

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John M. Milling, Special Referee

Case No: 2013-001291

RECEIVED

AUG 26 2014

SC Court of Appeals

Harleysville Group Insurance, a Pennsylvania
Corporation,

Appellant/Respondent,

v.

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

Defendants,

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

Respondents,

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

Respondents/Appellants.

JOINT MOTION TO TRANSFER
CASE TO THE SUPREME COURT

Pursuant to Rule 204(b), South Carolina Appellate Court Rules,
Respondents/Appellants and Appellant/Respondent hereby move the Court to transfer
this case to the Supreme Court for review. This appeal is a consolidated appeal from a
special referee trial involving coverage issues related to the following Court of Appeals

construction defect opinions: 1) *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012); and 2) *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). There is pending motion to stay this consolidated appeal in light of this Court's granting of certiorari respecting certain issues in the above two listed underlying construction defect cases. (See Motion to Stay, attached as Exhibit A). As can be seen by the pending motion to stay, this consolidated coverage appeal matter may become moot if this Court reverses the Court of Appeals opinions in the underlying construction defect matters. However, if this consolidated coverage appeal does *not* become mooted by this Court's rulings in those cases, then this Court, rather than the Court of Appeals, should consider and rule on this consolidated coverage appeal¹.

This case is appropriate for review by the Supreme Court based upon the following:

- a. It involves the proper application of "Time-on-Risk" for Commercial General Liability Policies and whether there is a need for procedures for intervention in the lower Court to create a record for "Time-on-Risk" application, or whether instead an application of "Time-on-Risk" can be determined in a declaratory judgment action following an underlying liability trial against the insured by an allegedly injured third party;
- b. The proper application of "Time-on-Risk" as set forth in *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) to a general verdict from an underlying liability trial against the insured by an allegedly injured third party that does not differentiate between progressive and non-progressive damages; or whether such application of "Time-on-Risk" can be determined in a declaratory judgment action following such an underlying liability trial;

¹ If this Court certifies this matter to itself from the Court of Appeals before the Court of Appeals rules on the motion to stay, the parties request that this Court rule on the motion to stay and stay this matter pending disposition of the appeals in the underlying construction defect matters.

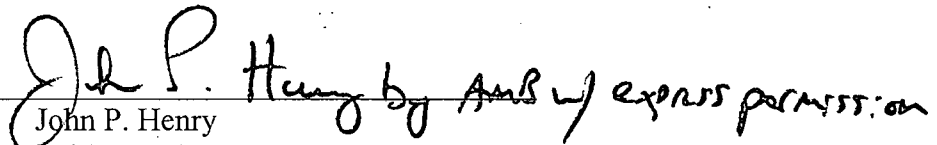
- c. Whether "Time-on-Risk" would apply to punitive damages and loss-of-use damages; and
- d. The proper method and procedure for an insurer and an insured, with divergent interests, to determine covered and non-covered damages respecting a verdict amount in an underlying litigation between a third party and the insured, which verdict contains a mix of both covered and non-covered damages.

These issues are novel to South Carolina jurisprudence and need final resolution by the Supreme Court. The resolution of these issues require a final decision by the Supreme Court in order to instruct the lower Courts in the proper handling of "Time-on-Risk" issues during the trial phase.

This Court has long recognized that the insurance business is affected with a public interest. *Hinds v. United Insurance Co. of America*, 248 S.C. 285, 149 S.E.2d 771 (1966); *State v. Hammond*, 66 S.C. 219, 44 S.E.2d 797 (1903); *La Tourette v. McMaster*, 104 S.C. 501, 89 S.E. 398 (1916). Assuming this matter is not rendered moot as set forth above, it not only the public interest, but also will affect procedural matters in the lower courts.

Respectfully Submitted,

THOMPSON & HENRY, P.A.

By:  *John P. Henry by Aubrey expert permission*
John P. Henry
Philip C. Thompson
Thompson & Henry, P.A.
Post Office Box 1740
Conway, South Carolina 29528
(843)248-5741

*Attorneys for Respondents/ Appellants Magnolia North
Horizontal Property Regime, Magnolia North Property
Owners Association, Inc., a South Carolina Corporation*

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: A. Mattison Bogan

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

Robert C. Calamari
Post Office Box 3939
Myrtle Beach, SC 29577
(843)448-3500

Attorneys for Appellant/Respondent Harleysville

August 25, 2014

Exhibit A

RECEIVED

AUG 26 2014

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-26-11862 and 2009-CP-26-10053
Appellate Case No. 2013-001281

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

v.

