THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2009-CP-26-10053

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

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 Riverwalk at Arrowhead Country Club Horizontal Property Regime; Riverwalk at Arrowhead Country Club Property Owners Association, Inc., a South Carolina corporation; 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.

Petition for Supersedeas Relief with Request for Expedited Decision

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Harleysville Group Insurance ("Harleysville") hereby submits this Petition for Supersedeas under Rule 241 of the South Carolina Appellate Court Rules.[1]

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[1] Simultaneously with the appeal of this matter, Harleysville also filed an identical appeal in *Harleysville Group Insurance v. Heritage Communities Inc., et al.*, Case No. 2009-CP-26-11862.

Harleysville respectfully requests a writ of supersedeas allowing Harleysville to deposit with the Clerk of Court for the South Carolina Court of Appeals or the Horry County Clerk of Court the amount of the judgments against Harleysville in the above captioned action, as modified by the South Carolina Supreme Court, along with accrued post-judgment interest as set forth herein. The trial court has, in this action, committed error in declining to grant leave to Harleysville, under Rule 67, SCRCP, to deposit the funds. Harleysville has appealed two erroneous orders. The first order of the trial court rejected Harleysville's motion on grounds not argued by the judgment creditor Respondents (hereinafter "Respondents"). The second order, addressing a Rule 59 motion of Harleysville, adopted the grounds argued by the Respondents. None of the grounds have any merit.

While Harleysville has appealed, the fact remains that Respondents have successfully stopped Harleysville from obtaining leave to make the deposit. Respondents' clear design in their opposition is for post-judgment interest to continue to run. The appellate process can be lengthy. If Harleysville prevails in this appeal, it will seek as the only fair remedy that post-judgment interest should be deemed to have stopped when Harleysville argued its original Rule 67 motion to the trial court and stated at that hearing its ability to make the deposit payment immediately. Respondents must not be rewarded with further accumulation of post-judgment interest based on their erroneous and successful opposition to the motion for leave to deposit.

In this unusual setting, Harleysville files this petition for supersedeas as well. Through this petition, it seeks again, before this Court, to deposit the funds during the pendency of the appeal. If permitted to do so, once the money is deposited it would have the effect of stopping

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As both appeals are from the same orders which applied equally in both cases, on May 31, 2017, Harleysville filed a motion in this matter to consolidate the two appeals. Thus, this Petition for Supersedeas is being filed in this matter but is intended to apply as to both appeals. If the Court wishes, Harleysville can file a similar Petition as to Case No. 2009-CP-26-11862.

the accrual of post-judgment interest against Harleysville from that date of deposit, regardless of the result of the appeal.

Harleysville also requests that this Court set a condensed briefing schedule for Respondents' Return and any Reply and issue an expedited decision due to the continuing accrual of post-judgment interest on the judgments against Harleysville. In support of this request, Harleysville would respectfully show as follows:

GROUNDS FOR EXPEDITED DECISION BY THIS COURT

1. This matter warrants a condensed briefing schedule and expedited decision from this Court pursuant to Rule 241, SCACR.

2. As shown fully herein, the appealed orders denied Harleysville leave to deposit the judgment sums against it as set forth herein.

3. If there is no supersedeas, post-judgment interest will continue to accrue against Harleysville on the judgment sums rendered against it during the pendency of Harleysville's appeal of the trial court's orders denying it leave to make the deposit, although Harleysville will seek an appellate remedy that no such interest should be owed.

4. Based on Respondents' calculations[2], the combined post-judgment interest alone accrues at a rate of over $4,000.00 per day.

5. These facts warrant expedited supersedeas relief from this Court.

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[2] Harleysville disagrees with Respondents as to the amounts of the judgments and the post-judgment interest thereon owed by Harleysville. However, Harleysville is willing to deposit the current amounts of judgments entered along with a sum sufficient to cover the post-judgment interest based on Respondents' methodology and calculations, without waiving Harleysville's objections as to the determination of the proper amounts to be deposited and reserving Harleysville's rights to have any deposited funds it is ultimately determined not to owe returned to it.

PROCEDURAL HISTORY

On January 22, 2009, judgments were entered against Harleysville's insureds in the cases of *Riverwalk at Arrowhead Country Club Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation*, C/A No. 2003-CP-26-7169) and *Pope et al. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation*, C/A No. 2005-CP-26-3289 ("Riverwalk Actions"), in the total amounts of $4,500,000 and $1,000,000, respectively, for a total of $5,500,000 in the Riverwalk Actions. The trial court in the Riverwalk Actions granted a set-off in the amount of $1,028,821.69, resulting in the total judgments in the Riverwalk Actions becoming $4,471,178.31.

On May 20, 2009, a judgment was entered against Harleysville's insureds in the case of *Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation*, C/A No. 2003-CP-26-3203) (Magnolia North Action") in the total amount of $8,500,000. The trial court in the Magnolia North Action granted a set-off in the amount of $1,531,063.15, resulting in the total judgment in the Magnolia North Action becoming $6,968,936.85.

Harleysville filed a declaratory judgment action relating to the Riverwalk Actions on October 14, 2009 (Case No. 2009-CP-26-10053). Harleysville filed a separate declaratory judgment action relating to Magnolia North Action on December 10, 2009 (Case No. 2009-CP-26-11862). Both declaratory judgment actions sought a declaration as to the amount of the Riverwalk and Magnolia North Actions' judgments that was covered by Harleysville's policies with its insureds. More specifically, these actions sought a declaration that Harleysville has no duty to indemnify its insureds for monetary damages awarded in the underlying suits or, alternatively, seeking an allocation of those damages into covered or non-covered categories.

The insured defendants made no appearance and filed no responsive pleading in either action and went into default. The defendant property owners and property owners' associations (who are the Respondents in this appeal), filed answers and counterclaims.

The two declaratory judgment actions were consolidated and, on October 21, 2010, the consolidated matters were referred to the Honorable John M. Milling as Special Referee to take testimony and evidence and to issue orders disposing of the actions. On March 5, 2013, the Special Referee filed two Orders disposing of the Riverwalk and Magnolia North declaratory judgment actions. The Special Referee ruled in the two Orders that Harleysville's Commercial General Liability policies covered the damages awarded in the underlying trial, that no policy exclusions applied, that the underlying damages could not be allocated into covered and non-covered damages, that a "time on risk" analysis applied to the underlying actual damages, but not punitive damages, and that Harleysville had failed to reserve its rights to contest coverage. After applying a time-on-the-risk analysis in the Riverwalk and Magnolia North Actions to determine the amount of the underlying judgments that were covered by Harleysville's policies, the Special Referee entered judgments against Harleysville in the amount of $3,044,499.43 in the Riverwalk Actions and $3,766,593.94 in the Magnolia North Action. The Special Referee's Orders in the Riverwalk and Magnolia North actions were appealed to the South Carolina Supreme Court, which consolidated the two appeals.

On January 11, 2017, in Opinion No. 27698, the South Carolina Supreme Court affirmed the trial court's judgment of $3,766,954.00 in the Magnolia North Action against Harleysville and modified the judgment in the Riverwalk Action against Harleysville to $2,922,338.54 (the "Judgment Sums"). Petitions for rehearing have been filed with the Supreme Court by both sides in the appeal, and those petitions remain pending.

Based on the final Orders of the trial court in these actions, as affirmed and modified by the Supreme Court, the responsibility for the judgments between Harleysville and its insureds in the underlying Riverwalk and Magnolia North Actions at this time is as follows:

Riverwalk Actions Total Judgment	=	**$4,471,178.31**
Harleysville's responsibility	=	**$2,922,338.54**
Insureds' responsibility	=	**$1,548,839.77**
Magnolia North Action Total Judgment	=	**$6,968,936.85**
Harleysville's responsibility	=	**$3,766,954.00**
Insureds' responsibility	=	**$3,201,982.85**

Thus, the judgments against Harleysville are ***solely*** for the $2,922,338.54 coverage amount found in Riverwalk and for the $3,766,954.00 coverage amount found in Magnolia North.

