

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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S.C. SUPREME COURT

HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION,
Appellant-Respondent,

v.

HERITAGE COMMUNITIES, INC., *et al.*,
Respondents

and

MAGNOLIA NORTH HORIZONTAL PROPERTY REGIME, *et al.*,
Respondents-Appellants

Appellate Case No. 2013-001281

AND

HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION,
Appellant-Respondent,

v.

HERITAGE COMMUNITIES, INC., *et al.*,
Respondents

And

RIVERWALK AT ARROWHEAD COUNTRY CLUB HORIZONTAL PROPERTY
REGIME, *et al.*,

Respondents-Appellants

Appellate Case No. 2013-001291

BRIEF OF *AMICI CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION
ASSOCIATION AND PROPERTY CASUALTY INSURERS' ASSOCIATION OF
AMERICA IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

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INTEREST OF AMICUS CURIAE

The Complex Insurance Claims Litigation Association (“CICLA”) and the Property and Casualty Insurer’s Association of America (“PCI”) are trade associations of major property and casualty insurance companies. CICLA and PCI seek to appear here in support of Appellant/Respondent Harleysville’s (“Harleysville”) Petition for Rehearing, because this Court’s decision in Opinion 27698 raises a number of insurance coverage issues of growing importance nationwide and of direct importance to their members. In Opinion 27698, this Court affirmed the Special Referee’s finding that Harleysville’s reservation of rights was insufficient, without addressing whether or not the underlying tort plaintiffs had the necessary standing or capacity to raise such a challenge. Additionally, this Court affirmed the Special Referee’s decision regarding the allocation of the jury verdict between covered and non-covered damages, without addressing how Harleysville could have intervened in the underlying trial given then-existing precedent, or considering whether this approach is consistent with public policy considerations. Lastly, the Court declined to allocate the award of punitive damages pursuant to Harleysville’s time-on-the-risk, despite the fact that the award was based in part on conduct that took place outside the policy period. Because of their potentially wide ranging implications, the Court’s decisions on these issues are of great importance to insurers, including CICLA and PCI’s member companies.

The Court’s ruling on Harleysville’s petition for rehearing will be of substantial precedential importance affecting interests far beyond those of the parties to this appeal. To that end, this *Amici Curiae* brief will demonstrate that (1) third-party tort plaintiffs have no standing under the laws of South Carolina and the majority of other jurisdictions to challenge the sufficiency of an insurer’s reservation of rights with respect to its policyholder under an

insurance contract; (2) it is inadvisable to require insurers to intervene in trials against their policyholders in order to obtain an allocated verdict prior to an adverse judgment, as doing so creates an inherent tension between the parties while the insurer is defending its policyholder; and (3) South Carolina law requires the pro rata allocation of covered punitive damages awards based on the insurer's time-on-the-risk.

CICLA and PCI member companies provide a substantial percentage of the liability coverage written in South Carolina, and have issued many policies containing terms similar or identical to those at issue here. Due to their members' extensive experience with the insurance policy provisions before the court, CICLA and PCI have a unique perspective on the issues presented. CICLA and PCI also offer their insights on the importance of this case for the insurance system. CICLA and PCI have participated in important insurance cases throughout the country, including other cases before this court.¹ In other complex insurance matters, courts have cited CICLA and PCI's contributions as *amici curiae* approvingly in their decisions.² CICLA and PCI respectfully submit that their participation in this case is desirable and will assist in resolving the important issues before the Court.

¹ See, e.g., *Auto-Owners Insurance Co., Inc. v. Newman, et al.*, 684 S.E.2d 541 (S.C. 2009); see also *Harleysville Mutual Insurance Co. v. South Carolina, et al.*, 736 S.E.2d 651 (S.C. 2012); *Traynum v. Scavens*, 416 S.C. 197, 786 S.E.2d 115 (S.C. 2016) (PCI).

