

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

RECEIVED

FEB 27 2017

S.C. SUPREME COURT

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

Return to Respondents/Appellants' Petition for Rehearing

Pursuant to Rules 221(a) and 240(e) of the South Carolina Appellate Court Rules, Appellant/Respondent Harleysville Group Insurance ("Harleysville") hereby submits its return to Respondents/Appellants' Petition for Rehearing.

In Opinion No. 27698, (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at pp. 21-54) (“Op. No. 27698”), this Court affirmed the application of time-on-the-risk allocation to the actual damages awarded in the general verdicts issued in the underlying Riverwalk and Magnolia North actions. Respondents/Appellants seek rehearing on this issue. Because the Court’s ruling on this issue was correct and well-reasoned, Harleysville respectfully requests the Court deny Respondents/Appellants’ Petition for Rehearing.¹

Argument

I. The Court Correctly Found that Application of Time-on-the-Risk is a Separate Issue from Whether Harleysville Reserved its Rights to Assert Policy Defenses.

Respondents/Appellants’ first ground for rehearing contends that the Court erred by upholding the Special Referee’s application of time-on-the-risk to the general verdict because Harleysville’s reservation of rights letter did not advise them that Harleysville “would rely on damages occurring outside the policy period.” The Court correctly determined that this has no bearing on the propriety of applying time-on-the-risk to determine the amount of damages covered by the policy. Therefore, the Court should decline to rehear this issue.

As an initial matter, the reservation of rights letters (“RRLs”) in question did adequately inform the insureds that Harleysville was reserving its rights with regard to any property damages that did not occur within the respective policy periods. Contrary to the assertions of Respondents/Appellants that the RRLs “did not advise the insureds” regarding “damage occurring outside the coverage period”, the RRLs in the record clearly establish that the insureds were so advised. Specifically, each of the RRLs contained the statement, in the section titled “RESERVATION OF RIGHTS,” that Harleysville’s reservation included the issue of “[w]hether

¹ Harleysville, however, does respectfully request a rehearing of Opinion No. 27698 and/or the issuance of a new opinion on the issues outlined in its Petition for Rehearing.

property damage ... happened during the HMIC policy period.” (See C.R. 1787, 1801, 1815, 1830). Thus, the insureds were adequately advised that property damage determined to occur outside of Harleysville’s policy periods would not be covered. Nevertheless, even assuming *arguendo* that Harleysville’s reservation of rights letters were insufficient² in with regard to time-on-the-risk, that determination has no bearing on whether time-on-the-risk should apply.

Respondents/Appellants’ contention that the RRLs were deficient because they did not advise the insureds that Harleysville was relying on portions of the damage occurring outside of the policy period ignores the fact that time-on-the-risk is not a policy based defense. The purpose and nature of a reservation of rights letter is to inform the insured that the insurer may deny coverage pursuant to the policy’s definitions, exclusions, or other terms. *See Alaska Nat’l Ins. Co. v. Bryan*, 104 P.3d 1, 9 (Wash Ct. App. 2004) (noting that the purpose of a reservation of rights “is not to change the contractual relationship of the parties, but rather to identify the insurer’s position regarding coverage”). In contrast, time-on-the-risk is not a policy defense and has nothing to do with the question of whether there is coverage. Rather, it is a judicially adopted rule of law that is used to divide responsibility for progressive damages among insurers and the insured for any periods where there was no insurance coverage. *See Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011) (“[W]e find that each triggered insurer must indemnify only for the portion of the loss attributable to property damage that occurred during its policy period.”). Because the issue of time-on-the-risk is not a policy defense, a letter reserving the right to contest coverage need not discuss it. Therefore, Respondents/Appellants’ argument is without merit.

² As Harleysville detailed in its Petition, the Court should grant rehearing on the issue of the sufficiency of the RRLs. Further, as detailed in the Petition, Harleysville also orally discussed with the insureds that the vast majority of the damages involved were not covered by the policies.

Respondents/Appellants' reliance on *Desert Ridge Resort, LLC v. Occidental Fire and Casualty Co. of North Carolina*, 141 F. Supp. 3d 962 (D. Ariz. 2015) is misplaced. First, as detailed in Harleysville's Petition for Rehearing, the discussion of RRLs in *Desert Ridge* relates to a highly specific context not comparable to the present matter. (See Harleysville Pet. for Rehearing, pp. 20-21.) The quoted language related to RRLs where there is a "Morris agreement" between the insured and a plaintiff. *Morris* agreements are settlement agreements recognized by Arizona law 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. See 141 F. Supp. 3d at 967-68. Critically, 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 to cooperate with the insurer. *USAA v. Morris*, 741 P.2d 246, 252 (Ariz. 1987). Thus, when a *Morris* agreement is involved, there is a special significance to the specificity of the RRL because the 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. See *id.*

Additionally, the quoted language from *Desert Ridge* does not support Respondents/Appellants' argument in any event. The Court quoted the following statement from *Desert Ridge*: "[i]f the insured does not know the grounds on which the insurer may contest coverage, the insured is placed at a disadvantage because it loses the opportunity to investigate and prepare a defense of its own." 141 F. Supp. 3d at 967. As detailed above, however, time-on-the-risk is not a "ground on which the insurer may contest coverage" under the policy. It is simply a tool for courts to utilize in order to determine the amount of damages that are fairly

attributable to an insurer in a progressive damages context. Therefore, this principle does not support that an insurer must make a reservation of rights to assert time-on-the-risk.