On March 7, 2017, Harleysville filed an identical motion in both the Riverwalk and Magnolia North declaratory judgment actions seeking leave of the trial court to deposit the Judgment Sums ($2,922,338.54 in Riverwalk and $3,766,954.00 in Magnolia North) with the Horry County Clerk of Court pursuant to Rule 67 to prevent the further accrual of post-judgment interest. In addition to depositing these Judgment Sums, Harleysville indicated that its deposit would include an amount sufficient to cover accrued post-judgment interest as set forth herein as of the date of the deposit.[3] In addition to seeking to deposit a sum sufficient to cover the Judgment Sums and accrued post-judgment interest based on Respondents' counsel's

[3] In its motion, Harleysville noted that it had filed a Petition for Rehearing in its consolidated appeals before the South Carolina Supreme Court and that it otherwise disagreed with the positions of counsel for the Respondents herein as to the amounts of the judgment owed and the amount of post-judgment interest owed, if any. Thus, Harleysville was not waiving its rights on those issues by moving for leave to deposit funds with the trial court or actually depositing these funds with the trial court.

calculations, Harleysville also agreed to deposit the additional sum of $2,500.00 representing possible recoverable costs.

On March 28, 2017, a hearing on Harleysville's motions was held before the Honorable Larry B. Hyman, Jr., and, at the trial court's request, both Harleysville and the Respondents submitted proposed orders to the trial court following that hearing. On April 26, 2017, the trial court entered its own Order addressing both cases and which denied Harleysville leave to make the deposit ("the April 26, 2017 Order") (Attached as Exhibit A).

On April 27, 2017, Harleysville filed motions to alter or amend the April 26, 2017 Order. On May 25, 2017, a hearing was held on Harleysville's motions to alter or amend the April 26, 2017 Order. Again, at the trial court's request, both Harleysville and the Respondents submitted proposed orders. On May 31, 2017, the trial court entered Respondents' proposed order unchanged ("the May 31, 2017 Order"). On that same day Harleysville filed Notices of Appeal with this Court as to the April 26, 2017 Order and the May 31, 2017 Order, as well as a motion to consolidate the two appeals. On June 7, 2017, the trial court corrected one misspelled word in the May 31, 2017 Order and then refiled that Order ("the June 7, 2017 Order") (Attached as Exhibit B). On June 9, 2017, Harleysville filed Amended Notices of Appeal reflecting the replacement of the May 31, 2017 Order with the June 7, 2017 Order.

Harleysville now asks this Court to grant a writ of supersedeas. Specifically, Harleysville requests a writ of supersedeas allowing it to deposit with the Clerk of Court for the South Carolina Court of Appeals or the Horry County Clerk of Court the amount of the judgments against Harleysville in the above captioned action, as modified by the South Carolina Supreme Court, along with an amount sufficient to cover the accrued post-judgment interest as set forth herein.

GOVERNING LAW

"The purpose of a supersedeas is to stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal, and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham,* 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (quoting 4A C.J.S. Appeal & Error § 662 at 49495 (1957)) (internal quotation marks and alterations omitted). The standard for granting supersedeas is set forth in the Rule 241, SCACR: "In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether ***such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.***" Rule 241(c)(2), SCACR (emphasis added).

GROUNDS FOR SUPERSEDEAS

If this Court does not grant supersedeas, and if the appellate remedy Harleysville will request is denied, then Harleysville's appeal will become moot. The requested supersedeas is necessary to preserve to Harleysville "the fruits of a meritorious appeal where they might otherwise be lost." *Graham*, 301 at 130, 390 S.E.2d at 470.

This matter presents a quintessential case for supersedeas. This appeal will determine whether the trial court erred by denying Harleysville's motion pursuant to Rule 67, SCRCP, to deposit the judgment sums with the Court. In order to make a deposit with the court under Rule 67, a party must provide notice to every other party and obtain leave of the court. Rule 67, SCRCP; *Russo v. Sutton*, 317 S.C. 441, 444-445, 454 S.E.2d 895, 897 (1995). The South Carolina Supreme Court has held that where a judgment debtor deposits funds into the court pending the judgment debtor's own appeal, the deposit prevents further accrual of post-judgment interest. *Russo*, 317 S.C. at 444, 454 S.E.2d at 896. The mere filing of the motion for leave to deposit has no effect on the accrual of post-judgment interest. "It is the final tender of the money

to the court, rather than the filing of a motion requesting the court's permission to do so, which stays the accrual of interest." *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 65, 496 S.E.2d 884, 886 (1998). That deposit cannot be made without leave of the court being granted.

If the trial court in this matter had granted leave to make the deposit, Harleysville would have immediately made the requested deposit and, under the rule set forth in *Russo*, the accrual of further post-judgment interest against Harleysville would have ceased as of the date of the deposit. Under such a scenario, if Respondents successfully appealed the grant of the leave to deposit, the interest would presumably be added back onto the judgment as the remedy.

Here, the trial court has denied the leave to make the deposit. Harleysville will similarly argue on appeal that if it prevails and the trial court is reversed, the remedy should be that no interest should be payable from the date that Harleysville argued to the trial court its motion for leave and from its stated immediate ability to make the deposit.

However, Harleysville knows Respondents will argue against this remedy for Harleysville, and thus since there is some risk to Harleysville that it would not obtain such an appellate remedy, Harleysville risks a scenario that it would win an appeal which would be, as a practical matter, rendered moot. This is because absent the remedy Harleysville would seek, interest will continue to accrue post-judgment interest during the entire pendency of the appeal.

As a result, Harleysville once more seeks leave to make a deposit into the Court, this time via this supersedeas petition. The ***grant*** of the supersedeas would not moot the appeal. If the supersedeas is granted, and the deposit is permitted, interest will cease as of the date of the deposit. This will still leave alive whether the trial court should have granted the motion for leave to deposit back on March 28, 2017. The ***denial*** of the supersedeas threatens to moot the appeal and the supersedeas is thus warranted.

The motion for deposit, via this supersedeas petition, should be granted. The South Carolina Supreme Court long ago recognized that a judgment debtor could deposit funds into court and stop the accrual of interest because "[i]t is just, equitable, and no one can be harmed by so doing." *Manning v. Brandon Corp.*, 163 S.C. 178, 161 S.E. 405, 407 (S.C. 1931) (noting that this had been the law "from the earliest decisions down to th[at] time."). Now, Rule 67 of the South Carolina Rules of Civil Procedure provides that

> [i]n an action in which any part of the relief sought is a judgment for a sum of money . . . a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. Money paid into the court under this Rule . . . shall be withdrawn only . . . to whom the order of the court directs.

Rule 67, SCRCP. Under Rule 67, both the South Carolina Supreme Court and the South Carolina Court of Appeals have approved the practice of depositing judgment sums with the clerk of court. *See, e.g., Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (S.C. 1995); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000); *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998).

Additionally, our courts have found that allowing post-judgment interest to be cut off upon deposit with the court of the judgment sums and accrued post-judgment interest "encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." *Russo*, 317 at 444, 454 S.E.2d at 896. Once the judgment sums and accrued post-judgment interest have been deposited into the Court, the judgment creditors will be assured that sufficient funds will be available for the satisfaction of the judgments against Harleysville and there would be no need for supplementary proceedings or an execution on the judgment. Also, Harleysville will be deprived of the use of such funds.

When a party complies with the plain language of Rule 67, it is "unmistakably clear" that South Carolina law permits the deposit of funds and the termination of the accrual of post-judgment interest. *Duval*, 339 S.C. at 618, 620, 529 S.E.2d at 567-68. Harleysville has complied with the plain language of the Rule by giving notice to all parties that the funds are being deposited, and requesting leave of the trial court to deposit the funds. *See Russo*, 317 S.C. at 444-45, 454 S.E.2d at 897.

Granting leave to deposit under Rule 67 is essentially a ministerial function of the court. Rule 67 requires only two things for a party to be permitted to make a deposit with the court: (1) notice to every other party; and (2) obtaining leave of court before making the deposit. Rule 67, SCRCP. The requirements of notice to other parties and obtaining leave from the court prevent ***unilateral*** deposits with the clerk of court. By requiring notice and leave of the court, deposits are conducted in a clear fashion with proper instructions being provided to the clerk of court regarding how the deposit is to be handled.