² See, e.g., *Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So. 2d 705, 711 (Ala. 2007) (citing with approval to the arguments regarding a pollution exclusion made by CICLA in support of the party-insurer); *ACMAT Corp. v. Greater N.Y. Mut. Ins. Co.*, 282 Conn. 576, 593 n.14, 923 A.2d 697, 708 n.14 (2007) ("Indeed, we find more persuasive the argument of the amicus curiae [CICLA] that [the policyholder's] position assumes too much and sweeps too far."); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 485 n.1, 861 N.E.2d 121, 125 n.1 (2006) ("The court acknowledges with appreciation the briefs provided by amici curiae . . . the Complex Insurance Claims Litigation Association.").

ARGUMENT

Amici respectfully submit that this Court should vacate Opinion 27698 and grant Harleysville's Petition for Rehearing to address three critical errors in its prior ruling. Specifically, *Amici* urge this Court to reconsider (1) its ruling regarding the Respondents/Appellants challenge to the sufficiency of Harleysville's reservation of rights with respect to its policyholder, as Respondents/Appellants have no capacity or standing to raise such objections and coverage cannot be created through waiver under South Carolina law; (2) its decision that Harleysville should have intervened in the underlying trial in order to obtain an allocated verdict between covered and uncovered damages, despite the existence of contrary South Carolina precedent at the time of trial; and (3) its decision to not apply pro rata time-on-the-risk allocation to the punitive damages award despite evidence that the award was based, at least in part, on acts that took place outside the Harleysville policy period. *Amici* submit that these holdings are contrary to established South Carolina precedent and inconsistent with overriding public policy concerns. After highlighting the potentially adverse policy implications of the Court's decision as a whole, *Amici* will address each issue in turn.

I. THIS COURT'S DECISION RAISES A NUMBER OF IMPORTANT PUBLIC POLICY ISSUES WHICH COULD ULTIMATELY DISADVANTAGE POLICYHOLDERS AS WELL AS INSURERS AND WOULD HAVE AN UNDESIRABLE EFFECT ON THE INSURANCE SYSTEM.

While *Amici* firmly support the legal arguments set forth in Harleysville's petition for rehearing, CICLA and PCI also submit this brief to underscore the larger picture underlying why courts must not strain to find coverage where none exists, and are not authorized to change or alter the terms of the contract under the guise of judicial interpretation. A failure to enforce the provisions of insurance contracts affects the integrity of the insurance underwriting process. Insurance involves an agreement by the insurer to protect the policyholder against agreed risks

for a fee. Insurance can cover risks, even very large ones that can be actuarially predicted over a large number of insureds. The vital risk-spreading function, however, is dependent on courts upholding the agreed-upon contractual terms, and not altering the parties' contractual expectations. See *S.S. Newell & Co. v. American Mut. Liab. Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942); *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589, 591, 592 n. 1 (Ct. Appl. 1997), *reh'g denied* (Mar. 20, 1997); *accord Hudson Ins. Co. v. Gelman Sciences, Inc.*, 921 F.2d 92, 95 (7th Cir. 1990) ("public policy requires that contracts be interpreted to effectuate the actual agreement between the parties").

This principal is particularly vital for insurers. An insurer must take many considerations into account in determining whether to underwrite coverage for a prospective policyholder and, if so, the extent and cost of coverage to be issued. Changing settled practice regarding general reservations of rights, covered damages, and allocation would inject unpredictability in the insurance market. Such uncertainty, in turn, adversely affects underwriters' efforts to generate meaningful actuarial estimates, and hinders insurers' efforts to provide consumers with affordable insurance coverage.

This Court's affirmance of the Special Referee's decision raises a number of policy issues, each of which could have an undesirable effect on the insurance system by disadvantaging both policyholders and insurers. For instance, disallowing general reservations of rights as a means of preserving coverage defenses would force insurers to choose between promptly defending their policyholders against claims that *might* trigger coverage at the risk of expanding coverage, or refusing to defend any claim until after a policyholder's right to coverage is firmly established. Neither of these scenarios serves the best interests of policyholders or insurers, or the insurance system as a whole. Similarly, requiring insurers to intervene in

lawsuits pending against their policyholders could have the effect of placing insurers and policyholders at odds with one another, at a time when the insurer seeks to protect its policyholder's best interests. Lastly, requiring insurers to assume liability for portions of punitive damages based on conduct that occurred outside the relevant coverage period is at odds with the insurance policy language and intent. In light of this, *amici* submit that this Court should grant rehearing because its decision in Opinion 27698 has the potential to upset the carefully balanced underwriting process and undermine the insurer – policyholder relationship.

