THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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; National Surety Corp., are .... Respondents,

and Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., are .... Respondents/Appellants.

Appellate Case No. 2013-001281

AND

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, are .... Respondents,

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

Appellate Case No. 2013-001291

Appellant/Respondent's Petition for Rehearing

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant/Respondent Harleysville Group Insurance ("Harleysville") hereby files this petition for rehearing.

Harleysville respectfully requests a rehearing of Opinion No. 27698, (S.C. Sup. Ct. filed Jan.11, 2017) (Shearouse Adv. Sh. No. 2 at pp. 21-54) ("Op. No. 27698") and/or the issuance of a new opinion on the issues outlined herein.

In Opinion No. 27698, this court affirmed the Special Referee's finding that Harleysville failed to properly reserve the right to contest coverage of actual damages and obtain an allocation of those damages between covered amounts and non-covered amounts related to faulty workmanship. Op. No. 27698 at pp. 31-37. Additionally, this Court affirmed the finding that punitive damages were covered by the Harleysville policies. Op. No. 27698 at pp. 37-40. This Court also affirmed the Special Referee's time-on-the-risk analysis in the Magnolia North action, and affirmed the time-on-the-risk analysis in the Riverwalk actions with the modification of applying it to the Riverwalk class action's loss of use damages. Op. No. 27698 at pp. 41-44. With regard to the application of time-on-the-risk to punitive damages, this Court affirmed the Special Referee's refusal to apply time-on-the-risk to the punitive damages. Op. No. 27698 at pp. 44-48. With the exception of the affirmance of applying the time-on-the-risk analysis to all actual damages, these conclusions were, respectfully, incorrect.

First, Opinion No. 27698 misapprehends the issues regarding Harleysville's reservation of rights letters. Respondents/Appellants lack standing to contest the sufficiency of the reservation of rights letters since they were not parties to the insurance contract. Additionally, by determining that Harleysville's letters were insufficient, the opinion authorizes creation of coverage through waiver, and changes established South Carolina law in this regard.

Second, where allocation is necessary between covered and non-covered damages, Opinion No. 27698 effectively will require insurers to intervene in underlying actions, which will likely result in extensive trial and appellate court litigation to the detriment of all parties involved in construction defect litigation. This is demonstrated by the fact that since this Court's issuance of Opinion No. 27698, two trial courts have denied intervention in the face of the Heritage opinion, and appeals have ensued as a result.

Third, with regard to whether a time-on-the-risk allocation should apply to punitive damages as well as actual damages, Opinion No. 27698 overlooked that the general verdicts in the underlying construction defect actions necessarily require application of time-on-the-risk to the punitive damages award. The general verdicts support the legal conclusion that punitive damages were awarded for actions that occurred outside of Harleysville's time-on-the-risk. In failing to apply time-on-the-risk to the punitive damage awards, the Court forces Harleysville to pay damages unrelated to the injury that triggered its policies. Additionally, Opinion 27698 failed to consider the combined effect of the positions South Carolina has taken with regard to: 1) the insurability of punitive damages generally; and 2) South Carolina's exception to the application of the economic loss doctrine for residential construction defect cases. South Carolina jurisprudence, liberally permitting tort actions for purely economic losses in residential construction defect cases, and further liberally permitting the insurability of punitive damages generally, should at minimum apply time-on-risk to punitive damages for policy reasons.

Argument

I. The Court Misapprehended the Applicable Rules Governing Reservation of Rights Letters and Incorrectly Determined that Harleysville's Letters were Insufficient.

A. Respondents/Appellants lacked standing to contest the adequacy of the Reservation of Rights letters.

Opinion No. 27698 affirmed the Special Referee's finding that Harleysville failed to properly reserve the right to contest coverage. In reaching this decision, the Court overlooked the critical fact that Respondents/Appellants were not parties to the insurance contracts at issue in this matter. Therefore, they lacked standing to contest the sufficiency of the reservation of rights letters sent by Harleysville to its insureds ("RRLs")[1]. Accordingly, the Special Referee erred by addressing the adequacy of Harleysville's reservation of rights.

The Special Referee's Orders stated, without explanation, that the judgment holders from the underlying suits could raise and rely on the purported shortcomings in the RRLs Harleysville sent to its insureds. (*See* Riverwalk Order at 44; CR 68; Magnolia North Order at 41; CR 115.) This is error, as pointed out to this Court by Harleysville in its briefing. (Riverwalk – Final Appellant's Brief at pp. 59-61; Riverwalk – Final Reply Brief at pp. 29-30; Magnolia North – Final Appellant's Brief at pp. 57-59; Magnolia North – Final Reply Brief at pp. 25-27.) Opinion No. 27698 fails to address Harleysville's standing argument.

As Harleysville detailed in its opening Appellant's brief, South Carolina courts have specifically held that an injured person or entity is a stranger to the insurance contract and has no right to enforce the terms of that contract or rely on its breach. This is because "'no privity [of contract exists] between an injured person and the tortfeasor's liability insurer, and the injured person has no right of action at law against the insurer.'" *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003) (quoting 44 Am. Jur. 2d *Insurance* § 1445 (1982)) (alteration in original). In short, an injured party "does not have a contractual

[1] At trial, the purported inadequacy of the Reservation of Rights letters was not a focus of anyone. In fact, opposing counsel only mentioned this in a single footnote in his pre-trial brief, and provided no citation of any authority. (*See* Memorandum in Support of Riverwalk and Magnolia North Cases at p. 3 n.1; CR 2318.) The purported inadequacy of the Reservation of Rights letters was briefed to this Court by opposing counsel at pages 46-48 of his Final Respondents' Brief in Magnolia North, and pages 48-50 of his Final Respondents' Brief in Riverwalk, , with no citation to authority. Essentially, this was a "thrown in" additional finding of the Special Referee by opposing counsel in his submitted order, which was left in over Harleysville's objection that the Reservation of Rights letters were not even litigated to the trial judge.

relationship with the insurer and cannot maintain an action against the insurer for breach of the insurance contract." *Id.* at 554-55, 581 S.E.2d at 861 (citations omitted). For example, an injured third party may not, in South Carolina, bring a claim against an insurer for bad faith. Rather, the injured party must sue the insured/first party beneficiary, who may then pursue an action against its insurer if a judgment is obtained, under certain circumstances. *Kleckley v. Nw. Nat'l Caves, Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000).

Therefore, under established South Carolina law, Harleysville's insureds were the only parties with the right to challenge the sufficiency of the RRLs. These entities defaulted in the declaratory proceedings before the Special Referee, as is set forth in the Special Referee's orders. (*See* Riverwalk Order at 2-3; CR 26-27; Magnolia North Order at 2; CR 76.) The record does not reflect any assignment of rights which would permit the Respondents-Appellants to step into the insureds' shoes and challenge the sufficiency of the reservation of rights letters. Such an assignment would likely be prohibited, in any event, by the terms of the policy prohibiting assignments of contractual rights without the insurance company's permission. (*See, e.g.*, CR 1498, 1587, 1616.) Therefore, the Special Referee erred by entertaining the Respondents/Appellants argument, and the Court overlooked this critical issue.

Courts from other jurisdictions have specifically held that a stranger to an insurance contract has no standing to contest the timeliness or sufficiency of a reservation of rights letter. An insurance policy is a contract solely between an insurer and insured; thus, an injured third-party lacks the right to raise issues with the reservation of rights letters. A decision from the Eastern District of Pennsylvania is instructive. *See U.S. Fid. & Guar. Co. v. Regis Ins. Co.*, No. 90-5180, 1991 WL 68151 (E.D. Pa. Apr. 25, 1991). In *U.S. Fidelity*, the insurance company assumed the defense of its insured without a reservation of rights. *Id.* at *1. The policy was a multi-peril insurance policy that excluded coverage to the extent the insured "acted as a real estate manager" for a certain apartment complex. *Id.* A secondary insurer asserted that the insurer waived this exclusion by assuming the defense without a reservation of rights, or was estopped from denying coverage. *Id.* The court rejected this argument, explaining that the secondary insurer was "a stranger to the contract of insurance between [primary insurer] and its insured." *Id.* Additionally, the court noted that waiver and/or estoppel would not apply under these circumstances. Waiver did not apply because the doctrine "is not available to bring within the coverage of an insurance policy risks that are expressly excluded therefrom." *Id.* Moreover, estoppel did not apply because a party must have detrimentally relied on an action or inaction by the other party. *Id.*

Similarly, a Pennsylvania state court also reached the same conclusion. *See Am. Nat. Prop. & Cas. Companies v. Hearn*, 93 A.3d 880 (Pa. Sup. Ct. 2014). In *Hearn*, an injured third party complained that an insurer issued a deficient reservation of rights letter to its insured. *Id.* at 887. The court declined to entertain this argument, noting that because they are "not the insureds . . . they lack standing to raise this contractual issue." *Id.*

Georgia appellate courts have also addressed this issue in detail. In *Capitol Indemnity Corp. v. Fraley*, 597 S.E.2d 601 (Ga. Ct. App. 2004), the Georgia Court of Appeals held that the "right to deny coverage flows only to [an] insured and [an injured party] may not complain about [the insurer's] failure to provide a timely reservation of rights notice." *Id.* at 603. In *Fraley*, the insurer filed a declaratory judgment action regarding coverage owed under a liability insurance policy following an altercation at a bar. *Id.* at 602. The injured party contended that the insurer was estopped from asserting coverage defenses due to the untimeliness of its reservation of rights. *Id.* The court examined the injured party's standing to challenge the reservation of rights, and determined that the injured party lacked standing to assert waiver or estoppel based on a failure to provide notice of reservation of rights. *Id.*

The Georgia Supreme Court reached the same conclusion in *National Union Fire Ins. Co. v. Am. Motorists Ins. Co.*, 504 S.E.2d 673 (Ga. 1998). In *National Union*, an excess insurance carrier undertook defense of two lawsuits against its insured after the primary insurer tendered the policy limits. The excess carrier later sued the primary carrier contending that one of its policies provided for additional coverage. *Id.* at 674. The primary insurer, however, countered that the excess carrier failed to reserve its rights to deny coverage, and thus was estopped from raising those claims. *Id.* The court disagreed, finding that the excess carrier's contract was with its insured, and thus its "right to deny coverage" flowed only to its insured. *Id.* at 675. Any reservation of rights would have to be directed to the insured, and a stranger to the contract could not complain about the insurer's failure to provide such notice. *See id.*

Applying *Fraley and National Union*, the Southern District of Georgia addressed a situation that is procedurally on all fours with this matter. *See Progressive Mountain Ins. Co. v. Anderson*, 91 F. Supp. 3d 1290, 1296 (S.D. Ga.), *aff'd sub nom. Progressive Mountain Ins. Co. v. Cason*, 626 F. App'x 916 (11th Cir. 2015). In *Anderson*, an injured third party and his uninsured motorist carrier contended that the insurer was estopped from relying on coverage defenses under its policy because it failed to properly notify its insured of its reservation of rights. *Id.* at 1296. The court explained it was undisputed that these parties were not parties to the insurance contract and were not in privity with the insurer. *Id.* Therefore, the court determined that these parties lacked standing to challenge the adequacy of insurer's notice of its reservation of rights. *Id.*

Finally, California explicitly recognizes that "a third party claimant may not bring a direct action against an insurance company on the contract because the insurer's duties flow to the insured." *San Diego Hous. Comm'n v. Indus. Indem. Co.*, 95 Cal. App. 4th 669, 685 (Ct. App. 2002). A judgment creditor is a third party beneficiary of the insurance contract, and thus may only enforce those promises made directly for his benefit. *Id.* at 691-92. The *San Diego Housing* court held that a third party judgment creditor is merely an incidental beneficiary for obligations that arise under the duty to defend and that, absent an assignment from the insured, the third party has no right to bring a claim upon a duty owed only to the insured. *Id.* at 692-93.