In addition to failing to recognize the function of Rule 67, the trial court's Orders denying leave to make the deposit were erroneous in numerous respects. Each of the Orders is addressed in turn.

First, the trial court's initial April 26, 2017 Order incorrectly concluded that because this matter involves an insurance policy it is distinguishable from the established South Carolina case law allowing judgment debtors to deposit the judgment sums with the court. (Exhibit A at p. 6). This is error. In deciding this coverage dispute, the trial court in this matter entered judgments ***against Harleysville*** that established the amounts of the underlying judgment against the insureds for which Harleysville was responsible. Thus, Harleysville itself became a judgment debtor, and its status as such is no different from that of any other judgment debtor. It is entirely

appropriate that Harleysville be able to deposit the judgment sums in accordance with Rule 67, SCRCP, while its appeal remains pending. *Russo*, 317 S.C. at 444, 454 S.E.2d at 898 ("[A] judgment debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest."). The fact that insurance policies served as the basis for Harleysville's liability does nothing to change this analysis. There is nothing in Rule 67 or South Carolina case law interpreting this rule that supports the conclusion that there is one rule for non-insurer judgment debtors, and a different rule for insurer judgment debtors.

The initial April 26, 2017 Order also incorrectly states that "[b]oth parties acknowledge in their memorandums of law that it is within the ***sole*** discretion of the trial court to grant or deny the Rule 67 request to deposit money into the Court." (Exhibit A at p. 8 (emphasis added)). This was incorrect. Harleysville did not make any such statement in its motion, its reply in support of its motion, or its proposed order. To the contrary, Harleysville has only acknowledged that leave of court is required under Rule 67 prior to making any deposit, that this leave of court to make the deposit should be freely granted, and that not allowing a deposit in this circumstance amounts to an abuse of discretion. *See Small*, 330 S.C. at 64, 496 S.E.2d at 885 (affirming the trial court which concluded that it would be an abuse of discretion for it to refuse to allow the deposit of funds where the depositing party complied with Rule 67). The April 26, 2017 Order's conclusion that leave to deposit is within the ***sole*** discretion of the trial court is belied by the South Carolina cases cited above where this decision was reviewed by our appellate courts.

The April 26, 2017 Order ultimately concludes that leave to deposit should be denied because Harleysville did not seek to deposit the judgment sums at some prior point in this litigation. (Exhibit A at pp. 9-10). Specifically, the Order states that "[t]he rationale behind Rule 67, SCRCP, is that 'such a rule encourages the debtor to pay the judgment and assures the

judgment creditor the funds will be available'" but that, in this case, "the rule has not encouraged Harleysville to pay the judgment" because Harleysville "waited until the final petition for rehearing from the Supreme Court of South Carolina before making this motion." *Id. citing Duval*, 339 S.C. at 620, 529 S.E.2d at 568. This analysis, however, is mistaken. The fact that Harleysville did not previously seek leave to deposit the judgment sums with the court at an earlier stage of the appeal has no bearing on a Rule 67 analysis. Rule 67 contains no time limit or deadline for making such a motion. Moreover, South Carolina's appellate courts have never imposed a timeliness factor in a Rule 67 analysis. When a judgment debtor chooses to seek leave to deposit changes nothing in the analysis. If a judgment debtor seeks leave at the outset, that debtor would avoid all or most of the post-judgment interest. If the judgment debtor chooses to wait a period of time before seeking such leave, it must deposit accrued post-judgment interest in addition to the underlying judgment sums. Put simply, there is no prejudice whatsoever to the judgment creditor if there is a delay—of any amount of time—in the making of the motion for leave to deposit.

Second, the June 7, 2017 Order concludes that allowing a deposit with the court would be in contravention with Harleysville's obligations under its policies. (Exhibit B at pp. 5-10). This is incorrect. Harleysville's policies do not set a specific interest rate nor do they mandate that Harleysville must pay the ***entire*** underlying judgment amounts to avoid further obligation for post-judgment interest. To the contrary, the Harleysville policies specifically contemplate that Harleysville may avoid further obligation for post-judgment interest by depositing the amount ***it is responsible*** to pay with the court. The plain language of the insurance contracts' Supplementary Payment Provision provides that Harleysville's obligation to pay post-judgment interest on the underlying judgments against its insured ends when it has "paid, offered to pay, or

deposited in court <u>the part</u> **of the judgment that is within the applicable limit of insurance.**" (emphasis added). Thus, once Harleysville deposits the "part of the judgment that is within the applicable limit of insurance," Harleysville is no longer responsible for post judgment interest on any part of the underlying judgments that are not covered by its policies.

The June 7, 2017 Order incorrectly concludes that a deposit under Rule 67 cannot be made until there is a "final judgment" determining the "part of the judgment" that is covered by Harleysville's policies. (Exhibit B at p. 11). Specifically, the June 7, 2017 Order asserts that because there are pending Petitions for Rehearing in the prior appeal, there is no "final judgment" upon which the amount to be deposited is determined. This ruling renders South Carolina's long established case law on Rule 67 deposits entirely meaningless. Specifically, this position directly contravenes the *Duval* and *Russo* cases which clearly hold that a judgment debtor's deposit of funds into court pursuant to Rule 67, SCRCP, ***<u>pending the debtor's own appeal</u>*** stops the accrual of interest on the judgment. The June 7, 2017 Order asserts that until the appeal before the Supreme Court is finally concluded, "there is no crystal ball" to determine "the part of the judgment that is within the 'applicable limit of insurance.'" (Exhibit B at p. 11). This is wholly incorrect. Previously, the special referee in the coverage litigation issued final judgments determining the amount of the judgments covered by the policy. The Supreme Court modified and affirmed those orders. While the cross-petitions for rehearing are pending, Harleysville seeks to make the deposit. The fact that Harleysville disagrees with Respondents on what is owed and has not waived any of its positions or arguments about what it owes – both as to judgment sum and about the amount of interest – and the fact that the amount of Harleysville's responsibility may change based on a subsequent ruling, does not affect its ability to make a deposit with the Court. This is the situation every judgment debtor with a pending appeal faces.

If the reasoning of the June 7, 2017 Order on this point is taken to its logical conclusion, neither Harleysville, nor any other judgment debtor would ever be permitted to make a deposit under Rule 67 until their appeal was finally completed. Such a result completely nullifies Rule 67 deposits in the context of judgment debtors. Once an appeal is finally concluded, the judgment amount is then uncontested. Rule 67 deposits cannot be used for uncontested sums. *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) ("The deposit of uncontested funds with the court does nothing but delay payment of funds that are legally due. This is not the intent of Rule 67.").

The June 7, 2017 Order incorrectly concludes that Harleysville is imposing "conditions" on its deposit with the Court. (Exhibit B at pp. 11-13). To the contrary, the only "conditions" contained in Harleysville's motion are those specifically contemplated by Rule 67. Those are that: 1) part of the deposit may ultimately be returned to Harleysville; and 2) that the deposit not be disbursed without an appropriate order directing that disbursement. Rule 67 specifically provides that a party may "deposit with the court all or any part of such sum or thing, ***whether or not that party claims all or any part of the sum or thing***." Rule 67, SCRCP (emphasis added). Thus, the fact that Harleysville may be entitled to reimbursement of some or all of the deposited amount is not a "condition" that prevents a deposit under Rule 67. Rule 67 further provides that the deposited funds "shall be withdrawn only upon the check of the clerk of court in favor of the party to who the order of the court directs." *Id.* Thus, the requirement that the funds only be disbursed by order of the court is also not a "condition" that prevents a deposit under Rule 67. Rather, it is entirely consistent with the Rule.

