IX Wigmore, *The Law of Evidence* Section 2485 (3<sup>rd</sup> ed.). Duke continues to have the burden of producing "a quantity of evidence fit . . . to form a reasonable basis for the judgment." *Id.* at Section 24587, at 279. The primary source of evidence will be, of course, the transcript of the merits trial, containing the evidence on which the jury based its verdict. The trial judge, as trier of fact, will be in the position of establishing as best he can the allocation which the jury would have made had it been tendered the opportunity to do so. If it is impossible for the court to make a meaningful allocation based on only the transcript, Duke should have the right to adduce additional evidence and Home to present evidence in rebuttal.

Duke, at 984.

Restor-A-Dent v. Certified Alloy, 725 F.2d 871 (2d Cir. 1984) addressed the impracticability of intervention by a carrier. Attempts to intervene for the limited purpose of requesting that the trial court have the jury specify the basis of any verdict in favor of the plaintiff by way of a special verdict or answers to interrogatories have generally been

unsuccessful. See Christopher Lyle McIlwain, *Clear as Mud: An Insurer's Rights and Duties Where Coverage Under a Liability Policy is Questionable*, 27 *Cumb. L. Rev.* 31 (1997). This is mainly because state supreme courts have held that liability insurers have no absolute right to intervene, and that the trial court has the virtually irreversible discretion to grant or deny intervention. *Id.*

In Restor-A-Dent, Unigard, the insurance carrier, was denied on its request to intervene. The court ruled that the critical inquiry regarding Unigard's right to intervene under *Rule 24(a)(2)* was whether Unigard had an "interest" relating to the property or transaction which was the subject matter of the action. Restor-A-Dent noted that the Supreme Court has found that the interest must be "significantly protectable." See Donaldson v. United States, 400 U.S. 517, 537 (1971). The Supreme Court has said that such an interest must be direct, as opposed to remote or contingent. See, e.g., Air Line Stewards and Stewardesses Ass'n v. American Airlines, Inc., 455 F.2d 101, 105 (7<sup>th</sup> Cir. 1972); In re Penn Central Commercial Paper Litigation, 62 F.R.D. 341, 346-47 (S.D.N.Y. 1974), *aff'd* without opinion, 515 F.2d 505 (2d Cir. 1975). The court found that the interest asserted by Unigard was dependant upon two contingencies, a jury verdict for Restor-A-Dent and a finding in a separate litigation between Unigard and Certified that Unigard was not responsible for indemnification of certain types of losses under the terms of the policy. *Id.* at 875.

In United States Fidelity & Guaranty Co. v. Adams, et al., 485 So.2d 720, 1986 Ala. LEXIS 3453 (1986) the court held that intervention in the construction setting is improper. The court noted that, in the event a verdict, USF&G may determine its liability by subsequent litigation. *Id.* at 721.

In Connecticut, an insurance company sought permissive intervention. Hunter v.

Peters, 2001 Conn. Super. LEXIS 3761 (2001), Unreported Decision. The court denied the motion reasoning that allowing such intervention could create a potential conflict of interest for the attorney furnished by the insurance company. In denying the motion, the court opined that “[f]actual questions left unanswered in the pending action may have to be answered in a second action.” *Id.* at 3.

In Maine an Insurance company, defendant physician’s professional liability insurer, had undertaken his defense but also sought to participate as a party to protect its interest in establishing whether the basis for liability was covered by the physician’s policy. Donna v. Kalamaras, 485 A.2d 222 (Me. 1984). The appellate court affirmed the lower court’s denial of Medical Mutual Insurance Company’s motion to intervene. The court stated that an insurer can litigate coverage questions in a subsequent action, explaining that its reasoning in Marston<sup>4</sup> “cannot rationally be interpreted as meaning that a general verdict will preclude the insurer from later litigating its coverage questions.” *Id.* At 224. In rejecting Medical Mutual’s contrary interpretation of Marston, the court noted that “in the absence of special findings of fact, our decision may necessitate a second trial on the duty to indemnify.” *Id.*

In Florida, an insurance company sought to intervene. Emp. Ins. Of Wausau v. Lavender, et. al., 506 So.2d 1166, 12 Fla. L. Weekly 1240 (1987). In denying the insurer’s motion to intervene before the verdict, the court noted that the question of insurance coverage can be determined in a subsequent litigation. 506 So.2d at 1167, 12 Fla. L. Weekly at 1240.

In Indiana, an insurer petitioned to intervene. Allstate Ins. Co. v. Keltner, 842 N.E.2d 879 (Ind. Ct. App. 2006). In affirming the lower courts denial of the motion, the court

<sup>4</sup> Marston v. Merchants Mutual Ins. Co., 319 A.2d 111 (Me. 1974). The court discussed an insurer’s duty to defend and held that, where an insurance company refused to defend it will be bound by the judgment in that action, as to issues which were or might have been litigated in that action, in a subsequent suit by the injured person for recourse to the policy.

disagreed with insurer's assumption that if there was a general verdict against its insured that did not distinguish between covered and uncovered damages, there would be no later opportunity to make that distinction. *Id.* at 883. The court explained that the insurer would be permitted to bring a subsequent action to raise its policy defense against paying the full amount of any general judgment against its insured. *Id.* At this later action the coverage issue "might be determined by examining the evidence and argument of counsel presented during the underlying trial or by the presentation of additional evidence." *Id.*

In Illinois, insurers sought to intervene in the action to obtain a declaratory judgment that the insurers had no obligation to indemnify insureds for any judgment entered against them. Davila v. Arlasky, 141 F.R.D. 68 (N.D. Ill. 1991). In denying the motion to intervene, the court explained that the insurers could not obtain a judgment on coverage until after the underlying dispute was settled. *Id.*

For the reasons stated above, and supported by the South Carolina Supreme Court in Sims, I find it impracticable and impermissible to intervene and further find that this declaratory judgment action is the best forum for analysis and resolution of the damage allocation issue.

#### G. Allocation of Damages

Harleysville presented expert testimony for the Magnolia North project showing a repair cost percentage breakdown of 32.93% of costs relating to repairing damaged portions of the building. The total actual damage award in this matter, after set off, is \$4,968,937 million dollars. Since only 32.93% of the damages relate to damaged portions of the building, the total potentially recoverable amount of damages under the insurance policies is \$1,636,271.

Harleysville presented expert testimony for the Riverwalk project showing a repair cost percentage breakdown of 17.82% of costs relating to repairing damaged portions of the building. The total actual damage award in this matter, after set off, is \$3,228,679 million dollars. Since only 17.82% of the damages relate to damaged portions of the building, the total potentially recoverable amount of damages under the insurance policies is \$575,351.

X. Exclusions

Harleysville asserted exclusions to defeat coverage. Because this Court has ruled that no property damages occur during policy periods and therefore, no duty of indemnity is triggered, this Court need not address the exclusions.

However, since the issue of exclusions was raised, in order to properly preserve those issues, the Court will address exclusions.

The Harleysville Policy contains the following exclusions, relevant to this action, which are incorporated into the NSC Policy:

a. Expected or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured.

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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.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage to Premises Rented to You as described in Section III – Limits of Insurance.

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.

[TRIAL 00012750-00012753).

Definitions

- 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
  - \* \* \*
- 16. "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:
    - (2) Work that has not yet been completed or abandoned. . . .
- 17. "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 . . . .
- 22. "Your work":
  - a. Means:
    - (1) Work or operations performed by you or on your behalf;
    - and
    - (2) Materials, parts or equipment furnished in connection with such work or operations.
  - b. Includes
    - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
    - (2) The providing of or failure to provide warnings or instructions.

(TRIAL 00013206; 00013231-00013234).

The insureds in this matter fall into three (3) categories. Heritage is a developer for the various projects. Heritage Riverwalk and Heritage Magnolia North are developers for the specific projects. Buildstar is the general contractor. Each is addressed below.

There is no evidence in the underlying transcripts to support a claim that Heritage,

Heritage Riverwalk or Heritage Magnolia North were involved in the construction phase. The sole entity involved in the construction phase was Buildstar, the general contractor.

A. Expected or Intended

The record is replete with the notion that Buildstar intended the work to be performed in the manner it was performed. Areas of defect were brought to the attention of Buildstar during construction. Buildstar, instead, chose to continue the current status of the construction methods. The Jim Graham deposition reveals that Buildstar was aware of the construction problems.

The punitive damages awarded in each action required a burden of proof that the insureds sold the condominium units with a conscious intention of wrongdoing. Since the jury awarded punitive damages against each insured on all claims, it cannot be said that the insured did not expect or intend the damage. On that basis, all damages are excluded and there is no duty of indemnity.

B. Your Work Exclusion

The policies issued to Buildstar contain a subcontractor exception excluding damage to "your work." The recent ruling in Newman concludes that the "your work" exclusion is inapplicable to general contractors such as Buildstar. Harleysville still took the position that the entire project is the work of the general contractor. There was no allegation or evidence of any damage occurring outside of the project. Despite Harleysville's position, this Court must follow the law as established by Newman and decline that the "your work" exclusion applies to Buildstar.

Heritage, Heritage Magnolia North and Heritage Riverwalk were entities formed as developers. There were no subcontractors of these insureds. The entire project was

their “work.” All of the work on the project falls into the category of “your work” since it cannot be argued that the entire project was not the “work” of Heritage, Heritage Magnolia North and Heritage Riverwalk. As such, the “your work” exclusion results in no duty of indemnity being triggered for any policy issued to Heritage, Heritage Magnolia North and Heritage Riverwalk.

C. Your Product Exclusion

The recent ruling in Newman concluded that the “your product” exclusion is inapplicable to general contractors such as Buildstar. Harleysville still took the position that the entire project is the product of the general contractor. There was no allegation or evidence of any damage occurring outside of the project. Despite Harleysville’s position, this Court must follow the law as established by Newman and decline that the “your work” exclusion applies to Buildstar.

Heritage, Heritage Magnolia North and Heritage Riverwalk were entities formed as developers. All of the work on the project falls into the category of “your product” since it cannot be argued that the entire project was not the “product” of Heritage, Heritage Magnolia North and Heritage Riverwalk. As such, the “your product” exclusion results in no duty of indemnity being triggered for any policy issued to Heritage, Heritage Magnolia North and Heritage Riverwalk.

D. Impaired Property Exclusion

The policies involved in this matter each contained an “impaired property” exclusion. The evidence in the underlying action reveals that problems existed with the project at the time of sale. Building codes and industry standard practices were not followed. The result is that any damage alleged was to a product that was already

damaged or “impaired.” The “impaired property” exclusion acts to defeat any duty of indemnity on any policy.

E. Damage to Property

The policies involved in this matter each contained a “damage to property” exclusion. Pursuant to this exclusion any property owned, rented or occupied. At the time of all damage taking place during any policy period, if any, the common elements continued to be owned by Heritage, Heritage Magnolia North and Heritage Riverwalk. (See, Factual Background). It was not until well after the final policy period that the ownership of the common elements was transferred to the individual property owner’s associations. Since the property experiencing damage during the policy period was owned by the insureds, there can be no indemnity triggered under the policy for any damage occurring during a policy period.

XI. Punitive Damage Issue

The parties seek a declaration as to whether the punitive damage award in each case is covered.

A. Jury Instructions

As is noted above, in the Riverwalk POA and Pope consolidated trials, the trial court instructed that punitive damages could only be awarded for willful, wanton and reckless conduct or where a defendant’s actions “were so grossly negligent as to imply a willfulness or wantonness”. (TRIAL 00001824). Specifically, the trial court charged the jury that punitive damages were “imposed as punishment” and were “not intended to compensate”. (TRIAL 00001823-00001824). The court further charged that punitive damages were awarded to punish a “defendant’s recklessness, willfulness, wantonness, or

malicious conduct". (TRIAL 00001823). The trial court clearly instructed the jury that, in order to recover punitive damages, a plaintiff must prove acts beyond mere negligence. (TRIAL 00001825). With that charge given, the jury returned a verdict for the POA which included \$250,000.00 in punitive damages. (TRIAL 00013548-00013549). In the Pope Class Action, the jury returned a verdict which included \$750,000.00 in punitive damages. (TRIAL 00013550-00013551). As noted by the South Carolina Court of Appeals in its opinion affirming the verdicts, the jury's award of punitive damages was based upon a finding that the Riverwalk construction defects were caused by the amalgamated defendant entities' willful, wanton, and reckless conduct. Pope, 717 S.E.2d at 770. In performing its analysis of the punitive damage awards under Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), the Court of Appeals relied upon the defendants' experts' admissions of code and industry standard violations, defendants' admissions regarding the continued sale of defective units with knowledge of the units' defects, and evidence of similar conduct in other developments. Pope, 717 S.E.2d at 782.