As these cases establish, a stranger to the insurance contract lacks standing to challenge the sufficiency of a reservation of rights letter. The very nature of a reservation of rights letter has to do with the provision of a defense to an insured and does not relate to a judgment creditor, who is a plaintiff. The judgment creditor is not a contracting party and is not being afforded a defense by the insurance company. The judgment creditors would not have been recipients of any of the reservation of rights letters and thus could not have relied on them to their detriment. There is **no** evidence that the insureds, who did receive the letters[2], complained about them at all.

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[2] The Special Referee's orders found that Harleysville failed to issue a separate RRL to Buildstar (CR 36, 64-65, 85, 111-112), and Opinion No. 27698 noted this, suggesting Harleysville was deficient in not sending separate letters to each entity in each action. Op. No. 27698 at p. 34, n.10. This, however, overlooks the trial courts' determination in the underlying construction defect cases, affirmed by the Court of Appeals, that all of the Heritage entities were "amalgamated" so they should be treated as "one and the same." *See Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 419–20, 717 S.E.2d 765, 773 (Ct. App. 2011); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 359–60, 725 S.E.2d 112, 118 (Ct. App. 2012). Because the three entities were "amalgamated" rendering them "one and the same," a reservation of rights letter to one was a reservation of rights letter to all. This Court, after initially granting certiorari to review the Court of Appeals rulings, later dismissed the writs of certiorari as improvidently granted. *See Pope v. Heritage Communities, Inc.*, 414 S.C. 199, 200, 777 S.E.2d 832 (2015); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 414 S.C. 198, 199, 777 S.E.2d 831, 832 (2015)

Therefore, it was error for the Special Referee to examine the sufficiency of the reservation of rights letters. The Court overlooked this critical issue in Opinion No. 27698, and should grant rehearing to address this issue.

B. Opinion No. 27698 improperly creates coverage via waiver.

The Court also misapprehended the purpose and effect of a reservation of rights letter, which resulted in a creation of coverage via waiver. Therefore, if the Court determines that somehow the judgment creditor does have standing to challenge the RRLs, the Court should reconsider its finding regarding the adequacy of those RRLs.

1. Coverage may not be created via waiver.

South Carolina law has been clear that coverage may not be created via estoppel or waiver. *See Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 53, 524 S.E.2d 847, 852 (Ct. App. 1999) ("Waiver cannot create coverage and cannot bring into existence something not covered in the policy."); *see also Doe v. Nw. Mut. Life Ins. Co.*, No. 2:10-CV-2961, 2012 WL 2405510, at *6 (D.S.C. June 26, 2012) ("Under South Carolina insurance law, estoppel cannot extend or create coverage."); *Campbell, Inc. v. N. Ins. Co. of N.Y.*, 337 F. Supp. 2d 764, 769–70 (D.S.C. 2004) ("As a general rule, insurance coverage may not be expanded or created by waiver or estoppel."). A limited exception exists for estoppel, which may apply to extend the ***scope of risk*** under an insurance policy "if the insurer has misled the insured into believing the particular risk is within the coverage." *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460, 462 (1990). However, to succeed on such a claim, a party must establish all of the elements of estoppel under South Carolina law, which include: "(1) ignorance of the party invoking it of the truth as to the facts in question; (2) representations or conduct of the party estopped which misled; (3) reliance upon such representation or conduct; and (4) prejudicial change of position as a result of such reliance." *Id.*

Courts applying South Carolina law have rejected waiver arguments relating to reservation of rights letters. For example, in *Laidlaw* the Court of Appeals disagreed with the appellant's argument that the insurer "waived its right to refuse coverage and withdraw representation by originally agreeing to provide coverage and representation." 338 S.C. at 52, 524 S.E.2d at 852. In *Laidlaw*, the insurer sent a letter stating: "we find it necessary to reserve our rights to disclaim coverage totally or in part at a later date," and that further activity would be handled under this reservation of rights. *Id.* The insurer later sent a second letter stating in part that: "[w]e will provide coverage for the loss under a general reservation of rights subject to the definitions and wordings of your policies." *Id.* The court found that these two letters established that the insurer "repeatedly reserved its right to deny coverage and correspondingly withdraw representation as its investigation of Laidlaw's claims proceeded," and thus the plaintiff failed to show that the insurer "intentionally relinquished its right to deny coverage." *Id.* Finally, the *Laidlaw* Court noted that even if the insurer waived its right to deny coverage, plaintiff's claim failed because "[w]aiver cannot create coverage and cannot bring into existence something not covered in the policy." *Id.* (quoting *Alverson v. Minn. Mut. Life Ins. Co.*, 287 S.C. 432, 434, 339 S.E.2d 140, 142 (Ct. App. 1985)); *see also Peak Prop. & Cas. Ins. Corp. v. Davis*, No. CA 3:12-1689-JFA, 2013 WL 1182679, at *5 (D.S.C. Mar. 21, 2013) (holding that insurer's failure to send RRL to insured until five years after accident did not waive its right to deny coverage, noting that "'South Carolina courts have repeatedly and explicitly held that waiver cannot create coverage and cannot bring into existence something not covered in the policy'") (quoting *Liberty Mut. Ins. Co. v. Westport Ins. Corp.*, 664 F. Supp. 2d 587, 594 (D.S.C. 2009)).

The Court's decision here will be argued to have fundamentally altered the way insurance companies handle reservations of rights going forward. Prior to this decision, South Carolina courts had never required that a reservation of rights include a discussion of the insurer's "position as to the various provisions or explanation of its reasons for relying thereon," or to "specify the particular grounds upon which Harleysville did, or might thereafter, dispute coverage." Op. No. 27698 at 34. In fact, *Laidlaw* previously recognized the opposite was true, finding that a general reservation of rights was sufficient. This Court's broad statement that "[i]t is axiomatic that an insured must be provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage," *id.* at 31, is not supported by any prior South Carolina jurisprudence.

Such requirements are problematic because they will force insurers to explain the meaning and effect of terms and provisions of their policies that are already set forth in the policies themselves. If the insurer fails to do so, the insurer will apparently now waive the right to raise those defenses under the Court's analysis in Op. No. 27698, despite the fact that no reasonable reading of the policy could support coverage. The insurance policy is a contract between the insured and the insurer. Nothing in that contract discusses waiver or change to the contract terms due to the content (or lack of content) of an RRL, which is subject to after-the-fact judicial criticism as to specificity and the like. It is inconsistent with contract principles for a court to determine that an RRL, sent well after entry into the insurance contract, is insufficiently specific or unclear, leading to a change to the clear, binding contractual arrangement between the insurer and insured.

Further complicating matters is the fact that reservation of rights letters are often sent in the early stages of litigation. The requirements imposed by the court will force insurers to attempt to provide a detailed explanation of their position without having obtained all of the relevant facts and details. This will open up insurers to claims that they misrepresented the availability, or lack thereof, of coverage, even if the insurer believed the facts and evidence justified its position at the time it issue the letter. Additionally, insurers will arguably have a duty to continually update reservation of rights letters any time a new fact comes to light which could remotely impact coverage. Otherwise, the insurer risks a finding, according to Op. No. 27698, that its RRL explanation was "insufficient" and resulted in a waiver.

Finally, the Court's ruling has the, presumably unintended, consequence of potentially placing insurers who flatly deny coverage in a better position than those who are cautious and seek to ensure that they comply with their policy duties by defending their insureds under a reservation of rights. If the insurer denies coverage and the insured brings an action for coverage, the insured bears the initial burden of proving that coverage exists under the terms of the policy. *See Rakestraw v. Allstate Ins. Co.*, 238 S.C. 217, 224, 119 S.E.2d 746, 749 (1961) ("The burden of proving coverage under the omnibus clause of an insurance policy is upon the person seeking coverage."). If the insured meets its burden, then the burden shifts to the insurer to establish that an exclusion applies to defeat coverage. *See Foster v. Canal Ins. Co.*, 227 S.C. 322, 333, 88 S.E.2d 59, 64 (1955) ("[T]he burden rests upon the insurer to sustain the defense of an excepted risk."). Denying coverage outright and denying any defense would preserve the contract of insurance and its terms without question. Offering a defense under a reservation of rights approach, under Op. No. 27698, creates a risk of waiver of policy terms and defenses if the letter is not deemed sufficient. Insurers should not be incented by the law to withhold benefits to insureds. The law should incent the opposite, and permit the insurer to offer a defense to the insured under a reservation of rights without fear that the insurance contract will be thereby expanded or altered later by a court.[3]

2. Numerous courts from other jurisdictions have held that a Reservation of Rights need not detail each policy defense upon which an insurer may rely.

The general standard for reservation of rights is that it must "fairly inform the insured of the insurer's position." *Couch on Insurance*, 3d ed. § 202:47; *see also* 38 A.L.R.2d 1148 § 7(a) (RRL is sufficient "if it fairly informs the insured of the insurer's position"). This begs the question, however, of what this "general standard" actually means. Respectfully, it does **not** mean what this Court stated it means in Op. No. 27698.