The cases cited by the June 7, 2017 Order for the conclusion that a deposit must be "unconditional" are inapplicable to the present situation. These cases either deal with additional

conditions or are from jurisdictions with differing law. The only "conditions" Harleysville seeks to impose here are already a part of Rule 67 itself. Harleysville requests that the court not disburse the funds until the court renders a final determination as to how much of the judgments Harleysville is responsible to pay. The fact that Harleysville requests a reasonable time to appeal such an order is not an impermissible "condition" as Rule 59, SCRCP, specifically contemplates a ten day period to move to alter or amend an order of the court and Rule 62, SCRCP, specifically provides for a ten day automatic stay on enforcement of judgments. All Rule 67 and our courts in South Carolina require, "from the earliest decisions down to this time" is that Harleysville relinquish control of the funds by paying them into court. *Manning v. Brandon Corp.*, 163 S.C. 178, 161 S.E. 405, 407 (S.C. 1931). After it does this, by virtue of Rule 67, interest on the judgment should cease, as "it is just, equitable, and no one can be harmed by so doing." *Id.*

CONCLUSION

For the reasons above, Harleysville respectfully requests that its petition be granted and that it be granted leave to make the deposit.

Signature Page Attached

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June 9, 2017

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION, Plaintiff, vs. 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.	)	Civil Action No. 2009-CP-26-10053
HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION, Plaintiff, vs.	)	Civil Action No. 2009-CP-26-11862

HERITAGE COMMUNITIES, INC, A SOUTH CAROLINA CORPORATION; HERITAGE MAGNOLIA NORTH, INC., RIVERWALK, 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.

Order denying leave to deposit funds pursuant to Rule 67.

This Motion to Deposit Funds under Rule 67, S.C.R.C.P. came before the Court March 28, 2017. The Motion was filed by Harleysville Group Insurance, a Pennsylvania Corporation ("Harleysville"). Harleysville is represented by Brian P. Crotty and Robert C. Calamari, of Nelson Mullins Riley and Scarborough, LLC. Appearing in opposition to this Motion is John P. Henry and Philip C. Thompson, of Thompson & Henry, P.A., who represent the judgment creditors: Riverwalk at Arrowhead Country Club Horizontal Property Regime, Riverwalk at Arrowhead Property Owners Association, Inc., Tony L. Pope and Lynn S. Pope, Individually and Representing as a Class all Unit Owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime (hereinafter collectively "Riverwalk"), Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., (hereinafter collectively "Magnolia North"). Riverwalk and Magnolia North are collectively referred to as "judgment creditors". The attorneys were present at the hearing and each side was able to orally argue and submit memorandums of law for

review by the Court. After reviewing all relevant information and case law, I find the Motion to Deposit Funds in the court pursuant to South Carolina Rules of Civil Procedure, Rule 67 is **Denied.**

Background

On January 22, 2009, judgments were entered against Harleysville's insureds in the case of Riverwalk at Arrowhead Country Club Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation, C/A No. 2003-CP-26-7169 and Pope et al. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation, C/A No. 2005-CP-26-3289 ("Riverwalk Actions"), in the total amounts of Four Million Five Hundred Thousand Dollars ($4,500,000) and One Million Dollars ($1,000,000), respectively, for a total of Five Million Five Hundred Thousand ($5,500,000) in the Riverwalk Actions. The trial court in the Riverwalk Actions granted a set-off in the amount of One Million Twenty-Eight Thousand Eight Hundred Twenty-One and 69/100 Dollars ($1,028,821.69), resulting in the total judgments in the Riverwalk Actions becoming Four Million Four Hundred Seventy-One Thousand One Hundred Seventy-Eight and 31/100 dollars ($4,471,178.31).

On May 20, 2009, a judgment was entered against Harleysville's insureds in the case of Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation, C/A No. 2003-CP-26-3203) (Magnolia North Action") in the total amount of Eight Million Five Hundred Thousand dollars ($8,500,000). The trial court in the Magnolia North Action granted a set-off in the amount of $1,531,063.15, resulting in the total judgment in the Magnolia North Action becoming Six Million Nine Hundred Sixty-Eight Thousand Nine Hundred Thirty-Six and 85/100 dollars ($6,968,936.85).

After the verdicts were rendered in 2009, Harleysville brought the above captioned declaratory judgment actions to determine what part of the judgments in the underlying actions, if

any, were covered. The cases were consolidated and the declaratory judgment action was referred to the Honorable Judge John Milling, as special referee. On March 5, 2013, Judge Milling issued his Order finding Harleysville's coverage in the Riverwalk Actions was for only $3,044,449.43 of the judgment amounts, and that Harleysville's coverage in the Magnolia North Action was for only $3,766,954.00 of the judgment amount, but also finding that "time-on-risk" applied to the verdicts. This Order was appealed by all parties.

On January 11, 2017, in Opinion No. 27698, the South Carolina Supreme Court affirmed Judge Milling's Order judgment of $3,766,954.00 in the Magnolia North Action against Harleysville and modified the judgment in the Riverwalk Action against Harleysville to $2,922,338.54 (the "Judgment Sums"). Based on the final Orders of the trial court in these actions, as affirmed and modified by the Supreme Court, the responsibility for the judgments between Harleysville and its insureds in the underlying Riverwalk and Magnolia North Actions is as follows:

Riverwalk Actions Total Judgment	=	$4,471,178.31
Harleysville's responsibility	=	$2,922,338.54
Insured's responsibility	=	$1,548,839.77

Magnolia North Action Total Judgment	=	$6,968,936.85
Harleysville's responsibility	=	$3,766,954.00
Insured's responsibility	=	$3,201,982.85

Petitions for rehearing have been filed with the Supreme Court by both sides in the appeal, and they remain pending.

Statutory post-judgment interest began to accrue upon filing the judgments in 2009. (S.C. Code §34-31-20). Until filing this Motion, Harleysville has made no effort to stop the accrual of post-judgment interest, by either paying or offering to pay the judgement amount, It has been over eight (8) years since the first judgements were ordered in January 2009.

Harleysville now seeks leave of this Court to deposit the Judgment Sums ($2,922,338.54 in Riverwalk and $3,766,954.00 in Magnolia North) with the Horry County Clerk of Court pursuant to Rule 67 to prevent the further accrual of post-judgment interest. In addition to depositing these Judgment Sums, Harleysville states they will include in the deposit an amount sufficient to cover accrued post-judgment interest as of the date of the deposit. Counsel for the judgment creditors calculates the Judgment Sums with accrued post-judgment interest as of February 7, 2017, as being $6,327,377.88 in the Riverwalk Actions with post-judgment interest accruing $1,659.31 per day thereafter, and $8,804,839.88 in the Magnolia North Action with post-judgment interest accruing $2,529.52 per day thereafter. Defendants argued upon deposit, there would be a total remaining balance of Four Million Seven Hundred Fifty Thousand Eight Hundred Twenty-Two and 81/100 ($4,750,822.81) Dollars on the underlying judgments. This amount is the difference between the total judgement value and the portion that Harleysville is responsible for in the judgement, it is the amount the Supreme Court found is the Insured's responsibility.

Analysis

Rule 67

The South Carolina Supreme Court and the South Carolina Court of Appeals have addressed the use of Rule 67 to stop the accrual of interest on very few occasions. Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (1995); Manning v. Brandon Corp., 163 S.C. 178, 161 S.E.2d 405 (1931); Duval v. Heritage Life Ins. Co., 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000); Small

Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998); Renaissance Enterprises v. Ocean Resorts, 334 S.C. 324, 513 S.E.2d 617 (1999). Rule 67 of the South Carolina Rules of Civil Procedure provides that:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. Money paid into the court under this Rule shall be deposited as directed by the court in any bank or institution authorized to receive public funds, and shall be withdrawn only upon the check of the clerk of court in favor of the party to whom the order of the court directs.

Rule 67, SCRCP.

Under Rule 67, both the South Carolina Supreme Court and the South Carolina Court of Appeals have approved the practice of depositing judgment sums with the clerk of court as a means to prevent the continued accrual of post-judgment interest. *See, e.g.*, Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (S.C. 1995); Duval v. Heritage Life Ins. Co., 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000); Small v. Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998).

Allowing post-judgment interest to be cut off upon deposit with the court of the judgment sums and accrued post-judgment interest "encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." Russo v. Sutton, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (S.C. 1995). Once the judgment sums and accrued post-judgment interest have been deposited into the Court, the judgment creditors will be assured that sufficient funds will be available for the satisfaction of the judgments against Harleysville and there would be no need for supplementary proceedings or an execution on the judgment. Additionally, Harleysville would be deprived of the use of such funds.