In the Magnolia North Action, the trial court likewise charged the jury that the paramount purpose for awarding punitive damages is not to compensate the plaintiff, but to punish and set an example for others. As the trial court instructed

[p]unitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that Defendants action were willful, wanton, malicious, and in reckless disregard of the plaintiffs' rights or where defendants' actions were so grossly negligent as to imply a willfulness or wantonness. A conscious failure to exercise due care constitutes willfulness. It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the wrongdoer.

(TRIAL 000007222-00007228). With that charge given, the jury rendered a verdict which included \$2,000,000.00 in punitive damages. (TRIAL 00013552-00013553).

**B. Post Trial Review of Punitive Damages**

In upholding the punitive damages award on post trial motions, the trial court found that the defendants violated a legal duty to comply with the Southern Standard Building Code, that they were aware of the significant deficiencies at the complex and that they had repeatedly committed their injurious conduct. In addition, the court found that there was evidence of deceit inasmuch as underlying defendants knew of the substantial deficiencies in the units, yet continued to market and sell them without any proactive program to inform potential purchasers that these substantial deficiencies existed. (Heritage Communities, Inc., Heritage Riverwalk, and Buildstar Corporation, Inc.'s Post-Trial Motions, April 14, 2009).

**C. Appellate Court Review**

In affirming the verdict, the South Carolina Court of Appeals found that the trial court properly applied Gamble and Mitchell v. Fortis Insurance Co., 385 S.C. 570, 584-89, 686 S.E.2d 176, 183-86 (2009), in reviewing the jury's award of punitive damages.<sup>5</sup> Magnolia North Prop. Owners' Assoc., Inc. v. Heritage Communities, Inc., et al., Slip Opinion No. 4943 (Feb. 15, 2012).

**D. Policy Application Shows that the Punitive Damages Awards in these Actions are Not Covered Losses**

For the reasons set forth below, I find that no part of the punitive damages awards described above meets the definition of "bodily injury" or "property damage" as defined

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<sup>5</sup> The *Mitchell* "guideposts" include the "reprehensibility" of defendant's conduct. 385 S.C. at 584-89, 686 S.E.2d at 183-86. The *Gamble* factors are: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) existence of similar past conduct; (5) likelihood of deterring the defendant or others from similar conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. 305 S.C. at 111-12, 406 S.E.2d at 354.

in the various Harleysville policies and/or any policies which follow form.<sup>6</sup> Even if the punitive damage awards constituted “bodily injury” or “property damage”, the acts underlying the damages awards cannot be defined as an “occurrence” under the applicable policies. Finally, even if an “occurrence” existed which resulted in “bodily injury” or “property damage”, the “expected or intended” exclusion acts to void any potential duty of indemnity.

I. No Bodily Injury or Property Damage

Punitive damages are not “bodily injury” or “property damage” under the policies. (TRIAL 00012750). A “bodily injury” is defined as “injury, sickness or disease sustained by a person, including death resulting from any of these at any time. (TRIAL 00012758). “Property damage” is defined by the policies as “physical injury to tangible property, including all resulting loss of use of that property” and/or “loss of use of tangible property that is not physically injured.” (TRIAL 00012761). This Court must interpret these definitions as they are “understood in their plain, ordinary, and popular sense.” B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 514 S.E.2d 327, 330 (S.C. 1999).

In Riverwalk and Pope, the trial court charged the jury that punitive damages were “imposed as punishment” and were “*not intended to compensate*”. (TRIAL 00001823-00001824). Likewise, in Magnolia North, the trial court charged the jury that the paramount purpose for awarding punitive damages is *not to compensate the plaintiff*, but to punish and set an example for others. (TRIAL 000007222-00007228). To hold

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<sup>6</sup> It is only after “property damage” has been alleged that the question of “occurrence” is reached. Crossman II, 395 S.C. 40; 717 S.E.2d 589; 2011 S.C. LEXIS 277, \*12.

that damages awarded as "punishment" and not as "compensation" for "bodily injury" or "property damage" would be torturing the language of the policies. S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, 390 S.C. 125, 700 S.E.2d 258, 261 (S.C. Ct. App. 2010)

2. No Occurrence

Even if covered "property damage" or "bodily injury" existed, the acts underlying the punitive damage awards do not constitute an "occurrence" under the Harleysville policies and/or the policies which follow form. Under the Harleysville policies, "occurrence" is defined as an "accident, including continuous or repeated exposure to substantially the same harmful conditions." (TRIAL 00012761). It is

important to note that the analysis of whether an "occurrence" exists for the purposes of punitive damages should be distinct from the analysis of whether an "occurrence" exists for negligence damages due to "continuous or repeated exposure to substantially the same general harmful conditions" as defined in *Crossman II*. Therefore, the court must consider whether the acts underlying the punitive damages verdict were an "accident".

Under South Carolina law, in the absence of a prescribed policy definition, an "accident" is defined as an "unexpected happening or event, which occurs by change and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." Green v. Ins. Co. of America, 254 S.C. 202 (S.C. 1970). "An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen [circumstance exists or] happening occurs which produces or brings about" the injury. Manufacturers and Merchants Mut. Ins. Co. v. Harvey, et al., 330 S.C. 152, 498 S.E.2d 222 (S.C. App. 1998) (citing Vermont Mutual Insurance Company v. Malcolm, 128 N.H. 521, 523-24, 517 A.2d 800, 802 (1986)).

The transcript testimony in the Riverwalk, Pope, and Magnolia North cases clearly demonstrate that the jury believed either: (1) the underlying defendants acted in a willful, wanton, and malicious manner, with reckless disregard of the plaintiffs' rights and/or (2) the underlying defendants' actions were so grossly negligent as to imply a willfulness or wantonness. The above-cited jury instructions on punitive damages demonstrate that the evidence necessary to support punitive damages is intentional conduct. The juries came back with punitive damages verdicts, which were upheld on appeal. For purposes of its analysis, this Court is required to conclude that the juries followed the instructions given to them. Intentional conduct is not an "unexpected happening or event". In fact, the juries based their punitive awards, in part, based on the underlying defendants' admitted violation of code and industry standards, continued sale of defective units with knowledge of the units' defects, and evidence of similar conduct in other developments. These acts cannot be deemed "unexpected". By awarding punitive damages, the jury was, in effect, ruling by clear and convincing evidence that the conduct of the insured was not accidental.

3. Excluded by Expected or Intended Exclusion

Finally, even if an "occurrence" existed which resulted in "bodily injury" or "property damage", the "expected or intended act" exclusion bars coverage. The Harleysville policies specifically exclude from coverage "bodily injury" or "property damage" which is "expected or intended from the standpoint of the insured." (TRIAL 00012750). Although the South Carolina appellate courts have not interpreted the "expected and intended" exclusion in the context of commercial general liability policies, it is valid public policy that contracts of insurance should not be construed to indemnify

an insured for damages resulting from its own intentional misconduct. See, Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1187 (7th Cir.), *cert. denied*, 449 U.S. 1033, 66 L. Ed. 2d 495, 101 S. Ct. 608 (1980). To allow coverage for intentional or willful acts is a license for an insured to commit harmful, wanton, or malicious acts.

Based upon the evidence in the underlying transcripts, the charges to the jury, and the verdicts rendered, the acts upon which the punitive damage awards were based were clearly intentional. As well, because the evidence in the cases showed that the defendants were aware of the same or substantially recurring defects and subsequent damages at various projects prior to the full development of the Riverwalk and Magnolia North projects, for defendants to continue constructing the buildings in the same manner, while knowing it was incorrect, and continuing to sell the units with the knowledge that they were defective, the defendants surely understood the damages that might occur from their intentional acts.

For the above reasons, no part of any punitive damage award in these actions triggers the duty of indemnity under any relevant policy.

## XII. Time-On-Risk Analysis

### A. Standard Application

The South Carolina Supreme Court adopted the time on risk method for allocation of damages in the Crossmann opinion. It is this Court's duty to determine what portions of the damages fall within policy periods and which portions of the damages fall outside of the damages periods.

Crossmann addressed time-on-risk and established the calculation rules. It addressed concerns and stated as follows:

An ideal application of the "time-on-risk" approach would require the finder of fact to determine precisely how much of the injury-in-fact occurred during each policy period and precisely what quantum of the damage award in the underlying suit was attributable to *that* injury. Unfortunately, it often "both scientifically and administratively impossible" to make such determinations. (citations omitted)

In cases where it is impossible to know the exact measure of damages attributable to the injury that triggered each policy, courts have looked to the total loss incurred as a result of all of the property damage and then devised a formula to divide that loss in a manner that reasonably approximates the loss attributable to each policy period. The basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.

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Crossmann at 15.

Crossmann provided that this Court has discretion to view evidence that might suggest when the damages occur and to apportion those damages into certain time periods. The damages in these matters are typical progressive construction defect damages that naturally flow from continuous water intrusion. Damages form over a long period of time. The expert testimony offered by each plaintiff in the underlying action supports a long and progressive damage period flowing from shortly after the certificate of occupancy was issued through the verdict date. Since the jury was informed that damages were continuing, the end date should be the verdict date. There was no effort in the underlying action to signify the precise date when damages began to occur or when they stopped occurring. To the contrary, my view of the evidence suggests that damages began at some undisclosed point in time after construction and are continuing today. The POAs' best evidence offered in the declaratory judgment trial indicated that damages *likely* began at the first *significant* rain event following the issuance of the certificates of occupancy. No specific evidence was offered as to which part of the alleged damages

began at that time. Testimony in the underlying trial indicated that property damages first manifested in 2003-2004 when the expert hired by each POA inspected and documented the property damage. The damage, according to the same expert, continued through the date of trial. Plaintiff's expert testified that damages are progressive and that the condition of the buildings would worsen over time and that significant structural damages had manifested themselves between his visits in 2003 and the time of trial. (See, Factual Background in this Order).

This Court needs to choose a start date and an end date for the time on risk calculation. ~~Opinion evidence was offered showing that no damage manifested itself as~~ of the date of the certificates of occupancy. In fact, had evidence suggested the manifestation of damages at certificate of occupancy, much of the claims brought by Magnolia North POA and Riverwalk POA would have been barred by the statute of limitations. It is counterintuitive for Magnolia North POA or Riverwalk POA to claim in the underlying trials that they did not know of damages until well into 2000 in order to meet the statutory limitations requirement when the Complaint was filed in late 2003 and, in contrast, to now claim that damages manifested themselves in 1998 and 1999 shortly after the first certificates of occupancy in December of 1998. A party cannot have it both ways.

Crossmann provided for a default method of calculating time on risk periods. The court used a stipulated 30 days following the certificate of occupancy and settlement date. Using those dates allowed the Court to set forth a fair and reasonable period for allocation of damages.

The attached chart shows the time on risk analysis taking into consideration the

recoverable damages, applicable policy periods, progressive period in which damages accrued and total damages recoverable under the policy. The total repair cost property damage figure recoverable in the Magnolia North action is \$220,102.60. The total repair cost property damage figure recoverable in the Riverwalk action is \$101,784.21.

**B. Alternatives to Standard Damage Period**

Crossmann, as set forth above, utilized a damage period of the respective certificates of occupancy plus 30 days and the date of the settlement. The Crossmann court defined this as the “default method” for calculating time-on-risk.

In this action, an alternative method to the standard method results in zero covered damages. If the verdict date is not used, the court can consider using other dates. However, out of judicial fairness, if the Court is using a date sooner than the verdict date, it must necessarily use a starting date later than the certificate of occupancy date. The start date under such a scenario is likely after the expiration of the final policy period.

Testimony was offered at trial by expert witnesses. Harleysville offered expert testimony indicating that damages typically do not manifest themselves to the point necessitating repair until several years after the building has been in existence. Contrarily, the judgment holders’ expert offered opinion testimony that damages begin immediately. The technical evidence submitted in the underlying trial and made part of this record supports Harleysville’s position. Pictures were offered of conditions taken in 2003 and 2004 showing areas where damages had not yet occurred. The evidence offered by each POA in the underlying actions, however, was that damages had increased over time. Evidence was further offered that damages had worsened. Drew Brown indicated that much of the damage was to come in the future. (See, Factual Background

herein and trial testimony of Drew Brown).

If I were to significantly shorten the damage period by moving up the "end" date of the damages, I would also be compelled to choose a later "start" date for the damage period. Since the insurance ceased to provide any policy period beyond August of 2000, there would be no damages occurring in any policy period.

