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
AUG 01 2017
SC Court of Appeals

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.

Respondent's Initial Brief

John P. Henry
Philip C. Thompson
Thompson & Henry, P.A.
P.O. Box 1740
Conway, South Carolina 29528
843-248-5741
Attorneys for the Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

STATEMENT OF ISSUES ON APPEAL..... vi

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS 5

STANDARD OF REVIEW..... 8

ARGUMENTS..... 9

I. **THE ORDER DATED MAY 31, 2017 IS THE APPLICABLE AND FINAL ORDER. HARLEYSVILLE'S ARGUMENTS OF ISSUES CONTAINED IN THE APRIL 27, 2017 ORDER ARE INCONSEQUENTIAL.**

II. **HARLEYSVILLE'S PROPOSED DEPOSIT IS NOT IN CONFORMITY WITH THE PURPOSE OF THE STANDARD INTEREST PROVISION CONTAINED IN THEIR POLICIES.**

III. **HARLEYSVILLE'S PROPOSED DEPOSIT UNDER RULE 67 IS NOT IN CONFORMITY WITH THE PROVISION OF ITS POLICY OBLIGATING HARLEYSVILLE TO PAY ALL INTEREST ON THE FULL AMOUNT OF THE JUDGMENT THAT ACCRUES AFTER ENTRY OF THE JUDGMENT AND BEFORE HARLEYSVILLE HAS PAID, OFFERED TO PAY OR DEPOSITED IN COURT THE PART OF THE JUDGMENT THAT IS WITHIN THE APPLICABLE LIMITS OF INSURANCE.**

A. **HARLEYSVILLE CANNOT USE RULE 67 TO ALTER OR AFFECT ITS CONTRACTUAL OBLIGATIONS WITH ITS INSUREDS.**

B. **THE PROPER INTERPRETATION OF THE "STANDARD INTEREST PROVISION" DOES NOT ALLOW HARLEYSVILLE TO MAKE THE PROPOSED DEPOSIT AND STOP ITS LIABILITY FOR POST-JUDGMENT INTEREST ON THE UNDERLYING RIVERWALK AND MAGNOLIA JUDGMENTS.**

C. **THE STANDARD INTEREST PROVISION DOES NOT ALLOW HARLEYSVILLE TO MAKE THE PROPOSED DEPOSIT BEFORE A FINAL DETERMINATION HAS BEEN MADE OF THE AMOUNT OF HARLEYSVILLE'S LIABILITY FOR THE JUDGMENTS.**

D. **THE STANDARD INTEREST PROVISION DOES NOTALLOW HARLEYSVILLE TO DEPOSIT FUNDS WHICH ARE NOT ACCESSIBLE TO THE JUDGMENT CREDITORS AND STOP INTEREST FROM ACCRUING.**

E. **HARLEYSVILLE'S RELIANCE ON RULE 67 TO MAKE THE PROPOSED DEPOSIT IS MISPLACED.**

IV. **HARLEYSVILLE'S PAYMENT OF POST JUDGMENT INTEREST IS THE ONLY INCENTIVE HARLEYSVILLE HAS TO PAY THE JUDGMENTS.**

CONCLUSION..... 27

TABLE OF AUTHORITIES

CASES

Blasini-Stern v. Beech-Nut Life Savers Corp., 429 F. Supp. 533 (D. Kan. 1976 23

Bossert v. Douglas, 1976 Ok. Civ. App. 55, 557 P.2d 1164 (1976) 22

Cohen v. Jenkintown Cab Co., 300 PA. Super. 528, 446 A.2d 1284 (1982) 16

Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005)..... 8

Crook v. State Farm Mutual Auto Ins. Co., 235 S.C. 452, 112 S.E.2d 241 (1960) 11

Davis v. Allstate Ins. Co., 434 Mass. 174, 747 N.E.2d 141 (2001) 22

DiBenedetto v. Estate of DiBenedetto, 218 N.J. Super. 143, 526 A.2d 1161 (1986)..... 19

Doty v. Central Mut. Ins. Co., 186 So.2d 328 (La. 1966)..... 20

Duval v. Heritage Life Ins. Co., 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000)..... 24, 25

Farmers-Merchants Bank and Trust Co. v. St. Katherine Ins. Co., 570 So.2d 1186 (La. 1990)..... 23

Horry County v. Woodward, 291 S.C. 1, 351 S.E.2d 877 (Ct. App. 1986)..... 16, 19, 25