II. THE COURT ERRED WHEN IT FOUND THAT HARLEYSVILLE'S RESERVATION OF RIGHTS WITH RESPECT TO ITS POLICYHOLDER WAS INSUFFICIENT.

Amici respectfully submit that this Court's analysis of Harleysville's reservation of rights was flawed in two ways. First, neither the Special Referee nor this Court should have considered the Respondents/Appellants' arguments regarding the sufficiency of Harleysville's reservation of rights, as Respondents/Appellants lacked the necessary capacity or standing to raise such a challenge. Additionally, by declaring Harleysville's purported reservation of rights ineffective, the Special Referee essentially created coverage that otherwise would not have been available under the policy through waiver – an approach expressly at odds with established South Carolina precedent. Not only are these approaches inconsistent with preexisting South Carolina law, but they also raise a number of potentially adverse outcomes with respect to public policy considerations. Accordingly, and for the reasons detailed below, *amici* submit that this Court should vacate its prior rulings, and grant Harleysville's petition for rehearing.

A. Neither this Court nor the Special Referee Should Have Considered the Appellants/Respondents' Arguments with Respect to Harleysville's Reservation of Rights, as Appellants/Respondents' Lack the Necessary Capacity or Standing to Raise that Challenge.

Harleysville petitions for rehearing of this Court's affirmance of the Special Referee's finding that Harleysville failed to properly reserve its rights to contest coverage under the policies. Notably, the policyholder itself never challenged the sufficiency of Harleysville's reservation of rights. Rather, those arguments were articulated only by the Appellants/Respondents as judgment-creditors *after* the policyholder defaulted in this declaratory judgment action. As Appellants/Respondents were not parties to the relevant Harleysville insurance policies, they have no capacity or standing to challenge the sufficiency of Harleysville's reservation of rights thereunder. However, neither the Special Referee nor this Court addressed Appellants/Respondents' apparent lack of capacity or standing to challenge Harleysville's reservation of rights. *Amici* submit that this was in error, and urge this Court to grant rehearing to recognize that a non-party stranger to an insurance policy cannot challenge the adequacy of an insurer's reservation of rights letter to its policyholder, absent an assignment or other established basis through which to do so.

Under South Carolina law, insurance policies are contracts like any other. As such, South Carolina courts have generally held that only parties to the insurance contract have the right to claim that an insurer has breached the terms of the policy. *See, e.g., Trancik v. USAA Ins. Co.*, 354 S.C. 549, 554-55 (Ct. App. 2003) (holding that third-parties lack the necessary privity of contract to maintain an action against an insurer for breach of contract). This is consistent with South Carolina's approach to breach of contract generally, as courts applying South Carolina law consistently have held that third parties may not maintain actions for breach of contract absent either privity of contract or some indication that the parties to the agreement intended to create a direct, rather than incidental, benefit to that third party. *See, e.g., Bob*

Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424 (Ct. App. 1994); *see also Keleckley v. Northwestern Nat'l Cas. Co.*, 338 S.C. 131, 136 (2000).