Courts from around the country have recognized that a RRL need not comply with the requirements set forth in Op. No. 27698. Additionally, numerous courts have found that a general statement in a reservation of rights letter that the insurer preserves its right to pursue policy defenses other than those specifically listed in the letter is sufficient. For example, in a case from the District of New Jersey, the insurer issued a reservation of rights letter which closed with the statement that "[t]his reservation of rights letter does not waive any other rights or privileges the Continental Casualty Company has under its contract of insurance." *Hatco Corp. v. W.R. Grace & Co.--Conn.*, 801 F. Supp. 1334, 1363 (D.N.J. 1992). The insured contended that the blanket reservation was "insufficient to preserve any defenses to coverage other than the two grounds specifically set forth in the letter, and therefore constituted a waiver of any other defenses." *Id.* The court rejected this argument, noting that the insurer's actions could not be

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[3] A defense to coverage not appearing on the face of the insurance contract, such as facts demonstrating a failure to cooperate, or late notice of a suit, should perhaps be treated differently and the RRLs should put the insureds on notice of such a coverage defense. There should be no reason, however, for an RRL to provide an insured of notice of what the insured already knows under the insurance policy and repeat its terms.

construed as a waiver, as the insured failed to establish that the insurer "acted in any manner inconsistent with its expression of intent to preserve all defenses." *Id.*

Similarly, the District of Montana held that an insurer "was not obligated to detail all potential defenses in its reservation of rights letter and that it has not waived nor is estopped from asserting other policy defenses." *Barnard Pipeline, Inc. v. Travelers Prop. Cas. Co. of Am.*, 3 F. Supp. 3d 865, 874–75 (D. Mont. 2014). In *Barnyard Pipeline*, the insured sought summary judgment on each of the insurer's affirmative defenses, claiming that they were waived because the insurer did not identify them in the reservation of rights letter. The court rejected this argument, noting that the insurer's "reservation of rights letter expressly reserve[d insurer's] right to pursue additional applicable policy defenses." *Id.* Thus, the insured had always "been on notice of [insurer's] intention to pursue all available policy defenses." *Id.*

The Ninth Circuit found that a reservation of rights letter put an insured on adequate notice in *Bell Lavalin, Inc. v. Simcoe & Erie Gen. Ins. Co.*, 61 F.3d 742, 747–48 (9th Cir. 1995). The insured contended that the reservation of rights failed to "provide a reasonable explanation of the basis for the denial." *Id.* The court noted that "[a]lthough the reservation of rights letter did not technically state that pure contract claims would not be covered, it did cite to the relevant policy provision and informed [insured] that [insurer] was tendering a defense under a full reservation of any and all rights." *Id.* at 748. Thus, the insured was on notice that the insurer might contest issues in the future. *Id.* The court rejected the insured's estoppel argument, noting that the evidence supported that the insurer consistently informed the insured that contract claims might not be covered, and the insured did not suffer any injury by relying on the insurer's conduct. *Id.*

In a case from Texas, the insured contended that the reservation of rights letter was ambiguous and thus the insurer waived its right to contest coverage. *See J.E.M. v. Fid. & Cas. Co. of N.Y.*, 928 S.W.2d 668, 672 (Tex. App. 1996). The court noted that "[w]aiver or estoppel may preclude an insurer from forfeiting a policy because of the insured's failure to comply with a term of the policy,[4] but these doctrines do not normally operate to preclude the insurer's 'no coverage' defense." *Id.* The court rejected the plaintiff's argument that the reservation of rights letter was insufficient to preserve the no coverage defense because it "does not reference specific policy provisions on which the insurer is relying." *Id.*

Similarly, the Southern District of Florida addressed the following question: "Can the doctrine of estoppel apply if the insurer issues a reservation of rights letter, but leaves out a coverage defense therein?" in the negative. *Solar Time Ltd. v. XL Specialty Ins. Co.*, No. 02-23548-CIV-BROWN, 2004 WL 1683149, at *7 (S.D. Fla. June 15, 2004), *aff'd*, 142 F. App'x 430 (11th Cir. 2005). As the court explained, estoppel typically applies only where an insurer assumes the defense in the absence of a reservation of rights, leading the insured to believe that there is coverage. *Id.* Because there was a reservation of rights, however, there "was nothing misleading the insured into believing there was coverage." *Id.* On appeal to the Eleventh Circuit, the insured contended the district court erred by declining to find that the insurer was estopped. 142 F. App'x at 434. The reservation of rights letter mentioned only one of the two conditions that the insurer relied on to contest coverage, but did contain a general statement that the insurer was "not waiving any defenses or rights." *Id.* The insured contended that this "lulled the [insured] into believing that coverage existed." *Id.* The court rejected this point, noting that there was no binding precedent "applying the doctrine of estoppel when the insurer

[4] This notation by the *J.E.M.* court is consistent with footnote 3, *supra*.

issues a reservation of rights letter that refers to a coverage defense but does not refer to a specific basis for a denial of coverage." *Id.*

A number of other courts are also in agreement. *See, e.g.*, *Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196 (5th Cir. 1986) (holding that RRL was sufficient where it specifically identified the policy in question, informed the insured that the insurer had retained an attorney to defend insured in underlying suit, apprised insured of initial results of insurer's investigation, and expressly reserved insurer's rights); *Scottsdale Ins. Co. v. Ala. Mun. Ins. Corp.*, No. 2:11-CV-668-MEF, 2013 WL 5231928, at *6 (M.D. Ala. Sept. 16, 2013) ("Alabama case law establishes that a general reservation of rights is sufficient to allow an insurer to later deny coverage under a specific policy exclusion."); *Houston Gen. Ins. Co. v. AG Prod. Co.*, 840 F. Supp. 738, 743 (E.D. Cal. 1993) ("[The RRL] clearly indicates that denial of the claim was because of [the insurer's] conclusion that the policy did not provide coverage. The fact that the legal theory upon which it relies in making this statement was not articulated cannot be seen as a waiver of the right to do so."); *State Farm Fire & Cas. Co. v. Jioras*, 24 Cal. App. 4th 1619, 1627 (Ct. App. 1994) ("[T]he insurer accepted the defense subject to a 'global' reservation of rights, and a generalized reservation of rights is deemed adequate for [reserving his rights]."); *Nationwide Mut. Ins. Co. v. Nixon*, 682 A.2d 1310, 1314 (Pa. Super. Ct. 1996) (holding that insurer's failure to include specific policy exclusion in RRL as a possible defense did not constitute waiver of that defense); *Richards Mfg. Co. v. Great Am. Ins. Co.*, 773 S.W.2d 916, 919 (Tenn. Ct. App. 1988) ("The position taken may be correct, but for other legal reasons. It is the insurer's conclusion regarding the existence or non-existence of certain coverage that must be clearly and fairly communicated to the insured, not its legal reasons therefor."); *see also Nw. Airlines v. Fed. Ins. Co.*, 32 F.3d 349, 356-57 (8th Cir. 1994) (noting that the RRL "could have been far more specific," but the insurer "did reserve its right to deny coverage 'on additional and alternative bases,'" and thus the insurer "adequately preserved its policy defenses").

Courts have even held that an insurer's ***failure*** or delay to reserve its rights does not waive its ability to later contest coverage or raise certain defenses. *See, e.g.*, *Garamendi v. Golden Eagle Ins. Co.*, 116 Cal. App. 4th 694, 721 (Ct. App. 2004) ("In virtually every case discussing the waiver issue . . . the courts have found that there was no waiver if the insurer made a reservation of rights at any time, even if years after the defense was undertaken."); *Medical Protective Co. v. Fragatos*, 940 N.E.2d 1011, 1015 (Ohio Ct. App. 2010) (reversing trial court and holding that insurer had not waived coverage defenses by failing to timely send RRL to insured); *Maxwell v. Hartford Union High Sch. Dist.*, 814 N.W.2d 484, 487 (Wis. 2012) ("We strongly urge insurers to communicate with their insureds about their potential coverage defenses, but we do not see the failure to issue a reservation of rights letter as grounds to require an insurer to provide insurance coverage that does not otherwise exist in the insurance contract."). Recently, the District of South Carolina held that an insurer's failure to reserve its rights prior to underlying suit against its insured did not waive its ability to subsequently contest coverage. *Peak Prop.*, 2013 WL 1182679, at *5 (holding that insurer's failure to send RRL to insured until five years after accident did not waive its right to deny coverage, noting that "'South Carolina courts have repeatedly and explicitly held that waiver cannot create coverage and cannot bring into existence something not covered in the policy'") (quoting *Liberty Mut. Ins. Co. v. Westport Ins. Corp.*, 664 F. Supp. 2d 587, 594 (D.S.C. 2009)).

3. The authorities cited in Op. No. 27698 do not support the Court's conclusions on RRLs.

The cases cited and quoted by the Court in Opinion No. 27698 to provide a "basic understanding of reservation of rights to contest coverage" are not supportive of the Court's conclusions as to RRLs. As an initial matter, only one of the cases cited in Opinion No. 27698's section addressing reservation of rights addressed a situation where it is a judgment creditor lacking any assignment, rather than the insured[5], who is attempting to challenge the validity and effect of an insurer's RRL. (Op. No. 27698 at 31-37).

The Court in Opinion No. 27698 quoted *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602 (Minn. 2012) to support the proposition that a reservation of rights letter must inform the insured of the need to obtain an allocated verdict. *Id.* at 618. That court, however, noted that this requirement is "***conditioned upon*** the insured affirmatively showing that a written explanation of an award is available under applicable rules, the insurer had the opportunity to provide timely notice to the insured of the insured's interest in a written explanation of the award, and prejudice was caused by the failure of the insurer to provide such notice." *Id.* (emphasis added). Therefore, the quoted statement does not, respectfully, stand for the conclusive proposition that Opinion No. 27698 suggests. Here, the only evidence presented at the trial was that the insureds agreed with Harleysville that coverage matters would be litigated between them in a subsequent proceeding after the conclusion of the construction defect trials. (*See* Trial Tr. of Dec. 13-14, 2010 at 208-210; CR 453-455; Tr. Ex. 11 – Dep. Tr. of

[5] The case is *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972), applying Florida law, which the *Duke* Court stated "favors third-party beneficiary rights created by contracts of insurance to an almost unparalleled extent."

James Lee Wright at 85-86; CR 1434.) There can be no prejudice to the insureds in such a scenario.