Knippen v. Glens Falls Ins. Co., 564 F.2d 525 (D.C. Cir. 1997)..... 23

Lancer Co. v. Sunrise Removal Inc., 914 N.Y.S.2d 174 (2010)..... 21

LTV Corp. v. Gulf States Steel, Inc., 969 F.2d 1050 (D.C. App. 2006)..... 14

Manning v. Brandon Corp., 163 S.C. 178, 161 S.E. 405 (1931) 24

McDowell v. S.C. Dept. of Soc. Services, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989) . 21

McNeil v. Herring, 155 S.C.187, 152 S.E. 189 (1930) 18

McPhee v. American Motorists Co., Inc., 57 Wis 2d 669, 205 N.W.2d 152 (1973) ... 10, 21

Phillips Petroleum Co. v. Adams, 513 F.2d 355 (Tex. 1975) 22

Progressive Cas. Ins. Co. v. Drive Trademark Holding, LP, 680 F. Supp. 2d 639 (D. Del. 2010) 23

Prudential Ins. Co. v. BMC Industries, Inc., 630 F. Supp. 1298 (S. D.N.Y. 1986) 14

Renaissance Enterprises v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E.2d 617 (1999) .. 14

River Val. Cartage Co. v. Hawkeye-Security Ins. Co., 17 Ill. 2d 242, 161 N.E.2d 101 (1959) 10

Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (1995), ... 12, 24, 25

S.C. Dept. of Transp. V. First Carolina Corp. of S.C., 369 S.C. 150, 631 S.E.2d 533 (2006) 16

Salinas v. Ellis, 26 S.C. 337, 2 S.E.121 (1887) 19

Security Ins. Co. of Hartford v. Houser, 191 Colo. 189, 552 P.2d 308 (1976) 12

Small v. Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d 884 (Ct. App.1998) 24, 25

Smith v. Sovereign Camp, W.O.W., 204 S.C. 193, 28 S.E.2d 808 (1944) 19

Snow v. Smith, 416 S.C. 72, 91 n.7, 784 S.E.2d 242 n.7 (Ct. App. 2016) 19

South Carolina Dept. of Trans. v. First Carolina Corp. of S.C., 369 S.C. 150, 152, S.E.2d 533, (2006) 8

Southeast Atlantic Cargo Operators, Inc. v. First State Ins. Co., 216 Ga. App. 791, 456 S.E.2d 101 (1995) 10

Stamps v. Consolidated Underwriters, 208 Kan. 630, 493 P.2d 246 (1972) 10, 21

Tiger River Pine Co. v. Maryland Cas. Co., 163 S.C. 229, 161 S.E. 491 (1931) 24, 26

Turner Coleman v. Ohio Const. & Eng., Inc., 272 S.C. 289, 251 S.E.2d 738 (1979) 14

U.S. For Use of Garrett v. Midwest Const. Co., 619 F.2d 349 (5th Cir. 1980) 23

U.S. v. American Home Assur. Co., 6 F. Supp. 3d 1371 (2014) 22

Western Cas. And Sur. Co. v. Preis, 695 S.W.2d 579, 586 (Tex. App. 1985) 12

Whiddon v. Hutchinson, 668 So.2d 1368 (La. 1996) 23

STATUTES

S.C. Code Ann. 34-31-20 ..... 14, 15, 25

RULES

Rule 59 (e) SCRCP 4, 9

Rule 67, Fed. Rule Civ. P. 14

Rule 67, SCRCP ..... passim

STATEMENT OF ISSUES ON APPEAL

I. IS THE ORDER DATED MAY 31, 2017 THE ONLY APPLICABLE ORDER FOR APPEAL?

II. IS RULE 67 PERFUNCTORY OR MINISTERIAL AS OPPOSED TO DISCRETIONARY?

III. DID THE TRIAL JUDGE ERR IN HOLDING THAT HARLEYSVILLE'S PROPOSED DEPOSIT UNDER RULE 67 COULD NOT ALTER OR ABROGATE THE TERMS OF ITS POLICIES REGARDING THE RATE AND PAYMENT OF INTEREST?

IV. DID THE TRIAL JUDGE ERR IN HOLDING THAT HARLEYSVILLE COULD NOT DEPOSIT A CONTINGENT AMOUNT BECAUSE SUCH DEPOSIT WAS ADVERSE TO ITS POLICY TERMS AND WOULD BE PREJUDICIAL TO ITS INSUREDS?

