

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. 2009-CP-26-10053 & 2009-CP-26-11862

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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 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.

Appellant's Initial Brief

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Statement of Issues on Appeal

1. Did the trial court err in denying Harleysville leave to deposit where Harleysville fully complied with the requirements of Rule 67, SCRPC?
2. Did the trial court err by considering the fact that a Rule 67 deposit stops the accrual of post-judgment interest against the judgment debtor as a factor in determining whether leave to deposit should be granted?
3. Did the trial court err in considering the timing of Harleysville's motion to deposit as a factor in determining whether leave to deposit should be granted?
4. Did the trial court err in holding that South Carolina's existing precedent regarding Rule 67 deposits was inapplicable to this matter because this matter involves insurance policies?
5. Did the trial court err in holding that allowing Harleysville to deposit the Judgment Sums would be in contravention with the provisions of Harleysville's policies?
6. Did the trial court err in holding that a deposit cannot be allowed because there is no final determination of the part of the underlying judgments for which Harleysville is liable?
7. Did the trial court err in holding that Harleysville's motion to deposit was impermissibly conditional and improperly prevented Respondents from immediately accessing the deposited funds?
8. Did the trial court err in holding that a deposit by Harleysville would improperly reduce a post-judgment interest rate set forth in its policy?
9. Did the trial court err in holding that a denial of the motion to deposit was proper because allowing a deposit removes Harleysville's incentive to pay the judgment?

Statement of the Case

This appeal comes from the denial of a motion by Harleysville Group Insurance (“Harleysville”) under Rule 67, SCRCF, to deposit with the trial court certain judgment sums along with an amount sufficient to cover accrued post-judgment interest for which Harleysville may be responsible. This appeal involves two declaratory judgment actions initiated by Harleysville to determine the existence and extent of Harleysville’s coverage relating to underlying construction defect cases against Harleysville’s insureds. The first underlying construction defect matter consisted of 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 (the “Riverwalk Actions”). The second underlying construction defect matter is 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) (the “Magnolia North Action”).

On January 22, 2009, judgments were entered against Harleysville’s insureds in the Riverwalk Actions in the total amount of \$5,500,000. (Verdict Forms in Riverwalk Actions, dated January 22, 2009; R. ____). 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. (Order Denying Defendants’ Post-Trial Motions and Granting Setoff in Riverwalk Actions, filed April 14, 2009; R. ____).

On May 20, 2009, a judgment was entered against Harleysville’s insureds in the Magnolia North Action in the total amount of \$8,500,000. (Verdict Form in Magnolia North Action dated May 20, 2009; R. ____). 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. (Order Granting Defendants' Motion for Set Off in Magnolia North Action, filed December 1, 2009, R. ____).

Harleysville filed a declaratory judgment action relating to the Riverwalk Actions on October 14, 2009 (Case No. 2009-CP-26-10053) ("Riverwalk DJ Action"). Harleysville filed a separate declaratory judgment action relating to the Magnolia North Action on December 10, 2009 (Case No. 2009-CP-26-11862) ("Magnolia North DJ Action"). 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, sought an allocation of those damages into covered or non-covered categories.

The two declaratory judgment actions were consolidated and, on October 21, 2010, the matters were referred to the Honorable John M. Milling as Special Referee. On March 5, 2013, the Special Referee filed two Orders disposing of the Riverwalk and Magnolia North declaratory judgment actions. (Final Order in Riverwalk DJ Action, filed March 5, 2013; R. ____; Final Order in Magnolia North DJ Action, filed March 5, 2013; R. ____). The Special Referee ruled in the two Orders that Harleysville's 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. (*Id.*) 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 Harleystown in the amount of \$3,044,499.43 in the Riverwalk Actions and \$3,766,593.94 in the Magnolia North Action. (*Id.*) The Special Referee's Orders in the Riverwalk and Magnolia North DJ Actions were appealed to the South Carolina Supreme Court, which consolidated the two appeals.

On January 11, 2017, in Opinion No. 27698, (S.C. Sup. Ct. filed Jan.11, 2017) (Shearouse Adv. Sh. No. 2 at pp. 21-54), the South Carolina Supreme Court affirmed the trial court's judgment of \$3,766,954.00 in the Magnolia North DJ Action against Harleystown and modified the judgment in the Riverwalk DJ Action against Harleystown 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.

On March 7, 2017, Harleystown filed an identical motion in both the Riverwalk and Magnolia North DJ 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, SCRCF, to prevent the further accrual of post-judgment interest. (Motion for Leave to Deposit Judgment Amounts with the Court, filed March 7, 2017; R. ____). In addition to depositing these Judgment Sums, Harleystown indicated that its deposit would include an amount sufficient to cover accrued post-judgment interest as of the date of the deposit.¹ (*Id.*) Respondents filed their opposition to this motion on March 22, 2017, and Harleystown filed a reply in support of its motion on March 27, 2017. (Memorandum in Opposition to Motion for Leave to

¹ In its motion, Harleystown 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. This includes all arguments Harleystown could assert that it owes no judgment or interest to the Respondents. Thus, Harleystown did not and has not waived 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.

Deposit Judgment Amounts with the Court, filed March 22, 2017; R. ____; Reply in Support of Motion for Leave to Deposit Judgment Amounts with the Court, filed March 27, 2017; R. ____).