### **XIII. Loss of Use**

Loss of use was only awarded in the Riverwalk action. The policies at issue address damages awarded for loss of use. Obviously, the loss of use claims have not yet occurred, even at the time of this Order, since the evidence offered to support loss of use in the underlying action related to the time when the repairs are being performed and the unit owners are required to vacate the premises. Evidence in this action suggested that repairs have not yet begun and no unit owner has vacated the building. Evidence was offered for the cost of alternate housing to support the claim. The jury awarded actual damages of \$250,000 and punitive damages of \$750,000. Loss of use was not presented in the Magnolia North action.

The policy provides for loss of use damages in "property damage" which is defined as: "(a.) Physical injury to tangible property, including all resulting loss of use of that property; or (b.) Loss of use of tangible property that is not physically injured." The policy further explains that "Property damage that is loss of use of tangible property that is not physically injured will be deemed to occur at the time of the occurrence that caused it."

No testimony was offered supporting any claim pursuant to section (a). The sole claim for loss of use is found under section (b). The Court must, pursuant to section (b)

determine the date of the occurrence to the property that caused the loss of use.

Crossmann made clear that no occurrence exists until property damage is shown. The property damage necessitating the unit owners to vacate their units has not occurred as of the date of this Order. To the contrary, all testimony indicates that no unit owner has yet to vacate his or her unit. Until property damage is sufficient to necessitate moving out of the units, there is no loss of use. There can be no loss of use deemed to occur during the policy period.

If this Court were to determine that the occurrence happened at an earlier event, it would need to analyze the record to make such a determination. The insured and judgment holder offered no evidence sufficient to make such a determination. The Court could follow an analysis similar to the time-on-risk analysis. As discussed above and with the Crossmann decision, damages in a construction project are progressive in nature. The evidence presented in the underlying action was that much of the damage to the buildings is hidden. Even as of 2010, Baiden's testimony showed that no more than 17.82% of the repair costs are related to property damage. Since the damages are progressive, it is difficult to believe that the loss of use is caused by *assumed* damages that are minimal at best occurring prior to 2001. The property damage necessitating the repair resulting in causing unit owners to vacate, did not occur until well after the last potential policy expired. While the Court could conduct the same time-on-risk analysis, it is clear that the property damage necessitating the loss of use did not occur during any policy period.

No part of the loss of use or the occurrence causing the loss of use, took place during the policy periods and therefore, there is no duty of indemnity for the loss of use

verdict in the Riverwalk action.

**XIV. Effect of Appellate Decision on Underlying Action**

The underlying action (Magnolia North POA v. Heritage, Buildstar and Heritage Magnolia North & Pope et. al. v Heritage, Buildstar and Heritage Magnolia North) are currently on appeal. In the event that the appellate court remands for a new trial or any other issue affecting damages, this Order will either be declared null and void or modified as necessary. Following the final ruling on the appeal, if necessary, either party is granted leave by this Order to petition this Court for a modification of this Order.

**XV. Court Order and Declarations**

Based on the foregoing, I hereby ORDER the following declarations:

1. The judgment holders are the real parties in interest to assert the claims to satisfy their respective judgments. The insureds declined to participate and all rights of the insureds are foreclosed.
2. The construction defects allege in the underlying actions are occurrences.
3. The verdicts in the underlying action consist of damages relating to repairing defective workmanship and repairing damaged portions of the buildings.
4. In Magnolia North, the total actual damage award, after set-off, of \$4,968,937 dollars consists of \$1,636,271 dollars relating to repairing damaged portions of the building.
5. The total damage award meeting the policy definition of property damage in the Magnolia North action is \$1,636,271 dollars.
6. The verdict in the Magnolia North action awarded punitive damages in the

amount of \$2 million dollars. Those damages, based on the evidence and jury instruction, necessarily were awarded for willful actions of the insured and therefore are not accidents under the definition of occurrence. Said punitive damages would also be excluded pursuant to the Expected or Intended exclusion.

7. The time-on-risk calculation, because there is no credible evidence to show when damages began or ended, utilizes a damages period beginning at the certificate of occupancy and ending at the date of the verdict.
8. The policies issued to Heritage and Heritage Magnolia North are not triggered because no damage is alleged in this action or the underlying action to have occurred outside of the Magnolia North project. The Magnolia North project is the entire product or work of the developers, Heritage and Heritage Magnolia North.
9. The policies issued to Buildstar are triggered.
10. The time-on-risk calculation in Magnolia North reveals, absent the application of exclusions or a finding that damages did not occur inside of an policy period, that Harleysville owes \$220,102.60 to Magnolia North POA.
11. The time-on-risk calculation in Riverwalk reveals, absent the application of exclusions or a finding that damages did not occur inside of a policy period, that Harleysville owes \$101,784.21.
12. No part of the loss of use verdict in the Riverwalk action triggers indemnity because the Court finds that no physical damage necessitating

- the loss of use occurred during any policy period.
13. In Riverwalk, the total actual damage award, after set-off, of \$3,228,679 dollars consists of \$575,351 dollars relating to repairing damaged portions of the building.
  14. The total damage award meeting the policy definition of property damage in the Riverwalk action is \$575,351 dollars.
  15. The verdict in the Riverwalk action awarded punitive damages in the amount of \$250,000 for the repair cost estimate and \$750,000 for the loss of use claim. Those damages, based on the evidence and jury instruction, necessarily were awarded for willful actions of the insured and therefore are not accidents under the definition of occurrence. Said punitive damages would also be excluded pursuant to the Expected or Intended exclusion.
  16. The time-on-risk calculation, because there is no credible evidence to show when damages began or ended, utilizes a damages period beginning at the certificate of occupancy and ending at the date of the verdict.
  17. The policies issued to Heritage and Heritage Riverwalk are not triggered because no damage is alleged in this action or the underlying action to have occurred outside of the Riverwalk project. The Riverwalk project is the entire product or work of the developers, Heritage and Heritage Riverwalk.
  18. The policies issued to Buildstar are triggered.
  19. The time-on-risk calculation in Riverwalk reveals, absent the application.

of exclusions or a finding that damages did not occur inside of a policy period, that Harleystville owes \$101,784.21.

20. No part of the loss of use verdict in the Riverwalk action triggers indemnity because the Court finds that no physical damage necessitating the loss of use occurred during any policy period.
21. In the event that the appeal of the underlying action involves changes to the judgments, any party to this action is granted leave to petition this Court for voidance or modifications to this Order.

It is So Ordered.

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John M. Milling  
Special Referee

April \_\_\_\_, 2012

STATE OF SOUTH CAROLINA )  
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 )  
 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

**MOTION TO ALTER OR  
 AMEND ORDER**

13 MAR 20 PM 2:51  
 CLERK OF COURT

Pursuant to Rule 59, S.C.R.C.P., the Defendant, Magnolia North Horizontal Property Regime, Magnolia North Property Owners Association, Inc. a South Carolina Corporation, respectfully submit that his Honor should alter or amend his Order issued February 21, 2013, to eliminate application of the "time-on-the-risk" analysis for the following reasons:

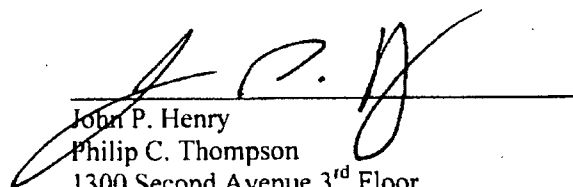
- 1) Application of "time-on-the-risk" ("TOR") necessarily concludes that all damages awarded by the jury were for progressive damages which requires speculation by the Court.
- 2) TOR is not applicable to a general verdict where various types of damages and causes of action were submitted to the jury, not all of which may have included progressive damages. Owners Insurance Company v. Clayton, 364 S.C. 555 (2005) (If several claims are submitted to the jury and a general verdict is rendered, if one claim is covered the entire verdict is covered).

- 3) The first analysis in applying TOR is to determine that the damages are progressive damages. Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, 395 S.C. 40 (2011) "Crossman". Because there is no opportunity for the court to determine progressive damages, TOR cannot be applied.
- 4) As "Crossman" dictates, "Only after determining how policies are triggered will it be possible to decide which policies were triggered by a progressive injury and, correspondingly by how much of the loss caused by the injury is covered by each." Id. at p. 51. In this case, since there is a general verdict it is impossible to determine when and if each policy is triggered.
- 5) TOR does not apply to a discrete and identifiable event as to make it impossible to identify one such event. Woodale Builders, Inc. v. Maryland Casualty Company, 722 NW 2d 283 (2006). In this case damages were submitted which had an identifiable event and it would be error to apply TOR.
- 6) Harleysville controlled the defense but failed to advise its insureds of a need for an allocated verdict or a verdict conducive to TOR and therefore prejudiced its insureds and these claimants.
- 7) The court's application of TOR requires the court to enter into speculation as to how the jury allocated damages; speculation the court properly denied Harleysville to engage in.
- 8) Since the court has determined that Harleysville failed to properly reserve its rights to contest coverage, it would be error to apply TOR which is in effect a denial of coverage for a portion of the verdict.
- 9) TOR analysis necessarily requires an allocation of damages over various policy periods. Since Harleysville failed to intervene and seek an allocated verdict, the entire verdict is covered. Auto Owners Insurance Company v. Newman, 385 S.C. 187 (2009) "Newman".
- 10) Applying TOR to a general verdict containing several causes of action and different types of damages, usurps the sanctity of the general verdict; the court assumes the role of the judge and Jury.
- 11) Applying TOR to a general verdict where numerous types of damages were submitted to the jury and numerous causes of action were submitted to the jury will leave a multi-million dollar verdict against the insureds who had no control over the defense or settlement which is contrary to law and prejudices the insureds and these claimants. Tyger River Pine Company v. Maryland Casualty Company, 170 S.C. 29-86 (1933).
- 12) The Court erred in determining the ending date for application of the TOR. The jury found breach of fiduciary duty which breach occurred on September 13, 2002. If the

Court is going to apply TOR, which is error, the ending date should be September 13, 2002, which is the date of the breach of fiduciary duty.

- 13) Harleysville failed to intervene in the underlying action to seek both an allocated verdict and a determination of damages in policy periods thereby depriving the insureds of their right to a jury determination on these issues. The court's application of TOR substitutes its findings for that of the jury, clear error.
- 14) "Newman" makes clear, that if covered damages and non-covered damages are submitted to the jury it is the insurance carrier's responsibility to protect its insured by seeking an allocated verdict and failure to do so requires payment by the insurance company of the entire verdict.

THOMPSON & HENRY, P.A.



John P. Henry  
Philip C. Thompson  
1300 Second Avenue 3<sup>rd</sup> Floor  
Conway, South Carolina 29528  
Telephone: (843) 248-5741  
Fax: (843) 248-6396  
Attorneys for Plaintiff

Conway, South Carolina  
March 20, 2013

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
 )  
 )  
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 )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO. 2009-CP-26-10055

**MOTION TO ALTER OR  
AMEND ORDER**

FILED  
13 MAR 20 PM 2:57  
CLERK OF COURT

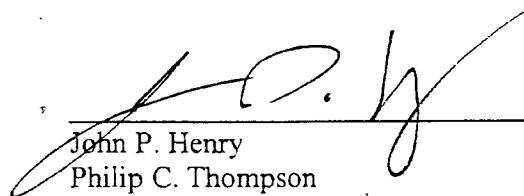
Pursuant to Rule 59, S.C.R.C.P., the Defendant, Riverwalk at Arrowhead Country Club Horizontal Property Regime, Riverwalk at Arrowhead Country Club Property Owners Association, Inc., a South Carolina Corporation, respectfully submit that his Honor should alter or amend his Order issued February 21, 2013, to eliminate application of the "time-on-the-risk" analysis for the following reasons:

- 1) Application of "time-on-the-risk" ("TOR") necessarily concludes that all damages awarded by the jury were for progressive damages which requires speculation by the Court.
- 2) TOR is not applicable to a general verdict where various types of damages and causes of action were submitted to the jury, not all of which may have included progressive damages. Owners Insurance Company v. Clavton, 364 S.C. 555 (2005) (If several claims are submitted to the jury and a general verdict is rendered, if one claim is covered the entire verdict is covered).
- 3) The first analysis in applying TOR is to determine that the damages are progressive damages. Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, 395 S.C. 40 (2011) "Crossman". Because there is no opportunity for the court to determine progressive damages, TOR cannot be applied.
- 4) As "Crossman" dictates, "Only after determining how policies are triggered will it be possible to decide which policies were triggered by a progressive injury and, correspondingly by how much of the loss caused by the injury is covered by each." Id. at p. 51. In this case, since there is a general verdict it is impossible to determine when and if each policy is triggered.
- 5) TOR does not apply to a discrete and identifiable event as to make it impossible to identify one such event. Woodale Builders, Inc. v. Maryland Casualty Company, 722 NW 2d 283 (2006). In this case damages were submitted which had an identifiable event and it would be error to apply TOR.
- 6) Harleysville controlled the defense but failed to advise its insureds of a need for an allocated verdict or a verdict conducive to TOR and therefore prejudiced its insureds and these claimants.
- 7) The court's application of TOR requires the court to enter into speculation as to how the jury allocated damages; speculation the court properly denied Harleysville to engage in.
- 8) Since the court has determined that Harleysville failed to properly reserve its rights to contest coverage, it would be error to apply TOR which is in effect a denial of coverage for a portion of the verdict.
- 9) TOR analysis necessarily requires an allocation of damages over various policy periods. Since Harleysville failed to intervene and seek an allocated verdict, the entire verdict is covered. Auto Owners Insurance Company v. Newman, 385 S.C. 187 (2009) "Newman".
- 10) Applying TOR to a general verdict where numerous types of damages were submitted to the jury and numerous causes of action were submitted to the jury

will leave a multi-million dollar verdict against the insureds who had no control over the defense or settlement which is contrary to law and prejudices the insureds and these claimants. Tyger River Pine Company v. Maryland Casualty Company, 170 S.C. 29-86 (1933).