The foregoing South Carolina case law is consistent with the majority of other jurisdictions who have considered the issue and found that, because insurance policies are fundamentally contracts between the insurer and policyholder, strangers to that agreement have no standing to challenge the sufficiency of reservations of rights under the policy. *See, e.g., U.S. Fid. & Guar. Co. v. Regis Ins. Co.*, No. 90-5180, 1991 WL 68151 (E.D. Pa. Apr. 25, 1991) (rejecting a secondary insurer's attempt to challenge the sufficiency of a primary insurer's reservation of rights letter to its policyholder); *see also, Am. Nat. Prop. & Cas. Companies v. Hearn*, 93 A.3d 880 (Pa. Sup. Ct. 2014) (holding that injured third parties lack standing to challenge the sufficiency of an insurer's reservation of rights under an insurance contract); *Capitol Indemnity Corp. v. Fraley*, 597 S.E.2d 601 (Ga. Ct. App. 2004) (same, with respect to the timeliness of an insurer's reservation of rights); *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) (same); *San Diego Hous. Comm'n v. Indus. Indem. Co.*, 95 Cal. App. 4th 669, 685 (Ct. App. 2002) (same).

Here, Respondents/Appellants' challenge to the sufficiency of Harleysville's reservation of rights amounts to an allegation that Harleysville breached its contract with its policyholder. However, here there is no evidence that the policyholder assigned any rights to the Respondents/Appellants under the policies, or that the policyholder intended to vest Respondents/Appellants with the right to claim direct benefits under the policies. Rather, *amici* understand that Respondents/Appellants are proceeding in this action solely as judgment-creditors of the policyholders. As such, under existing South Carolina precedent, they lack the

necessary capacity or standing to advance that claim. Nevertheless, this Court affirmed the Special Referee's finding that Harleysville's reservation of rights was insufficient. *Amici* respectfully submit that this was in error.

B. This Court Should Not Have Affirmed the Special Referee's Finding That Harleysville's Reservation of Rights was Insufficient, as Doing So Creates Coverage By Waiver.

Additionally, Harleysville argues, and *Amici* agree, that the practical effect of this Court's affirmance of the Special Referee's decision is to create coverage by waiver under the Harleysville policies – an approach expressly at odds with established South Carolina law. As neither the Special Referee nor this Court detailed the rationale for departing from this established precedent, *Amici* submit that this may be an unintentional error. Accordingly, *Amici* urge this Court to grant rehearing to address the apparent conflict between its decision in Opinion 27698 and preexisting South Carolina precedent.

Prior to this Court's decision in Opinion 27698, South Carolina law made clear that coverage under an insurance policy could not be created through waiver. *See, e.g., Alverson v. Minn. Mut. Life Ins. Co.*, 287 S.C. 432, 434 (Ct. App. 1985) (“Waiver cannot create coverage and cannot bring into existence something not covered in the policy.”); *see also, Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 53, 524 S.E.2d 847, 852 (Ct. App. 1999) (same); *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”). Similarly, courts applying South Carolina law rejected the argument that insurers waived their right to object to coverage under the policies through insufficient reservation of rights letters. *See, e.g., Laidlaw*, 338 S.C. at 52 (rejecting the argument that an insurer waived its right to

contest coverage and withdraw representation because it originally agreed to provide defense and indemnity under a reservation of rights).

This Court's decision in Opinion 27698 is squarely at odds with the foregoing cases. Whereas previous South Carolina cases recognized that an insurer could preserve coverage defenses under a general reservation of rights while investigating the potential duties to defend and indemnify the policyholder, *see, e.g., Laidlaw*, 338 S.C. at 52-3, this Court's decision in Opinion 27698 seemingly requires an insurer to detail all potential bases for disclaiming coverage from the outset of its investigation into the claim. As neither the Special Referee nor the Court addressed this departure from established precedent, and in light of the policy rationales addressed below, *Amici* urge the Court to grant Harleysville's petition for reconsideration.

C. This Court's Findings Regarding Harleysville's Reservation of Rights Will Have an Adverse Impact on Both Insurers and Policyholders Subject to South Carolina Law, and Are Contrary to Established Public Policy.

Amici urge the Court to grant Harleysville's petition for rehearing to address the potentially negative policy implications of its decision. The Court's decision is likely to have a number of unanticipated implications for both insurers and policyholders in South Carolina. *Amici* are concerned with the impact that the Court's decision could have on claim handling following the initial tender of a claim for defense and indemnity. As detailed below, by departing from established South Carolina precedent, the Court's decision could encourage insurers to deny coverage rather than defend under a reservation of rights while investigating the policyholder's claim for coverage.