On March 28, 2017, a hearing on Harleysville's motions was held before the Honorable Larry B. Hyman, Jr. (Hearing Transcript of March 28, 2017; R. ____). On April 26, 2017, the trial court filed an Order addressing both cases which denied Harleysville leave to make the deposit ("the April 26, 2017 Order"). (Order denying leave to deposit funds pursuant to Rule 67, filed April 26, 2017; R. ____).

On April 27, 2017, Harleysville filed motions to alter or amend the April 26, 2017 Order. (Motion to Alter or Amend the Order Denying Leave to Deposit Funds Pursuant to Rule 67, filed April 27, 2017; R. ____). On May 1, 2017, Respondents filed an opposition to Harleysville's motion which alternatively served as a Rule 59(e) motion by Respondents. (Response to Motion to Alter or Amend the Order Denying Leave to Deposit Funds Pursuant to Rule 67 and Rule 59(e) Motion by the Judgment Creditors, filed May 1, 2017; R. ____). On May 25, 2017, a hearing was held on Harleysville's motions to alter or amend the April 26, 2017 Order. (Hearing Transcript of May 25, 2017; R. ____). On May 31, 2017, the trial court entered an Amended Order in the Magnolia North DJ Action which set forth additional grounds for denying Harleysville's motion to deposit ("the May 31, 2017 Order").² (Amended Order denying Harleysville's Motion to deposit funds under Rule 67, SCRCF, filed May 31, 2017; R. ____). On May 31, 2017, Harleysville filed Notices of Appeal in both the Riverwalk and Magnolia North DJ Actions as to both the April 26, 2017 Order and the May 31, 2017 Order. On that same day, Harleysville filed a motion to

² The May 31, 2017 Order did not specifically withdraw or overrule any of the grounds set forth in the April 26, 2017 Order. Rather, it "amended" the April 26, 2017 Order by setting forth additional grounds for the denial. Because it is unclear whether the trial court intended to withdraw or overrule the grounds set forth in the April 26, 2017 Order, Harleysville has appealed both Orders.

consolidate the two appeals which was granted by this Court on June 12, 2017. On June 7, 2017, the trial court filed the May 31, 2017 Order in the Riverwalk Action. (Amended Order denying Harleysville's Motion to deposit funds under Rule 67, SCRCF, filed June 7, 2017; R. ____). Harleysville initially thought that the June 7, 2017 filing was a replacement of the May 31, 2017 Order to correct some typographical error. Thus, 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 understands that the June 7, 2017, filing was merely a duplicative filing of the May 31, 2017 Order (previously filed only in the Magnolia North DJ Action) in the Riverwalk DJ Action. Thus, on June 29, 2017, Harleysville filed a Second Amended Notice of Appeal to reflect that its appeal is from the April 26, 2017 Order, the May 31, 2017 Order, and the June 7, 2017 Order. Because the May 31, 2017 Order and the June 7, 2017 Order are identical in content, they will be collectively referred to as "the May 31, 2017 Order."

Statement of the Facts

As explained in the above Statement of the Case, the judgments against Harleysville's insureds in the underlying Riverwalk and Magnolia North Actions, after setoffs were applied, were, respectively, \$4,471,178.31 and \$6,968,936.85. Harleysville, however, is not responsible for all of those judgment amounts. Rather, the trial court in the Riverwalk and Magnolia North DJ Actions determined that a "time-on-the risk" analysis applied as to the actual damages for defective construction in those cases. (Final Order in Riverwalk DJ Action, filed March 5, 2013, at pp. 44-47; R. ____; Final Order in Magnolia North DJ Action, filed March 5, 2013, at pp. 41-44; R. ____). The Supreme Court extended the application of the "time-on-the-risk" to include the loss of use actual damages in the Riverwalk DJ Action. *See* Opinion No. 27698, (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at pp. 21-54). 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 entered 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.

While cross-petitions for rehearing remain pending before the South Carolina Supreme Court in the appeals of the final Orders in the DJ Actions, Harleysville sought leave of the trial court to deposit the Judgment Sums with the court. In addition to seeking to deposit the Judgment Sums, Harleysville also sought to include in its deposit, an amount sufficient to cover the accrued post-judgment interest as of the date of the deposit based on Respondents' calculations of that interest.³ (Motion for Leave to Deposit Judgment Amounts with the Court, filed March 7, 2017, at

³ Harleysville does not concede that Respondents' calculations of the accrued post-judgment interest are correct. Rather, Harleysville's position as to the potential amount of post-judgment interest and the methodology for making the post-judgment interest calculations based on the existing Orders in the Riverwalk and Magnolia North DJ Actions differs substantially from Respondents. However, for the purposes of depositing the still-contested judgment sums, Harleysville was willing and able to deposit an amount sufficient to cover the largest possible total amount Harleysville could be ultimately determined to owe based on the then existing judgments.

pp. 3-4; R. ____). In addition, Harleysville also offered to deposit the additional sum of \$2,500.00 representing possible recoverable costs. (*Id.* at p. 4; R. ____).

In accordance with Rule 67, SCRCF, Harleysville directed its request to deposit the Judgment Sums to the trial court, as leave of the court is required prior to a party being able to make the deposit. Additionally, as required by Rule 67, Harleysville provided notice to Respondents. At the hearing held on March 28, 2017, Harleysville reiterated its willingness to deposit the Judgment Sums and an amount sufficient to cover accrued post-judgment interest with the court once leave to make the deposit was granted. (Hearing Transcript of March 28, 2017 at p. 5; R. ____).