Therefore, Harleysville did adequately advise the insureds regarding coverage, and the Court properly rejected Respondents/Appellants' argument that the RRLs were deficient for failing to discuss time-on-the-risk. Therefore, the Court should decline to rehear this issue.

II. The Court Properly Affirmed the Special Referee's Application of Time-on-the-Risk to the General Verdicts.

Respondents/Appellants' second ground for rehearing asserts that because the jury awarded less than the full amount of damages requested in the underlying matters, application of time-on-the-risk to the general verdicts was improper. The Court rejected this argument, and determined that the Special Referee properly applied time-on-the-risk. This determination by the Court was well reasoned and therefore the Court should decline to rehear this issue.

As the Court explained, Respondents/Appellants are attempting to use the general verdict rule as both a shield and a sword. (Op. No. 27698 at 48.) Respondents/Appellants received a considerable victory when the Special Referee declined to allocate the jury verdicts despite finding that the general verdicts supported both covered and non-covered claims. (*See id.*) As Harleysville discussed in its briefing, the Special Referee should have made such an allocation. (*See Riverwalk – Final Appellant's Brief at pp. 4-13; Riverwalk – Final Reply Brief at pp. 1-7; Magnolia North – Final Appellants Brief at pp. 4-13; Magnolia North – Final Reply Brief at pp. 1-7.*) Instead, the Special Referee found that the *entire* amount of actual damages, relating to both covered and non-covered claims, would be subject to time-on-the-risk apportionment. (*See Op. No. 27698 at 48.*) Despite this, Respondents/Appellants seek a second bite at the apple and contend that the Special Referee should not have applied time-on-the-risk. The Court properly rejected Respondents/Appellants' argument. As the Court explained, the general verdict rule

should not serve as a basis for Respondents/Appellants to obtain coverage for non-covered claims and simultaneously serve as a basis to avoid time-on-the-risk apportionment. (*Id.*)

As Harleysville explained in its response briefing, if the Court were to adopt Respondents/Appellants argument, it would permit a plaintiff to entirely circumvent the rule of *Crossmann* by simply including an item of non-progressive damages in its claim and seeking a general verdict (which is oft times favored by trial judges for its simplicity). The South Carolina Supreme Court adopted the “time on risk” formula as a safeguard to fairly and justly allocate responsibility between insurers and, in some instances, between insurers and the insured. Respondents/Appellants’ argument, if adopted, would stymie that rule by giving plaintiffs a simple method to prevent its application.

The Court correctly affirmed the Special Referee’s application of time-on-the-risk to the general verdicts. Therefore, the Court should deny Respondents/Appellants’ Petition for Rehearing.

III. Respondents/Appellants’ Grounds were not Preserved for Review.

Respondents/Appellants raised both of their grounds for rehearing in their appellant’s briefs. As Harleysville explained in its response brief, Respondents/Appellants grounds were not preserved for appellate review. (Riverwalk – Final Respondent’s Brief at pp. 3-6; Magnolia North – Final Respondent’s Brief at pp. 3-6.) The Court did not address Harleysville’s preservation argument in Op. No. 27698, but notably did not reject the argument either. Therefore, Respondents/Appellants’ failure to preserve both of these grounds provides an alternate basis for declining to rehear these issues.

If a party believes it is entitled to judgment as a matter of law on an issue but fails to move for judgment on that basis at trial, it cannot argue on appeal that the trial court erred and

the party was entitled to a different judgment. This is precisely what happened here; thus, the property owners' associations' arguments are not preserved. See *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 189, 708 S.E.2d 787, 796 (Ct. App. 2011) (holding appellants failed to preserve an issue of law for appellate review because they failed to move for a directed verdict on that basis); *Lites v. Taylor*, 284 S.C. 316, 319, 326 S.E.2d 173, 175 (Ct. Ap. 1985) (noting absence of a post-judgment motion and holding "that a question concerning the verdict must be raised at trial level, whether the judge sits alone or with a jury, to be preserved for review on appeal") (citation omitted).

Respondents/Appellants never moved for judgment as a matter of law on the issue of whether time-on-the-risk or any other argument at any time, either orally or in writing. Although they raised the issue of "time on risk" in their post-judgment motion to alter or amend, that is insufficient to preserve the issue. Where a party should have moved for judgment on an issue but failed to do so, that failure to preserve the issue cannot be remedied by a post-judgment motion to alter or amend. See *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 87-88, 610 S.E.2d 852, 855-56 (Ct. App. 2005) (holding issue was not preserved for appellate review where defendant raised the issue in its post-judgment motion to alter or amend, but had failed to raise the issue in its directed verdict motion).

Respondents/Appellants' failure to preserve these two appellate grounds, therefore, provides an alternate reason to deny their Petition for Rehearing.

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 deny Respondents/Appellants' Petition for Rehearing.

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February 27, 2017

Columbia, South Carolina

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Horizontal Property Regime; Magnolia North Property Owners
Association, Inc., a South Carolina corporation, and National Surety
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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
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are

Respondents,

and Magnolia North Horizontal Property Regime and Magnolia
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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):

Pleadings:

Return to Respondents/Appellants' Petition for Rehearing

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February 27, 2017