Similarly, Opinion No. 27698 quoted *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994), to support the proposition that the insurer must inform the insured of the need to request a special verdict or interrogatories where appropriate. *Id.* at 1498. This case, however, did not involve an analysis of a reservation of rights letter. *Id.* Rather, the court simply noted that the insurer's right to control the litigation may impose this duty where appropriate. *Id.*[6]

The Court relied heavily in its RRL analysis section of Opinion No. 27698 on the case of *Desert Ridge Resort LLC v. Occidental Fire & Cas. Co. of N.C.*, 141 F. Supp. 3d 962, 967 (D. Ariz. 2015). *Desert Ridge*, however, arises and is grounded upon a factual context that does not exist in this case making *Desert Ridge* inapplicable here. Specifically, *Desert Ridge* made it explicit that its discussion of RRLs was only within the context of what is known in Arizona as a "Morris Agreement." *Id.* at 967-68. A "*Morris* Agreement" is a settlement agreement between an insured and a plaintiff whereby the insured assigns any claim he has against his insurer to the plaintiff and the plaintiff grants the insured a covenant not to execute. Significantly, the Supreme Court of Arizona holds that such agreements can only exist in situations where the insurer is providing a defense subject to a reservation of rights because the settlement of any claims or damages that are not subject to a reservation of rights would violate the insured's duty

[6] Opinion No. 27698 also incorrectly attributes three quotes, beginning "virtue of its duty, "the insured has no reason," and "[t]he general rule precluding" to *Magnum Foods* when in fact they came from *Desert Ridge Resort LLC v. Occidental Fire & Cas. Co. of N.C.*, 141 F. Supp. 3d 962, 967 (D. Ariz. 2015). As is further described in this section of this Petition, the actual context of these quotes as they appear in *Desert Ridge* makes them inapplicable to this case.

to cooperate with the insurer.[7] *USAA v. Morris*, 741 P.2d 246, 252 (Ariz. 1987). Thus, in a *Morris* agreement context, there is a special significance to the specificity of the RRL because the *Morris* agreement pertains only to the claims the insurer is potentially contesting, and does not apply to the claims where the insurer has unconditionally assumed liability. *Id.* Outside of the *Morris* agreement context, the *Desert Ridge* Court's only statement as to the requirements of a RRL is its citation to *Equity Gen. Ins. Co. v. C&A Realty Co.*, 715 P.2d 768, 771 (Ariz. Ct. App. 1985). *Desert Ridge*, 141 F. Supp. 3d at 967. *Equity General* held that, to be effective, a RRL need only "inform[] a reader of average intelligence that while the insurer was providing a defense, it was doing so without waiving any rights to contest liability under the policy" such that it "informed the insured of the insurer's position." *Equity Gen.*, 715 P.2d at 771. Significantly, aside from Opinion No. 27698, the only other court to cite to *Desert Ridge* is *Prescott Lakes Comm. Assoc., Inc. v. Auto-Owners Ins. Co.*, No. CV-14-08201-PCT-JTT, 2015 U.S. Dist Lexis 168865 (D. Ariz. Dec. 17, 2015), which did so within the context of a *Morris* agreement. Therefore, Opinion 27698 misapprehended the meaning of *Desert Ridge* and that case has no application here.

Many courts from around the country have found that reservation of rights letters need not list every defense or provide a detailed explanation in order to be effective. This is logical in light of the fact that coverage cannot be created through waiver. What may or may not be contained in a reservation of rights letter should have no bearing on the scope of coverage under the policy. Rather, the purpose of a reservation of rights is to allow the insurer to fulfill its "broad duty to defend while investigating and pursuing the narrower issue of whether

[7] A different type of agreement, referred to as a *Damron* agreement, is available in Arizona where an insurer has completely denied coverage and is not providing its insured with a defense. *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969).

indemnification will result." *Wilson v. Cont'l Cas. Co.*, 778 N.E.2d 849, 852 (Ind. Ct. App. 2002). The key requirement is that notice be given to the insured that coverage may ultimately not exist, as this "prevent[s] an insured's detrimental reliance on the defense provided by the insurer," *Federated Dep't Stores, Inc. v. Twin City Fire Ins. Co.*, 807 N.Y.S.2d 62, 67 (N.Y. App. Div. 2006). Critically, the purpose of a reservation of rights "is ***not to change the contractual relationship of the parties***, but rather it is to identify the insurer's position regarding coverage," which protects both parties, *Alaska Nat'l Ins. Co. v. Bryan*, 104 P.3d 1, 9 (Wash. Ct. App. 2004), not whether the insurer sufficiently explained each policy defense it may or may not rely on in detail.

There are other decisions in state and federal courts that address the content of RRLs in various contexts. All of those cases have not been set forth in this Petition. As stated in footnote 1, supra, this issue received scant treatment at trial and opposing counsel's briefs, and was only addressed relatively briefly at the end of Harleysville's briefs. Harleysville would welcome the opportunity to present robust briefing to this Court on the issue of what RRLs should contain and under what context.[8]

The Court therefore, respectfully, misapprehended the law governing reservation of rights letters, including how they operate in practice. Accordingly, rehearing should be granted.

4. Harleysville's Reservation of Rights letters were sufficient.

Harleysville's RRLs identified the relevant policies, described the complaint's claims, cited and quoted the relevant policy provisions, specifically reserved Harleysville's rights, and advised the insureds of the prudence of retaining their own attorney. (*See, e.g.*, January 27, 2004

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[8] For example, under Arizona law, as illustrated in the *Desert Ridge* case, in the context of a *Morris* agreement the requirements for specificity in a RRL serve a special purpose of determining which claims in the underlying action fall within the *Morris* agreement.

RRL to Buildstar regarding Riverwalk suit; CR 1820). Additionally, Harleysville's construction defect litigation manager, Mr. Lee Wright, testified that Harleysville explained why various policy provisions could affect coverage, discussed the insurer's investigation, and discussed the need to avoid intervening in the suit so as to avoid an actual conflict of interest to its insureds. (*See* Trial Tr. of Dec. 13-14, 2010 at 182-85; CR 427-30.) Critically, Harleysville's RRLs note that Harleysville "expressly reserves the right to rely upon any term or condition of the insurance contract." (*See* January 27, 2004 RRL to Buildstar regarding Riverwalk suit at 11; CR 1830).

The content of these letters and Harleysville's subsequent explanation, therefore, was more than sufficient to satisfy Harleysville's obligations under the authorities detailed above. Harleysville's RRLs put the insured on clear notice that coverage may ultimately not exist. They also explicitly noted that Harleysville may rely on any term or condition of the insurance contract to contest coverage. Therefore, the Special Referee erred by failing to consider the applicability of the policy exclusions identified by Harleysville in this matter. Preventing Harleysville from raising valid coverage defenses identified in the policies amounted to a creation of coverage via waiver. For all of these reasons, the Court should grant rehearing.

5. This Court should grant rehearing to consider Harleysville's asserted coverage defenses and to provide for further proceedings to determine the covered and non-covered damages.

Because Respondents/Appellants lacked standing to challenge Harleysville's RRLs, and because the RRLs were adequate to preserve Harleysville's coverage defenses, this Court should grant rehearing to address the coverage defenses addressed in Harleysville's briefs, but not addressed in Opinion 27698 (*see* Riverwalk – Final Appellants' Brief at pp. 4-15, 24-39; Magnolia North – Final Appellants' Brief at pp. 4-15, 22-36), and Harleysville should prevail for the reasons stated in its briefing. Additionally, rehearing should also be granted to allow for the allocation of the damages in the underlying cases between covered and non-covered damages.

II. The Opinion Overlooks the Inherent Problems Created by the Special Referee's Rulings Regarding an Insurer's Obligations to Seek Intervention or Other Means to Secure an Allocated Verdict.

The Special Referee's final orders in these matters held that "Harleysville made a conscious decision not to intervene in the underlying action[s] and took no action to seek an allocated verdict by informing the trial court of the need for an allocated verdict or by submitting special interrogatories for the Court's consideration for submission to the jury." (CR 0037 & 0086). The Special Referee further held that these steps could have been done under Rules 24 and 49, SCRCP. (CR 0056 & 0105). The Special Referee then concluded that "Harleysville's failure to intervene or otherwise seek an allocated verdict cannot now be used to prejudice the rights of its insureds or the rights of the claimants who step into the shoes of the insureds." (CR 0058 & 0107).

These rulings are affirmed by Opinion No. 27698. However, the majority's opinion in this matter fails to address the inherent problems created by the Special Referee's rulings on this issue. As noted by former Chief Justice Pleicones in his dissent, "there is no suggestion how Harleysville could have intervened in these lawsuits and asserted a defense against coverage without creating an impermissible conflict of interest in violation of established South Carolina law." Op. No. 27698 at p. 54 (Pleicones, J., dissenting) (citing *Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 145 S.E.2d 523 (1965)).

At the time of the trials of the underlying construction defect matters, the law on this issue was governed by this Court's first opinion in *Auto Owners v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009). In that initial *Newman* opinion, this Court held that every dollar of construction defect damages triggered indemnity obligations under a standard CGL policy. In accordance with that opinion, South Carolina's trial courts had denied motions to intervene in analogous cases. The initial *Newman* opinion was not withdrawn and replaced until September of 2009, several months *after* the trials of these underlying construction defect cases had been completed. Thus, the revised *Newman* opinion cannot support the Special Referee's conclusion that Harleysville was at fault in not seeking an allocation of covered damages. The majority's view in Op. No. 27698 that Harleysville should have asserted to the trial court the need for intervention despite the existing *Newman* opinion then in place is unfounded. Indeed, this Court has recently held that because the trial court was bound to follow the existing appellate case law, it is futile for a party to challenge that law at the trial court level as that court had no authority to alter the decision of the appellate court. *Wilkinson v. E. Cooper Cmty. Hosp.*, 410 S.C. 163, 170 n.5, 763 S.E.2d 426, 430 n.5 (2014).

By affirming the Special Referee with regard the intervention/allocated verdict issue, without addressing any of the issues outlined in Harleysville's briefing regarding the problems inherent with requiring an insurer to intervene or somehow otherwise obtain an allocated verdict, Opinion 27698 has created a state of uncertainty in this area of the law. Questions regarding whether an insurer is now required to intervene in the underlying action in order to preserve allocation of damages issues; whether and how an insurer can arrange for special interrogatories or special verdict form[9] in the underlying trial's verdict form to resolve allocation issues; and whether any such actions are possible without creating an impermissible conflict between the

[9] Asking a jury in a construction defect case to answer questions about types of damages is to ask them a question which is unnecessary to the issues before them being actually litigated. This Court has previously held that it is error to submit a special verdict question to a jury on an issue not properly before them for decision. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 207, 701 S.E.2d 5, 23 (2010).

insurer and the insured now exist. Further, the Court in Opinion 27698 does not answer what the insurer is to do when a trial court denies the insurer's attempt to comply with such intervention or special verdict form requirements.

Indeed, since the filing of Opinion 27698, these issues have actually presented themselves in this state's courts and will continue to present themselves until resolved by this Court. For example, in the pending matter of *Beresford Commons Homeowners Association, Inc. v. Penuel Construction, LLC*, Case No. 2013-CP-08-00179 (Berkeley County Court of Common Pleas), following the issuance of Opinion No. 27698, Nationwide Mutual Fire Insurance Company filed a motion to intervene on January 26, 2017, and this motion was denied by the trial court a few days later on January 31, 2017, necessitating the insurer file an appeal of that denial or potentially be denied the possibility of allocation of damages in the future. *See* Notice of Appeal in Case No. 2013-CP-08-00179, filed 2/6/17 (attached as Exhibit A). This appeal has, in turn, resulted in a stay of the underlying construction defect trial there.

A similar situation has also presented itself in the case of *Waverly at Hamlin Plantation Townhome Association, Inc. v. John Weiland Homes and Neighborhoods of the Carolinas, Inc.*, Case No. 2013-CP-10-3326 (Charleston County Court of Common Pleas). *See* Order Denying Liberty Mutual's Motion for Limited Intervention filed 2/6/17 (attached as Exhibit B). In the *Waverly* case, the insurer sought to intervene in the action for "the limited purpose of submitting special verdict questions related to allocation of covered and non-covered damages." *Id.* at p. 2. The trial court denied the insurer's motion, holding that it was not entitled to either intervention as of right under Rule 24(a) or permissive intervention under Rule 24(b). *Id.* at pp. 2-3, Specifically, the trial court concluded that the insurer's interests in obtaining such an allocation "is probably not ripe until such time, if ever," a verdict against the insured is returned. *Id.* at p. 3.