The trial court, however, refused to grant Harleysville leave to deposit and denied Harleysville's motion. (Order denying leave to deposit funds pursuant to Rule 67, filed April 26, 2017; R. ____; Amended Order denying Harleysville's Motion to deposit funds under Rule 67, SCRCF, filed May 31, 2017, R. ____). At the hearings on the motions, the trial court improperly focused on the fact that a deposit of the Judgment Sums by Harleysville would stop the further accrual of post-judgment interest at the statutory rate (currently 7.75%) against Harleysville, and that if leave to deposit was granted, the amount deposited would likely earn the much lower rate of approximately 1.5%. (Hearing Transcript of March 28, 2017, at p. 5; R. ____; Hearing Transcript of May 25, 2017, at p. 17; R. ____). Further, the trial court erroneously stated that it considered the fact that Respondents wanted to continue to benefit from the higher statutory post-judgment interest rate (as opposed to the interest rate the deposited funds might earn if deposited in an interest bearing account) to be "a heck of a consideration" in its analysis of whether leave to make the deposit should be granted. (Hearing Transcript of May 25, 2017, at p. 17, R. ____).

In the April 26, 2017 Order which initially denied the motion to deposit, the trial court based its denial on several grounds. (Order denying leave to deposit funds pursuant to Rule 67, filed April 26, 2017; R. ____). First, the trial court stated that South Carolina’s existing precedent on Rule 67 deposits was inapplicable because this case involved an insurance policy. (*Id.* at pp. 5-7; R. ____). Next, the trial court concluded that the finding in *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 64, 496 S.E.2d 884, 885 (Ct. App. 1998)—that, where the judgment debtor complied with the terms of Rule 67, it would be an abuse of discretion to refuse to allow the funds to be deposited—was inapplicable in this matter because, in the “sole discretion” of the trial 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.” (Order denying leave to deposit funds pursuant to Rule 67, filed April 26, 2017 at pp. 8-10; R. ____).

The May 31, 2017 Order was entered by the trial court in response Respondents’ request that the trial court “add other sustaining grounds for the Court’s ruling” and “buttress” the prior April 26, 2017 order. (Response to Motion to Alter or Amend the Order Denying Leave to Deposit Funds Pursuant to Rule 67 and Rule 59(e) Motion by the Judgment Creditors, filed May 1, 2017, at pp. 4-5; R. ____). While the May 31, 2017 Order “amended” the April 26, 2017 Order, it did not expressly withdraw or overrule the stated grounds for denial in the April 26, 2017 Order. (Amended Order denying Harleysville’s Motion to deposit funds under Rule 67, SCRCF, filed May 31, 2017; R. ____). The May 31, 2017 Order added several additional reasons for the trial court’s denial of the motion to deposit, all of which had been disputed and debunked by Harleysville in its Reply to Respondent’s opposition to Harleysville’s motion to deposit. (Reply in Support of Motion for Leave to Deposit Judgment Amounts with the Court, filed March 27, 2017; R. ____). First, the May 31, 2017 Order concluded that allowing the requested deposit would

contravene the provisions of Harleysville's policies. (Amended Order denying Harleysville's Motion to deposit funds under Rule 67, SCRCPP, filed May 31, 2017 at pp. 6-10; R. ____). Second, the May 31, 2017 Order concluded that the proper amount to be deposited was unknown because the petitions for rehearing remain pending before the Supreme Court. (*Id.* at p. 11; R. ____). Third, the May 31, 2017 Order found that Harleysville's motion to deposit was improper because it placed limitations on the disbursement of the deposited funds and did not allow Respondents immediate use of the deposited funds. (*Id.* at pp. 11-13; R. ____). Fourth, the May 31, 2017 Order interpreted Harleysville's policies as requiring it to pay the statutory post-judgment interest rate and held that allowing a deposit (which would cease the accrual of post-judgement interest) would have the effect of changing the rate set forth in the policy. (*Id.* at p. 13; R. ____). Finally, the May 31, 2017 Order concluded that if Harleysville were permitted to deposit the Judgment Sums with the court, it would "eliminate any incentive it has to pay the judgment." (*Id.* at p. 14; R. ____).

Standard of Review

The April 26, 2017 Order 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." (Order denying leave to deposit funds pursuant to Rule 67, filed April 26, 201, at p. 8; R. ____) (emphasis added). Thus, the trial court mistakenly believed the decision whether to allow a deposit was in its "sole discretion" and that it could deny the motion if the trial court did not want Harleysville to be able to avoid the further accrual of post-judgment interest. Contrary to the trial court's assertion, Harleysville did not make any such statement in its motion, its reply in support of its motion, or its proposed order. Rather, Harleysville only acknowledged that "leave of court" is required under Rule 67 prior to making any deposit, that this "[l]eave 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* Motion for Leave to Deposit Judgment Amounts with the Court, filed March 7, 2017, at pp. 4-5; R. ____; Reply in Support of Motion for Leave to Deposit Judgment Amounts with the Court, filed March 27, 2017, at p. 7; R. ____; Harleysville’s Proposed Order Granting Leave to Deposit Funds with the Trial Court, submitted April 3, 2017; R. ____) (*citing Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 64, 496 S.E.2d 884, 885 (Ct. App. 1998) (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 actual standard of review for an order granting or denying a motion to deposit judgment sums pursuant to Rule 67 is “abuse of discretion.” *S.C. DOT v. First Carolina Corp.*, 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006). Thus, “[t]he granting of leave to deposit money with the court pursuant to Rule 67, SCRCP is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion.” *Id.*