Heritage Communities, Inc., a South Carolina corporation,
Heritage Magnolia North, Inc., a South Carolina corporation,
Buildstar Corp., a South Carolina corporation, Magnolia
North Horizontal Property Regime, Magnolia North Property
Owners Assoc., Inc., a South Carolina corporation, and
National Surety Corp.,

Defendants,

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

Respondents,

And 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. are Respondents/Appellants.¹

Consent Motion to Stay Appeal

Appellant/Respondent Harleysville Group Insurance (“Harleysville”) hereby
moves to stay the above-captioned consolidated appeals (and related cross-appeals),

¹ In a letter dated March 18, 2014, the Clerk instructed, “The matter titled “Harleysville Group Ins. v. Heritage Communities (Riverwalk)” (case no. 2013-001291) is now consolidated with the matter titled “Harleysville Group Ins. v. Heritage Communities (Magnolia)” (case no. 2013-001281). All future filings in this consolidated case shall use the case no. 2013-001281 and the caption as shown [in the Clerk’s letter].”

including a stay of oral argument, pending the outcome of the Supreme Court's review and opinions in the appeal of the underlying construction defect trials giving rise to these appeals.

The above-captioned appeals involve review of the Special Referee's rulings in declaratory judgment actions seeking to determine Harleysville's responsibility to cover two underlying judgments against its insureds. The judgments entered based on those underlying construction defect actions were themselves appealed. The Court of Appeals issued opinions in both of the underlying construction defect cases, affirming both. *See Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012); *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). However, on June 26, 2014, the Supreme Court granted certiorari as to certain issues in both of the underlying construction defect matters. (See attached Orders granting Petition for Certiorari, dated June 26, 2014.)

The grounds for the requested stay are that the issues before this Court may be mooted by the eventual opinion of the Supreme Court. If the Supreme Court reverses the two underlying cases on which it has granted certiorari, there will be new trials in them. If there are new trials in the underlying cases, the coverage rulings before this Court in the instant appeals will be rendered moot. This is because the coverage questions currently before this Court have to do with the general jury verdicts rendered in the underlying cases and the Respondents/Appellants' claims that the insurers should have intervened in the litigation or requested that the jury answer special interrogatories. New trials in the underlying construction defect cases would wipe away the underlying general jury verdicts. Hence, moving forward with further steps in the Heritage appeal in light of the certiorari grant is possibly a considerable waste of the parties' and the court's time

and resources, as the above-captioned appeals would be rendered moot if the new trials are ordered.

As an additional ground for this motion, the parties have moved to transfer this matter to the South Carolina Supreme Court for review (see attached motion to transfer as Exhibit A). Hence, this matter should be stayed in this Court due to the pending transfer motion as well.

For the foregoing reasons, Harleysville respectfully requests that this Court stay the above-captioned consolidated appeals pending in this Court, including the oral arguments that are tentatively scheduled for November 2014. Counsel for Respondent/Appellant agrees with and consents to this motion, as evidenced by the attached consent.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: A. Mattison Bogan

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

August 25, 2014
Columbia, South Carolina

Exhibit B

Lisa Whitehurst

From: Mitch Brown
Sent: Monday, August 25, 2014 1:59 PM
To: Lisa Whitehurst
Subject: Fw: Joint Motion to Transfer Case to the Supreme Court (RW) 6-11-14.docx

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Pat Henry <PHenry@thompsonlaw.com>
Sent: Monday, August 25, 2014 1:42 PM
To: Mitch Brown
Subject: Re: Joint Motion to Transfer Case to the Supreme Court (RW) 6-11-14.docx

I consent

Sent from my Verizon Wireless 4G LTE DROID

Mitch Brown <mitch.brown@nelsonmullins.com> wrote:

Pat:

My client has agreed with this motion, in conjunction with agreement on the stay motion, which will be coming to you shortly. Please let me know if you consent to this and if you authorize us to sign your name to this. I changed the caption per your email.

Mitch

Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure.

If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2013-001291

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

v.

Heritage Communities, Inc., a South Carolina
corporation; Heritage Riverwalk, a South Carolina
corporation; Buildstar Corporation, a South
Carolina corporation; Riverwalk at Arrowhead
Country Club Horizontal Property Regime;
Riverwalk at Arrowhead 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.

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

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

PROOF OF SERVICE

I, 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:

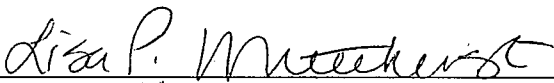
Joint Motion to Transfer Case to Supreme Court

Counsel Served:

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

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

Karin McCarthy, Esquire
Rivkin Radler
926 RXR Plaza
Uniondale, NY 11556



Lisa P. Whitehurst
Administrative Assistant

August 25, 2014

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.5916
www.nelsonmullins.com

A. Mattison Bogan
Tel: 803.255.9589
Fax: 803.255.5916
matt.bogan@nelsonmullins.com

August 25, 2014

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Harleysville Group Insurance v. Heritage Communities, Inc. (Riverwalk)
C.A. No.: 2009-CP-26-10053
Appellate Case No. 2013-001291
Our File No.: 00470.01581

Dear Mr. Shearouse:

Enclosed are the original and seven copies of a Joint Motion to Transfer Case to Supreme Court in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our check in the amount of \$25.00 as the required filing fee.

Very truly yours,


A. Mattison Bogan

AMB:lpw
Enclosures

cc: (all w/enc.)
The Honorable Jenny Abbott Kitchings
John P. Henry, Esquire
Philip C. Thompson, Esquire
Laura Johnson Evans, Esquire
Karin McCarthy, Esquire

RECEIVED

AUG 26 2014

SC Court of Appeals