The trial court in *Waverly* went so far as to state that this Court's Opinion No. 27698 "cannot fairly be read to direct or approve" such a motion and "does not authorize" intervention because allowing intervention by the insurer "would seem to create an impermissible conflict of interest in violation of established South Carolina law" and would create an "unacceptably high" risk of jury confusion. *Id.* at pp. 3-4. The *Waverly* trial court concluded that there was no prejudice to the insurer in denying intervention because the issues were not ripe until after a verdict is rendered and the insurer could bring "a declaratory judgment action after the verdict for the purpose of obtaining a ruling that apportions damages." *Id.* at p. 4. As with the *Beresford Commons* case, the denial of the motion to intervene in *Waverly* has now been appealed. *See* Notice of Appeal in Case No. 2013-CP-10-3326, filed 2/16/17 (attached as Exhibit C).

The denial of these motions to intervene, even after the filing of Opinion No. 27698, illustrates the quandary insurers now face while defending their insureds in construction defect cases. The insurer in *Waverly* was simply attempting to do exactly what the Special Referee in the present case faulted Harleysville for not doing—intervene or otherwise seek an allocated verdict in the underlying trial. This confusion will ultimately lead to an added level of appeals in any construction defect litigation that involved potentially non-covered actual damages.

Accordingly, because this issue was overlooked in Opinion No. 27698, this Court should grant rehearing to address this critical matter.[10]

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[10] Harleysville cited to other courts who have solved this quandary by permitting supplemental proceedings or subsequent declaratory judgment actions to determine an appropriate allocation of covered and non-covered damages. (*See* Riverwalk – Final Appellant's Brief pp. 13-15; Riverwalk – Final Reply Brief pp. 7-9; Magnolia North – Final Appellant's Brief pp. 13-15; Magnolia North – Final Reply Brief pp. 7-9.)

III. The Court Misapprehended Whether Time on Risk Should Apply to the Punitive Damages Award.

A. The general verdicts issued in the underlying suits establish that punitive damages were awarded for actions of the insureds that occurred outside of Harleysville's time-on-the-risk.

In the underlying liability suits, the juries returned general verdicts against Harleysville's insureds. *See* Op. No. 27698 at 25-26. These verdicts awarded actual and punitive damages to the underlying plaintiffs. Harleysville then brought the present declaratory action requesting that the court determine which portions of the general verdicts constituted damages during Harleysville's time-on-the-risk. *Id.* at 26. The Special Referee did that for actual damages. *See id.* at 26-27, 41-44. The Special Referee, however, refused to apply time-on-the-risk for punitive damages. *Id.* at 45. This Court agreed, and while determining that it was not issuing a general rule in the matter, it ruled in that Harleysville failed to present any evidence that the "reprehensible acts upon which punitive damages are predicated occurred outside the relevant policy periods." Op. No. 27698 at 48. But Harleysville was not required to present this evidence, because of the general verdict rule.

The Court misapprehended the nature of the punitive damage award, which was in fact premised on activities that occurred outside of the time period Harleysville's policies were effective. It is well established that a general verdict for the plaintiff "is a determination against all matters of defense set up by defendant." *Harry L. Hussmann Refrigerator & Supply Co. v. Cash & Carry Grocer*, 134 S.C. 191, 132 S.E. 173, 174 (1926) (quoting *Heiferman v. Greenhut Cloak Co.*, 145 N.Y.S. 142 (N.Y. S. Ct. App. Div. 1913)). In other words, a general verdict in the plaintiff's favor presumes that all questions of fact that were properly submitted to the jury were resolved in the plaintiff's favor. *Aldrich v. S. Ry. Co.*, 95 S.C. 427, 79 S.E. 316, 319

(1913); *see also Lord v. Hercules Powder Co.*, 167 P.2d 299, 301 (Kan. 1946) ("A general verdict is one by which a jury pronounces generally on all issues of fact submitted to it for determination. A general verdict in favor of a party imports a finding in his favor upon all issues in the case which are not inconsistent with the special findings returned by the jury." (citation omitted); *Owens v. McBride*, 694 P.2d 590, 593 (Utah 1984) ("A general verdict is a finding or pronouncement by a jury on all the issues submitted to it."). The general verdict rule ties in with the two issue rule, which upholds a general verdict so long as any one of the claims submitted to the jury would support a finding of liability. *See Cole v. Raut*, 378 S.C. 398, 406–07, 663 S.E.2d 30, 34 (2008).

As the Court listed in Opinion 27698, in the construction defect trials the Plaintiff Homeowner's Associations presented evidence of the following in support of their claim for punitive damages: (1) that Heritage chose not to employ an inspecting architect to evaluate and approve or disapprove any modification or substitutions to the original construction plans and specifications, (2) that Heritage was aware of significant water-intrusion problems at other developments before beginning construction, and nevertheless continued the same inadequate construction practices, (3) that despite knowledge of the ongoing construction problems, Heritage marketed its sales efforts to elderly, out-of-state residents and marketed the properties on the basis of luxurious amenities that were never constructed, and (4) willfully and repeatedly sold improperly constructed condominiums to innocent purchasers. Op. No. 27698 at 44-45. On both of the underlying verdict forms the jury simply agreed to the broad statement that the "Defendants actions were "willful, wanton, reckless and/or grossly negligent." Op. No. 27698 at 39 n.13.

Under the applicable principles governing general verdicts, the jury's award of punitive damages supports a finding in Respondents/Appellants favor on each of these specifications of recklessness. Therefore, contrary to the Court's assertion, the punitive damage award ***was*** necessarily predicated on actions that occurred outside of the Harleysville policy periods. The Special Referee determined that the relevant period for the progressive damages attributable to Harleysville's insureds began thirty days after the first certificate of occupancy was issued at each development and ended on the date of Respondents/Appellants' expert's last visit to the developments prior to the underlying trials.[11] Op. No. 27698 at 42. Each of averments supporting punitive damages, therefore, undoubtedly related to activities that occurred outside of Harleysville's time-on-the-risk. In fact, one of the averments—the insureds' knowledge of water intrusion problems at other developments prior to beginning construction on Riverwalk and Magnolia North—***only*** related to actions that occurred outside of the coverage period. Additionally, sales of condos also occurred over an extended period of time, some of which occurred prior to coverage becoming effective and others which occurred after coverage lapsed. Finally, the insureds' alleged failure to retain an architect to inspect or approve modifications to the original construction plans also would involve actions prior to coverage taking effect, and during and after Harleysville's coverage period.

Therefore, contrary to the Court's holding, acts supporting the punitive damage award did not take place "entirely during the period of time Harleysville's policies were effective." Op.

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[11] For Riverwalk, the period ran from November 27, 1999 and ended on April 30, 2004. (*See* Riverwalk Order at 45; CR 69.) For Magnolia North, the period ran from January 10, 1999 to May 5, 2005. (*See* Magnolia North Order at 41; CR 115.) Harleysville maintained coverage on Riverwalk from November 27, 1997 to June 18, 2001. (*See* Riverwalk Order at 46; CR 70.) Harleysville's maintained coverage from January 10, 1999 to November 30, 2000 in Magnolia North. (*See* Magnolia North Order at 41; CR 115.)

No. 27698 at 48. As a result, the Court should have applied time on risk to the punitive award. To hold otherwise would require Harleysville to answer for actions of its insureds that occurred outside of its contractual relationship. Therefore, the Court should grant rehearing for this reason as well.

B. The "paucity" of legal authority addressing the application of time-on-the-risk allocations to punitive damages results from South Carolina law permitting an an insurer to be responsible to pay a punitive damages award in a construction defects case involving purely economic loss.

In Opinion No. 27698, in supporting its refusal to apply a time-on-the-risk allocation to the punitive damages awards, the majority noted that "the parties have presented this Court (and the Special Referee) with a paucity of legal authority to inform our decision as to the allocability of punitive damages." Op. No. 27698 at p. 47. This lack of citation to legal authority is not due to lack of searching. The reason for the paucity of legal authority is because of South Carolina's jurisprudence in this area of construction defect litigation and the insurability of punitive damages. Due to South Carolina's position of interpreting insurance contracts as covering punitive damages, while also simultaneously restricting the application of the economic loss rule in residential construction defect cases, it appears South Carolina is one of only a handful of jurisdictions where a time-on-the-risk analysis of punitive damages in a construction defect case is even possible under the facts of this case.

First, with regard to the insurability of punitive damages, of the fifty-one jurisdictions comprised of the United States and the District of Columbia, only twenty-six of those jurisdictions (other than South Carolina) even allow punitive damages that are directly assessed against an insured to fall within an insurer's duty to indemnify.[12] Of the remaining twenty-four jurisdictions, seventeen generally do not allow insurance coverage for punitive damages,[13] two

[12] *See Omni Ins. Co. v. Foreman*, 802 So. 2d 195 (Ala. 2001); *Aetna Cas. & Surety Co. v. Marion Equipment Co.*, 894 P.2d 664 (Alaska 1995); *Price v. Hartford Accident & Indem. Co.*, 502 P.2d 522 (Ariz. 1972); *Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc.*, 962 S.W.2d 735 (Ark. 1998); *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986); *Greenwood Cemetery v. Travelers Indem. Co.*, 232 S.E.2d 910 (Ga. 1977); *Abbie Uriguen Oldsmobile Buick, Inc. v. U.S. Fire Ins. Co.*, 511 P.2d 783 (Idaho 1973); *Skyline Harvestore Systems, Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106 (Iowa 1983); *Continental Ins. Co. v. Hancock*, 507 S.W.2d 146 (Ky. Ct. App. 1973); *Sharp v. Daigre*, 555 So. 2d 1361 (La. 1990); *First Nat'l Bank of St. Mary's v. Fidelity and Deposit Co.*, 389 A.2d 359 (Md. 1978); *Meijer, Inc. v. General Star Indem. Co.*, 826 F. Supp. 241, 247 (W.D. Mich. 1993), *aff'd*, 61 F.3d 903 (6th Cir. 1995) (holding that while "[n]o Michigan case has squarely addressed the issue of insurability of punitive damages," "it appears that Michigan law permits recovery."); *James W. Sessums Timber Co., Inc. v. McDaniel*, 635 So. 2d 875 (Miss. 1994); *First Bank (N.A.)-Billings v. Transamerica Ins. Co.*, 679 P.2d 1217 (Mont. 1984); Nev. Rev. Stat. § 681A.095 (2003) (providing that "[a]n insurer may insure against legal liability for exemplary or punitive damages that do not arise from a wrongful act of the insured committed with the intent to cause injury to another."); *American Home Assurance Co. v. Fish*, 451 A.2d 358 (N.H. 1982); *Baker v. Armstrong*, 744 P.2d 170 (N.M. 1987); *Mazza v. Medical Mut. Ins. Co.*, 319 S.E.2d 217 (N.C. 1984); *Continental Cas. Co. v. Kinsey*, 499 N.W.2d 574 (N.D. 1993); *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013 (Or. 1977); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965); *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964); *Am. Protection Ins. Co. v. McMahan*, 562 A.2d 462 (Vt. 1989); *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 34 P.3d 809 (Wash. 2001) (allowing insurance coverage of punitive cases where punitive damages are authorized by statute); *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981); *Brown v. Maxey*, 369 N.W.2d 677 (Wis. 1985); *Sinclair Oil Corp. v. Columbia Cas. Co.*, 682 P.2d 975 (Wyo. 1984).