Significantly, “abuse of discretion” as a standard is different from a scenario where a ruling is within the “sole discretion” of the trial court. Where a matter is within the “sole discretion” of the trial court, it may only be reversed on appeal if that decision is wholly unsupported by the evidence. *State v. Stanko*, 402 S.C. 252, 271, 741 S.E.2d 708, 718 (2013) (holding that the determination of whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence); *State v. Dickerson*, 395 S.C. 101, 115, 716 S.E.2d 895, 903 (2011) (holding that determinations of whether a juror is qualified to serve on a panel are left to the sole discretion of the circuit court and will not be reversed unless wholly unsupported by the evidence). Another example of a trial court having “sole discretion” is in the remittitur context with respect to an unduly liberal verdict. There,

only the trial court may remit on such a basis, and the appellate court lacks the authority to remit on such basis. In contrast, “[a]n abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support.” *Id.*, citing *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). A trial court's ruling has also been characterized as constituting an abuse of discretion “when the ruling is manifestly arbitrary, unreasonable, or unfair.” *Maybank v. BB&T Corp.*, 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016). Additionally, the consideration of an improper factor by a trial court in its analysis has been held to be an abuse of discretion. *See Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) (holding that the trial court abused its discretion by considering an improper factor in sentencing a defendant). Thus, in deciding whether to grant leave to deposit under Rule 67, SCRCP, a trial court may not arbitrarily or unreasonably deny leave, nor can the trial court impose improper factors in its analysis as to whether leave should be granted.

Argument

I. The Trial Court’s Refusal to Grant Harleysville Leave to Deposit the Judgment Sums Constituted an Abuse of Discretion.

A. Harleysville Complied with the requirements of Rule 67.

The trial court’s refusal to grant Harleysville leave to deposit the Judgment Sums with the court constituted an abuse of discretion. 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 (1931) (noting that this had been the law “from the earliest decisions down to th[at] time.”). Additionally, South Carolina’s appellate courts have expressly approved the practice of depositing judgment sums with the clerk of court, and have specifically held that “a judgment debtor’s deposit of funds into the court pending his own appeal prevents further accrual

of interest.” *Russo v. Sutton*, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995); *see also Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 619, 529 S.E.2d 566, 568 (Ct. App. 2000); *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 65, 496 S.E.2d 884, 885 (Ct. App. 1998). As our appellate courts have explained, allowing the deposit of judgment sums with the court to have the effect of ceasing the further accrual of post-judgment interest is warranted because such deposits “encourage[] the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal.” *Id.* Once the judgment amount and accrued post-judgment interest have been deposited into the Court, the judgment creditors are assured that sufficient funds will be available for the satisfaction of the judgment avoiding the need for supplementary proceedings or an execution on the judgment. Additionally, by making the deposit, the judgment debtor is deprived of the use of the funds.

Rule 67, SCRCF, provides the mechanism for a judgment debtor to make a deposit with the court while an appeal of the judgment in question is pending. Specifically, Rule 67 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, SCRCF. Thus, Rule 67 has two requirements: (1) notice to the other parties; and (2) obtaining leave of the court prior to depositing the funds. *Id.*, *see also Russo*, at 444-445, 454 S.E.2d at 897 (holding that judgment debtor who deposited funds without providing prior notice to judgment creditor and without obtaining leave of the court did not comply with Rule 67, and, therefore, did not stop the accrual of post-judgment interest).

Here, Harleysville has complied with the requirements of Rule 67 by giving notice to all parties and requesting leave of the trial court to deposit the funds. The trial court's refusal to grant such leave under the circumstances present here constitutes an abuse of discretion. *Small v. Pioneer Machinery, Inc.*, 496 S.E.2d 884 (Ct. App. 1998) (affirming a trial court decision where "[t]he 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.")

B. The fact that a Rule 67 deposit stops the accrual of post-judgment interest is not a proper factor to be considered in determining whether leave to deposit should be granted.

It was improper for the trial court to consider as a factor in its analysis the fact that Respondents would no longer benefit by the accrual of post-judgment interest at the statutory rate. The trial court noted the significant difference between the statutory post-judgment interest rate and the rate paid by a bank where the deposited funds would likely be placed. (Hearing Transcript of March 28, 2017, at p. 5; R. ____). The trial court also expressed its view that loss of accruing post-judgment interest was a significant consideration in its determination as to whether leave should be granted. (Hearing Transcript of May 25, 2017, at p. 17, R. ____). These improper considerations completely ignore the rationale set forth in *Russo* and reaffirmed in *Duval* and *Small*, supporting South Carolina's rule that a deposit by a judgment creditor stops the accrual of post-judgment interest. If courts are permitted to deny leave to deposit simply to prevent a judgment creditor from avoiding the further accrual of post-judgment interest, then judgment debtors will likely never be granted leave to deposit. The trial court's consideration of this improper factor constituted an error of law and rendered its denial of leave to deposit arbitrary, unreasonable, and unfair. *See S.C. DOT v. First Carolina Corp.*, 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006) (holding that "[a]n abuse of discretion occurs when the ruling is based on an error

of law or a factual conclusion without evidentiary support.”); *Maybank v. BB&T Corp.*, 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016) (holding that a trial court's ruling constitutes an abuse of discretion “when the ruling is manifestly arbitrary, unreasonable, or unfair.”).

