

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM Horry COUNTY  
Court of Common Pleas

John M. Milling, Special Referee

Case No: 2013-001281

**RECEIVED**

SEP 08 2014

**SC Court of Appeals**

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

v.

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

Of whom Heritage Communities, Inc., a South Carolina  
corporation; Heritage Magnolia North, Inc., a South Carolina  
corporation; Buildstar Corp., a South Carolina corporation;  
and National Surety Corp. are ..... Respondents,

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

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 appeal.<sup>1</sup>

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. Harleystown 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;
- 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

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<sup>1</sup> 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.

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,

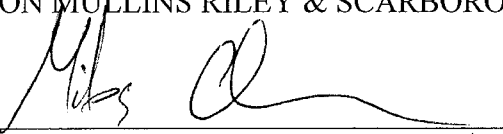
THOMPSON & HENRY, P.A.

By: John P. Henry by MEC with express  
John P. Henry permission  
Philip C. Thompson  
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*Attorneys for Respondents/Appellants Magnolia North  
Horizontal Property Regime, Magnolia North Property  
Owners Association, Inc., a South Carolina Corporation*

NELSON MULLINS RILEY & SCARBOROUGH, LLP

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*Attorneys for Appellant/Respondent Harleysville*

September 8, 2014

# *Exhibit A*

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

AUG 25 2014

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

SC Court of Appeals

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.<sup>1</sup>

**Consent Motion to Stay Appeal**

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

<sup>1</sup> 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

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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.

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**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](mailto: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

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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

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

v.

Heritage Communities, Inc., a South Carolina corporation; Heritage Magnolia North, Inc., a South Carolina corporation; Buildstar 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; and National Surety Corp. are ..... Respondents,

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

PROOF OF SERVICE

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

Pleadings:

Joint Motion to Transfer Case to the Supreme Court

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*Lisa P. Whitehurst*

---

Lisa P. Whitehurst  
Administrative Assistant

September 8, 2014

# Nelson Mullins

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September 8, 2014

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

**RECEIVED**

SEP 08 2014

**SC Court of Appeals**

RE: Harleysville Group Insurance v. Heritage Communities, Inc., a South Carolina Corporation; Heritage Magnolia North Inc., a South Carolina Corporation; et al.  
C.A. No.: 2009-CP-26-11862  
Appellate Case No. 2013-001281  
Our File No.: 00470/01580

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Joint Motion to Transfer Case to the Supreme Court in 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,



Miles E. Coleman

MEC:lpw  
Enclosures

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