- 11) The Court erred in determining the ending date for application of the TOR. The jury found breach of fiduciary duty which breached occurred on May 29, 2002. If the Court is going to apply TOR, which is error, the ending date should be May 29, 2002, which is the date of the breach of fiduciary duty.
- 12) Harleysville failed to intervene in the underlying action to seek both an allocated verdict and a determination of damages in policy periods thereby depriving the insureds of their right to a jury determination on these issues. The court's application of TOR substitutes its findings for that of the jury, clear error.
- 13) "Newman" makes clear, that if covered damages and non-covered damages are submitted to the jury it is the insurance carrier's responsibility to protect its insured by seeking an allocated verdict and failure to do so requires payment by the insurance company of the entire verdict.

THOMPSON & HENRY, P.A.



John P. Henry  
Philip C. Thompson  
1300 Second Avenue 3<sup>rd</sup> Floor  
Conway, South Carolina 29528  
Telephone: (843) 248-5741  
Fax: (843) 248-6396  
Attorneys for Plaintiff

Conway, South Carolina  
March 20, 2013

STATE OF SOUTH CAROLINA )

COUNTY OF Horry )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

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., )

Defendant. )

Civil Action No. 2009-CP-26-11862

HARLEYSVILLE'S MOTION TO  
VACATE, ALTER OR AMEND

(Rules 50 and 59)

FILED  
COUNTY  
MAR 21 AM 10:56  
ANGIE HUGGINS-WARD  
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that the plaintiff, Harleysville Group Insurance, a Pennsylvania Corporation (hereafter "Harleysville") Moves before this Honorable Court, pursuant to Rules 50 and 59, and any other applicable rules of the South Carolina Rules of Civil Procedure, for an Order Vacating and/or Altering or Amending the Orders (Order on all issues in case, Order denying directed verdict motion, and Order Dismissing Claims Against National Surety Corp. and Its Counterclaims and Crossclaims) of the Honorable Special Referee, John M. Milling dated February 28, 2013, filed and clocked on Tuesday,

March 5, 2012, entered into the Clerk of Court file on Friday, March 8, 2013, and served on the parties on Monday March 11, 2012 as well as any other Orders and Rulings made on the record during the testimony phase and incorporated into the March 11, 2012 Order or the lack of Orders on issues referenced below,

This matter involves insurance coverage issues in several commercial general liability policies. Harleystville is the insurance carrier who provided certain policies of insurance to its insureds Heritage Communities, Inc., Heritage Magnolia North, Inc. and Buildstar Corporation, Inc. In May of 2009, a verdict was entered against the three defendants who had been amalgamated by the court into one entity. Harleystville filed a declaratory judgment action seeking a declaration of rights under the insurance policy. Named in the action filed by Harleystville were the insureds, the judgment holder, Magnolia North POA and Horizontal Property Regime, and an excess insurance carrier, National Surety Corp.

The grounds for this Motion are recited below and will be supported by a memorandum to be submitted identifying the proper application of the law, further analysis on the Orders and misplaced rulings therein, and proper recitation of the supportive facts warranting alteration of the Orders and issuance of an Amended Order in favor of Harleystville.

Pursuant to Rules 50 and 59 and all other applicable rules of the South Carolina Rules of Civil Procedure, this court should vacate and/or alter or amend its Order of February 28, 2013 and served on the parties on March 11, 2013, and issue a new Order in favor of Harleystville on all issues. The grounds for this Motion are set forth below. Any grounds, reasons, and arguments asserted prior, during and after the trial of this matter, orally or in writing, not herein listed below are adopted and incorporated fully as if set forth below and are asserted as additional grounds for this Motion. The Orders, dated March 5, 2013 and received

by counsel for plaintiff on March 11, 2013 contain the following errors and should be vacated, altered or amended:

1. Directed Verdict Motion. The Directed Verdict Motion should have been granted on all issues. The basis for denial is that it was improper in a bench trial. The Order, dated February 28, 2013 but not served on the parties until March 11, 2013 denying the Motion for Judgment as a matter of law should be amended to Grant all relief requested.
2. National Surety Corp Order. The court dismissed any and all claims related to the excess policy of National Surety Corp. The Order should specifically identify that all claims by Harleysville, National Surety and the judgment holders are dismissed without prejudice. The Order fails to identify that Harleysville and National Surety Corp agreed to withhold any of the issues relating to the policy until a later date. The Order currently reserves the right to raise issues at a later time but the Order should be amended to clearly state that the dismissal is without prejudice and, should later matters implicate the policy as discussed by counsel, the parties may then litigate any unresolved issues.
3. Parties To Insurance Contract. The court failed to include in the Order that the insurance is for the benefit of the insurer and insured and there are no third party rights. Harleysville offered testimony and requested a ruling that the insurance between Harleysville and the insureds was for the sole and exclusive benefit of the insured and not for third parties claiming any rights. The Order fails to rule on this issue. The Order should be amended to include a ruling that the insurance policies

involved in these actions was for the benefit of the insureds and not for any third parties not named on the policy claiming any rights.

4. Occurrence. The Order improperly finds that all damages are a covered occurrence under the applicable policies. This is a factual impossibility given that the verdict in the underlying action was comprised of both covered and non-covered damages. The repair cost evidence offered in the underlying action was a mixture of construction defects and damages resulting therefrom. All repair cost evidence offered in the underlying action with respect to construction defects, however, conclusively established that construction defects would not constitute a covered "occurrence" under the South Carolina Supreme Court's analytical framework addressing the definition of "occurrence" under the policy language. No evidence was offered allowing the jury to make any decision other than to return a verdict of general damages to repair both defective work and the corresponding resulting damages. The Court has ruled that the entire verdict is covered by the policy as an occurrence because it is a general verdict. This is incorrect and a general verdict does not mean that the entire verdict is an occurrence. The Order should be amended to say that only a portion of the general verdict is an occurrence.
5. Occurrence. The court improperly ruled that the damages resulted from an occurrence. All evidence indicates that the insureds intended the construction exactly as it was built. As such, there can be no accident forming the basis of any claim of damages. The Order should be amended to rule that no damages stem from any occurrence.

6. Denial of Allocation. The Order improperly denied plaintiff's right to allocate damages into categories of covered versus non-covered losses. The South Carolina Supreme Court in *Crossmann* mandates that only those damages categorized as "property damage" are potentially recoverable under a standard commercial general liability policy. The Court was given evidence that the general verdict in the underlying action included both damages to repair defective work and damages resulting from defective work. The combination verdict must be allocated by this Court to exclude non-covered construction repair costs as those items are not recoverable. The Court failed to do so following evidence offered by plaintiff showing that of the construction defects on the building and resulting damages, the sole covered damages comprised seventeen (33%) percent of the verdict amount. Pursuant to the ruling in *Sims v. Nationwide*, the Court had an obligation in this subsequent action to allocate the damage total between covered and non-covered damages.
7. No Damages During Any Policy Period. The Court improperly found that the time on risk period began shortly after the Certificate of Occupancy was issued. The sole evidence offered on this issue was speculative testimony by Magnolia North POA's expert witness, Drew Brown. All documented evidence showed no damage occurring at any time during any policy period for the Harleysville policies at issue. The Order should be amended to rule that no damage occurred during any policy period and, therefore, there is no duty of indemnity by Harleysville thereby ruling entirely in favor of Harleysville.

8. Punitive Damages Not Occurrence. The Court improperly found that punitive damages are an occurrence within the insuring agreement and therefore a covered loss. The jury charge in the underlying action requires a finding of conscious intent of wrongdoing before any punitive damages may be awarded. The jury necessarily found that the punitive damages stemmed from intentional acts of wrongdoing known by the wrongdoers. The damages cannot be deemed as an occurrence because they do not stem from an accident. The Order should be amended to rule that punitive damages are not a covered loss because they do not result from an occurrence.
9. Punitive Damages and Exclusion A. The Court improperly found that punitive damages are not excluded from Exclusion A, Expected or Intended Loss. The punitive damage jury instruction required a finding of proof that the person committing the act supporting punitive damages did so with a conscious intent of wrongdoing. The jury awarding punitive damages necessarily found that they were supported by actions meeting the definition of Exclusion A. The Order should be amended to exclude punitive damages.
10. Default of Insureds. The court has failed to rule on the Motions for Default Judgment against the Insureds for failure to make an appearance after notice. The Order simply indicates that the insureds made no appearance after notice and defaulted. The court fails to rule that the rights of the insureds are foreclosed as a result of the default and failure to appear. Instead, the Order implies that while the insureds have defaulted, the judgment holder maintains rights lost by the insured. The Court made a finding that the Insureds failed to appear after proper service of

the action and notice of all hearings. As such, all rights of the insured should be foreclosed. A motion for default judgment was filed by Harleysville against all insureds. There is no specific ruling granting or denying the motion. Either a specific Order should be issued or the global Order should be amended to specifically rule that the insureds are in default and a default judgment is entered against each foreclosing all rights they may have under the policies.

11. Judgment Holder Rights. The court improperly found that the judgment holders step into the shoes of the insured in a very broad sense. The insureds lost any rights by failing to appear and take any position in this matter. The judgment holder rights are set forth in the policies which provide "A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after and actual trial; but we will not be liable for damages that are not payable under the terms of this policy 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. Nowhere does the policy allow the judgment holder to fully step into the shoes and become the insured. In fact, South Carolina denies any third party rights under a liability insurance policy. The Order should be amended to provide that the judgment holders may bring an action to recover under the policy but do not obtain all rights of the insured.

12. Reservation of Rights Letters. The Order improperly concludes that the Reservation of Rights letters failed in whole to reserve any coverage issues and resulted in an implied waiver of any and all coverage matters. The Order further

improperly finds that the Reservation of Rights letters prejudiced the insureds. No evidence was offered that anything in the Reservation of Rights letters prejudiced the insureds. The insureds failed to appear and defaulted resulting in a foreclosure of their rights. Nothing allows a judgment holder to benefit from any issue personal to the insured. The policy language is specific in the limited rights given to the judgment holder and do not include any rights of prejudice or Reservation of Rights. Such ruling is improper based on the law and evidence submitted at trial. Conclusion F is improper and the Order should be amended to rule that Harleysville properly preserved its rights on all coverage issues to all insureds.

13. Reservation of Rights Letters. The Reservation of Rights letters were offered into evidence as a plaintiff's Exhibit. Harleysville did not have possession of some of the Reservation of Rights letters but testified that they definitely existed and were mailed to and discussed with the insureds. The Court improperly ruled that since the missing letters relating to Buildstar were not offered into evidence that they did not exist and, therefore that Harleysville cannot contest coverage against the insureds or judgment holders. The indisputable evidence offered at trial showed that written reservation of rights letters were sent to the insured and discussed with the principals of the insured. No evidence existed to the contrary. In addition, since the insureds have defaulted, the provisions of the pleadings indicating that Harleysville defended the insured under a reservation of rights is deemed admitted as a fact that cannot be contested. The judgment holder takes no rights better than that of the insured and therefore cannot contest on a reservation of rights claim since it is an admitted fact. Finally, the reservation of rights issue is personal to the

insured and the judgment holder has no standing to raise such an issue because the policy is a contract between the insured and insurance carrier and no third party rights exist. The Order should be amended to find that all Reservation of Rights letters existed and were mailed to and discussed with each insured.