Under preexisting South Carolina law, insurers were permitted to assume defense of claims against their policyholders under a general reservation of rights. *See, e.g., Laidlaw*, 338 S.C. at 55. This approach is consistent with that approved by a majority of other jurisdictions,

which permit general reservations of rights so long as they inform the policyholder of the insurer's position with respect to coverage. *See generally, Couch on Insurance*, 3d Ed. §202:47; *see also* 38 A.L.R.2d 1148 §7(a) (noting that a reservation of rights letter is sufficient "if it informs the insured of the insurer's position"); *Hatco Corp. v. W.R. Grace & Co. -Conn.*, 801 F.Supp. 1334, 1363 (D.N.J. 1992) (rejecting a policyholder's argument that a blanket reservation of rights was "insufficient to preserve any defenses to coverage other than the two grounds specifically set forth in the letter"); *Barnard Pipeline, Inc. v. Travelers Prop. Cas. Co. of Am.*, 3 F. Supp. 3d 865, 874-74 (D. Mont. 2014) (reservation of rights letter that expressly reserves the insurer's "right to pursue additional applicable policy defenses" was sufficient to preserve all coverage defenses); *Bell Lavalin, Inc. v. Simcoe & Erie Gen. Ins. Co.*, 61 F.3d 742, 747-48 (9th Cir. 1995) (reservation of rights that did not explicitly state that pure contract claims would not be covered was nevertheless sufficient because it put the policyholder on notice that insurer might contest other issues in the future.); *J.E.M. v. Fid. & Cas. Co. of N.Y.*, 928 S.W.2d 668, 672 (Tex. App. 1996)(rejecting the argument that a reservation of rights was insufficient because it failed to reference specific policy provisions).

Encouraging insurers to assume the defense of claims against their policyholders under a general reservation of rights strikes the proper balance between protecting the interests of policyholders by encouraging insurers to promptly assume the defense of any potentially covered claims during investigation of the claim while simultaneously protecting the insurer's right to subsequently assert defenses to coverage under the policies. This Court's decision in Opinion 27698, however, destroys this balance, by forcing insurers who intend to assume defense of a claim under a reservation of rights to articulate in detail each potential coverage defense, lest they subsequently be deemed waived by a reviewing court. As a result, the Court's decision has

the peculiar effect of placing insurers who decline to defend their policyholders pending completion of an investigation in a more advantageous position to contest coverage than those who assume the defense in good faith while reserving their right to dispute coverage based on the parties' agreement as may be warranted by the facts that develop. *Amici* submit that this approach is contrary to the interest of both insurers and policyholders in South Carolina, and a departure from established precedent in both South Carolina and the majority of other jurisdictions. Accordingly, *Amici* submit that this Court should grant Harleystown's petition for rehearing in order to further address this issue.

III. THE COURT ERRED IN ITS DECISION REGARDING THE ALLOCATION BETWEEN COVERED AND NON-COVERED DAMAGES.

Amici respectfully submit that this Court's decision regarding the insurer's duties with respect to allocation of the jury verdict between covered and non-covered damages was contrary to established South Carolina law. By suggesting that Harleystown should have intervened in the underlying trial court action prior to a judgment against its policyholder in order to obtain an allocated verdict, both the Special Referee and this Court suggest that Harleystown should have acted in a way that was contrary to then existing South Carolina precedent. Additionally, *Amici* submit that the approach outlined by the Court in Opinion 27698 would result in unnecessary additional litigation, and could have the undesirable result of pitting insurers' interests against those of their policyholders while the insurers are simultaneously defending their policyholders against adverse claims and potential loss. Accordingly, and for the reasons set forth below, this Court should vacate its prior ruling, and grant Harleystown's petition for rehearing.

A. Contrary to the Special Referee's Finding, Harleysville Had No Right to Intervene in the Underlying Jury Trial Under Existing South Carolina Precedent.