However, the cases listed above are distinguishable from the present case because none involved an insurance policy. Additionally, the Courts have made it clear that Rule 67 cannot be

used to alter or affect the contractual or legal relations of the parties, including contractual provisions regarding the payment of interest. Renaissance, *supra*. (There is nothing in Rule 67 indicating that a deposit in Court will affect the parties' contract regarding interest); Turner Coleman, Inc. v. Ohio Const. and Eng., Inc., 272 S.C. 289, 251 S.E.2d 738 (1979). (There is nothing in Rule 67 that abrogates or overrides the intent of the parties regarding interest rates as expressed in their contract.) The Court in Renaissance pointed out that our Rule 67 is substantially the same as Rule 67, Fed. R. Civ. P. and the Federal Courts have also uniformly held that Rule 67 could not be used to alter or affect the contractual and legal duties of the parties. Renaissance, *supra*. at 619. The Renaissance Court also noted "Stopping the contractual accrual of interest would in effect substitute the interest rate of the Court's deposit account for that provided by contract which the Court has no authority to do." Id. at 619 (citing LTV Corp. v. Gulf State Steal, Inc. of Alabama, 969 F.2d 1050 (D.C. App. 2006). However, in the present case, there is no contractual interest rate disagreement and thus Renaissance is not relevant in those terms.

Judicial Discretion

Depositing money with the Court pursuant to Rule 67, SCRCP is within the sound discretion of the Court. The South Carolina Supreme Court ruled in South Carolina Department of Transportation v. First Carolina Corporation of South Carolina, "The granting of leave to deposit money with the court pursuant to Rule 67, SCRCP is a matter with the discretion of the trial court and will not be overturned absent an abuse of discretion." 369 S.C. 150, 152, 631 S.E. 2d 533, 535 (2006). Additionally, the South Carolina Supreme Court has adopted the ruling from Cajun Elec. Co-op., Inc. v. Riley Stoker Corp., 901 F.2d 411, 445 (5th Cir 1990) ("Whether Rule 67 relief should be available in any particular case is a matter committed to the sound discretion of the

district court.") An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). Both parties acknowledge in their memorandums of law that it is within the sole discretion of the trial court to grant or deny the Rule 67 request to deposit money into the Court.

Additionally, both parties cite to Small v. Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d (1998). In Small v. Pioneer Machinery, Inc., Small received a $500,000 verdict against Pioneer on May 31, 1996. On August 27, 1996, Pioneer filed a motion to deposit the amount of the judgment in the court pursuant to Rule 67 SCRCP pending their appeal of the case. The Parties continued to try to resolve the matter until January 7, 1997, when the trial judge was notified there would be no resolution without an appeal. *Id.* On February 7, 1997, the court agreed to grant Pioneer's Rule 67 motion. *Id.* "The trial judge held Pioneer had complied with the terms of Rule 67 and it would be an abuse of discretion to refuse to allow the funds to be deposited." *Id* at 64.

The present case is substantially different from Small v. Pioneer Machinery, Inc.. The present cases began in 2003 and 2005 respectively. In 2009 the trial court found against Heritage, Harleysville's insureds, in both cases. The declaratory judgement actions went to the Honorable Judge John Milling as special referee and the Court of Appeals. The Court of appeals upheld the 2011 special referee verdicts. Harleysville then filed a petition for certiari. The Supreme Court of South Carolina issued its opinion affirming the Magnolia North judgement and modifying the Riverwalk judgment and partitioned out the portion of the judgement that was covered under Harleysville's policy.

Different from Small, the present matter has been in litigation for fourteen (14) years. A Judgment was entered in 2009. There has been ample time for the Judgement debtors, Harleysville,

to pay the judgement over to the Judgment Creditors, almost eight (8) years to be exact. During the eight (8) years since the judgments were entered, as stated above, the cases have been consolidated, been referred to a special referee, appealed to the Court of Appeals, and appealed to the Supreme Court. Both Parties have now filed in the Supreme Court petitions for rehearing. In Small the trial court granted the Rule 67 motion after the parties had tried diligently to settle the issues. Less than one (1) year after Small obtained a judgment, after notifying the court of their intent to try to resolve the matter by agreement, the negotiations fell apart and the trial court granted the Rule 67 motion.

By depositing money into the court the judgement debtor may stop the running of interest by paying the amount of the judgment into court during the pendency of an appeal. Sears v. Fowler, 291 S.C. 43, 44, 358 E.E.2d 574, n. 1 (1987). The court stated in Russo, "a judgement debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest. 317 S.C. 441, 454 S.E.2d 895. However "a judgement creditor is not entitled to interest on the judgment obtained during the pendency of an unsuccessful appeal. The rationale for the rule is that a judgment creditor's appeal delays his right to the judgment, and the debtor, therefore, should not be required to pay interest. *Id* at 443, quoting Sears v. Fowler, 291 S.C. 43, 358 E.E.2d 574, (1987).

The rationale behind Rule 67, SCRCP, is that "such a rule encourages the debtor to pay the judgement and assures the judgment creditor the funds will be available." Duval v. Heritage, 339 S.C. at 620, 529 S.E.2d at 568, quoting Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895. However, in this case the rule has not encouraged Harleysville to pay the judgment. They have waited until the final petition for rehearing from the Supreme Court of South Carolina before making this motion to deposit funds into the court. Additionally, one of the reasons for a set statutory interest rate is to encourage the debtor the pay the creditor.

The equities of this case require the Court to deny Harleysville's Rule 67 motion asking for leave of the court to deposit money into the court. It would be inequitable to allow Harleysville to deposit money in the court to stop the accrual of interest at this final point in the appellate process. Therefore, for the foregoing reasons, Harleysville's Rule 67 motion is DENIED.

Conway, South Carolina

April 24, 2017

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge

Exhibit B

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) CASE NO. 2009-CP-26-10053
)
HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION)
)
PLAINTIFF,)
)
VS.)
)
HERITAGE COMMUNITIES, INC, A SOUTH CAROLINA CORPORATION; HERITAGE RIVERWALK, A SOUTH CAROLINA CORPORATION; BUILD-STAR CORPORATION, A SOUTH CAROLINA CORPORATION, RIVER-WALK AT ARROWHEAD COUNTRY CLUB HORIZONTAL PROPERTY REGIME, RIVERWALK AT ARROW-HEAD COUNTRY CLUB PROPERTY OWNERS ASSOCIATION, INC.,A SOUTH CAROLINA CORPORATION, NATIONAL SURETY CORP., AND TONY L. POPE AND LYNN POPE, INDIVIDUALLYAND REPRESENTING AS A CLASS ALL UNIT OWNERS AT RIVERWALK AT ARROWHEAD COUNTRY CLUB HORIZONTAL PROPERTY REGIME.

DEFENDANTS.

AMENDED ORDER DENYING HARLEYSVILLE'S MOTION TO DEPOSIT FUNDS UNDER RULE 67, S.C.R.C.P.

HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION

PLAINTIFF,

VS.

HERITAGE COMMUNITIES, INC., A SOUTH CAROLINA CORPORATION; HERITAGE MAGNOLIA NORTH, INC., RIVERWALK, A SOUTH

CASE NO. 2009-CP-26-11862

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.	)

This Motion to deposit funds under Rule 67, S.C.R.C.P. ("Motion"), originally came before me on the 28th day of March, 2017. The Motion was filed by Harleysville Group Insurance, a Pennsylvania Corporation ("Harleysville"). Harleysville was represented by Brian P. Crotty and Robert C. Calamari, of Nelson Mullins Riley and Scarborough, LLC. Appearing in opposition to the Motion was John P. Henry and Philip C. Thompson, of Thompson & Henry, P.A., who represent the judgment creditors: Riverwalk at Arrowhead Country Club Horizontal Property Regime; Riverwalk at Arrowhead Property Owners Association, Inc.; Tony L. Pope and Lynn S. Pope, Individually and Representing as a Class all Unit Owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime (hereinafter collectively "Riverwalk"); and Magnolia North Horizontal Property Regime; Magnolia North Property Owners Association, Inc., (hereinafter collectively "Magnolia North"). Riverwalk and Magnolia North will sometimes be referred to collectively as "judgment creditors". The attorneys were present and both sides presented both Memorandums and oral arguments.