14. Exclusions. The Order improperly denies all requested relief under Harleysville's request for judgment on Exclusions A, J(1), J(5), J(6), K and M. The evidence shows that the insureds intended the construction that was completed. Many examples of this are found in the record where the insureds believed the work they were performing was correct. This is clear evidence that they intended the work to be performed as it was constructed and there is no accident, the work is that of the insured, the insured was the owner of the property at the time of the construction defect and resulting damage, it is the insureds product and the work is impaired property. The Order should be amended to find that all damages are excluded pursuant to the policy exclusions.
15. Per Building Time On Risk Application. Notwithstanding the grounds above regarding policy periods and the fact that no policy was triggered, the Order fails to properly identify each building and respective certificate of occupancy to determine the appropriate starting date of the damage period for time on risk calculation. The Order simply chooses the first certificate of occupancy date plus thirty (30) days for the starting date of the damage period. The Order provides that since it is a general verdict, the certificate of occupancy date for the first building is proper. This finding is incorrect and improper. This finding is problematic in that pursuant to the Order, damages are assessed under the insurance policy for buildings that have

not yet been constructed. It is a physical impossibility to show damages within a policy period for a building that is not constructed. Plaintiff submitted a chart using the certificate of occupancy dates for each building plus the estimated thirty (30) days. The end date chosen by the Court is appropriate for each building in that that is the date on which the Magnolia North POA expert identified the conclusion of the damages that were submitted to the jury in the underlying action. The Order should be amended to utilize the certificate of occupancy date for each building. A proposed chart has previously been submitted to the court showing the individual certificate of occupancy date for each building, the corresponding damage period and the time on risk calculation showing the damages falling within the policy period and triggering the duty of indemnity under the policy.

16. Post Judgment Interest. The Order makes a specific finding that the policies provide coverage for post judgment interest. The judgment holders do not possess rights to obtain any damages outside of that specifically recoverable under the terms of the policies. No policy provision allows for the recovery of post judgment interest. The Order should be amended to delete the language indicating that the judgment holders are entitled to post judgment interest.

17. Improper basis for exclusion of Expert Testimony. The Order improperly excludes testimony on grounds not raised. Harleysville notes that it disputes any exclusion of the evidence proffered relating to Mr. Baiden's testimony and allocation of the damages. The Order, page 30, excludes testimony offered by plaintiff from Frank J. Baiden, III. At trial, the evidence was excluded solely on the basis that the general verdict cannot be disturbed in a subsequent action and therefore such

evidence was not relevant. In fact, the defendant indicated that if the appellate court determined such evidence was relevant, he wanted the opportunity to present evidence in opposition. No objection was made to the proffered evidence on the basis of speculation. The proffer was valid in any event and a proffer need not meet the admissibility test set forth by the Court in its Order. Arguments by lawyers are valid proffers. The Order lists as grounds for exclusion based on relevance due to the general verdict and, as an additional ground not raised at trial, that the evidence is speculative. All such objections were set forth on pages 216-233 of the Trial Transcript for trial days December 13-14, 2010. No mention that Mr. Baiden's method is speculative. Such ruling was never made by the Court during the hearing. The Order should be amended to state that the sole reason for the exclusion of the proffered testimony of Mr. Baiden was due to the general verdict.

18. Time On Risk to Non-Covered Damages. The Order improperly applies the time on risk analysis to non-covered losses. Because the Court failed to allocate the damage award into covered and non-covered losses, it necessarily applied time on risk analysis to damages that are non-covered losses. The Court should have only applied time on risk to the covered losses. The Order should be amended such that it only applies time on risk analysis to covered damages.

19. Time On Risk for Punitive Damages from Repair Cost Verdict. Notwithstanding the above grounds that punitive damages are not covered, the Court improperly failed to apply time on risk to the \$2,000,000 punitive damage award supported by the repair cost verdict. In the event that punitive damages are considered a covered

loss, then they are necessarily based upon the damages that have been deemed to be progressive and spread out over the entire damage period. Therefore, if punitive damages are not excluded because they are found to be an occurrence and not excluded by a policy exclusion, then they necessarily arise from progressive damages. The damages at the time of the act are simply repair cost which are not covered losses. It is not until the damages manifest themselves through the progressive damage period that they become sufficient to support the award. The punitive damages themselves must necessarily be subject to time on risk calculations and the Order must be altered and amended accordingly.

20. Improper and Incorrect Finding of Fact 20. The Order contains improper and incorrect findings of fact. Finding of Fact 22 states that damage began thirty (30) days following the certificate of occupancy. There is no factual evidence in the record to support the opinion testimony that damage began within thirty (30) days of the certificate of occupancy. The Order should be amended to provide that it is unknown when damage began to occur.

21. Improper and Incorrect Findings of Fact 32, 33, 35, 36, 37, 38, 39, 40 and 42.  
The Order contains improper and incorrect findings of fact. Finding of Fact 32, 33, 35, 36, 37, 38, 39, 40 and 41 indicate that some insureds did not receive a Reservation of Rights letter, that the letters were vague and that Harleysville did not discuss exclusions with its insureds. The uncontradicted testimony shows that a reservation of rights letter was mailed to each insured for each action. The uncontradicted testimony of Lee Wright provides that he is "absolutely, positively, 100%" that Reservation of Rights letters were sent to all insureds. The record

further contains testimony showing that full discussion was made with the insureds on many issues. The evidence, however, was objected to and excluded and is part of a proffer. It is not proper to include findings of fact in the Order that were excluded at trial. Findings of Fact 32, 33, 35, 36, 37, 38, 39, 40 and 41 should be amended to say that Reservation of Rights letters were mailed to each insured, read by each insured and discussed by each insured with Harleysville; that the Reservation of Rights and coverage issues were fully discussed with all rights reserved; and that Harleysville and its insureds agreed to resolve all coverage issues in a subsequent declaratory judgment action.

22. Improper and Incorrect Findings of Fact 39, 44 and 45. The findings of fact in 39, 44 and 45 indicate that Harleysville made the sole decision to not intervene and would wait until after the verdict was issued. The uncontradicted testimony shows that Harleysville and the insureds discussed the issues and agreed that all coverage issues would be decided in this post trial declaratory judgment action in light of the Reservation of Rights by Harleysville. This evidence was offered, objected to and excluded and is in the record as a proffer of evidence. It is misstated in the findings of fact and based on excluded testimony. The Order should be amend to say that Harleysville and its insureds agreed that intervention was not possible, that the insured refused to allow intervention due to perceived harm, and the parties agreed to resolve all insurance coverage disputes and issues in this post verdict declaratory judgment action.

23. Improper and Incorrect Findings of Fact 45. Finding of fact 45 indicates that Harleysville was aware of the need for allocation. The record shows the exact

opposite. Harleysville proffered testimony that the first *Newman v. Auto Owners* decision mandated that all damages were covered by a standard commercial general liability policy. The testimony was that under the Supreme Court's ruling, there was nothing that could be allocated. Harleysville never testified that it believed allocation was proper. It testified on proffer that it believed that if it intervened, harm would come to the insured and that the insured had strongly opposed intervention in previous actions. It was not until the second *Newman* decision was issued that any allocation was even possible. This change in the law is the sole reason for allocation. The finding of fact 48 should be amended to state that "because of the then existing Supreme Court opinion, there was no right to intervene and seek allocation or any special interrogatory on the verdict form."

24. Improper and Incorrect Findings of Fact 39, 41, 42, 43, 44 and 45. Findings of Fact 39, 41, 42, 43, 44 and 45 are all subjects that were objected to and excluded from evidence during trial. The court sustained the objection excluding any evidence relating to the reasons that Harleysville could not intervene. The facts listed in 39, 41, 42, 43, 44 and 45 come from the proffer of evidence. While Harleysville believes the evidence was admissible, the record reflects that it was excluded. Notwithstanding, the version of the facts in 39, 41, 42, 43, 44 and 45 is incorrect. The findings of fact are incorrect and the subject matter of the findings was excluded from evidence. The Order should be amended to accurately reflect the testimony and/or not include findings of fact based on excluded but proffered testimony.

25. Proffered Evidence. The trial court improperly excluded evidence that was proffered at trial. Harleysville renews all of its proffers of evidence and asserts that the court erred in failing to properly admit the evidence proffered and reserves its rights to raise all issues on appeal of any rulings by the court that excluded evidence, documents and testimony offered during the testimony phase of this matter. The Order should be amended to rule that such excluded evidence is admissible and part of the record on appeal.

26. Basis for Harleysville not Intervening. Harleysville offered into evidence all reasons that it believed it was improper for it to seek to intervene in the underlying action. The court sustained the objection to the evidence. The court ruled that such evidence was improper and excluded it. Such evidence was proffered and should be made part of the record. The proffered evidence showing the basis that Harleysville did not intervene is found on pages 129 through 139 of the Trial Transcript for trial days December 13-14, 2010. Such evidence is supportive of the reasons showing that the insured and insurer had divergent interests that made it impossible to raise and rule upon insurance coverage issues in the underlying action. To do so would have forced Harleysville to place its insured at risk of harm and would violate the duty to defend. The Order should be amended to include the proffered testimony as part of the record.

27. Affidavit of Roger Van Wie. Harleysville sought to introduce into evidence the affidavit of Roger Van Wie, Exhibit 23. The basis for offering the document was to show that discussions were had with the principal of the insured. The document was not offered for the truth of the content of the affidavit but under an independent

significant basis showing discussion with the insured. The court improperly excluded the document. The Order should be amended to include the admission into evidence of Exhibit 23, the affidavit of Roger Van Wie.

28. Meeting and discussion by Lee Wright with Jack Green. Harleysville sought to introduce into evidence testimony by Lee Wright of Harleysville that he held several meetings with Jack Green and his attorney, Alan Jeffcoat, for the purpose of showing communication with a principal of the insured and to show that Lee Wright discussed an agreement that all coverage issues would be decided in this post verdict declaratory judgment action with all rights reserved. The court improperly excluded the testimony which was proffered on pages 110, 111 and 182-189 of the Trial Transcript for trial days December 13-14, 2010. The Order should be amended to include the admission into evidence of the testimony of Lee Wright regarding his meeting and discussion with Jack Green, principal of the insured, and his attorney.

29. Harleysville's understanding of the then current law. Harleysville offered testimony from Lee Wright as to Harleysville's understanding of the then current law on insurance coverage from the first *Newman v. Auto Owners* decision. The court excluded the testimony stating that it was irrelevant and that Harleysville could not give an opinion on the law. Harleysville proffered the testimony on pages 114-117 of the Trial Transcript for trial days December 13-14, 2010. The basis for the testimony was to show reasonableness and fairness for Harleysville not seeking to intervene into the underlying action because there was no legal basis and to do so would harm the insured. The Order should be amended to include the testimony

from Lee Wright as to Harleysville's understanding of the then current law on insurance coverage.

30. Harleysville's Reasons for Not Moving to Intervene in the Underlying Action.

Harleysville offered many reasons that it did not attempt to intervene in the underlying action. The court sustained an objection and excluded all testimony relating to any basis for not moving to intervene into the underlying action.

Harleysville proffered the evidence at pages 129-139 of the Trial Transcript for trial days December 13-14, 2010. The evidence supports the contention that there was no reasonable or fair means of seeking allocation of the verdict into covered and non-covered categories. The Order should be amended to admit into evidence the testimony regarding all reasons that Harleysville did not move to intervene into the underlying action.

31. Insured's Refusal to Allow Intervention in Earlier Lawsuits. Harleysville, through

Lee Wright, sought to introduce evidence from a nearly identical lawsuit that reached trial several years before this action wherein Harleysville filed a motion to intervene. The insured's reaction was to threaten bad faith. The homeowner's association opposed the motion. Under threats of bad faith litigation from its insureds, threats from plaintiff's counsel that it would make the jury harm the insured and penalties from the court, Harleysville withdrew its motion. The evidence was offered to show that this same insured had already refused to allow intervention. The court sustained the objection and the evidence was excluded.

The evidence was proffered at page 131, 206-208 of the Trial Transcript for trial days December 13-14, 2010.

32. River Oaks Transcript. Harleysville sought to introduce evidence of other Circuit Court rulings denying motions to intervene. Harleysville sought to introduce Exhibit 22, the River Oaks transcript of a motion hearing where the judge denied a motion to intervene. The evidence of the River Oaks transcript was designed to show the court that Harleysville was proper in not attempting to intervene. The Order should be amended to admit into evidence Exhibit 22.
33. Drew Brown report and pictures. Harleysville sought to introduce testimony from Lee Wright addressing the findings, conclusions and opinions in the Drew Brown Report. Drew Brown was the expert for the Magnolia North Homeowner's Association in the underlying action. Mr. Wright sought to show that the damages supporting the verdict were all labeled by Mr. Brown as defective construction. The court sustained an objection excluding the testimony. The testimony is proffered at pages 152-161 of the Trial Transcript for trial days December 13-14, 2010. The Order should be amended to admit into evidence the testimony of Lee Wright regarding the Drew Brown report and pictures.
34. Magnolia North Opened the Door. Counsel for Magnolia North during cross examination of Lee Wright asked questions regarding the same issues raised on direct examination but excluded by the court. Such questions and responses allowed such testimony into the record without objection. The evidence opened the door to all previously proffered evidence. Harleysville moved to admit into evidence all proffered testimony. The court improperly denied the motion. The Order should be amended to admit into evidence, all proffered testimony previously excluded.