[13] *See PPG Industries, Inc. v. Transamerica Ins. Co.*, 975 P.2d 652 (Cal. 1999); *Bohrer v. Church Mut. Ins. Co.*, 12 P.3d 854 (Colo. Ct. App. 2000); *Bodner v. United Services Auto. Ass'n*, 610 A.2d 1212 (Conn. 1992); *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061 (Fla. 1983); *Beaver v. Country Mut. Ins. Co.*, 420 N.E.2d 1058 (Ill. App. Ct. 1981); *Grant v. North River Ins. Co.*, 453 F. Supp. 1361 (N.D. Ind. 1978); *Hartford Accident & Indem. Co. v. American Red Ball Transit Co., Inc.*, 938 P.2d 1281 (Kan. 1997); *Santos v. Lumbermens Mut. Cas. Co.*, 556 N.E.2d 983 (Mass. 1990); Rosenbloom v. Flygare, 501 N.W.2d 597 (Minn. 1993); *Johnson & Johnson v. Aetna Cas. and Sur. Co.*, 667 A.2d 1087 (N.J. Super. Ct. App. Div. 1995); *Public Service Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810 (N.Y. 1981); *State Farm Mut. Ins. Co. v. Blevins*, 551 N.E.2d 955 (Ohio 1990); *Aetna Cas. & Surety Co. v. Craig*, 771 P.2d 212 (Okla. 1989); *Butterfield v. Giuntoli*, 670 A.2d 646 (Pa. Super. Ct. 1995); *Allen v. Simmons*, 533 A.2d 541 (R.I. 1987): Utah Code Ann. § 31A-20-101 (prohibiting an insurer from insuring against punitive damages); *U.S. Fire Ins. Co. v. Aspen Building Corp.*, 367 S.E.2d 478 (Va. 1988) (interpreting Section 38.2-227 of the Virginia Code, which allows insurance coverage for punitive damages

require that the insurance contract expressly provide for punitive damage coverage in order for coverage to apply,[14] four are undecided or leaning against insurability of punitive damages,[15] and one state does not recognize punitive damages at all.[16] [17] Thus, it appears that an insurer is only potentially liable for punitive damages directly assessed against its insured in approximately half of the United States' jurisdictions.

Second, South Carolina's position regarding the application of the economic loss rule in residential construction defect cases further limits the possibility of comparable authority to review in this area. South Carolina generally follows the economic loss rule and prohibits tort

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"arising out of the death or injury of any persons as the result of negligence . . ." as not extending to property damage cases).

[14] Haw. Rev. Stat. § 431:10-240 (2016) (providing that "[c]overage under any policy of insurance issued in this State shall not be construed to provide coverage for punitive or exemplary damages unless specifically included."); *Colson v. Lloyd's of London*, 435 S.W.2d 42 (Mo. Ct. App. 1968).

[15] *See Pray v. Lockheed Aircraft Corp.*, 644 F. Supp. 1289 (D.D.C. 1986) (stating that insurance for punitive damages "may" be against public policy); *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359 (Me. 1982) (holding that, based upon a construction of the policy language and consideration of the purposes of uninsured motorist coverage, punitive damages awarded for reckless conduct were not insurable under an uninsured motorist policy); *but see Tuttle v. Raymond*, 494 A.2d 1353, 1360 (Me. 1985) (noting that "many issues concerning the availability of punitive damages, which are not raised by this case, remain for future consideration and resolution . . . [including issues such as] whether one can insure against the assessment of punitive damages."); *Dairyland Ins. Co. v. Wyant*, 474 N.W.2d 514, 516 (S.D. 1991) (holding that the "application of this principle of public policy to insurance contracts purporting to extend coverage for punitive damages is best left for a case where the question is squarely presented"); *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 665 (Tex. 2008) (holding that "[i]n situations where the Legislature has not spoken directly on whether public policy prohibits insurance coverage of exemplary damages for gross negligence, a court should consider the purpose of exemplary damages.").

[16] *Miller v. Kingsley*, 230 N.W.2d 472 (Neb. 1975).

[17] Many of the states that do not allow the insurability of punitive damages that are ***directly*** assessed against the insured would allow punitive damages to be insured in situations where the insured is held vicariously liable for the conduct of others.

claims for product defects where only economic losses are present. "The 'economic loss rule' is a creation of the modern law of products liability. The rule states that an action will not lie in tort for a product defect without a claim of injury to the person or other property of the plaintiff." *Carolina Winds Owners' Ass'n v. Joe Harden Builders, Inc.*, 297 S.C. 74, 80, 374 S.E.2d 897, 901 (1988) *overruled in part by Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 346-47, 384 S.E.2d 730, 737 (1989). "In effect, the 'economic loss rule' simply observes the traditional distinction between recovery in contract and recovery in negligence in those cases where the damage consists of a diminution in the expected value of a product. Unless the plaintiff has contracted with a party who warrants, expressly or impliedly, that the product meets a standard of quality, value, or fitness for an intended use, he has no claim for inferior or negligent manufacture of goods in the steam of commerce." *Id.* at 82, 374 S.E.2d at 902-03.

However, in *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989), this Court modified South Carolina's application of the economic loss rule in construction defect cases to allow claims in tort (and therefore allow punitive damages) even in cases limited to economic losses where the builder "acts in a way as to violate a legal duty." *Id.* at 345-46, 384 S.E.2d at 737. This was reiterated in *Sapp v. Ford Motor Company*, 386 S.C. 143, 687 S.E.2d 47 (2009), where this Court explained that "[i]n *Kennedy,* we held the economic loss rule does not preclude a homebuyer from recovering in tort against the developer or builder where the builder violates an applicable building code, deviates from industry standards, or constructs a house that he knows or should know will pose a serious risk of physical harm." *Id.* The *Sapp* Court explained that *Kennedy* "created this narrow exception to the economic loss rule to apply solely in the residential home context." *Id.* at 148, 687 S.E.2d at 49.

Significantly, of the twenty-six other states that **do** allow the insurability of punitive damages, nineteen of those states appear to apply the economic loss rule in a more stringent manner than does South Carolina.[18] Thus, of the fifty one possible other jurisdictions there are only seven[19] where it appears to be even possible for this situation to arise because either punitive damages are not insurable, or—where they are insurable—the economic loss rule would preclude a tort claim in a construction defect case involving purely economic losses, as is the case here. This is illustrated by the jurisdictions that do allow insurability of punitive damages

[18] *See Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So.2d 671, 672-74 (Ala. 1989); *Pratt & Whitney Can., Inc. v. Sheehan*, 852 P.2d 1173, 1177 (Alaska 1993); *Flagstaff Affordable Housing Ltd. P'ship v. Design Alliance, Inc.*, 223 P.3d 664, 665 (Az. 2010); *Vulcan Materials Company, Inc. v. Driltech, Inc.*, 306 S.E.2d 253 (Ga. 1983); *Aardema v. U.S. Dairy Sys.*, 215 P.3d 505, 512 (Idaho 2009); *Am. Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437 (Iowa 1999); *Giddings & Lewis, Inc. v. Indus. Risk Ins.*, 348 S.W.3d 729 (Ky. 2011); *Morris v. Osmose Wood Preserving*, 667 A.2d 624 (Md. 1995); *Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 618 (Mich. 1992); *State Farm Mut. Auto Ins. Co. v. Ford Motor Co.*, 736 So.2d 384, 387 (Miss. Ct. App. 1999); *Kelleher v. Marvin Lumber & Cedar Co.*, 891 A.2d 477, 495 (N.H. 2005); *Utah Int'l, Inc. v. Caterpillar Tractor Co.*, 775 P.2d 741 (N.M. Ct. App. 1989); *N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 240 S.E.2d 345, 350 (1978); *Hagert v. Hatton Commodities, Inc.*, 350 N.W.2d 591, 595 (N.D. 1984); *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 488-93 (Tenn. 2009); *EBWS, LLC v. Britly Corp.*, 928 A.2d 497 (Vt. 2007); *Water Power Co. v. Graybar Elec. Co.*, 774 P.2d 1197 (Wash 1989); *Aikens v. Debow*, 541 S.E.2d 576, 589 (W.V. 2000); *Sunnyslope Grading, Inc. v. Miller*, 437 N.W.2d 213, 217-218 (Wis. 1989).

[19] The remaining seven jurisdictions are Arkansas, Delaware, Louisiana, Montana, Nevada, Oregon, and Wyoming. Arkansas has declined to recognize the economic loss rule. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518 (Ark. 2011). Delaware and Nevada have specific statutes removing or limiting the economic loss rule in construction defect cases. 6 Del. C. § 3652 (2017); Nev. Rev. Stat. § 40.640 (2016). While Louisiana does not recognize the economic loss rule as adopted in other states, tort damages for economic losses may be recoverable by plaintiffs under laws unique to Louisiana. *In re Chinese Manufactured Drywall Products Liab. Litig.*, 680 F. Supp. 2d 780, 796 (D. La. 2010). Oregon, while applying he economic loss rule, defines "economic loss" to be different from injury to property such as construction defects to an apartment complex. *Harris v. Suniga*, 180 P.3d 12, 15 (Or. 2008). Montana has develop three tests for third party negligence liability instead of adopting the economic loss rule. *Jim's Excavating Serv., Inv v. HKM Assoc.*, 878 P.2d 248 (Mt. 1994). Wyoming recognizes a tort duty of reasonable care upon home builders independent from any contractual relationship. *Rogers v. Wright*, 366 P.3d 1264 (Wy. 2016).

but have specifically applied the economic loss rule in construction defect cases to bar tort claims. *See Travelers Indem. Co. v. Crown Corr, Inc*, 2011 U.S. Dist. LEXIS 148529 (D. Ariz. Dec. 27, 2011) (holding that when a construction defect causes only damage to the building itself, or other economic loss, common law contract remedies alone provide relief); *Flagstaff Affordable Housing Ltd. P'ship v. Design Alliance, Inc.*, 223 P.3d 664 (Ariz. 2010) (holding that the economic loss doctrine applies to non-intentional torts in the products liability and construction defects context); *Determan v. Johnson*, 613 N.W.2d 259, 263 (Iowa 2000) (applying the economic loss rule to a construct defect case and holding that the plaintiff's claim was based on unfulfilled expectations with respect to the quality of the home and, as such, the "remedy lies in contract law, not tort law").

