THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Special Referee

Appellate Case No. 2017-001272
Trial Court Case Nos. 2009-CP-26-10053 & 2009-CP-26-11862

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.

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.

Reply in Support of Petition for Supersedeas Relief

Harleysville Group Insurance ("Harleysville") in accordance with Rules 240(c) and 241 of the South Carolina Appellate Court Rules hereby submits this Reply in support of its Petition for Supersedeas.

I. Harleysville's Petition for Supersedeas Relief Complies With Rule 241.

As an initial matter, Respondents assert that the Harleysville's petition should be denied for alleged failure to comply with certain technical aspects of Rule 241, SCACR. Harleysville responds that it has meaningfully and effectively complied with Rule 241's requirements under the present circumstances.

A. Application to the lower court

Rule 241(d)(1), SCACR, requires that "[e]xcept where extraordinary circumstances make in impracticable, an application ... for supersedeas must first be made to the lower court ... which entered the order or decision on appeal." Respondents assert that Harleysville has failed to show such extraordinary circumstances. (Respondents' Return at p. 3). Here, Harleysville's petition is seeking permission from this Court to deposit funds, where Harleysville has twice been denied this specific relief by the trial court, because only such a deposit would ensure Harleysville the availability of the relief requested in its appeal should Harleysville prevail. Having been denied

this exact same request by the trial court in both of the appealed orders, the "extraordinary circumstances" showing the impracticability of a third request to the trial court are self-evident.

B. Certified orders

Rule 241(d)(3), SCACR, provides that "[a] certified copy of the lower court's ... ruling must be included." While acknowledging that the electronically filed copies of the orders that were attached to Harleysville's petition are authentic, Respondents contend that the orders have not been "certified." (Respondents' Return at p. 3). The orders in question were both filed with the Horry County Clerk of Court following that county becoming part of South Carolina's new E-Filing system. As such, each and every page of the orders bears a mark showing that it has been electronically filed and such orders are readily available to all with access to the new E-Filing system. Harleysville requests that this Court accept electronically filed orders as the equivalent of "certified" non-electronically filed orders.[1] Alternatively, Harleysville will gladly supplement its filing with additional paper copies of the electronically filed orders that have been reviewed and stamped by the Horry County Clerk of Court, although such an exercise appears to be a waste of the Clerk's resources given the new technology our court system has implemented.

C. Client Verification

Rule 241(d)(3), SCACR, also provides that the supersedeas petition be "verified by the client." This requirement tracks Rule 241(4)(A)'s requirement that "[I]f the facts are subject to dispute, the petition shall be supported by affidavit or other sworn statements." Respondent

[1] Under Respondents' view, even where orders are electronically filed, a party would be required to print out a paper copy of the order and physically take it to the Clerk of Court in the County where it is filed. That Clerk of Court would then, using the E-Filing system (because that is where the filed order exists now), check to make sure the paper copy (which bears the e-filing mark on every page) is accurate, and then stamp it as a "certified copy." This antiquated procedure is no longer needed under the new E-Filing system.

contends that the lack of verification warrants denial of the petition. (Respondents' Return at pp. 3-4). This matter, however, involves no facts which would require verification by the client. Rather, it is a purely legal issue of whether leave to deposit with the court was improperly denied and verification by the client serves no purpose because the record is fully established by the trial court's orders.

II. The Supersedeas Relief Requested is Appropriate.

Respondents contend that Harleysville is attempting to use supersedeas relief for an improper purpose. Specifically, Respondents contend that supersedeas can only be used to suspend or stay matters decided in an order. (Respondents' Return at pp. 4-5). Harleysville does not agree that this Court is so limited. In addition to providing for stays and preserving the status quo where appropriate, "The purpose of a supersedeas" is also 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 ... to prevent a contested issue from becoming moot.***" Rule 241(c)(2), SCACR.

In this situation, under the existing case law, even if Harleysville is successful in its appeal, that success might be meaningless because absent an actual deposit by Harleysville, it might be denied the effect of stopping the further accrual of post-judgment interest. Under our existing case law, 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). Thus, post-judgment interest continues to accrue until the funds have "been properly deposited with the court." *Id.* Harleysville has been denied the ability to make a proper deposit.

