

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 28 2014

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

SC Court of Appeals

73374

Case No. 2009-CP-26-10053
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.

Consent Motion to Stay Appeal

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

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Attorneys for Appellant/Respondent Harleysville

August 28, 2014

Exhibit A

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

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. Harleystville 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.

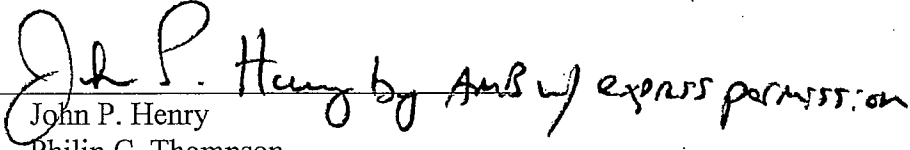
These issues are novel to South Carolina jurisprudence and need final resolution by the Supreme Court. The resolution of these issues require a final decision by the Supreme Court in order to instruct the lower Courts in the proper handling of "Time-on-Risk" issues during the trial phase.

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:


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

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Attorneys for Appellant/Respondent Harleysville

August 25, 2014

Exhibit B

Lisa Whitehurst

From: Mitch Brown
Sent: Monday, August 25, 2014 1:58 PM
To: Lisa Whitehurst
Subject: Fw: 2014 8 19--Mag North Riverwalk coverage appeals--motion to stay pendin .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: 2014 8 19--Mag North Riverwalk coverage appeals--motion to stay pendin .docx

I consent

Sent from my Verizon Wireless 4G LTE DROID

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

Pat:

My client has agreed to this motion. The name of the motion has been changed to a consent motion and the penultimate paragraph has been added, which is a point you suggested. Please let me know if you consent to this motion. Thank you.

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 Court of Appeals

APPEAL FROM Horry County
Court of Common Pleas
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SC Court of Appeals

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

v.

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Defendants.

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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:

Consent Motion to Stay Appeal

Counsel Served:

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Philip C. Thompson, Esquire
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Lisa P. Whitehurst
Administrative Assistant

August 28, 2014

Nelson Mullins

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August 28, 2014 **RECEIVED**

AUG 28 2014

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

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

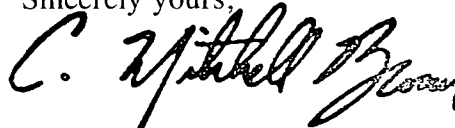
Dear Ms. Kitchings:

Pursuant to the Court's letter dated August 27, 2014, enclosed please find the original and seven copies of a Consent Motion to Stay Appeal 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.

By copy of this letter to counsel of record, we are serving them with a copy of this motion.

With kind regards, I remain

Sincerely yours,



C. Mitchell Brown

CMB:lpw

Enclosures

cc: John P. Henry, Esquire
Philip C. Thompson, Esquire
Laura Johnson Evans, Esquire
Karin McCarthy, Esquire