Lastly, among those seven other states where time-on-the-risk allocation of punitive damages is even a possibility, only two states (Delaware and Louisiana) have yet adopted or indicated a potential of adopting the time-on-the-risk doctrine with regard to indemnity coverage.[20] *See Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 491 (Del. 2001); *Monsanto Co. v. C.E. Heath Compensation & Liability Ins. Co.*, 652 A.2d 30, 35 n.7 (Del. 1994); *Norfolk S. Corp. v. Cal. Union Ins. Co.*, 859 So.2d 167, 197–98 (La. Ct. App. 2003); *Arceneaux v. Amstar Corp.*, 200 S.3d 277, 282 (La. 2016) ("As to an insurer's duty to indemnify, liability is to be prorated among insurance carriers that were on the risk during periods of exposure to injurious conditions."). Significantly, neither Delaware nor Louisiana have specifically held that time-on-the-risk would ***not*** apply to punitive damages.

[20] The states of Arkansas, Montana, Nevada, Oregon, and Wyoming have not yet addressed whether they would apply the time-on-the-risk doctrine to indemnity liability.

Thus, the above sheds light on the reason for the paucity of authority in this area. Given South Carolina's liberal common law on the insurability of punitive damages and on the economic loss rule in this residential construction context, this Court should at minimum apply time on risk to punitive damages awards found covered, for policy reasons. Thus, rehearing should be granted.

IV. Factual Findings, Evidentiary Issues, and the Denial of Harleysville's Motions for Judgment as a Matter of Law.

Further, for the reasons set forth herein and for the reasons set forth in Harleysville's appellate briefing, all of which should be deemed incorporated herein, this Court should grant rehearing and find in Harleysville's favor on the evidentiary issues and the Rule 41(b), S.C.R.Civ.P., issues.

Conclusion

For the reasons set forth herein, and for the reasons and arguments set forth in Harleysville's appellate briefs, all of which should be deemed incorporated herein, this Court should grant rehearing. Alternatively, this Court should reverse the trial court and find that exclusions on the policies at issue preclude any coverage. Failing that, this Court should issue a new opinion that applies time on risk to both actual and punitive damages, and reverse and remand to the trial court to hold proceedings and consider arguments and evidence to enable it to decide how much of the general verdicts at issue are covered property damages under the policies and how much are not, within the time on risk.

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By: ______________________________

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Attorneys for Appellant/Respondent Harleysville Group Insurance

Columbia, South Carolina

February 17, 2017

Exhibit A

(Notice of Appeal in Case No. 2013-CP-08-00179)

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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FEB 06 2017

SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

Ex Parte:

Nationwide Mutual Fire Insurance Company, ...Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,.....................................Respondent,

v.

Superior Solution, LLC, ...Respondent.

NOTICE OF APPEAL

Appellant Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide"), appeals the Orders of the Honorable Kristi Lea Harrington dated January 31, 2017 and February 6, 2017. All of the remaining defendants have been dismissed from this action except for Superior Solution, LLC. Appellant received notice of the entry of the Order denying Nationwide's Motion to Intervene on January 31, 2017. Appellant timely filed its Motion for Reconsideration on February 3, 2017. Appellant Nationwide received notice of the trial court's ruling that Nationwide's Motion for Reconsideration is denied on February 6, 2017. This action is set for trial beginning on this date. A copy of the final Order will be provided when it is filed.

February 6, 2017

Respectfully submitted,

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and

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Attorneys for Beresford Commons Homeowners Association, Inc.

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Attorney for Superior Solution, LLC

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-08-0179

BERESFORD COMMONS	PORTRAIT HOMES-SOUTH CAROLINA, LLC, ET AL.
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Nationwide Mutual Fire Insurance Company's Motion to Intervene on behalf of Superior Solutions, LLC filed January 26, 2017, was not heard. Motion was filed after pretrial deadline.

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FEB 06 2017
SC Court of Appeals

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
		$
		$
		$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

email all attys

	2151	1/31/2017
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED
FEB 06 2017
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

Ex Parte:

Nationwide Mutual Fire Insurance Company, ...Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,....................................Respondent,

v.

Superior Solution, LLC, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal upon Beresford Commons Homeowners Association, Inc., via regular and electronic mail, on February 6, 2017, to its attorneys of record, Mr. Phillip Ward Segui Jr. and Ms. Amanda Morgan Blundy, Segui Law Firm, 864 Lowcountry Blvd., Ste A, Mt. Pleasant, SC 29464 and Mr. John T. Chakeris, Chakeris Law Firm, 231 Calhoun St., Charleston, SC 29401. I have also served the Notice of Appeal upon Superior Solution, LLC, via regular and electronic mail, to its attorney of record, Albert A. Lacour, III, Clawson & Staubes, LLC, 126 Seven Farms Drive, Suite 200, Charleston, SC 29492, on February 6, 2017,

February 6, 2017

MURPHY & GRANTLAND, P.A.

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(803) 782-4100
Attorneys Nationwide Mutual Fire
Insurance Company

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2013-CP-08-00179

Ex Parte:

Nationwide Mutual Fire Insurance Company, ...Appellant,

In Re:

Beresford Commons Homeowners Association, Inc.,....................................Respondent,

v.

Superior Solution, LLC, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal upon Beresford Commons Homeowners Association, Inc., via regular and electronic mail, on February 9, 2017, to its attorneys of record, Mr. Phillip Ward Segui Jr. and Ms. Amanda Morgan Blundy, Segui Law Firm, 864 Lowcountry Blvd., Ste A, Mt. Pleasant, SC 29464 and Mr. John T. Chakeris, Chakeris Law Firm, 231 Calhoun St., Charleston, SC 29401. I have also served the Notice of Appeal upon Superior Solution, LLC, via regular and electronic mail, to its attorney of record, Albert A. Lacour, III, Clawson & Staubes, LLC, 126 Seven Farms Drive, Suite 200, Charleston, SC 29492, on February 6, 2017,

February 9, 2017

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Attorneys Nationwide Mutual Fire
Insurance Company

Exhibit B

(Order Denying Liberty Mutual's Motion for Limited Intervention)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

ORDER DENYING LIBERTY MUTUAL'S MOTION FOR LIMITED INTERVENTION

FILED

2017 FEB -6 PM 2:55

JULIE J. ARMSTRONG
CLERK OF COURT

BY ______

Presiding Judge:	Hon. Deadra L. Jefferson
Liberty Mutual's Attorney:	Robert Calamari, Esq.
Plaintiff's Attorney:	John Hayes, IV, Esq.
Defendant's Attorney:	John A. Massalon, Esq.
Date of Hearing:	January 23, 2017
Court Reporter:	Ruth Weese

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FEB 16 2017

SC Court of Appeals

On January 23, 2017, this matter came before this Court for a hearing on Liberty Mutual's Second Motion for Limited Intervention, filed January 19, 2017.[1] Present at the hearing was Robert Calamari of Nelson, Mullins, Riley & Scarborough appearing for Liberty Mutual. John A. Massalon of Wills, Massalon & Allen appeared for the Wieland Defendants (John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John

[1] Liberty Mutual's First Motion for Limited Intervention was filed on October 13, 2016. The Motion was subsequently withdrawn on December 5, 2016 by Attorney Robert C. Calamari.

469

Wieland Homes, Inc., and Builders Support Services of the Carolinas). Additionally present was John Hayes, IV, attorney for Plaintiff Waverly at Hamlin Planation, who joined in with Attorney John A. Massalon in opposing the motion. Based on the foregoing, Liberty's Motion to Intervene is denied.

Liberty insured the Wieland Defendants under some twelve (12) insurance policies over twelve (12) years. This is a construction defect dispute involving over one hundred (100) townhomes at Waverly at Hamlin Plantation filed in 2013.[2] Liberty Mutual, a CGL insurance carrier for Wieland, hired counsel to defend Wieland under a reservation of rights beginning in May 2016. Liberty has moved to intervene into this action for the limited purpose of submitting special verdict questions related to allocation of covered and non-covered damages during the trial that began on Monday January 23, 2017.

Liberty Mutual's motion does not fall with the ambit of South Carolina Rules of Civil Procedure, Rule 24 — Intervention. SCRCP Rule 24(a) provides for intervention as of right when (1) a statute provides a right to intervene; and (2) the movant claims an interest relating to the property or transaction which is the subject of the action and that he is so situated that the disposition of the action may impair or impeded his ability to protect that interest. SCRCP Rule 24(b) provides for permissive intervention when (1) a statute confers a conditional right to intervene; or (2) where movant's claim and main action have question of law for fact in common. Also, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties. Liberty does not claim a statutory right to intervene, conditional or otherwise. Further, Liberty does not claim an interest in the subject matter of the

[2] A companion case Sills v. John Wieland Homes of the Carolinas, Inc. et al, C.A. 2014-CP-10-4335 is being tried simultaneously with the above-captioned matter. Liberty did not move to intervene in the companion case which would also be a basis to further confound the jury and to deny the motion to intervene.

dispute between the Plaintiffs and the Wieland Defendants. The purpose of Liberty's intervention request is to submit special interrogatories to the jury pertaining to the issue of insurance coverage. The undersigned is not convinced that the interest that Liberty seeks to protect is sufficient under Rule 24 because that interest is probably not ripe until such time, if ever, as the jury returns a verdict for Plaintiffs against the Wieland Defendants.

Additionally, Rule 24 does not contemplate or permit the limited intervention sought by Liberty. Liberty does not seek to participate in the trial as a party. The rule cited in Liberty's motion speaks only of intervention. Therefore, the relief requested by Liberty is not available under SCRCP Rule 24.

Nonetheless, Liberty Mutual attempts to justify its request by stating that (1) it is seeking to comply with "directives of the recent Heritage opinion," referencing a January 11, 2017 opinion issued by the South Carolina Supreme Court, Opinion No. 29698[3]; and that (2) it is only seeking intervention for the purpose of obtaining special interrogatories or a special verdict form. The Heritage majority opinion cannot fairly be read to direct or approve Liberty's last minute motion to intervene for the purpose of seeking jury interrogatories and a special verdict form, which neither the insured nor its counsel has requested.[4] As stated in Heritage, the insurance company "cannot overcome the law in South Carolina concerning general verdicts." Id. at Fn. 11. This statement reflects the recognition that in South Carolina an insurer is responsible for the entire general verdict where at least one of several claims are covered. Id. However, the Heritage case does not authorize

[3] It is not clear if the Heritage opinion is final as the time to file for rehearing would not appear to have passed.
[4] The Court in Heritage references the cases of Magnum Foods, Inc. v. Cont'l Cas. Co., 3 F.3d 1491, 1498 (10th Cir. 1994) which relied upon Duke v. Hoch, 468 F.2d 973, 979 (4th Cir. 1972). Those cases speak more to the duties of insurance companies in notifying their insureds of conflicts in advance, were not construction cases, and do not direct that an insurer be permitted to intervene into a case on the eve of trial for the limited purpose of obtaining a special verdict or special interrogatories.

