

**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

Appellate Case No. 2017-001272  
Trial Court Case Nos. 2009CP2611862, 2009CP2610053

**RECEIVED**

JUN 20 2017

**SC Court of Appeals**

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 Arrowhead Country Club Horizontal Property Regime, Defendants

Of whom 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, are Respondents

Harleysville Group Insurance, a Pennsylvania Corporation, Appellant,

v.

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

Of whom Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., a South Carolina Corporation, are Respondents.

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**RETURN TO HARLEYSVILLE'S  
PETITION FOR WRIT OF SUPERSEDEAS**

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The Pope and Riverwalk Respondents and the Magnolia North POA Respondents, (hereinafter collectively "Respondents") file this Return to Harleystville's Petition for Supersedeas served on Respondents on June 11, 2017. For the reasons hereinafter set forth, the Court should dismiss the petition for failure to comply with Rule 241, S.C.A.C.R., or deny the Petition based upon legal grounds set forth below and in Judge Hyman's Amended Order dated May 31, 2017. (Exhibit A attached)

**Brief Procedural History  
Pertinent to this Proceeding.**

In 2009, Respondents in separate cases obtained judgments against the Harleystville insureds listed in the above caption. The cases were consolidated for appeal. The verdicts were upheld by both the Court of Appeals and the Supreme Court; the Supreme Court granted Certiorari but dismissed as being improvidently granted. Harleystville commenced a declaratory judgment action to determine their liability for the judgments. The lower Court modified the judgments and Harleystville and Respondents appealed the lower Court's Order. The Supreme Court took the consolidated cases on direct appeal and upheld the lower Court's Order with a slight modification to the Pope class action verdict amount. Both Harleystville and the Respondents filed Petitions for Rehearing which are pending. Harleystville petitioned the lower Court to deposit funds pursuant to Rule 67, S.C.R.C.P. for the sole purpose of stopping the statutory judgment interest rate required

to be paid under the terms of their policy.<sup>1</sup> Their Petition was denied in two separate but identical Orders in both cases which were issued by the Honorable Larry B. Hyman, Jr. on April 24, 2017.<sup>2</sup> Both Harleysville and Respondents filed Rule 59(e) S.C.R.C.P. Motions to Alter or Amend these Orders. Judge Hyman filed identical Amended Orders in both cases dated May 31, 2017. A reference to the Amended Order dated May 31, 2017 shall be a reference to the Amended Orders in both cases. A copy of the Amended Order is attached as Exhibit A. His Order denied the deposit of funds pursuant to Rule 67 S.C.R.C.P. Harleysville appealed and then filed its Petition for Supersedeas relief asking the Court to allow the deposit despite Judge Hyman's Order.<sup>3</sup>

**HARLEYSVILLE'S PETITION FOR A WRIT OF SUPERCEDAS SHOULD BE  
DISMISSED FOR FAILURE TO COMPLY WITH RULE 241 S.C.A.C.R.**

Harleysville failed to comply with Rule 241 in several particulars. First, Rule 241 (d)(1) provides: "Except where extraordinary circumstances make it impracticable, an application for an Order lifting the automatic stay or for supersedeas must first be made to the lower Court or administrative tribunal which entered the decision or Order on appeal." Harleysville has not made any application to the lower Court as required. Neither has Harleysville alleged in its petition "extraordinary circumstances" which made it impracticable to make such an application to the lower Court as required by Rule 241(d)(4)(C). In addition, although Respondents do not dispute the authenticity of the Orders Harleysville attached to its Petition, these Orders have not been certified as required by Rule 241(d)(3). Lastly, Harleysville failed to comply with Rule 241(d)(3)

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<sup>1</sup> Although Harleysville's policy does not set a specific interest rate it provides that Harleysville will pay "all interest on the full amount of any judgment that accrues after entry of the judgment..." This could only mean the statutory interest rate because that is what accrues after entry of judgment. (See Amended Order beginning on p. 5) The current judgment interest rate is 7.75% per annum. Harleysville's proposed deposit would drastically reduce this interest rate while leaving Harleysville's insureds paying the statutory rate before Harleysville has satisfied its known liability for the judgments in direct contravention to its contract (policy).

<sup>2</sup> It is unclear why Harleysville spent two and a half pages pointing out the errors in Judge Hyman's April 24, 2017 Order when it was superseded by the Amended Order dated May 31, 2017.

<sup>3</sup> For a more detailed history of these cases, see the Amended Order of Judge Hyman dated May 31, 2017, pp. 3-5.

which requires a “written petition verified by the client.” Harleystville’s Petition has not been verified by the Client. For these reasons alone, the Court should dismiss Harleystville’s Petition.