By Order dated April 24, 2017 and filed April 26, 2017 (hereinafter "Order"), I denied the Motion. Thereafter, on April 27, 2017, Harleysville timely filed its Rule 59(e), SCRCP, Motion to Alter or Amend the Order. On May 1, 2017, the judgment creditors filed their Response to Harleysville's Motion to Alter or Amend the Order and Rule 59(e) Motion to Alter or Amend the Order. These Motions to Alter or Amend came before me on the 25th day of May, 2017.

Harleysville was represented by Brian P. Crotty of Nelson Mullins Riley and Scarborough, LLC and the judgment creditors were represented by John P. Henry and Philip C. Thompson, of Thompson & Henry, P.A. The attorneys were present and both sides presented both Motions and oral arguments. Based upon the foregoing, I have amended the Order as set forth in this Amended Order Denying Harleysville's Motion to Deposit Funds Under Rule 67, S.C.R.C.P.

Background

The judgment creditors secured judgments against the Harleysville insureds in 2009. These judgments are final judgments ending with a dismissal of the Grant of Certiorari on September 30, 2015.[1] In the Riverwalk case, the jury awarded Five Million Five Hundred Thousand ($5,500,000.00) Dollars which was subsequently reduced by set-off to Four Million Four Hundred Seventy-One Thousand One Hundred Seventy-Eight and 31/100 ($4,471,178.31) Dollars. In the Magnolia North Case, the jury rendered a verdict of Eight Million Five Hundred Thousand ($8,500,000.00) Dollars which was subsequently reduced by set-off to Six Million Nine Hundred Sixty-Eight Thousand Nine Hundred Thirty-Six and 85/100 ($6,968,936.85) Dollars.

Soon after the verdicts were rendered in 2009, Harleysville filed the within declaratory judgment action to determine what part of the judgments in the underlying actions, if any, were covered. The cases were consolidated and the declaratory judgment action was referred to the Honorable Judge John Milling, as special referee. On March 5, 2013, Judge Milling issued his Order finding the entire verdicts were covered, but also finding that "time-on-risk" applied to the verdicts. This Order was appealed by all parties. On January 11, 2017, the Supreme Court issued its decision upholding Judge Milling's Order with a slight modification to the Pope Class Action verdict. Petitions for rehearing were filed by Harleysville and the judgment creditors, and they

[1] Magnolia North Properties Association, Inc., v. Heritage Communities, Inc., et al., 414 S.C. 198, 777 S.E.2d 831 (2015).
Pope v. Heritage Communities, Inc., et al., 414 S.C. 199, 777 S.E.2d 832 (2015).

remain pending. The judgments are not final judgments until remittitur is sent by the Supreme Court to the Horry County Clerk of Court. Harleysville Mutual Insurance Company v. State, 401 S.C. 15, 736 S.E.2d 651 (2012) (The filing of a rehearing petition stays the remittitur and the judgment is not final.)

Statutory postjudgment interest began to accrue upon filing the judgments in 2009. (S.C. Code §34-31-20) Until filing the Motion, Harleysville has made no effort to stop the accrual of postjudgment interest. Two issues should be initially mentioned about Harleysville's Motion: 1) The Motion's sole purpose is to deposit the amounts found covered "pursuant to Rule 67 to prevent the further accrual of post-judgment interest." (See Harleysville's Motion, para. 7). 2) Harleysville proposes to deposit the amounts the Supreme Court at this stage says is due plus accrued interest since 2009 on the entire judgments and estimated costs, even though the amounts of Harleysville's liability for the judgments have not become final. Upon deposit, there would be a total remaining balance of Four Million Seven Hundred Fifty Thousand Eight Hundred Twenty-Two and 81/100 ($4,750,822.81) Dollars on the underlying judgments.

For the reasons hereinafter set forth, the Court denies Harleysville's Motion to Alter or Amend, grants the judgment creditors' Motion to Alter or Amend, and again denies Harleysville's Motion to Deposit Funds Under Rule 67, S.C.R.C.P. Dept. of Trans. V. First Carolina Corp. of S.C., 369 S.C. 150, 631 S.E.2d 533 (2006) ("The granting of leave to deposit money with the Court pursuant to Rule 67, S.C.R.C.P., is a matter within the discretion of the trial Court and will not be overturned absence an abuse of discretion.); Cajun Elec. Power-Coop., Inc. v. Riley Stoker Corp., 901 F.2d 441 (5th Cir. 1990) (Relief under Rule 67 is committed to the sound discretion of the Court.)

Rule 67

The S.C. Appellate Courts have addressed the use of Rule 67 to stop the accrual of interest on very few occasions. Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (1995); Manning v. Brandon Corp., 163 S.C. 178, 161 S.E.2d 405 (1931); Duval v. Heritage Life Ins. Co., 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000); Small Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998); Renaissance Enterprises v. Ocean Resorts, 334 S.C. 324, 513 S.E.2d 617 (1999) However, all of these cases are distinguishable from the instant case because none involved an insurance policy. Our Courts have made it clear that Rule 67 cannot be used to alter or affect the contractual or legal relations of the parties, including contractual provisions regarding the payment of interest. Renaissance, *supra*. (There is nothing in Rule 67 indicating that a deposit in Court will affect the parties' contract regarding interest); Turner Coleman, Inc., *supra*. (There is nothing in Rule 67 that abrogates or overrides the intent of the parties regarding interest rates as expressed in their contract.) The Court in Renaissance pointed out that our Rule 67 is substantially the same as Rule 67, Fed. R. Civ. P. and the Federal Courts have also uniformally held that Rule 67 could not be used to alter of affect the contractual and legal duties of the parties. Renaissance, *supra*. at 619. The Renaissance Court also noted "Stopping the contractual accrual of interest would in effect substitute the interest rate of the Court's deposit account for that provided by contract which the Court has no authority to do." Id. at 619 (citing LTV Corp. v. Gulf State Steal, Inc. of Alabama, 969 F.2d 1050 (D.C. App. 2006)

HARLEYSVILLE'S POLICIES

Harleysville issued basically two forms of policies: a Commercial General Liability Form; and a Commercial Blanket Excess Liability Policy. These policies obligate Harleysville to pay postjudgment interest under the following provision:

SUPPLEMENTARY PAYMENTS-
COVERAGES A AND B

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

7. All interest on the **full amount of any judgment** that accrues after entry of the judgment and before we have paid, offered to pay, **or deposit in Court the part of the judgment that is within the "applicable limit of insurance"**. [Emphasis Supplied]

These payments will not reduce the limits of insurance.

This provision (known in the insurance industry as the "**Standard Interest Provision**") in the Harleysville policies is what governs payment of interest while Harleysville appeals to try and lesson its liability. As noted above, Harleysville cannot use Rule 67 to change its contractual duty under the policy. The proposed deposit by Harleysville does not comply with the "**standard interest provision**" in their policy and does not comport with judicial policy to encourage payment of the judgments:

A. **The deposit abrogates the very purpose of the standard interest clause.**

It is obvious from the plain language of the **standard interest clause** that its purpose is twofold: (1) to protect the insureds from the accumulation of postjudgment interest while the insurer appeals; and (2) to give the insurer a way out if it does not want to suffer the interest liability. Stamps v. Consolidated Underwriters, 208 Kan. 630, 493 P.2d 246 (1972) (Where the insurer controls the litigation and appeal insurer should be required to pay interest on the entire judgment until the insurer, under the **standard interest provision**, has satisfied its obligation under the policy.); McPhee v. American Motorists, Co. Inc., 57 Wis. 2d 669, 205 N.W. 2d 152 (1973) (Under the **standard interest clause**, where the insurer controls the litigation and appeal, the accumulation of interest on the entire judgment should be born by the insurer until insurer has discharged its obligation under the policy. Otherwise, the insurer could place any amount into the Court and stop the accrual of interest.)