C. The timing of Harleysville’s motion has no bearing on whether leave to deposit should be granted.

The trial court’s April 26, 2017 Order held that leave to deposit should be denied because Harleysville did not make this motion at some earlier point in the case, concluding that “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.” (Order denying leave to deposit funds pursuant to Rule 67, filed April 26, 2017, and pp. 9-10; R. ____). 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. at p. 9*; R. ____). 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 all accrued post-judgment interest for which it is responsible 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.

Additionally, any delay in requesting leave of court to deposit does nothing to take away from the rationale supporting allowing the deposit. The April 26, 2017 Order misconstrues the encouragement of the debtor to pay as meaning paying the judgment sums to the creditor. This is not the case. The entire purpose of a Rule 67 deposit in this context is to stop the accrual of post-judgment interest while an appeal contesting the judgment remains pending. Whether the judgment must be paid to the creditor remains at issue. The “encouragement” that supports a Rule 67 deposit, is encouraging the judgment debtor to place the contested funds with the court. The result of such a deposit is that, if and when the appeal ends favorably for the judgment creditor, the funds are readily available in the court’s account, and the judgment creditor need not take any efforts to enforce and collect on the judgment and need not worry about whether the debtor will have funds available to pay the obligation. Thus, the supporting rationale behind Rule 67 deposits is just as viable at this time, as it was at the inception of the appeal, and the timeliness of Harleysville’s motion is wholly irrelevant.

The trial court’s imposition of a “timeliness” factor into the Rule 67 analysis was an abuse of discretion. *See Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) (holding that the trial court abused its discretion by considering an improper factor in sentencing a defendant). The imposition of the improper timeliness factor, and the trial court’s misplaced reliance on that factor as a basis for its denial of the motion establishes that the trial court’s denial of leave was based on an error of law, and was manifestly arbitrary, unreasonable, and unfair under these circumstances.

D. South Carolina's precedent on Rule 67 and deposits by judgment debtors during the pendency of their appeal are fully applicable to insurers such as Harleysville.

In both of its orders denying leave to deposit, the trial court incorrectly concluded that the entirety of South Carolina's established jurisprudence on deposits under Rule 67 by judgment debtors while their appeal was pending was distinguishable from this matter because the existing cases did not involve "an insurance policy." (Order denying leave to deposit funds pursuant to Rule 67, filed April 26, 2017, at p. 6; R. ____; Amended Order denying Harleysville's Motion to deposit funds under Rule 67, SCRCF, filed May 31, 2017, at p. 5; R. ____). This was also an error of law rendering the denial of leave to deposit an abuse of the trial court's discretion.

The fact that this matter involves coverage under an insurance policy has no distinguishable effect on a Rule 67 analysis. As an initial matter, the trial court was simply incorrect in its conclusion that South Carolina's existing precedent on this issue did not involve insurance policies. In the *Duval* case, the depositing judgment debtor was an insurance company who was permitted to stop the accrual of post-judgment interest on a judgment against it based on its breach of a life insurance policy. *Duval*, 339 S.C. at 618, 529 S.E.2d at 567. Additionally, 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 not 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, SCRCF, while its appeal remains pending. *Russo*, 317 S.C. at 444, 454 S.E.2d at 896 ("[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. Thus, the established case law of South Carolina allowing a judgment debtor, such as Harleysville, to make a deposit with the court while its appeal remains pending in order to stop the accrual of post-judgment interest is entirely applicable to this matter and it was an abuse of discretion for the trial court to find otherwise.

II. Depositing the Covered Judgment Sums is Fully Consistent with Harleysville's Policies.

The May 31, 2017 Order concludes that allowing a deposit with the court would be in contravention with Harleysville's obligations under its policies. (Amended Order denying Harleysville's Motion to deposit funds under Rule 67, SCRPC, filed May 31, 2017, at pp. 5-10; R. ____). This is incorrect and overlooks both the plain language of the policies and the fact that the trial court previously entered judgments against Harleysville that established the amounts of the underlying judgment against the insureds for which Harleysville was responsible. The May 31, 2017 Order relies on the cases of *Turner Coleman, Inc. v. Ohio Constr. & Eng., Inc.*, 272 S.C. 289, 251 S.E.2d 738 (1979), and *Renaissance Enterprises v. Ocean Resorts*, 334 S.C. 324, 513 S.E.2d 617 (1999), for the proposition that a Rule 67 deposit cannot be used to affect the legal or contractual relationship of the parties. (Amended Order denying Harleysville's Motion to deposit funds under Rule 67, SCRPC, filed May 31, 2017, at p. 5; R. ____). While this proposition is correct, it is not applicable in this matter, as a deposit by Harleysville of the amount of the judgments for which it is responsible is fully consistent with the terms of its policies, which specifically provide that such action by Harleysville has the effect of stopping its obligations with regard to post-judgment interest.

The plain language of the insurance contracts' Supplementary Payments 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 the part of the judgment that is within the applicable limit of insurance.*” (Trial Exhibit 19 – Harleysville Four Policy Forms; R. ____) (emphasis added). This provision provides three separate methods for Harleysville to stop any obligation it has to pay post-judgment interest: (1) Harleysville could pay the judgment creditor the part of the judgment covered by Harleysville’s policies; (2) Harleysville could offer to pay the judgment creditor the part of the judgment covered by Harleysville’s policies; or (3) Harleysville could deposit into the court the part of the judgment covered by Harleysville’s policies. Significantly, all three options are qualified by the language “the part of the judgment that is within the applicable limit of insurance.” Thus, the policy language contemplated that part of a judgment might be uncovered and part might be covered by the policy. Therefore, under the policy’s terms, 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.