In his decision below, the Special Referee rejected Harleysville's argument that portions of the jury award should be allocated as non-covered damages, based in large part on his finding 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). However, neither the Special Referee nor this Court in its affirmance of the decision below addressed the inherent problem in the Special Referee's decision – namely, that at the time of the jury trial, there was no basis for Harleysville to seek allocated verdicts under existing South Carolina law.

At the time of trial, this Court's first opinion in *Auto Owners v. Newman*, 385 S.C. 187 (2009) was still in effect. Pursuant to that opinion, construction defect damages for harm to non-defective components of a construction project *and* those attributable to correcting faulty workmanship were deemed to trigger an insurer's indemnity obligations under a standard CGL policy. South Carolina's trial courts therefore routinely denied insurer motions to intervene in factually analogous cases, as there was no apparent need for an allocated verdict under the existing case law. It was not until several months after the underlying jury trials that this Court withdrew and replaced its decision in *Newman*, holding that damages attributable to correcting faulty workmanship do not trigger an insurer's indemnity obligations under the widely-used terms of a CGL policy.

In short, at the time of the underlying trials, there was no basis for either Harleysville or the trial court to believe that an allocated verdict would be necessary or beneficial. As such, Harleysville had no basis for seeking to intervene during the underlying jury trials. However, in

affirming the Special Referee's decision, this Court failed to address the way that its revised decision in *Newman* fundamentally changed Harleysville's interests in obtaining an allocated verdict. *Amici* submit that this was plain error, and urge this Court to grant the petition for rehearing, to more fully address this issue.

B. Requiring Insurer's to Intervene in Actions Against Their Policyholders In Order to Obtain an Allocated Verdict Prior to a Judgment Against the Policyholder Creates Unnecessary Tension Between the Insurer and Its Insureds, and is Contrary to Established Public Policy

In addition, the Court's summary affirmance of the Special Referee's decision regarding Harleysville's "failure" to intervene and obtain an allocated verdict leaves a number of impediments and issues unaddressed. Will insurers now be required to intervene in claims against their policyholders to preserve allocation of damages issues for later declaratory judgment actions? May insurers arrange to have special interrogatories or special verdict forms submitted to juries deliberating over suits against their policyholders? Do these actions create tension between the insurer and its policyholder at a stage where the insurer is acting through defense counsel to protect the interests of its policyholder? What is the consequence if an insured successfully opposes the special interrogatories or allocated verdict? The Court's decision creates a landscape of uncertainty for insurers and policyholders moving forward.

Harleysville's petition for reconsideration cites two examples to illustrate how the Court's decision already is leading to uncertainty at the trial court level. In *Beresford Commons Homeowners Association, Inc. v. Penuel Construction, LLC*, Case No. 2013-CP-08-00179 (Berkeley County Court of Common Pleas), the insurer moved to intervene in reliance on Opinion 27698, but the trial court denied the insurer's motion. This prompted the filing of an interlocutory appeal, designed to preserve the possibility of an allocated verdict in the event a verdict is entered against the policyholder in the future. As a result, resolution of the tort-

plaintiff's claim against the policyholder is delayed in order to resolve issues related to a *potential* dispute between the policyholder and its insurer, a dispute that is contingent upon the outcome of the tort-plaintiff's claim against the policyholder. *Amici* submit that this type of delayed resolution is advantageous for neither the parties nor the justice system, and supports rehearing of the Court's decision.

Similarly, in *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), the trial court denied an insurer's motion to intervene to obtain an allocated verdict, finding that the insurer's potential interest in an allocated verdict was not ripe until a verdict was actually entered. In doing so, the trial court opined that permitting the insurer to intervene in the manner specified by the Special Referee and this Court in Opinion 27698 "would seem to create an impermissible conflict of interest in violation of established South Carolina law." As in *Beresford Commons*, the insurer appealed the *Waverly* trial court's ruling, leading to the same unnecessary delay in resolution of that dispute.