**HARLEYSVILLE ATTEMPTS TO USE SUPERCEDEAS RELIEF  
FOR A PURPOSE NOT ALLOWED BY CASE LAW.**

In its Petition (p. 7), Harleystville asks this Court to grant a Writ of Supersedeas which, despite Judge Hyman’s Order, would allow the deposit under Rule 67. In support of this request, Harleystville cites Graham v. Graham, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (1990) as the governing law and quotes from Graham as follows:

“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.” (Harleystville’s Petition, p. 8)

However, Harleystville omits the next sentence and following which is a death knell to their request for supersedeas relief:

(“As a rule, a supersedeas ... does not reverse, annul, or undo what has already been done, or impair the force ... of the judgment, order, or decision of the trial court ... .”) 83 C.J.S. *Supersedeas* § 8 at 896 (153) (a supersedeas suspends the judgment but does not annul the judgment itself).

In Graham, the Court remanded the Supersedeas Order because it had language suggesting the lower Court reversed the Order by supersedeas. Harleystville is asking the Court to overturn Judge Hyman’s Order and grant the relief Judge Hyman denied, a procedure the Graham Court rejected. Harleystville’s appeal of Judge Hyman’s Order, if successful, may determine that Judge Hyman should have granted the relief and therefore interest stopped accruing at the time Harleystville argued its Motion to Deposit. If this Court were to grant Harleystville the requested Supersedeas relief, it would be inconsequential because the appeal would be a final determination of the correctness of Judge Hyman’s Order. The Writ of Supersedeas cannot be used as a substitute

for an appeal. The Supersedeas is used to suspend or stay the matters decided in the Order. Rule 241(C)(1), S.C.A.C.R.

**THE TRIAL COURT HAS DISCRETION TO GRANT  
OR DENY A DEPOSIT UNDER RULE 67, S.C.R.C.P.**

In its Petition, Harleysville states that “Granting leave to deposit under Rule 67 is essentially a ministerial function of the Court.” (Petition, p. 11) This is incorrect. A ministerial function “is a function as to which there is no occasion to use judgment or discretion.” Black’s Law Dictionary 996 (6<sup>th</sup> Ed. 1990) Whether to grant or deny a deposit under Rule 67 is committed to sound discretion of the Court. *Dept. of Trans. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 631 S.E.2d 533 (2006) (granting of leave to deposit money under Rule 67 to stop the accrual of interest is in the discretion of the trial Court and will not be overturned absence an abuse of discretion).

**HARLEYSVILLE IS CONTRACTUALLY BOUND BY ITS  
POLICY TO PAY POST JUDGMENT INTEREST ON THE ENTIRE  
VERDICT IN ORDER TO PROTECT ITS INSUREDS WHILE IT APPEALS.**

Harleysville hardly mentions in its Petition that its policy requires it to pay all interest accruing on the entire judgment until it has satisfied its obligation. This standard interest provision is to protect its insureds from the accumulation of post judgment interest while Harleysville appeals in an attempt to lessen its liability. At this point, Harleysville’s liability has not been determined. Harleysville cannot, as it is attempting to do, use Rule 67 to alter or affect the contractual relations of the parties including the interest rate. *Turner Coleman, Inc. v. Ohio Const. & 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’ contract regarding interest) See also, *Renaissance Enterprises v. Ocean Resorts*, 334 S.C. 324, 513 S.E.2d 617 (1999) (Stopping the contractual accrual of interest would in effect substitute the interest rate of the Court’s deposit for that provided by the contract which the Court has no authority to do.) In order to stop the accrual of interest and comply with

its policy terms, Harleystown would be required to deposit the full amount of the judgments entered by the trial Court plus accrued interest and costs because this is the only way Harleystown can protect its insureds from post-judgment interest while Harleystown appeals. This is the purpose of the standard interest provision in the Harleystown policy. (For a detailed discussion see pp. 6-13 of the Amended Order)

Harleystown points out that its policy allows it to pay, offer to pay or deposit the amount of their liability into Court and stop the accrual of interest. However, there cannot be a contingent deposit keeping the money from the Respondents and at the same time stopping the accrual of interest. (See Judge Hyman's Amended Order, pp. 8-10, Ex. A) In addition, since Harleystown has filed a Petition for Rehearing with the Supreme Court; the amount required for a deposit has not been finally determined (See Amended Order, p. 11, Ex. A)

#### **EXPEDITED DECISION**

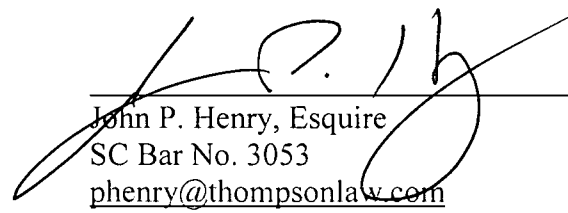
There is no need for an expedited decision since whatever this Court does with the supersedeas will either be affirmed on appeal or reversed and the accrual or non-accrual of interest will be controlled by the appeal. The denial of the supersedeas will not moot the appeal as Harleystown contends. A case becomes moot when the judgment rendered will have no practical legal effect upon the existing controversy. *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 291 (2001). The supersedeas relief requested by Harleystown should be denied.