The South Carolina Supreme Court has long recognized the equity in requiring the insurer to pay interest on the entire judgment because of its control of the litigation and appeal. In Cook v. State Farm Mutual Auto Ins. Co., 235 S.C. 452, 112 S.E.2d 241 (1960) the injured party had sued the insured and recovered a judgment and then sought payment from the insured's insurer, State Farm, and secured a judgment against State Farm. The judgment holder sought interest from State Farm in addition to his judgment. In holding State Farm liable for interest on the judgment, the Court stated:

> The appellant in this case had complete control of the litigation between the respondent and the insured. It had the right to settle the case, or defend it, irrespective of the desires of the insured. It elected to defend the injury action resulting in the judgment heretofore stated. It likewise elected to defend this action brought by the respondent against it upon the contract of insurance. It *467 is only fair to compel the insurer to pay all the interest which accrues from the date of the original judgment.

Harleysville agreed that it would pay interest on the entire judgment to protect its insured until it satisfied its obligation under the policy. Harleysville's proposed deposit is not in accord with its policy because it does not fulfill Harleysville's contractual obligation to protect its insured from postjudgment interest until it satisfies its liability. If I were to allow Harleysville to deposit the contingent proceeds as it proposes, the insured would be left with the Four Million Seven Hundred Fifty Thousand Eight Hundred Twenty-Two and 81/100 ($4,750,822.81) Dollars, the balance of the judgment and could not satisfy his excess liability because the deposit is contingent and the insured would not know the amount he should satisfy. Since the insurer controls the litigation, settlement and appeal, pending appeal, the insured cannot satisfy the excess liability, and so the insurer must continue paying interest on the entire judgment until the insurer satisfies its liability leaving the insured free to settle its excess (after payment of the insurer's liability) and stop the interest against him. Safeway Ins. Co. of Alabama v. Amerisure Ins. Co., 707 So.2d 218 (Ala. 1997) Harleysville's deposit in Court of a contingent amount and contingent costs does not

stop the running of interest on the judgment because no part of the judgment has been satisfied. Until the amount of the judgment for which Harleysville is determined liable is applied to the judgment, interest, by statute and contract, continues to accrue on the judgment. Harleysville cannot deposit the funds out of the reach of the judgment creditors and at the same time, terminate the statutory interest it agreed to pay.

B. Harleysville's proposed deposit does not comply with its agreement to pay interest on the full amount of the judgment until it, Harleysville, pays, offers to pay or deposits its liability in Court.

I agree with the judgment creditors that the Court's holding in Cohen v. Jenkintown Cab Co., 300 Pa. Super. 528, 446 A.2d 1284 (1982) does not allow Harleysville to make the deposit as they propose. The Court in Cohen v. Jenkintown Cab Co., 300 PA. Super. 528, 446 A.2d 1284 (1982) had before it a petition from the insurance carrier ("National") to deposit into Court its limits of $10,000.00 plus costs and interest to stop the interest on a $150,000.00 judgment obtained against its insured. The petition provided as follows:

> [2]The said insuring Agreement II(b)(2) provides, inter alla, that the insurer will "pay ... all interest accruing after entry of judgment until the company has **paid or tendered or deposited in court** such part of such judgment as does not exceed the limit of the Company's liability thereon", in this case $10,000.00.
>
> 5. In order to limit its liability for interest under this paragraph, your Petitioner desires to pay into this Court, **to hold pending the outcome of the appeal which it is prosecuting on behalf of its insured**, a sum equal to the limits of the policy plus interest on the verdicts up to the date of the payment into Court, a total of $23,875.00.
>
> 6. Under the terms of the policy, specifically "Exhibit A" hereto, your Petitioner's ultimate liability to its insured cannot exceed the said sum of $23,875.00, even if the verdicts totaling $150,000 should be sustained on appeal.
>
> 7. If this motion is not granted, your Petitioner would be seriously and irreparably prejudiced because its only alternatives would be to (a) pay the

[2] Notice- Language is practically identical to Harleysville policies.

> said $23,875.00 to plaintiff with the knowledge that the money can never be recovered if the verdicts are overturned on appeal, or (b) do nothing and have to defend a claim that is obligated to pay not only its limits but interest on the verdicts until the date of payment, after appeal (if the appeal is unsuccessful) which interest would accrue at the rate of $750.00 per month for as long as the appeal is pending in the Superior and Supreme Court.
>
> WHEREFORE, your **Petitioner prays this Honorable Court permit your Petitioner to pay the said sum of $23,875.00 into this Court, to be held pending the final appellate decision as to whether or not your Petitioner's insured is liable to Plaintiffs above named**. [Emphasis supplied]

The lower Court granted the petition. On appeal, the Appellate Court reversed. The Court agreed that money paid into Court becomes the absolute property of the other party. The Appellate Court also agreed with the Plaintiffs that National's payment into Court with the agreement that if the insured's appeal was successful, it would get their money back, could not stop the accrual of interest. The Court held that in the order to stop the accrual of interest National had to relinquish its claim to the money. Otherwise, National, under the terms of its policy would be required to pay interest on the entire $150,000.00 judgment despite their limit of liability being only $10,000.00. The Court, in discussing the interest provision of National's policy (practically identical to that in the Harleysville's policies) noted:

> The context of the phrase "**deposited in court**" in National Indemnity's policy is a standard clause providing that the company's interest liability continues to accrue "until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon." Thus "deposited in court" is set up in parallel with "paid" and "tendered." **What these three methods of stopping further accrual of the company's interest liability are intended to have in common is that in each method, the company makes an amount equal to the limits of its total liability to date unconditionally and immediately available to the judgment holder**. [Emphasis supplied]

In the Cohen case, the part of the judgment that was in the "applicable limit of insurance" was their policy limits of liability and thus, to stop the accrual of their interest liability, they were required to pay, tender or deposit into Court their limit of liability without contingency and make

the proceeds available to the judgment creditor. In this case, "that part of the judgment that is within the applicable limit of insurance" is to date the entire judgment; the amount Harleysville would have to deposit to stop the accrual of interest in accordance with the terms of their policy. See also Baughn v. Busick, 1975 OK. CIV. APP. 41, 541 P.2d. 873 (1975) (Under **standard interest clause** obligating the insurer to pay, offer to pay or deposit in Court that part of the judgment which does not exceed the limit of the companies liability thereon, the payment, offer to pay or deposit in Court must be unconditional in order to stop the accrual of interest.)

In a different context, our Court has addressed the requirements necessary to stop the running of interest. In Ruscon Const. Co. v. Beaufort-Jasper Water Authority, 259 S.C. 314, 191 S.E.2d 715 (1972) the Court said a valid tender stops the running of interest. The Court went on to say that a valid tender can only be in money, in the proper amount due, and without conditions annexed to its acceptance. Tender with a requirement of a release is not a valid tender. See also McNeil v. Herring, 155 S.C. 187, 152 S.E. 189 (1930) (Holding a conditional offer is not a valid tender. In order to be a valid offer (tender), it must be unconditional. The law is plain. Now, to keep a tender open, you offer the man the money unconditionally, and if he refuses it, you go and place it in the hands of the Clerk of Court without any conditions attached to it. This keeps the tender open so the creditor can go get it. The Court also opined:

> "Now, under the law, if you owe a man a debt and you go to him and offer him the money, offer to pay the debt, and he doesn't take it, you still owe the debt, and in order to stop interest and costs on the case, the law requires you to go and deposit that money in the hands of the Clerk of Court, so that the man can go and get it whenever he wants it, but you have to deposit it unconditionally."

Smith v. Keels, 15 Rich. 318, 49 S.C.L 318 (1868) (An offer to pay money to constitute a valid tender must be unconditional.)

C. Harleysville's proposed deposit cannot be allowed because there is no final determination of that part of the judgment for which Harleysville is liable.