Amici respectfully submit that the Court erred in affirming the Special Referee's decision without full consideration of the practical impediments and issues created by that ruling. Accordingly, *Amici* urge the Court to grant Harleysville's petition for rehearing on this issue.

IV. THE COURT ERRED WHEN IT DECIDED NOT TO APPLY TIME-ON-THE RISK ALLOCATION TO THE AWARD OF PUNITIVE DAMAGES.

Finally, *Amici* respectfully submit that this Court erred in its decision to not apply pro rata time-on-the-risk allocation to the punitive damages award, despite evidence that the award was based, at least in part, on acts that took place outside the Harleysville policy period. As detailed below, the Court's decision was contrary to the findings of fact underlying the decision to award punitive damages, as the evidence shows that the award was based, at least in part, on

acts that took place outside the Harleysville policy period. As such, the Court erred when it declined to apply the same pro rata allocation method to the award of punitive damages as it did to the award of compensatory damages.

A. The Award of Punitive Damages Was Based in Part on Actions That Occurred Outside of the Relevant Policy Period.

Although this Court stated in Opinion 27698 that there is “no evidence” that any of the acts underlying the awards of punitive damages occurred outside of the relevant policy periods, the very nature of the underlying jury verdicts belies this contention. The juries in the underlying suits returned general verdicts against the Harleysville policyholders. *See* Op. No. 27698 at 25-26. Pursuant to established South Carolina case law, general verdicts reflect “a determination against all matters of defense set up by [a] defendant.” *Harry L. Hussman Refrigerator & Supply Co. v. Cash & Carry Grocer*, 134 S.C. 191 (1926) (quoting *Heiferman v. Greenhut Cloak Co.*, 145 N.Y.S. 142 (N.Y.S. Ct. App. Div. 1913)). Put plainly, a general verdict in the plaintiff’s favor presumes that all fact questions submitted to the jury were resolved against the defendant and in the plaintiffs’ favor. *Aldrich v. S. Ry. Co.*, 95 S.C. 427 (1913).

The plaintiffs in the underlying trials presented a variety of evidence in support of their claims for punitive damages. This included, as the Court noted in Opinion 27698, evidence that (1) Heritage “chose not to employ an inspecting architect to evaluate and approve or disapprove any modifications and substitutions to the original construction plans and specifications”; (2) Heritage “was aware of significant water-intrusion problems at the other developments before beginning construction” but “nevertheless continued the same inadequate construction practices”; and (3) that “despite knowledge of the ongoing construction problems,” Heritage “deliberately targeted its sales efforts toward elderly, out-of-state residents and marketed its

condominiums on the basis of quality and luxurious amenities ... that were never constructed”. See Op. No. 27698 at 44-45. While the plaintiffs cited each of the foregoing reasons as independent bases which collectively justified the award of punitive damages, the juries returned a general verdict in the plaintiffs’ favor finding simply that the policyholders’ actions were “willful, wanton, reckless and/or grossly negligent.” *Id.* Thus, under established South Carolina precedent regarding general verdicts, the jury awards support a finding in plaintiffs’ favor on *each* of these factual assertions under established South Carolina precedent. This conclusion is directly at odds with the Court’s finding in Opinion 27698 that there was no evidence that any of the acts underlying the awards of punitive damages that occurred outside the relevant policy period.

Notably, in addressing the allocation issue below, the Special Referee determined that the relevant period for calculating the portion of progressive damages attributable to Harleysville’s time-on-the-risk began thirty days after the first certificate of occupancy was issued at each development, and ended on the date of the Respondents/Appellants’ expert’s last visit to the developments prior to the underlying trials. *Id.* at 42. In light of this, it is clear that at least *some* of the acts underlying the general jury verdicts in favor of punitive damages occurred outside of Harleysville’s time-on-the-risk. Indeed, one of the bases for the awards of punitive damages *only* related to actions that occurred outside Harleysville’s time-on-the-risk – the policyholder’s knowledge of water intrusion problems at other developments prior to the construction of the Riverwalk and Magnolia North communities. As such, the conclusion that the acts supporting the awards of punitive damages took place “entirely during the period of time Harleysville’s policies were effective” was in error. The Court should grant the petition for reconsideration,

and apply pro rata time-on-the-risk allocation to the punitive damages award under these circumstances.