#### **CONCLUSION**

Harleystown's Petition should be dismissed for failure to comply with Rule 241. It should also be dismissed on legal grounds as above set forth and on the legal basis set forth in Judge Hyman's Amended Order dated May 31, 2017, which is incorporated herein.

*Signature page to follow.*

THOMPSON & HENRY, P.A.



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June 19, 2017

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
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, )  
INDIVIDUALLY AND 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.**

CASE NO. 2009-CP-26-11862

HARLEYSVILLE GROUP INSURANCE, )  
A PENNSYLVANIA CORPORATION )

PLAINTIFF, )

VS. )

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. )

This Motion to deposit funds under Rule 67, S.C.R.C.P. (“Motion”), originally came before me on the 28<sup>th</sup> 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), SCRCPP, 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 25<sup>th</sup> 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.<sup>1</sup> 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

<sup>1</sup> 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 (5<sup>th</sup> 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 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)

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 lessen 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:

<sup>2</sup>The said insuring Agreement II(b)(2) provides, inter alia, 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

<sup>2</sup> 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.<sup>3</sup> 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

<sup>3</sup> 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 (5<sup>th</sup> 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.)<sup>4</sup>

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

In Harleystown’s Memorandum, Harleystown states that there is no interest rate set in the policy. The Court disagrees. Harleystown 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 Harleystown agreed to pay which the Court has no authority to do. Renaissance, supra.

<sup>4</sup> Progressive Cas. Ins. Co. v. Drive Trademark Holding, LP, 680 F. Supp. 2d 639 (D.C. Dé. 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.<sup>5</sup>

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.)

<sup>5</sup> 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

ELECTRONICALLY FILED - 2017 Jun 07 11:55 AM - HORRY - COMMON PLEAS - CASE#2009CP2610053

THOMPSON  
& HENRY, P.A.

ATTORNEYS AT LAW

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PHILIP C. THOMPSON  
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TELEPHONE  
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FACSIMILE  
(843) 248-6396

June 19, 2017

Via FedEx:

The Honorable Jenny Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

RECEIVED

JUN 20 2017

SC Court of Appeals

RE: Harleysville Group Insurance, Inc. v. Heritage Communities, Inc., et al  
Appellate Case No.: 2017-001272  
Trial Court Case Nos. 2009CP2611862 and 2009CP2610053

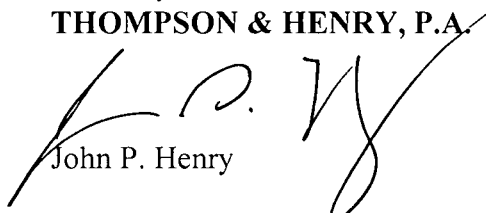
Dear Ms. Kitchings:

Please find enclosed herewith the original and seven (7) copies of our Return to Petition for Supersedeas Relief with Request for Expedited Decision filed by Harleysville in regards to the above referenced matter along with the original and seven (7) copies of our Affidavit in Compliance with Rule 240(c), S.C.A.C.R. Also enclosed is our Proof of Service. We would ask that you file the original and return clocked copies to us in the self-addressed, stamped envelope also enclosed herewith.

By copy of this letter I am serving same on all counsel of record.

With kindest regards, I am

Sincerely,  
THOMPSON & HENRY, P.A.

  
John P. Henry

PCT/sbh  
cc: Brian P. Crotty, Esquire  
Laura J. Evans, Esquire  
Enclosures as noted.

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

**RECEIVED**

**JUN 20 2017**

**SC Court of Appeals**

**APPEAL FROM HORRY COUNTY  
Court of Common Pleas**

Larry B. Hyman, Jr., Circuit Court Judge

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Appellate Case No. 2017-001272  
Trial Court Case Nos. 2009CP2611862, 2009CP2610053

---

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 Arrowhead Country Club Horizontal Property Regime, Defendants

Of whom 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, are Respondents

Harleysville Group Insurance, a Pennsylvania Corporation, Appellant,

v.

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

Of whom Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., a South Carolina Corporation, are Respondents.