35. Baiden Testimony. Harleysville offered expert testimony from its expert Frank Baiden, III regarding the allocation of the damages at Magnolia North into categories of covered and non-covered damages. Mr. Baiden conducted an independent analysis of the conditions at Magnolia North and produced a repair estimate. The repair estimate was broken down into categories of repairing improperly performed work and repairing parts of the building damaged by the improper work. The testimony was offered to allow the court to perform an allocation of the damages either on a percentage basis or simply on a repair cost of damage basis. The court sustained an objection based upon the position that a general verdict cannot be disturbed in a subsequent action. The evidence was proffered on pages 217-262 including a report from Mr. Baiden offered into evidence. No objection was made other than that the general verdict barred the introduction of the evidence. The Order contains additional grounds not presented to the court. The Order should be amended to admit into evidence the testimony and exhibits of Baiden.

For the foregoing reasons, the Orders of the Honorable John M. Milling (Order on all issues in case, Order denying directed verdict motion, and Order Dismissing Claims Against National Surety Corp. and Its Counterclaims and Crossclaims), dated March 5, 2013 and at trial and served on the parties on March 11, 2013, should be altered and amended as set forth herein.

And We So Move.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 

Robert C. Calamari

SC Bar No. 064985

Mitch Brown

E-Mail: bob.calamari@nelsonmullins.com

3751 Robert M. Grissom Parkway / Suite 300

Post Office Box 3939 (29578-3939)

Myrtle Beach, SC 29577-3165

(843) 448-3500

Attorneys for Harleysville

Myrtle Beach, South Carolina

March 21, 2013

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF HORRY ) FIFTEENTH JUDICIAL CIRCUIT

HARLEYSVILLE GROUP ) Civil Action No. 2009-CP-26-10053  
 INSURANCE, A PENNSYLVANIA )  
 CORPORATION, )

Plaintiff, )

vs. )

HARLEYSVILLE'S MOTION TO  
VACATE, ALTER OR AMEND  
 (Rules 50 and 59)

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, )

Defendant. )

FILED  
 HURRY COUNTY  
 2010 MAR 21 AM 11:00  
 MELANIE HERRIGS-WARD  
 CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that the plaintiff, Harleysville Group Insurance, a Pennsylvania Corporation (hereafter "Harleysville") Moves before this Honorable Court, pursuant to Rules 50 and 59, and any other applicable rules of the South Carolina Rules of Civil Procedure, for an Order Vacating and/or Altering or Amending the Orders (Order on

all issues in case, Order denying directed verdict motion, and Order Dismissing Claims Against National Surety Corp. and Its Counterclaims and Crossclaims) of the Honorable Special Referee, John M. Milling dated February 21 and 28, 2013, filed and clocked on Tuesday, March 5, 2012, entered into the Clerk of Court file on Friday, March 8, 2013, and served on the parties on Monday March 11, 2012 as well as any other Orders and Rulings made on the record during the testimony phase and incorporated into the March 11, 2012 Order or the lack of Orders on issues referenced below,

This matter involves insurance coverage issues in several commercial general liability policies. Harleysville is the insurance carrier who provided certain policies of insurance to its insureds Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation, Inc. In January of 2009, a verdict was entered against the three defendants who had been amalgamated by the court into one entity. Harleysville filed a declaratory judgment action seeking a declaration of rights under the insurance policy. Named in the action filed by Harleysville were the insureds, the judgment holder, Riverwalk POA and Horizontal Property Regime, the judgment holders, Tony Pope and Lynn Pope as class representatives, and an excess insurance carrier, National Surety Corp.

The grounds for this Motion are recited below and will be supported by a memorandum to be submitted identifying the proper application of the law, further analysis on the Orders and misplaced rulings therein, and proper recitation of the supportive facts warranting alteration of the Orders and issuance of an Amended Order in favor of Harleysville.

Pursuant to Rules 50 and 59 and all other applicable rules of the South Carolina Rules of Civil Procedure, this court should vacate and/or alter or amend its Order of February 28, 2013 and served on the parties on March 11, 2013, and issue a new Order in favor of

Harleysville on all issues. The grounds for this Motion are set forth below. Any grounds, reasons, and arguments asserted prior, during and after the trial of this matter, orally or in writing, not herein listed below are adopted and incorporated fully as if set forth below and are asserted as additional grounds for this Motion. The Orders, dated March 5, 2013 and received by counsel for plaintiff on March 11, 2013 contain the following errors and should be vacated, altered or amended:

1. Directed Verdict Motion. The Directed Verdict Motion should have been granted on all issues. The basis for denial is that it was improper in a bench trial. The Order, dated February 21, 2013 but not served on the parties until March 11, 2013 denying the Motion for Judgment as a matter of law should be amended to Grant all relief requested.
2. National Surety Corp Order. The court dismissed any and all claims related to the excess policy of National Surety Corp. The Order should specifically identify that all claims by Harleysville, National Surety and the judgment holders are dismissed without prejudice. The Order fails to identify that Harleysville and National Surety Corp agreed to withhold any of the issues relating to the policy until a later date. The Order currently reserves the right to raise issues at a later time but the Order should be amended to clearly state that the dismissal is without prejudice and, should later matters implicate the policy as discussed by counsel, the parties may then litigate any unresolved issues.
3. Parties To Insurance Contract. The court failed to include in the Order that the insurance is for the benefit of the insurer and insured and there are no third party rights. Harleysville offered testimony and requested a ruling that the insurance

between Harleysville and the insureds was for the sole and exclusive benefit of the insured and not for third parties claiming any rights. The Order fails to rule on this issue. The Order should be amended to include a ruling that the insurance policies involved in these actions was for the benefit of the insureds and not for any third parties not named on the policy claiming any rights.

4. Occurrence. The Order improperly finds that all damages are a covered occurrence under the applicable policies. This is a factual impossibility given that the verdict in the underlying action was comprised of both covered and non-covered damages. The repair cost evidence offered in the underlying action was a mixture of construction defects and damages resulting therefrom. All repair cost evidence offered in the underlying action with respect to construction defects, however, conclusively established that construction defects would not constitute a covered "occurrence" under the South Carolina Supreme Court's analytical framework addressing the definition of "occurrence" under the policy language. No evidence was offered allowing the jury to make any decision other than to return a verdict of general damages to repair both defective work and the corresponding resulting damages. The Court has ruled that the entire verdict is covered by the policy as an occurrence because it is a general verdict. This is incorrect and a general verdict does not mean that the entire verdict is an occurrence. The Order should be amended to say that only a portion of the general verdict is an occurrence.
5. Occurrence. The court improperly ruled that the damages resulted from an occurrence. All evidence indicates that the insureds intended the construction exactly as it was built. As such, there can be no accident forming the basis of any

claim of damages. The Order should be amended to rule that no damages stem from any occurrence.

6. Denial of Allocation. The Order improperly denied plaintiff's right to allocate damages into categories of covered versus non-covered losses. The South Carolina Supreme Court in *Crossmann* mandates that only those damages categorized as "property damage" are potentially recoverable under a standard commercial general liability policy. The Court was given evidence that the general verdict in the underlying action included both damages to repair defective work and damages resulting from defective work. The combination verdict must be allocated by this Court to exclude non-covered construction repair costs as those items are not recoverable. The Court failed to do so following evidence offered by plaintiff showing that of the construction defects on the building and resulting damages, the sole covered damages comprised seventeen (17%) percent of the verdict amount. Pursuant to the ruling in *Sims v. Nationwide*, the Court had an obligation in this subsequent action to allocate the damage total between covered and non-covered damages.
7. No Damages During Any Policy Period. The Court improperly found that the time on risk period began shortly after the Certificate of Occupancy was issued. The sole evidence offered on this issue was speculative testimony by Riverwalk POA's expert witness, Drew Brown. All documented evidence showed no damage occurring at any time during any policy period for the Harleystown policies at issue. The Order should be amended to rule that no damage occurred during any policy

period and, therefore, there is no duty of indemnity by Harleysville thereby ruling entirely in favor of Harleysville.

8. Punitive Damages Not Occurrence. The Court improperly found that punitive damages are an occurrence within the insuring agreement and therefore a covered loss. The jury charge in the underlying action requires a finding of conscious intent of wrongdoing before any punitive damages may be awarded. The jury necessarily found that the punitive damages stemmed from intentional acts of wrongdoing known by the wrongdoers. The damages cannot be deemed as an occurrence because they do not stem from an accident. The Order should be amended to rule that punitive damages are not a covered loss because they do not result from an occurrence.
9. Punitive Damages and Exclusion A. The Court improperly found that punitive damages are not excluded from Exclusion A, Expected or Intended Loss. The punitive damage jury instruction required a finding of proof that the person committing the act supporting punitive damages did so with a conscious intent of wrongdoing. The jury awarding punitive damages necessarily found that they were supported by actions meeting the definition of Exclusion A. The Order should be amended to exclude punitive damages.
10. Default of Insureds. The court has failed to rule on the Motions for Default Judgment against the Insureds for failure to make an appearance after notice. The Order simply indicates that the insureds made no appearance after notice and defaulted. The court fails to rule that the rights of the insureds are foreclosed as a result of the default and failure to appear. Instead, the Order implies that while the

insureds have defaulted, the judgment holder maintains rights lost by the insured.

The Court made a finding that the Insureds failed to appear after proper service of the action and notice of all hearings. As such, all rights of the insured should be foreclosed. A motion for default judgment was filed by Harleysville against all insureds. There is no specific ruling granting or denying the motion. Either a specific Order should be issued or the global Order should be amended to specifically rule that the insureds are in default and a default judgment is entered against each foreclosing all rights they may have under the policies.

11. Judgment Holder Rights. The court improperly found that the judgment holders step into the shoes of the insured in a very broad sense. The insureds lost any rights by failing to appear and take any position in this matter. The judgment holder rights are set forth in the policies which provide "A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after and actual trial; but we will not be liable for damages that are not payable under the terms of this policy 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. Nowhere does the policy allow the judgment holder to fully step into the shoes and become the insured. In fact, South Carolina denies any third party rights under a liability insurance policy. The Order should be amended to provide that the judgment holders may bring an action to recover under the policy but do not obtain all rights of the insured.

12. Reservation of Rights Letters. The Order improperly concludes that the Reservation of Rights letters failed in whole to reserve any coverage issues and resulted in an implied waiver of any and all coverage matters. The Order further improperly finds that the Reservation of Rights letters prejudiced the insureds. No evidence was offered that anything in the Reservation of Rights letters prejudiced the insureds. The insureds failed to appear and defaulted resulting in a foreclosure of their rights. Nothing allows a judgment holder to benefit from any issue personal to the insured. The policy language is specific in the limited rights given to the judgment holder and do not include any rights of prejudice or Reservation of Rights. Such ruling is improper based on the law and evidence submitted at trial. Conclusion F is improper and the Order should be amended to rule that Harleysville properly preserved its rights on all coverage issues to all insureds.

13. Reservation of Rights Letters. The Reservation of Rights letters were offered into evidence as a plaintiff's Exhibit. Harleysville did not have possession of some of the Reservation of Rights letters but testified that they definitely existed and were mailed to and discussed with the insureds. The Court improperly ruled that since the missing letters relating to Buildstar and Pope were not offered into evidence that they did not exist and, therefore that Harleysville cannot contest coverage against the insureds or judgment holders. The indisputable evidence offered at trial showed that written reservation of rights letters were sent to the insured and discussed with the principals of the insured. No evidence existed to the contrary. In addition, since the insureds have defaulted, the provisions of the pleadings indicating that Harleysville defended the insured under a reservation of rights is

deemed admitted as a fact that cannot be contested. The judgment holder takes no rights better than that of the insured and therefore cannot contest on a reservation of rights claim since it is an admitted fact. Finally, the reservation of rights issue is personal to the insured and the judgment holder has no standing to raise such an issue because the policy is a contract between the insured and insurance carrier and no third party rights exist. The Order should be amended to find that all Reservation of Rights letters existed and were mailed to and discussed with each insured.