Harleysville contends that the proper remedy if it is ultimately successful in this appeal is that no interest should be payable from the date that Harleysville argued to the trial court its motion for leave to deposit showing its immediate ability to make the deposit. Respondents, in their Return, acknowledge the appropriateness of this remedy. (Respondents' Return at p. 4) (stating "Harleysville'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 Harleysville argued its Motion to Deposit***) (emphasis added)). However, this remedy is not currently set forth in South Carolina's precedent. *See Small v. Pioneer Machinery, Inc.*, 330 S.C. at 65, 496 S.E.2d 884, 886. Thus, Harleysville seeks supersedeas relief to address this unclear point.

Additionally, it is Harleysville's position that the Court of Appeals should not be bound by the Trial Court's erroneous orders denying leave to deposit. Rule 67 does not limit the granting of leave to the *trial* court. Rather, should this Court determine that leave to deposit should be granted, Harleysville should be granted such leave, with the effect of at least stopping the accrual of post-judgment interest as of the date of its actual deposit. Whether the accrual of post-judgment interest should have stopped as of the hearing date could then be resolved in this appeal.

III. Granting Leave to Deposit is a Ministerial Act.

Respondents' contend that granting leave to deposit under Rule 67, SCRCP in these circumstances is not a ministerial act, but one that requires an exercise of discretion by the court. (Respondents' Return at p. 5). While the exercise of discretion may be appropriate in interpleader

situations to determine if a deposit is necessary and appropriate, it is not necessary where the deposit is a judgment sum pending an appeal of that judgment. Significantly, Rule 67 makes no mention of this being a discretionary decision by the court, that can be denied for whatever reason the court may have, or no reason at all. Rather, Rule 67 merely requires that the depositing party provide notice to all other parties and obtain leave of the court prior to making the deposit. 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.

IV. Harleysville is not Required to Deposit Portions of the Judgment That are Outside its Coverage.

Respondents contend that Harleysville's policies require it to pay the ***entire*** underlying judgment amounts to avoid further obligation for post-judgment interest. (Respondents' Return at pp. 5-6). To the contrary, the Harleysville policies specifically contemplate that Harleysville may avoid all further obligation for post-judgment interest by depositing the amount ***it is responsible*** to pay with the court. The policies specifically provide 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 the part*** **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.[2] The "part of

[2] Harleysville waives no positions with regard to the amount of the judgments or the interest owed and preserves all of its arguments with respect to those positions.

the judgment that is within the applicable limits" is the portion of the judgments for which coverage has been determined to apply.

Respondents further contend that, because cross-petitions for rehearing remain pending before the Supreme Court, the amount of Harleysville's coverage has not been determined rendering Harleysville unable to make a deposit. (Respondents' Return at pp. 5-6). This is wholly incorrect and directly contravenes the cases of *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (S.C. 1995) and *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000), which clearly hold that a judgment debtor can deposit the existing judgment amount into the court ***pending the debtor's own appeal***.

The special referee in the these actions issued final judgments determining the specific amounts covered by Harleysville's policies, and the Supreme Court then modified and affirmed those orders. 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.

Finally, Respondents claim that Harleysville cannot make a deposit under Rule 67 that is "contingent" in that it "keep[s] the money from Respondents." (Respondents' Return at p. 6). This ignores the fact that 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). Rule 67 addresses deposits *with the court*, not payments *to the opposing party*, and as such, the Rule recognizes the fact that the depositing party my still contest the other party's entitlement to all or part of the deposited funds. Thus, the fact that Harleysville may be entitled to reimbursement of some or all of the deposited amount does not make a deposit impermissible "contingent."

CONCLUSION

For the reasons above, as well as those stated in Harleysville's petition, Harleysville respectfully requests that its petition be granted and that it be granted leave to make the deposit.

Respectfully submitted,

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June 26, 2017

THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
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Larry B. Hyman, Jr., Circuit Court Judge

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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:

Reply in Support of Petition for Supersedeas Relief

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June 26, 2017

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June 26, 2017

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals
P.O. Box 11629
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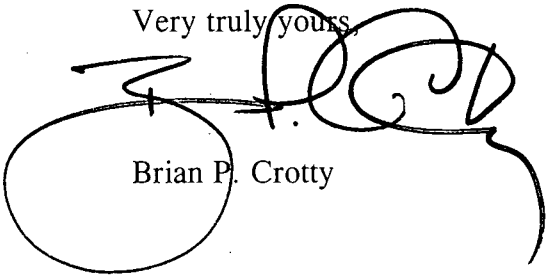
RE: Harleysville v. Heritage (Arrowhead)
Appellate Case No. 2017-001272

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Reply in Support of Petition for Supersedeas Relief 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.

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

Very truly yours,



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Enclosures
cc: John P. Henry, Esquire
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