The trial court erroneously concluded that this provision requires Harleysville (and other insurers) to deposit *both* covered and *uncovered* damages that are within the overall limits of the policy in order to avoid further post-judgment interest obligations. (Amended Order denying Harleysville’s Motion to deposit funds under Rule 67, SCRCp, filed May 31, 2017, at p. 10; R. ____). This conclusion is nonsensical. There is a distinct portion of the underlying judgments for which Harleysville is responsible to pay as covered damages, and there is a distinct portion of the underlying judgments which Harleysville is *not* responsible to pay because it constitutes uncovered damages. The trial court, however, would require Harleysville to deposit both of these amounts, despite having no legal liability to pay the uncovered damages. This is incorrect.

The May 31, 2017 Order cites to cases from other jurisdictions in an attempt to support the faulty conclusion that Harleysville must deposit into court the entire amount of the judgment, to include both covered and non-covered portions, in order to avail itself of the policies' provisions stopping the accrual of post-judgment interest against Harleysville. (*Id.* at pp. 6-10; R. ____). The cited authorities, however, do not support a requirement that an insurer deposit non-covered judgment amounts. Rather, the cited cases all use the words "entire judgment" in an analysis related to how much interest the insurer is liable for under the Supplementary Payment Provisions; *not* how much of the underlying judgment must be deposited into court. The May 31, 2017 Order conflates these two concepts, and ignores two key facts: (1) that "the judgment" within the Supplementary Payment Provisions is clearly qualified to mean "the part of the judgment that is within the applicable limit of insurance;" and (2) that the meaning of "limit of insurance" establishes that it only applies to covered damages.

Specifically, Harleysville's policies provide:

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. . . .
 - i. The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III). . . .

...

SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay . . .

- ...
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of . . . “property damage” included in the “products-completed operations hazard” . . .

- ...
5. Subject to 2. or 3. Above, whichever applies, the Each Occurrence Limit is the most we will pay for . . .

- a. Damages under Coverage A . . .

Because of all . . . “property damage” arising out of any one “occurrence”.

(Trial Exhibit 19 – Harleysville Four Policy Forms; R. ____) (emphasis added). Thus, the plain language of the policy clearly provides that: (1) Harleysville will only pay for damages that are covered by the policy subject to the limit of insurance; and (2) that the limit of insurance is defined as the most Harleysville will pay for damages covered by the policy. The May 31, 2017 Order takes the view that “limit of insurance” in this context is only defined by the numeric amounts stated on the declarations page. This is mistaken. The maximum *potential* amount of insurance available for a claim, as enumerated by the declarations page, is merely the cap on the “limit of insurance.” The fact that damages have to actually be “covered” damages under the policy obviously remains.

III. There is a “Final Judgment” for the Purposes of a Rule 67 Deposit.

The May 31, 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. (Amended Order denying Harleysville’s Motion to deposit funds under Rule 67, SCRCF, filed May 31, 2017, at p 11; R. ____). Specifically, the May 31, 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. (*Id.*) 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, *pending the debtor's own appeal* stops the accrual of interest on the judgment. The May 31, 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.'" (*Id.*). This is incorrect.

Previously, the special referee in the coverage litigation issued final judgments determining the amount of the judgments covered by the policy. Under Rule 201(a), SCACR, these orders were "final judgments" allowing an appeal to be taken. The Supreme Court modified and affirmed those orders. While the cross-petitions for rehearing are pending, Harleysville sought 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 interest – and the fact that the amount of Harleysville's responsibility may change based on a subsequent Supreme Court ruling, does not affect its ability to make a deposit under Rule 67. This is the situation every judgment debtor with a pending appeal faces. *See Small*, 330 S.C. at 66, 496 S.E.2d at 886 ("The respondents fully complied with the trial court's instruction by paying into court the amount ordered. The respondents could not have been expected to anticipate that the amount would be modified on appeal and thus to have paid more than ordered by the court.").

If the reasoning of the May 31, 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 nullifies Rule 67 deposits in the context of judgment debtors. The plain language of the Rule requires that there be an ongoing "action," pursuant to which an entity deposits money. SCRCP, Rule 67 ("In an action in which

any part of the relief sought is a judgment for a sum of money. . . .”). Once Harleystown’s appeal is final, there is no longer an “action” under which it can deposit funds and the judgment sums would become uncontested. Indeed, the South Carolina Supreme Court has expressly held that 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.”). Once the appeal is concluded, the Judgment sums would become uncontested, and it would be improper to then allow a Rule 67 deposit. Thus, it is entirely proper for Harleystown to seek to deposit the Judgment Sums while its appeal remains pending, and the trial court’s ruling on this point was a clear abuse of discretion.

IV. Harleystown’s Motion to Deposit the Judgment Sums Was Not Impermissibly Conditional.

The May 31, 2017 Order erroneously held that Harleystown’s motion to deposit the Judgment Sums placed improper “contingencies on the deposit.” (Amended Order denying Harleystown’s Motion to deposit funds under Rule 67, SCRCF, filed May 31, 2017, at pp. 11-13; R. ____). Specifically, the trial court took issue with the fact that Respondents would not be given immediate access to the deposited Judgment Sums. (*Id.* at pp. 12-13; R. ____). However, Harleystown’s motion fully comported with Rule 67’s requirements and contained no conditions not already contemplated by that Rule and South Carolina’s other rules of civil procedure.