14. Exclusions. The Order improperly denies all requested relief under Harleysville's request for judgment on Exclusions A, J(1), J(5), J(6), K and M. The evidence shows that the insureds intended the construction that was completed. Many examples of this are found in the record where the insureds believed the work they were performing was correct. This is clear evidence that they intended the work to be performed as it was constructed and there is no accident, the work is that of the insured, the insured was the owner of the property at the time of the construction defect and resulting damage, it is the insureds product and the work is impaired property. The Order should be amended to find that all damages are excluded pursuant to the policy exclusions.

15. Per Building Time On Risk Application. Notwithstanding the grounds above regarding policy periods and the fact that no policy was triggered, the Order fails to properly identify each building and respective certificate of occupancy to determine the appropriate starting date of the damage period for time on risk calculation. The Order simply chooses the first certificate of occupancy date plus thirty (30) days for the starting date of the damage period. The Order provides that since it is a general

verdict, the certificate of occupancy date for the first building is proper. This finding is incorrect and improper. This finding is problematic in that pursuant to the Order, damages are assessed under the insurance policy for buildings that have not yet been constructed. It is a physical impossibility to show damages within a policy period for a building that is not constructed. Plaintiff submitted a chart using the certificate of occupancy dates for each building plus the estimated thirty (30) days. The end date chosen by the Court is appropriate for each building in that that is the date on which the Riverwalk POA expert identified the conclusion of the damages that were submitted to the jury in the underlying action. The Order should be amended to utilize the certificate of occupancy date for each building. A proposed chart has been previously submitted to the court showing the individual certificate of occupancy date for each building, the corresponding damage period and the time on risk calculation showing the damages falling within the policy period and triggering the duty of indemnity under the policy.

16. Post Judgment Interest. The Order makes a specific finding that the policies provide coverage for post judgment interest. The judgment holders do not possess rights to obtain any damages outside of that specifically recoverable under the terms of the policies. No policy provision allows for the recovery of post judgment interest. The Order should be amended to delete the language indicating that the judgment holders are entitled to post judgment interest.
17. Improper basis for exclusion of Expert Testimony. The Order improperly excludes testimony on grounds not raised. Harleysville notes that it disputes any exclusion of the evidence proffered relating to Mr. Baiden's testimony and allocation of the

damages. The Order, page 30, excludes testimony offered by plaintiff from Frank J. Baiden, III. At trial, the evidence was excluded solely on the basis that the general verdict cannot be disturbed in a subsequent action and therefore such evidence was not relevant. In fact, the defendant indicated that if the appellate court determined such evidence was relevant, he wanted the opportunity to present evidence in opposition. No objection was made to the proffered evidence on the basis of speculation. The proffer was valid in any event and a proffer need not meet the admissibility test set forth by the Court in its Order. Arguments by lawyers are valid proffers. The Order lists as grounds for exclusion based on relevance due to the general verdict and, as an additional ground not raised at trial, that the evidence is speculative. All such objections were set forth on pages 216-233 of the Trial Transcript for trial days December 13-14, 2010. No mention that Mr. Baiden's method is speculative. Such ruling was never made by the Court during the hearing. The Order should be amended to state that the sole reason for the exclusion of the proffered testimony of Mr. Baiden was due to the general verdict.

18. Time On Risk to Non-Covered Damages. The Order improperly applies the time on risk analysis to non-covered losses. Because the Court failed to allocate the damage award into covered and non-covered losses, it necessarily applied time on risk analysis to damages that are non-covered losses. The Court should have only applied time on risk to the covered losses. The Order should be amended such that it only applies time on risk analysis to covered damages.

19. Time On Risk for Punitive Damages from Repair Cost Verdict. Notwithstanding the above grounds that punitive damages are not covered, the Court improperly failed to apply time on risk to the \$250,000 punitive damage award supported by the repair cost verdict. In the event that punitive damages are considered a covered loss, then they are necessarily based upon the damages that have been deemed to be progressive and spread out over the entire damage period. Therefore, if punitive damages are not excluded because they are found to be an occurrence and not excluded by a policy exclusion, then they necessarily arise from progressive damages. The damages at the time of the act are simply repair cost which are not covered losses. It is not until the damages manifest themselves through the progressive damage period that they become sufficient to support the award. The punitive damages themselves must necessarily be subject to time on risk calculations and the Order must be altered and amended accordingly.

20. Time On Risk for Loss of Use. The Court improperly failed to apply time on risk to loss of use damages. Loss of use based upon tangible property loss is deemed to occur at the time the tangible damage to the property makes it incapable of use. Notwithstanding the objections raised previously and cited herein with respect to whether there was a covered occurrence, to the extent any occurrence was found, all parties to the action agreed that the damages in the underlying action would be deemed progressive in nature. Since the loss of use verdict is based upon the progressive damages, it must necessarily be found to be a progressive damage subject to time on risk analysis. The Order should be amended to subject the loss of use to a time on risk calculation.

21. Time On Risk for Punitive Damages for Loss of Use. The Court improperly failed to apply time on risk to the punitive damages awarded for the loss of use actual damages. Since the loss of use actual damages are based upon progressive damages, the corresponding punitive damages must also be deemed as progressive damages subject to time on risk analysis. The Order should be amended to subject the punitive damage award for loss of use to a time on risk calculation.
22. Improper and Incorrect Finding of Fact 22. The Order contains improper and incorrect findings of fact. Finding of Fact 22 states that damage began thirty (30) days following the certificate of occupancy. There is no factual evidence in the record to support the opinion testimony that damage began within thirty (30) days of the certificate of occupancy. The Order should be amended to provide that it is unknown when damage began to occur.
23. Improper and Incorrect Findings of Fact 36, 37, 39, 40, 41 and 42. The Order contains improper and incorrect findings of fact. Finding of Fact 36, 37, 39, 40, 41 and 42 indicate that some insureds did not receive a Reservation of Rights letter. The findings further find that the Reservation of Rights was vague and failed to address issues. The uncontradicted testimony shows that a reservation of rights letter was mailed to each insured for each action. The uncontradicted testimony of Lee Wright provides that he is "absolutely, positively, 100%" that Reservation of Rights letters were sent to all insureds. The Reservation of Rights letters were supplemented with discussions with the insured on all issues. The law at the time of the trial did not permit allocation. Findings of Fact 36, 37, 39, 40, 41 and 42

should be amended to say that Reservation of Rights letters were mailed to each insured, read by each insured and discussed by each insured with Harleysville.

24. Improper and Incorrect Findings of Fact 43, 44, 45, 46, 48 and 49. These findings of fact indicate that Harleysville made the sole decision to not intervene and would wait until after the verdict was issued. The uncontradicted testimony shows that Harleysville and the insureds discussed the issues and agreed that all coverage issues would be decided in this post trial declaratory judgment action in light of the Reservation of Rights by Harleysville. The parties agreed that any involvement by Harleysville in the underlying action would create a conflict. The insured had previously refused to allow Harleysville to intervene in a very similar action. The findings of fact in 43, 44, 45, 46, 48 and 49 of the Order should be amend to say that Harleysville and its insureds, because of potential conflicts, agreed to resolve all insurance coverage disputes and issues in this post verdict declaratory judgment action.

25. Improper and Incorrect Findings of Fact 43 and 48. Findings of fact 43 and 48 indicate that Harleysville was aware of the need for allocation. The record shows the exact opposite. Harleysville proffered testimony that the first *Newman v. Auto Owners* decision mandated that all damages were covered by a standard commercial general liability policy. The testimony was that under the Supreme Court's ruling, there was nothing that could be allocated. Harleysville never testified that it believed allocation was proper. It testified on proffer that it believed that if it intervened, harm would come to the insured and that the insured had strongly opposed intervention in previous actions. It was not until the second *Newman*

decision was issued that any allocation was even possible. This change in the law is the sole reason for allocation. The findings of fact 43 and 48 should be amended to state that "because of the then existing Supreme Court opinion, there was no right to intervene and seek allocation or any special interrogatory on the verdict form."

26. Improper and Incorrect Findings of Fact 41, 42, 43, 44, 45, 46, 47, 48 and 49.

Findings of Fact 41, 42, 43, 44, 45, 46, 47, 48 and 49 are all subjects that were objected to and excluded from evidence during trial. The court sustained the objection excluding any evidence relating to the reasons that Harleysville could not intervene. The facts listed in 41, 42, 43, 44, 45, 46, 47, 48 and 49 come from the proffer of evidence. While Harleysville believes the evidence was admissible, the record reflects that it was excluded. Notwithstanding, the version of the facts 41, 42, 43, 44, 45, 46, 47, 48 and 49 is incorrect. The findings of fact are incorrect and the subject matter of the findings was excluded from evidence. The Order should be amended to accurately reflect the testimony and/or not include findings of fact based on excluded but proffered testimony.

27. Proffered Evidence. The trial court improperly excluded evidence that was proffered at trial. Harleysville renews all of its proffers of evidence and asserts that the court erred in failing to properly admit the evidence proffered and reserves its rights to raise all issues on appeal of any rulings by the court that excluded evidence, documents and testimony offered during the testimony phase of this matter. The Order should be amended to rule that such excluded evidence is admissible and part of the record on appeal.

28. Basis for Harleysville not Intervening. Harleysville offered into evidence all reasons that it believed it was improper for it to seek to intervene in the underlying action. The court sustained the objection to the evidence. The court ruled that such evidence was improper and excluded it. Such evidence was proffered and should be made part of the record. The proffered evidence showing the basis that Harleysville did not intervene is found on pages 129 through 139 of the Trial Transcript for trial days December 13-14, 2010. Such evidence is supportive of the reasons showing that the insured and insurer had divergent interests that made it impossible to raise and rule upon insurance coverage issues in the underlying action. To do so would have forced Harleysville to place its insured at risk of harm and would violate the duty to defend. The Order should be amended to include the proffered testimony as part of the record.
29. Affidavit of Roger Van Wie. Harleysville sought to introduce into evidence the affidavit of Roger Van Wie, Exhibit 23. The basis for offering the document was to show that discussions were had with the principal of the insured. The document was not offered for the truth of the content of the affidavit but under an independent significant basis showing discussion with the insured. The court improperly excluded the document. The Order should be amended to include the admission into evidence of Exhibit 23, the affidavit of Roger Van Wie.
30. Meeting and discussion by Lee Wright with Jack Green. Harleysville sought to introduce into evidence testimony by Lee Wright of Harleysville that he held several meetings with Jack Green and his attorney, Alan Jeffcoat, for the purpose of showing communication with a principal of the insured and to show that Lee Wright

discussed an agreement that all coverage issues would be decided in this post verdict declaratory judgment action with all rights reserved. The court improperly excluded the testimony which was proffered on pages 110, 111 and 182-189 of the Trial Transcript for trial days December 13-14, 2010. The Order should be amended to include the admission into evidence of the testimony of Lee Wright regarding his meeting and discussion with Jack Green, principal of the insured, and his attorney.

31. Harleysville's understanding of the then current law. Harleysville offered testimony from Lee Wright as to Harleysville's understanding of the then current law on insurance coverage from the first *Newman v. Auto Owners* decision. The court excluded the testimony stating that it was irrelevant and that Harleysville could not give an opinion on the law. Harleysville proffered the testimony on pages 114-117 of the Trial Transcript for trial days December 13-14, 2010. The basis for the testimony was to show reasonableness and fairness for Harleysville not seeking to intervene into the underlying action because there was no legal basis and to do so would harm the insured. The Order should be amended to include the testimony from Lee Wright as to Harleysville's understanding of the then current law on insurance coverage.

32. Harleysville's Reasons for Not Moving to Intervene in the Underlying Action.

Harleysville offered many reasons that it did not attempt to intervene in the underlying action. The court sustained an objection and excluded all testimony relating to any basis for not moving to intervene into the underlying action.

Harleysville proffered the evidence at pages 129-139 of the Trial Transcript for trial

days December 13-14, 2010. The evidence supports the contention that there was no reasonable or fair means of seeking allocation of the verdict into covered and non-covered categories. The Order should be amended to admit into evidence the testimony regarding all reasons that Harleysville did not move to intervene into the underlying action.