B. The Absence of Applicable Legal Precedent is Due in Large Part to South Carolina's Relatively Unique Legal Landscape.

In rejecting the contention that pro rata time-on-the-risk allocation should apply to the punitive damages awards entered against the policyholders, the Court cited the “paucity” of legal authority in support of this approach as a factor. However, the absence of guiding precedent from other jurisdictions is due in large part to South Carolina's relatively unique legal landscape in permitting insurance to cover awards of punitive damages leveled directly against the policyholder. *See Carroway v. Johnson*, 139 S.E.2d 908, 910 (S.C. 1965); *see also S.C. State Budget & Control Board v. Price*, 403 S.E.2d 643, 648 (S.C. 1991). Many jurisdictions (including the District of Columbia) either would not permit a policyholder to seek indemnification for awards of punitive damages like those at issue here, or do not recognize punitive damages at all. Finally, where insurability of punitive damages is permitted, other courts have not refused to apply pro rata allocation to punitive damages as well as the compensatory award. The better-reasoned approach, consistent with the facts of this case, is to allocate responsibility in accordance with the policy periods implicated. Here, that means that pro rata allocation should have been applied to the punitive damages as well as compensatory damages award.

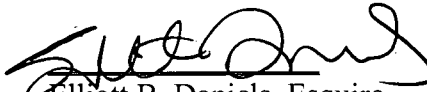
In light of the foregoing, *Amici* respectfully urge this Court to grant the petition for rehearing and to ensure the proper allocation of the punitive damages awards based on Harleysville's time-on-the-risk.

CONCLUSION

Amici curiae respectfully urge this Court to grant the Appellant-Respondent's petition for rehearing, and find that (1) the Appellants/Respondents lacked the necessary capacity or standing to challenge the sufficiency of Harleysville's reservation of rights with respect to its policyholder; (2) Harleysville is entitled to additional proceedings to allocate the jury award between covered and non-covered damages, given the shift in governing South Carolina law following the close of trial; and (3) awards of punitive damages based in part on actions the policyholder took outside the relevant coverage period are subject to pro rata allocation consistent with the insurer's relative time-on-the-risk.

Respectfully submitted,

March 22, 2017



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION,
Appellant-Respondent,

v.

HERITAGE COMMUNITIES, INC., et al.,
Respondents

and

MAGNOLIA NORTH HORIZONTAL PROPERTY REGIME, et al.,
Respondents-Appellants

Appellate Case No. 2013-001281

AND

HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION,
Appellant-Respondent,

v.

HERITAGE COMMUNITIES, INC., et al.,
Respondents

And

RIVERWALK AT ARROWHEAD COUNTRY CLUB HORIZONTAL PROPERTY REGIME, et al.,
Respondents-Appellants

Appellate Case No. 2013-001291

CERTIFICATE OF COMPLIANCE

I, Elliott B. Daniels, Esquire, Attorney for Appellant, certify that the Brief of *Amici Curiae* Complex Insurance Claims Litigation Association and Property Casualty Insurers' Association of

America in Support of Appellant's Petition for Rehearing complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

A handwritten signature in black ink, appearing to read "Elliott B. Daniels", is written over a horizontal line.

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March 22, 2017

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S.C. SUPREME COURT

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CERTIFICATE OF SERVICE

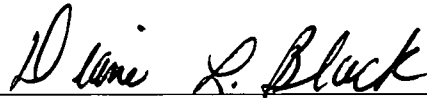
I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for Plaintiff, do hereby certify that I have served a copy of the Brief of *Amici Curiae* Complex Insurance Claims Litigation Association and Property Casualty Insurers' Association of America in Support of Appellant's Petition for Rehearing, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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March 22, 2017