Specifically, Harleystown seeks to impose only the following restrictions on its deposit: (1) part of the deposit may ultimately be returned to Harleystown, if it is found that Harleystown deposited more than its ultimate liability; and (2) that the deposit not be disbursed without an appropriate order directing that disbursement. The plain language of Rule 67 provides:

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 (emphasis added). Thus, the restrictions contained in Harleysville's motion to deposit are the same restrictions specifically contemplated by Rule 67. The fact that Harleysville also requests a reasonable time to respond to a disbursement order also does not make the deposit "conditional." 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.

The May 31, 2017 Order placed heavy emphasis on the Pennsylvania case of *Cohen v. Jenkintown Cab Co.*, 446 A.2d 1284 (Pa. Super. 1982). *Cohen*, which was decided under Pennsylvania law which is in stark contrast to South Carolina law, is completely inapplicable to this dispute and the trial court's reliance on this case is in error. In *Cohen*, an insurer's deposit of funds into court was found to contain impermissible conditions, where the deposit was made under the condition that it was to be held in court pending the outcome of the appeal. *Cohen*, 446 A.2d at 1287, 1289. This was because under Pennsylvania law (unlike the law here), any deposit into court is a "tender" because it *immediately* becomes the property of the judgment creditor. *See id.* at 1288 (quoting *School Dist. of Baldwin TP. v. Pittsburgh Terminal Coal Corp.*, 194 A. 900 (Pa. 1937)). Considering this, it is no surprise that the court equated a "deposit into court" under the policy to a "tender." Other cases cited in the May 31, 2017 Order are equally inapposite due to different underlying law regarding deposits. *See Whiddon v. Hutchinson*, 668 So.2d 1368 (La. 1996) (In Louisiana, "if the money is deposited into the court registry, it must be done by the debtor with the intention that the creditor be at liberty to withdraw the money"); *Blasini-Stern v.*

Beech-Nut Life Savers Corp., 429 F. Supp. 533 (D.P.R. 1976) (analyzing Section 3181 of the Puerto Rico Civil Code, requiring a “tender” into court in order to cut off interest).

The May 31, 2017 Order further conflates a “tender” and a “deposit” by its reliance on *Ruscon Const. Co. v. Beaufort-Jasper Water Authority*, 191 S.E.2d 715 (1972) for the proposition that a valid “tender” cannot be conditional. (Amended Order denying Harleysville’s Motion to deposit funds under Rule 67, SCRCPP, filed May 31, 2017, at p. 10; R. ____). The trial court’s focus on whether “tenders” could be conditional has no bearing on the issue of whether Harleysville’s motion to deposit comported with the requirements of Rule 67. Rule 67 clearly and exclusively deals with *deposits* into court. Under the plain language of the Rule, a “deposit” into court is not a “tender,” because the Rule explicitly provides that the judgment debtor has the right to “claim[] all or any part of the sum or thing” deposited. Rule 67, SCRCPP.

The May 31, 2017 Order cites to a string of cases in support of the argument that a deposit into court cannot be “conditional.” However, the cited cases are distinguishable in that they involved debtors who were offering to deposit the amounts into court in exchange for a release of any further liability. See *U.S. v. Amer. Home Assur. Co.*, 6 F. Supp. 3d 1371 (Ct. Intl. Trade 2014) (“AHAC conditions its Rule 67 request upon the court issuing an order stopping the accrual of pre-judgment interest and the entry of judgment on the principal amounts”); *Davis v. Allstate*, 747 N.E.2d 141 (Mass. 2001) (“Allstate sent the plaintiff a check for \$25,000 (with no interest included), marked ‘final settlement of any and all claims. . . .’”) (quotations and parenthetical in original); *Knippen v. Glens Falls Ins. Co.*, 564 F.2d 525 (D.C. Cir. 1997) (the judgment debtor requested the court “to accept the check in full and final payment of the judgment” where the debtor was attempting to pay \$50,000 of a \$350,000 judgment for which he was jointly and severally liable); *Bossert v. Douglas*, 557 P.2d 1164 (Ct. App. Okla. 1976) (“All offers. . . were

on the condition that the payment of the policy limits . . . would operate as a complete satisfaction of all claims of plaintiff. . . .”).

Harleysville’s motion to deposit was in full compliance with the provisions of Rule 67. The trial court’s ruling that denying Respondents immediate access to the deposited funds was an improper condition constituted an error of law, and, as such, it was an abuse of discretion for the trial court to deny the motion.

V. **The Trial Court Erred in Finding that a Deposit by Harleysville Would Improperly Reduce the Interest Rate Set Forth in the Policy.**

The May 31, 2017 Order interpreted Harleysville’s policy as adopting the post-judgment interest rate set forth in S.C. Code Ann. § 34-31-20, and then concluded that a deposit under Rule 67 by Harleysville would “reduce the interest rate Harleysville agreed to pay” in violation of the rule set forth in *Renaissance Enterprises v. Ocean Resorts*, 334 S.C. 324, 327, 513 S.E.2d 617, 619 (1999) (holding that a deposit into the court pursuant to Rule 67 does not stop the accrual of interest provided by contract). (Amended Order denying Harleysville’s Motion to deposit funds under Rule 67, SCRCF, filed May 31, 2017, at p. 13; R. ____). This ruling is clearly erroneous, in that it ignores both South Carolina’s law regarding Rule 67 deposits as well as the express language in Harleysville’s policy providing for a cessation of post-judgment interest where Harleysville deposits the part of the judgment for which it is responsible with the court.