33. Insured's Refusal to Allow Intervention in Earlier Lawsuits. Harleysville, through Lee Wright, sought to introduce evidence from a nearly identical lawsuit that reached trial several years before this action wherein Harleysville filed a motion to intervene. The insured's reaction was to threaten bad faith. The homeowner's association opposed the motion. Under threats of bad faith litigation from its insureds, threats from plaintiff's counsel that it would make the jury harm the insured and penalties from the court, Harleysville withdrew its motion. The evidence was offered to show that this same insured had already refused to allow intervention. The court sustained the objection and the evidence was excluded. The evidence was proffered at page 131, 206-208 of the Trial Transcript for trial days December 13-14, 2010.
34. River Oaks Transcript. Harleysville sought to introduce evidence of other Circuit Court rulings denying motions to intervene. Harleysville sought to introduce Exhibit 22, the River Oaks transcript of a motion hearing where the judge denied a motion to intervene. The evidence of the River Oaks transcript was designed to show the court that Harleysville was proper in not attempting to intervene. The Order should be amended to admit into evidence Exhibit 22.

35. Drew Brown report and pictures. Harleysville sought to introduce testimony from Lee Wright addressing the findings, conclusions and opinions in the Drew Brown Report. Drew Brown was the expert for the Riverwalk Homeowner's Association in the underlying action. Mr. Wright sought to show that the damages supporting the verdict were all labeled by Mr. Brown as defective construction. The court sustained an objection excluding the testimony. The testimony is proffered at pages 152-161 of the Trial Transcript for trial days December 13-14, 2010. The Order should be amended to admit into evidence the testimony of Lee Wright regarding the Drew Brown report and pictures.
36. Riverwalk Opened the Door. Counsel for Riverwalk during cross examination of Lee Wright asked questions regarding the same issues raised on direct examination but excluded by the court. Such questions and responses allowed such testimony into the record without objection. The evidence opened the door to all previously proffered evidence. Harleysville moved to admit into evidence all proffered testimony. The court improperly denied the motion. The Order should be amended to admit into evidence, all proffered testimony previously excluded.
37. Baiden Testimony. Harleysville offered expert testimony from its expert Frank Baiden, III regarding the allocation of the damages at Riverwalk into categories of covered and non-covered damages. Mr. Baiden conducted an independent analysis of the conditions at Riverwalk and produced a repair estimate. The repair estimate was broken down into categories of repairing improperly performed work and repairing parts of the building damaged by the improper work. The testimony was offered to allow the court to perform an allocation of the damages either on a

percentage basis or simply on a repair cost of damage basis. The court sustained an objection based upon the position that a general verdict cannot be disturbed in a subsequent action. The evidence was proffered on pages 217-262 including a report from Mr. Baiden offered into evidence. No objection was made other than that the general verdict barred the introduction of the evidence. The Order contains additional grounds not presented to the court. The Order should be amended to admit into evidence the testimony and exhibits of Baiden.


38. Improper Policy Period. The Order incorrectly identifies the policies at issue in the case. Harleysville provided Exhibit 17 identifying all policies that were issued to the insureds. A binder book of the actual policies was entered into evidence as Exhibit 12. The binder book did not include one of the primary policies and one of the excess policies that were listed on Exhibit 17. Those policies were issued to Heritage Riverwalk, Inc and are identified as MPA-4D4650 and BEC 4D4650 with policy periods from 6/18/2000 through 6/18/2001. Thus, those policies were never entered into evidence. Harleysville submitted evidence to the court showing that the policy was originally issued but cancelled from inception due to non-payment of any premium. Evidence of the cancellation was offered to the court and a motion was made to reopen and amend the record to accurately reflect the true facts of the case. The court denied the motion which resulted in Harleysville providing an extra year of insurance coverage in this Order that simply does not exist. The record supporting the award of damages in the time on risk calculation is incorrect. The Order should be amended to shorten the coverage period from the end date of June 18, 2001 to the earlier date of November 30, 2000 and the time on risk calculation

should be amended to lessen the number of covered days from 1300 to 1100 and the percentage for time on risk reduced from .5558 down to .4686 reducing the award from \$1,794,499.43 to \$1,513,228.03.

For the foregoing reasons, the Orders of the Honorable John M. Milling (Order on all issues in case, Order denying directed verdict motion, and Order Dismissing Claims Against National Surety Corp. and Its Counterclaims and Crossclaims), dated March 5, 2013 and at trial and served on the parties on March 11, 2013, should be altered and amended as set forth herein.

And We So Move.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By:   
Robert C. Calamari  
SC Bar No. 064985  
Mitch Brown  
E-Mail: bob.calamari@nelsonmullins.com  
3751 Robert M. Grissom Parkway / Suite 300  
Post Office Box 3939 (29578-3939)  
Myrtle Beach, SC 29577-3165  
(843) 448-3500

Attorneys for Harleystville

Myrtle Beach, South Carolina

March 21, 2013

Magnolia North Data

Bldg	Date of CO	Last Policy Date	Co to Policy End	Date of Verdict	CO to Verdict	Damage Per Bldg.	Damage Per Day	Covered	Non-covered
1	12/10/1998	11/30/2000	721	5/11/2009	3805	\$216,040.74	\$56.78	\$40,937.02	\$175,103.72
2	12/10/1998	11/30/2000	721	5/11/2009	3805	\$216,040.74	\$56.78	\$40,937.02	\$175,103.72
3	12/17/1998	11/30/2000	714	5/11/2009	3798	\$216,040.74	\$56.88	\$40,614.29	\$175,426.45
4	12/15/1998	11/30/2000	716	5/11/2009	3800	\$216,040.74	\$56.85	\$40,706.62	\$175,334.12
5	12/22/1998	11/30/2000	709	5/11/2009	3793	\$216,040.74	\$56.96	\$40,383.04	\$175,657.70
6	1/22/1999	11/30/2000	678	5/11/2009	3762	\$216,040.74	\$57.43	\$38,935.57	\$177,105.17
7	9/17/1999	11/30/2000	440	5/11/2009	3524	\$216,040.74	\$61.31	\$26,974.44	\$189,066.30
8	2/19/1999	11/30/2000	650	5/11/2009	3734	\$216,040.74	\$57.86	\$37,607.52	\$178,433.22
9	4/1/1999	11/30/2000	609	5/11/2009	3693	\$216,040.74	\$58.50	\$35,626.54	\$180,414.20
10	5/12/1999	11/30/2000	568	5/11/2009	3652	\$216,040.74	\$59.16	\$33,601.08	\$182,439.66
11	11/4/1999	11/30/2000	392	5/11/2009	3476	\$216,040.74	\$62.15	\$24,363.63	\$191,677.11
12	11/5/1999	11/30/2000	391	5/11/2009	3475	\$216,040.74	\$62.17	\$24,308.47	\$191,732.27
13	10/8/1999	11/30/2000	419	5/11/2009	3503	\$216,040.74	\$61.67	\$25,841.01	\$190,199.73
14	11/22/1999	11/30/2000	374	5/11/2009	3458	\$216,040.74	\$62.48	\$23,365.89	\$192,674.85
15	12/29/1999	11/30/2000	337	5/11/2009	3421	\$216,040.74	\$63.15	\$21,282.00	\$194,758.74
16	12/23/1999	11/30/2000	343	5/11/2009	3427	\$216,040.74	\$63.04	\$21,622.99	\$194,417.75
17	1/14/1999	11/30/2000	686	5/11/2009	3770	\$216,040.74	\$57.31	\$39,311.39	\$176,729.35
18	12/29/1999	11/30/2000	337	5/11/2009	3421	\$216,040.74	\$63.15	\$21,282.00	\$194,758.74
19	6/29/1999	11/30/2000	520	5/11/2009	3604	\$216,040.74	\$59.94	\$31,171.25	\$184,869.49
20	12/30/1999	11/30/2000	336	5/11/2009	3420	\$216,040.74	\$63.17	\$21,225.06	\$194,815.68
21	12/30/1999	11/30/2000	336	5/11/2009	3420	\$216,040.74	\$63.17	\$21,225.06	\$194,815.68
22	7/6/2000	11/30/2000	147	5/11/2009	3231	\$216,040.74	\$66.86	\$9,829.15	\$206,211.59
23	8/15/2000	11/30/2000	107	5/11/2009	3191	\$216,040.74	\$67.70	\$7,244.24	\$208,796.50
<b>Total</b>						\$4,968,937.02	\$1,394.47	\$668,395.29	\$4,300,541.73

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**Riverwalk Data**  
**CO Plus 30 Days**  
**Policy End: 2001**  
**Verdict Date**  
**Total Damages**

Bldg.	Date of CO Plus 30 Days	Last Policy Date	Days from Co (+30) to Policy End	Verdict Date	Days from CO to Verdict Date	Damage Per Bldg.	Damage Per Day	Covered	Non-covered
1	11/29/1997	6/18/2001	1297	1/5/2009	4055	\$169,930.44	\$41.91	\$54,352.60	\$115,577.84
2	11/30/1997	6/18/2001	1296	1/5/2009	4054	\$169,930.44	\$41.92	\$54,324.09	\$115,606.35
3	12/14/1997	6/18/2001	1282	1/5/2009	4040	\$169,930.44	\$42.06	\$53,923.47	\$116,006.97
4	12/26/1997	6/18/2001	1270	1/5/2009	4028	\$169,930.44	\$42.19	\$53,577.87	\$116,352.57
5	12/24/1999	6/18/2001	542	1/5/2009	3300	\$169,930.44	\$51.49	\$27,909.79	\$142,020.65
6	2/2/1998	6/18/2001	1232	1/5/2009	3990	\$169,930.44	\$42.59	\$52,469.75	\$117,460.69
7	3/2/1998	6/18/2001	1204	1/5/2009	3962	\$169,930.44	\$42.89	\$51,639.64	\$118,290.80
8	3/9/1998	6/18/2001	1197	1/5/2009	3955	\$169,930.44	\$42.97	\$51,430.27	\$118,500.17
9	6/11/1998	6/18/2001	1103	1/5/2009	3861	\$169,930.44	\$44.01	\$48,545.27	\$121,385.17
10	7/15/1998	6/18/2001	1069	1/5/2009	3827	\$169,930.44	\$44.40	\$47,466.85	\$122,463.59
11	8/16/1998	6/18/2001	1037	1/5/2009	3795	\$169,930.44	\$44.78	\$46,434.22	\$123,496.22
12	9/25/1998	6/18/2001	997	1/5/2009	3755	\$169,930.44	\$45.25	\$45,118.68	\$124,811.76
13	11/5/1998	6/18/2001	956	1/5/2009	3714	\$169,930.44	\$45.75	\$43,740.85	\$126,189.59
14	11/30/1998	6/18/2001	931	1/5/2009	3689	\$169,930.44	\$46.06	\$42,885.67	\$127,044.77
15	12/17/1998	6/18/2001	914	1/5/2009	3672	\$169,930.44	\$46.28	\$42,297.50	\$127,632.94
16	10/24/1999	6/18/2001	603	1/5/2009	3361	\$169,930.44	\$50.56	\$30,487.37	\$139,443.07
17	1/30/2000	6/18/2001	505	1/5/2009	3263	\$169,930.44	\$52.08	\$26,299.38	\$143,631.06
18	12/24/1999	6/18/2001	542	1/5/2009	3300	\$169,930.44	\$51.49	\$27,909.79	\$142,020.65
19	12/24/1999	6/18/2001	542	1/5/2009	3300	\$169,930.44	\$51.49	\$27,909.79	\$142,020.65
<b>Total</b>						<b>\$3,228,678.36</b>	<b>\$870.18</b>	<b>\$828,722.84</b>	<b>\$2,399,955.52</b>

Consolidated ROA\_2569

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THE STATE OF SOUTH CAROLINA  
In The 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.

CERTIFICATE OF COUNSEL

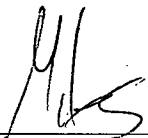
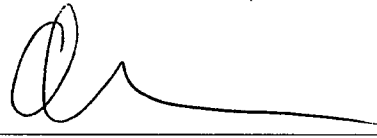
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**SC Court of Appeals**

The undersigned certifies that the Consolidated Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

NELSON MULLINS RILEY & SCARBOROUGH  
LLP

By:  

C. Mitchell Brown

William C. Wood, Jr.

A. Mattison Bogan

Miles E. Coleman

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Robert C. Calamari

Post Office Box 3939

Myrtle Beach, SC 29577

(843) 448-3500

Attorneys for Appellant/Respondent Harleysville

April 17, 2014

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

**SC Court of Appeals**

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.

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PROOF OF SERVICE

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

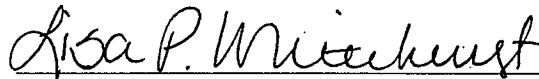
Pleadings:

Consolidated Record on Appeal

Counsel Served:

John P. Henry, Esquire  
Philip C. Thompson, Esquire  
Thompson & Henry  
1300 Second Avenue, 3<sup>rd</sup> Floor  
Conway, SC 29528

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



Lisa P. Whitehurst  
Lisa P. Whitehurst  
Administrative Assistant

April 17, 2014