 3 of 5

or direct an insurer like Liberty to intervene in a case under circumstances that exist here for several reasons.

First, as noted in the dissent in Heritage, insurance companies intervening in these lawsuits and asserting a defense against coverage would seem to create an impermissible conflict of interest in violation of established South Carolina law. Id. at p. 54. Asking the Wieland Defendants to defend themselves against the Plaintiffs' claims and the efforts of their own insurance carrier simultaneously would be unfair. Counsel for the Defendants has spent considerable effort during discovery and trial preparation to formulate a defense strategy. Undoubtedly, that strategy would be disrupted if Liberty was permitted to intervene at this stage, probably to the detriment of Liberty's insured. Conversely, I find no prejudice to Liberty Mutual in denying its Motion since (1) the issues it raises are not ripe until a verdict is reached, and (2) it is not precluded from bringing a declaratory judgment action after the verdict for the purpose of obtaining a ruling that apportions damages, if any, found in this case.

Second, the risk of jury confusion is unacceptably high. During oral argument counsel for Liberty expressed his intention to submit special interrogatories for the jury to answer presumably pertaining to the allocation of any liability among covered and uncovered claims. Less clear is how evidence would be introduced during the trial which would allow the jury to decide the special interrogatories. It is safe to assume that Plaintiffs' counsel would have no interest in submitting such evidence and trial counsel for the Wieland Defendants would be ethically constrained from introducing such evidence or examining witnesses about the differences between covered and uncovered claims. That leaves Mr. Calamari as the only attorney with the interest and ability to introduce that evidence; however, Mr. Calamari does not represent a party in the case and so he would have no right under the Rules of Civil Procedure or the Rules of Evidence to examine witnesses or introduce evidence.

Therefore, Liberty's motion to intervene is denied. In summary, this "non-party" intervention, on the eve of trial, will only complicate and delay the underlying action, confuse the jury, and introduce a question of insurance coverage that is simply not the subject matter of this action.

Accordingly the motion is DENIED.

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

February 6, 2017
Charleston, SC
At Chambers

Exhibit C

(Notice of Appeal in Case No. 2013-CP-10-03326)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
FEB 16 2017
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson
Circuit Court Judge

Case No. 2013-CP-10-03326

Ex Parte: Liberty Mutual Fire Insurance Company,............ Appellant,

In re: Waverly at Hamlin Plantation Townhome Association, Inc., ... Respondent,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., ... Respondents,

and

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc.,... Respondent,

v.

Barr Construction, Inc. Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler

Company, Inc., Paul M. Vasquez, Richard Ditullio,
Richard Ditullio a/k/a RDT Contracting, LLC, ...

Respondents.

Notice of Appeal

Liberty Mutual Fire Insurance Company ("Appellant") appeals the Order Denying Liberty Mutual's Motion for Limited Intervention filed February 6, 2017, attached as Exhibit A, in the above-captioned action. Appellant received written notice of the entry of the February 6th order on February 9, 2017.

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Exhibit A

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	C/A No.: 2013-CP-10-3326
Waverly at Hamlin Plantation Townhome Association, Inc., *Plaintiffs,* vs. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., *Defendants.*	**ORDER DENYING LIBERTY MUTUAL'S MOTION FOR LIMITED INTERVENTION**

FILED
2017 FEB -6 PM 2:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY________

Presiding Judge:	Hon. Deadra L. Jefferson
Liberty Mutual's Attorney:	Robert Calamari, Esq.
Plaintiff's Attorney:	John Hayes, IV, Esq.
Defendant's Attorney:	John A. Massalon, Esq.
Date of Hearing:	January 23, 2017
Court Reporter:	Ruth Weese

RECEIVED
FEB 16 2017
SC Court of Appeals

On January 23, 2017, this matter came before this Court for a hearing on Liberty Mutual's Second Motion for Limited Intervention, filed January 19, 2017.[1] Present at the hearing was Robert Calamari of Nelson, Mullins, Riley & Scarborough appearing for Liberty Mutual. John A. Massalon of Wills, Massalon & Allen appeared for the Wieland Defendants (John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John

[1] Liberty Mutual's First Motion for Limited Intervention was filed on October 13, 2016. The Motion was subsequently withdrawn on December 5, 2016 by Attorney Robert C. Calamari.

Wieland Homes, Inc., and Builders Support Services of the Carolinas). Additionally present was John Hayes, IV, attorney for Plaintiff Waverly at Hamlin Planation, who joined in with Attorney John A. Massalon in opposing the motion. Based on the foregoing, Liberty's Motion to Intervene is denied.

Liberty insured the Wieland Defendants under some twelve (12) insurance policies over twelve (12) years. This is a construction defect dispute involving over one hundred (100) townhomes at Waverly at Hamlin Plantation filed in 2013.[2] Liberty Mutual, a CGL insurance carrier for Wieland, hired counsel to defend Wieland under a reservation of rights beginning in May 2016. Liberty has moved to intervene into this action for the limited purpose of submitting special verdict questions related to allocation of covered and non-covered damages during the trial that began on Monday January 23, 2017.

Liberty Mutual's motion does not fall with the ambit of South Carolina Rules of Civil Procedure, Rule 24 — Intervention. SCRCP Rule 24(a) provides for intervention as of right when (1) a statute provides a right to intervene; and (2) the movant claims an interest relating to the property or transaction which is the subject of the action and that he is so situated that the disposition of the action may impair or impeded his ability to protect that interest. SCRCP Rule 24(b) provides for permissive intervention when (1) a statute confers a conditional right to intervene; or (2) where movant's claim and main action have question of law for fact in common. Also, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties. Liberty does not claim a statutory right to intervene, conditional or otherwise. Further, Liberty does not claim an interest in the subject matter of the

[2] A companion case Sills v. John Wieland Homes of the Carolinas, Inc. et al, C.A. 2014-CP-10-4335 is being tried simultaneously with the above-captioned matter. Liberty did not move to intervene in the companion case which would also be a basis to further confound the jury and to deny the motion to intervene.

 2 of 5

dispute between the Plaintiffs and the Wieland Defendants. The purpose of Liberty's intervention request is to submit special interrogatories to the jury pertaining to the issue of insurance coverage. The undersigned is not convinced that the interest that Liberty seeks to protect is sufficient under Rule 24 because that interest is probably not ripe until such time, if ever, as the jury returns a verdict for Plaintiffs against the Wieland Defendants.

Additionally, Rule 24 does not contemplate or permit the limited intervention sought by Liberty. Liberty does not seek to participate in the trial as a party. The rule cited in Liberty's motion speaks only of intervention. Therefore, the relief requested by Liberty is not available under SCRCP Rule 24.

Nonetheless, Liberty Mutual attempts to justify its request by stating that (1) it is seeking to comply with "directives of the recent Heritage opinion," referencing a January 11, 2017 opinion issued by the South Carolina Supreme Court, Opinion No. 29698[3]; and that (2) it is only seeking intervention for the purpose of obtaining special interrogatories or a special verdict form. The Heritage majority opinion cannot fairly be read to direct or approve Liberty's last minute motion to intervene for the purpose of seeking jury interrogatories and a special verdict form, which neither the insured nor its counsel has requested.[4] As stated in Heritage, the insurance company "cannot overcome the law in South Carolina concerning general verdicts." Id. at Fn. 11. This statement reflects the recognition that in South Carolina an insurer is responsible for the entire general verdict where at least one of several claims are covered. Id. However, the Heritage case does not authorize

[3] It is not clear if the Heritage opinion is final as the time to file for rehearing would not appear to have passed.
[4] The Court in Heritage references the cases of Magnum Foods, Inc. v. Cont'l Cas. Co., 3 F.3d 1491, 1498 (10th Cir. 1994) which relied upon Duke v. Hoch, 468 F.2d 973, 979 (4th Cir. 1972). Those cases speak more to the duties of insurance companies in notifying their insureds of conflicts in advance, were not construction cases, and do not direct that an insurer be permitted to intervene into a case on the eve of trial for the limited purpose of obtaining a special verdict or special interrogatories.

 3 of 5

or direct an insurer like Liberty to intervene in a case under circumstances that exist here for several reasons.

First, as noted in the dissent in Heritage, insurance companies intervening in these lawsuits and asserting a defense against coverage would seem to create an impermissible conflict of interest in violation of established South Carolina law. Id. at p. 54. Asking the Wieland Defendants to defend themselves against the Plaintiffs' claims and the efforts of their own insurance carrier simultaneously would be unfair. Counsel for the Defendants has spent considerable effort during discovery and trial preparation to formulate a defense strategy. Undoubtedly, that strategy would be disrupted if Liberty was permitted to intervene at this stage, probably to the detriment of Liberty's insured. Conversely, I find no prejudice to Liberty Mutual in denying its Motion since (1) the issues it raises are not ripe until a verdict is reached, and (2) it is not precluded from bringing a declaratory judgment action after the verdict for the purpose of obtaining a ruling that apportions damages, if any, found in this case.

Second, the risk of jury confusion is unacceptably high. During oral argument counsel for Liberty expressed his intention to submit special interrogatories for the jury to answer presumably pertaining to the allocation of any liability among covered and uncovered claims. Less clear is how evidence would be introduced during the trial which would allow the jury to decide the special interrogatories. It is safe to assume that Plaintiffs' counsel would have no interest in submitting such evidence and trial counsel for the Wieland Defendants would be ethically constrained from introducing such evidence or examining witnesses about the differences between covered and uncovered claims. That leaves Mr. Calamari as the only attorney with the interest and ability to introduce that evidence; however, Mr. Calamari does not represent a party in the case and so he would have no right under the Rules of Civil Procedure or the Rules of Evidence to examine witnesses or introduce evidence.

Therefore, Liberty's motion to intervene is denied. In summary, this "non-party" intervention, on the eve of trial, will only complicate and delay the underlying action, confuse the jury, and introduce a question of insurance coverage that is simply not the subject matter of this action.

Accordingly the motion is DENIED.

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

February 6, 2017
Charleston, SC
At Chambers

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-03326

Ex Parte: Liberty Mutual Fire Insurance Company, ... Appellant.

v.

In re: Waverly at Hamlin Plantation Townhome Association, Inc., ... Respondent,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., ... Respondents,

and

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc. .... Respondents,

v.

Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc., Gerardo Rosette Sanchez a/k/a GR Painting, Jorge Medina, Jorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC,.. Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Liberty Mutual Fire Insurance Company, 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):

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Notice of Appeal

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Lisa P. Whitehurst

Lisa P. Whitehurst
Administrative Assistant

February 16, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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; National Surety Corp., are .... Respondents,

and Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., are .... Respondents/Appellants.

Appellate Case No. 2013-001281

And

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, are .... Respondents,

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

Appellate Case No. 2013-001291

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):

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February 17, 2017