In *Renaissance*, a broker and a management company had a contract providing for payment of a 10% commission, and also expressly providing that any commission not paid when due would accrue interest at the rate of 1.5% per month compounded monthly. *Renaissance*, 334 S.C. at 325, 513 S.E.2d at 618. The broker obtained a judgment against the management company for a commission, and an issue arose as to whether the management company’s deposit of the judgment sum stopped the accrual of interest. *Id.* The court held that parties’ contract could not be altered

through a Rule 67 deposit, and that the contract rate of 1.5% compounded monthly prevailed over the statutory post-judgment interest rate. *Id.* at 326-327, 513 S.E.2d at 618-619. Thus, the management company owed the contractual rate until the commission was paid to the broker, and a deposit under Rule 67 had no effect on the accrual of that interest. *Id.*

The facts and circumstances in *Renaissance* are completely inapplicable to the present matter. The trial court in this matter concluded that the policy, which sets no rate for post-judgment interest, must be interpreted to set the statutory rate. The trial court then determined that a deposit would improperly reduce this rate to zero, and that the trial court lacked the authority to allow that under *Renaissance*. In reaching this conclusion, the trial court's reasoning was fatally flawed. First, the rule set forth in *Renaissance* is that where a contract specifically supplants the statutory post-judgment interest rate, it is the contractual rate that controls. Any judgment based on a contract that does not set a different rate falls within South Carolina's statutory post-judgment interest rate. This does not elevate a non-specific contract to one that sets a specific controlling rate. Moreover, the trial court's ruling ignores the fact that Harleystown's policy expressly provides that one method for it to avoid the accrual of post-judgment interest is to deposit the part of the judgment that is covered by its policy. Thus, this finding was an abuse of discretion and it is proper for Harleystown to seek to deposit the Judgment Sums as a means to avoiding the further accrual of post-judgment interest.

VI. The Trial Court Erred in Denying the Motion to Deposit for the Reason that it Removes Harleystown's Incentive to Pay the Judgments.

The final ruling in the trial court's May 31, 2017 Order is that the denial of the motion to deposit was proper because allowing such a deposit would "eliminate any incentive [Harleystown]

has to pay the judgment.” (Amended Order denying Harleysville’s Motion to deposit funds under Rule 67, SCRCF, filed May 31, 2017, at p. 14; R. ____). This ruling is erroneous and illogical.

As the South Carolina Supreme Court held in *Russo*, our rule providing for the cessation of the accrual of post-judgment interest through a Rule 67 deposit serves the purpose of “encourage[ing] the debtor to pay the judgment and assur[ing] the judgment creditor the funds will be available at the conclusion of the appeal.” *Russo*, 317 S.C. at 444, 454 S.E.2d 896. A deposit under Rule 67 does not need to “motivate” Harleysville to later pay the judgments because the deposited funds will immediately be available to Respondents upon the conclusion of the appeal final order should the Respondents prevail. Hence, once again the trial court is in error.

Conclusion and Requested Relief

For the foregoing reasons, this Court should reverse the trial court. Further, the Court should find that Harleysville has no duty to pay any further post-judgment interest accumulating after April 26, 2017, regardless of the outcome of the prior appeal. 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. However, 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.

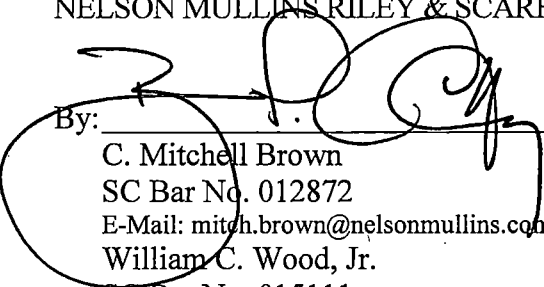
Under such a scenario, if Respondents successfully appealed the grant of the leave to deposit, the result of such a successful appeal is that post-judgment interest would have never stopped accruing despite the deposit.

Here, Harleysville was denied the ability to make that deposit, though it stood ready, willing and able to do so. Thus, the only logical and meaningful remedy is for this Court to reverse and hold that Harleysville's responsibility for post-judgment interest ceased as of the April 26, 2017, which was the date of the initial trial court Order erroneously denying Harleysville that leave to deposit.

Signature Page Attached

Respectfully submitted,

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July 6, 2017

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. 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, ...

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SC Court of Appeals

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.

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:

Appellant's Initial Brief

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July 6, 2017

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July 6, 2017

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SC Court of Appeals

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

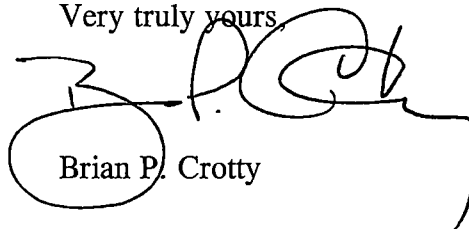
RE: Harleysville v. Heritage (Arrowhead)
Appellate Case No. 2017-001272

Dear Ms. Kitchings:

Enclosed please find the original and one copy each of Appellant's Initial Brief and Appellant's Designation of Matter for the Record on Appeal in regard to the above-referenced matter. We would ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with copies of the brief and designation.

Very truly yours,



Brian P. Crotty

BPC:lpw

Enclosures

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