Harleysville agreed to pay interest on the full amount of the judgment until it deposited in Court "the part of the judgment that is within the 'applicable limit of insurance". During oral arguments on the Motion, Harleysville argued that it was willing to deposit the amount of their maximum liability as found by the Supreme Court. The Court is not sure of the basis of this argument since petitions for rehearing have been filed by the parties.[3] Until the Supreme Court finally decides Harleysville's liability, there is no crystal ball to determine "the part of the judgment that is within that applicable limit of insurance". Lancer Co. v. Sunrise Removal, Inc., 914 NYS 2d 174 (2010) (Where the policy provided that the accrual of interest would terminate upon the payment of, offer to pay or depositing in Court [**standard interest provision**] of its share of the judgment, the policy did not provide a mechanism for the extinguishment of the insurer's obligation to pay interest before the existence of a final judgment. The Court indicated that until there was a final judgment, insurer had to pay interest on the entire judgment.) Harleysville's proposal to deposit funds into Court will not stop the accrual of interest because it does not comply with Harleysville's contract (policy) regarding interest because at this point, it is impossible to determine the part of the judgment within "the applicable limit of insurance". Renaissance, *supra*.

D. Harleysville's proposed deposit is not in accord with its policy because Harleysville proposes to place contingencies on the deposit and the judgment creditors' access to the proceeds.

The Court would first note that there is no provision in Harleysville's policy for a contingent payment, offer to pay or deposit in Court. In Harleysville's proposed order attached to its Motion, it asks that the clerk not disburse the money until the parties litigate who is entitled to the proceeds and also asks the Court to hold that "a deposit of the judgment funds will have the

[3] Harleysville notes in its Motion that it has filed a petition for rehearing and does not agree with the amounts of the judgments owed or the interest owed, if any.

same effect as a supersedes bond" and which stays execution and enforcement of the judgment. Again, there is nothing in Harleysville's policy that allows for such a contingent deposit and the Court will not rewrite Harleysville's policy to allow for such a contingency. DiBenedetto v. Estate of DiBenedetto, 219 N.J. Super 440, 530 A.2d 800 (1987) (In order to stop the accrual of interest the deposit must be made without contingency and cannot be used as a supercedeas to stop the accrual of interest. To stop the accrual of interest, the deposit must be continuously available to the claimant and placed beyond the reach of the carrier.) Dinkins v. General Airline and Film Corp., 214 F. Supp. 281, 283 (D.C. S.D. NY 1963) (The deposit under Rule 67 of a sum of money in Court is not to be used to circumvent the stringent prerequisites of seizure or attachments of a defendant's assets.)

The Courts have all been in accord that a deposit, to stop the accrual of interest under the "**Standard Interest Clause**" as contained in Harleysville's policy must be unconditional and the proceeds must be made available to the judgment creditor. Phillips Petroleum Co. v. Adams 513 F.2d 355 (D.C. Tex. 1975) (In order to stop accrual, there must be an unconditional offer to give up the disputed fund and cease any dominion over the fund. The policy does not provide for a contingent, estimated, amount to be deposited.) U.S. v. American Home Assur. Co., 6 F. Supp. 3d 1371 (2014) (The accrual of interest will continue when the depositor seeks to impose conditions upon payment into the depository fund); U.S. For Use of Garrett v. Midwest Const. Co., 619 F.2d 349 (5th Cir. 1980) (In order to stop the accrual of interest under Rule 67, Midwest had to make the money available to Garrett without attempting to impose conditions on its acceptance.); Knippen v. Glens Falls Ins. Co., 564 F.2d 525 (Dist. Of Cola. Cir. 1997) (The insurance company must relinquish control over the money before the interest would cease.) Bossert v. Douglas, 557 P.2d 1164 (1976) (Where policy required there be a "paid or tendered or deposited in Court" in order to stop interest accruing after the judgment, there must be an unconditional, payment, tender

or deposit in Court to stop interest from accruing.) Davis v. Allstate Ins. Co., 434 Mass. 174, 747 N.E.2d 141 (2001) (Because there was nothing in Allstate's policy that allowed for a conditional offer to pay, Allstate was required to make an unconditional offer to pay to stop its obligation to pay postjudgment interest.) Whiddon v. Hutchinson, 668 So.2d 1368 (La. 1996) (Where Allstate's Motion was to deposit the funds with a requirement "forbidding the withdrawal of the funds without a determination of the amount and validity of the competing claims" and the Court ordered the funds to be deposited with this requirement, the deposit was not unconditional. The funds must be placed so as to allow Plaintiff's access to stop accrual of interest.) Farmers-Merchants Bank and Trust Co. v. St. Katherine Ins. Co., 570 So.2d 1186 (La. 1990) (Fire insurers deposit of funds into Court with condition that depositor was to be relieved from further liability was not an unconditional deposit.); Blasini-Stern v. Beech-Nut Life Savers Corp., 429 F. Supp. 533 (1976) (It seems the Defendant is seeking the best of all possible worlds. He is making a conditional tender and at the same time disputing what he owes. The tender cannot be made so to deprive the Plaintiff of his money. Rule 67 does not allow such a [contingent] deposit to stop the accrual of interest.)[4]

E. Harleysville's proposed deposit is not in accord with its policy because it changes the interest rate contained in its policy.

In Harleysville's Memorandum, Harleysville states that there is no interest rate set in the policy. The Court disagrees. Harleysville agreed to pay "any interest that accrues after entry of the judgment". The Court can think of no other reasonable way to interpret that provision other than payment of the judgment interest rate established by *S.C. Code §34-31-20* which, in 2017, is 7.75%. To allow the deposit would reduce the interest rate Harleysville agreed to pay which the Court has no authority to do. Renaissance, *supra*.

[4] Progressive Cas. Ins. Co. v. Drive Trademark Holding, LP, 680 F. Supp. 2d 639 (D.C. De. 2010) (Rule 67 cannot be used to alter the contractual relations of the parties. Moreover, it cannot be used to deposit in Court a fund to secure the satisfaction of a prospective judgment.)

F. By allowing Harleysville to make the proposed deposit, Harleysville loses all incentive to pay the judgments.

The proposed deposit by Harleysville will eliminate any incentive it has to pay the judgment. As Harleysville pointed out in its Motion, our Court has pointed out two reasons to use Rule 67 to allow a deposit in Court while litigation is pending. First, the deposit in Court encourages the debtor to pay the judgment, and secondly, assures the judgment creditor that the funds will be available at the end of litigation. Russo v. Sutton, *supra*. The only reason Harleysville seeks by its Motion to make the deposit is to stop the accrual of interest. Nowhere in their Motion do they say how this deposit will encourage them to pay their liability, or assure the judgment creditors the funds will be there. In fact, under Harleysville's proposed contingent deposit, the judgment creditors have no assurance what, if any, funds will be available. Harleysville's only purpose is to relieve itself of their contractual duty to pay statutory interest on the entire judgments.[5]

The only incentive Harleysville has at present to pay their liability is the requirement that they pay statutory interest on the entire judgment as provided in their policy. If Harleysville is relieved of any duty to pay interest by the deposit, they can continue their appeals with impunity while postjudgment interest continues to accrue against their insureds. River Val. Cartage Co., Inc. v. Hawkeye-Security Ins. Co., 17 Ill. 2d 242, 161 N.E.2d 101, 104 (1959) (By allowing the insurer to deposit a sum which is not in compliance with its contract, the insurer relieves itself of the provision for the payment of interest which is its incentive for speedily discharging its entire obligation.)

[5] In its Motion, Harleysville states: "The Motion is for the express purpose of stopping further post-judgment interest from running."

Based on the foregoing reasons it is ORDERED, ADJUDGED AND DECREED that Harleysville's Motion be, and the same is hereby denied.

5-31-17
Date

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2009-CP-26-10053

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

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 Riverwalk at Arrowhead Country Club Horizontal Property Regime; Riverwalk at Arrowhead Country Club Property Owners Association, Inc., a South Carolina corporation; 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.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Harleysville Group Insurance, a Pennsylvania corporation, 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:

Petition for Supersedeas Relief with Request for Expedited Decision

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June 9, 2017

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June 9, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia SC 29211

RE: Harleysville Group Insurance v. Heritage Communities, Inc. (Riverwalk)
C.A. No.: 2009-CP-26-10053

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of a Petition for Supersedeas Relief with Request for Expedited Decision in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our Firm check in the amount of $25.00 as the required filing fee.

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

Very truly yours,

Brian P. Crotty

BPC:lpw
Enclosures
cc: John P. Henry, Esquire
Philip C. Thompson, Esquire
Laura Johnson Evans, Esquire