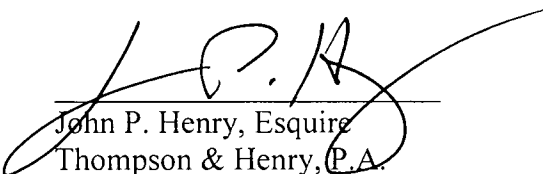
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**AFFIDAVIT IN COMPLIANCE WITH RULE 240(c), S.C.A.C.R.**

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Personally appeared before me, John P. Henry, and upon being duly sworn testified as follows:

1. I am the attorney for the Respondents as captioned above and file this Affidavit in support of the Respondents' position in compliance with Rule 240(c), S.C.A.C.R.
2. Attached hereto as Exhibit A is a true and correct copy of the supplemental payment provision which is contained in the Harleysville policies, the subject of this action (See p. 4; Section 3(e)(6))

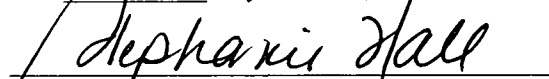


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John P. Henry, Esquire  
Thompson & Henry, P.A.  
1300 Second Avenue, 3<sup>rd</sup> Floor  
Conway, SC 29526  
(843)248-5741  
Attorney for Respondents

Sworn to and subscribed before me

this 19<sup>th</sup> day of June, 2017.



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Notary Public for South Carolina  
My commission expires 1-20-27

- (4) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste;"

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.

### 3. Defense of Claims or Suits

- a. We will have no duty to defend any claim or "suit" that any other insurer has a duty to defend. If we elect to join in the defense of such a claim or "suits," we will pay all expenses we incur.
- b. We will have the right and duty to defend any "suit" for damages which are payable under Coverages A or B (including damages wholly or partly within the "retained limit") but which are not payable by a policy of "underlying insurance," or any other available insurance, because;
- (1) Such damages are not covered; or
- (2) The "underlying insurance" has been exhausted by the payment of claims.
- c. We may investigate and settle any claim or "suit" in b. above at our discretion.
- d. Our right and duty in b. above end when we have used up the "applicable limit of insurance" in the payment of judgements or settlements.
- e. We will pay with respect to any claim or "suit" we defend in b. above:
- (1) All expenses we incur.
- (2) The cost of appeal bonds and bonds to release attachments, but only for bond amounts within the "applicable limit of insurance." We do not have to furnish these bonds.
- (3) All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to \$100 a day because of time off from work.
- (4) All costs taxed against the insured in the "suit."

- (5) Pre-judgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the "applicable limit of insurance," we will not pay any pre-judgment interest based on that period of time after the offer.

~~(6) All interest on the full amount of any judgment that accrues after entry of the judgment and before we have:~~

- ~~(a) paid, or offered to pay; or~~  
~~(b) deposited in court;~~

~~the part of the judgment that is within the applicable limit of insurance.~~

These payments will not reduce the limits of insurance.

In any jurisdiction outside the United States of America (including its territories and possessions), Puerto Rico or Canada where we may be prevented by law or otherwise from carrying out this agreement:

1. You must arrange to investigate, defend or settle any claim or "suit."
2. You will not make any settlement without our consent.
3. We will pay expenses incurred with our consent.

### SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:
  - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
  - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
  - c. An organization other than a partnership or joint venture, you are an insured.
2. Each of the following is also an insured:
  - a. As respects the "auto hazard:"
    - (1) Anyone using an "auto" you own, hire or borrow including any person or organization legally responsible for such use provided it is with your permission; and
    - (2) Any of your executive officers, directors, partners, employees or stockholders, operating an "auto" you do not own, hire or borrow while it is being used in your business.

**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

**RECEIVED**

JUN 20 2017

**SC Court of Appeals**

---

Appellate Case No. 2017-001272  
Trial Court Case Nos. 2009CP2611862, 2009CP2610053

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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 Arrowhead Country Club Horizontal Property Regime, Defendants

Of whom 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, are Respondents

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Of whom Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., a South Carolina Corporation, are Respondents.

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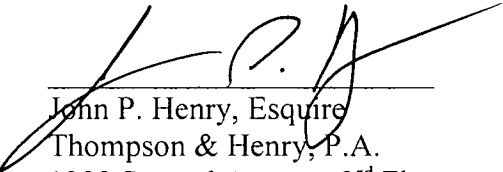
PROOF OF SERVICE

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I certify that I served a copy of the Return to Harleysville's Petition for Writ of Supersedeas and Affidavit in Compliance with Rule 240(c), S.C.A.C.R. on Brian P. Crotty, Esquire and Laura J. Evans, Esquire by depositing a copy of it in the United States Mail, postage prepaid on June 19, 2017, addressed to:

Laura J. Evans, Esquire  
Smith Moore Leatherwood, LLP  
25 Calhoun Street, Suite 250  
Charleston, South Carolina 29401

Brian P. Crotty, Esquire  
Nelson Mullins Riley & Scarborough, LLP  
1320 Main Street, 17<sup>th</sup> Floor  
Columbia, SC 29201



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John P. Henry, Esquire  
Thompson & Henry, P.A.  
1300 Second Avenue, 3<sup>rd</sup> Floor  
Conway, SC 29526  
(843)248-5741  
Attorney for Respondents