V. DID THE TRIAL JUDGE ERR IN HOLDING THAT A DEPOSIT BY HARLEYSVILLE, IN ORDER TO STOP THE ACCRUAL OF INTEREST WOULD BE REQUIRED, AT THIS STAGE, TO DEPOSIT THE FULL AMOUNTS OF THE UNDERLYING JUDGMENTS SINCE TO DO OTHERWISE WOULD VIOLATE THE TERMS OF ITS POLICIES BECAUSE IT WOULD FAIL TO PROTECT ITS INSUREDS FROM THE ACCRUAL OF POSTJUDGMENT INTEREST WHILE HARLEYSVILLE APPEALS?

VI. DID THE TRIAL JUDGE ERR IN HOLDING THAT IN ORDER TO STOP THE ACCRUAL OF POSTJUDGMENT INTEREST, HARLEYSVILLE WOULD BE REQUIRED, AT THIS STAGE, TO MAKE THE FULL AMOUNTS OF THE UNDERLYING JUDGMENTS AVAILABLE TO THE RESPONDENTS (JUDGMENT CREDITORS)?

VII. DID THE TRIAL JUDGE ERR IN HOLDING THAT THE DEPOSIT WITH THE CESSATION OF HARLEYSVILLE'S LIABILITY FOR POST-JUDGMENT INTEREST WOULD TAKE AWAY HARLEYSVILLE'S INCENTIVE TO PAY THE JUDGMENT?

STATEMENT OF THE CASE

This appeal arises from the denial of a motion by Harleysville Group Insurance ("Harleysville") under Rule 67, SCRCP, 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 judgments 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 third underlying construction defect matter is the case of *Magnolia North Property Owners Association, Inc.* v. *Heritage Communities, Inc., Heritage Magnolia North,, 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 were 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; and that a "time on risk" analysis applied to the underlying actual damages, but not punitive

damages. *(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 Harleysville in the amount of $3,044,499.43 in the Riverwalk Actions and $3,766,593.94 in the Magnolia North Action. *(Id. at p. ____)* 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 Harleysville and modified the judgment in the Riverwalk DJ Action against Harleysville to $2,922,338.00 (the "Judgment Sums"). Petitions for rehearing have been filed with the Supreme Court by both sides in the appeal questioning the amounts awarded, and those petitions remain pending. (Petition for Rehearing by Harleysville; R. ___) (Petition for Rehearing by Respondents; R. ____)

On March 7, 2017, Harleysville filed an identical motion in both the Riverwalk and Magnolia North DJ Actions seeking leave of the trial court to deposit the Judgment Sums ($2,922,338.00 in Riverwalk and $3,766,954.00 in Magnolia North) with the Horry County Clerk of Court pursuant to Rule 67, SCRCP, 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, Harleysville 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 Harleysville filed a reply in support of its motion on March 27, 2017. (Memorandum in Opposition to Motion for Leave to 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"; R. ___). (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 a response in opposition to Harleysville's motion which also served as a Rule 59(e) motion by Respondents to alter or amend. (Response to Motion to Alter of 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 and Respondents' 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 and Riverwalk DJ Actions. (Amended Order denying Harleysville's Motion to deposit funds under Rule 67, SCRCP, filed May 31, 2017;

[1] The total amount Harleysville offered to deposit was $15,132,217.76 which included accrued interest through February 7, 2017.

R. ____).[2] 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 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, SCRCP, filed June 7, 2017; R. ____). 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 FACTS

Harleysville issued numerous policies to the insureds in the underlying defect cases. Each of these policies contained a provision regarding Harleysville's obligations regarding payment of post-judgment interest and deposit into Court. Strikingly, Harleysville provides almost no discussion of this policy provision and cites no case related thereto. As the old saying goes, there are three things that cannot long be hidden; the sun, the moon and the truth. The truth is Rule 67 does not control the payment of interest and deposit into Court. The truth is that Harleysville's proposed deposit into Court is controlled by the Harleysville policy provision; a provision Harleysville largely overlooked in its brief.

The South Carolina Supreme Court and the Federal Courts have universally held that Rule 67 cannot be used to alter or affect the contractual relations of the parties,

[2] Judge Hyman's May 31, 2017 Order concluded with "Based on the foregoing reasons, it is Ordered, Adjudged and Decreed that Harleysville's Motion be, and the same is hereby denied." (R. ___)

including the parties contractual provisions for the rate and payment of interest. This is precisely what Harleysville is attempting to do.

In Harleysville's meager discussion of the interest provision in its policies, these facts stand out. First, Harleysville fails to set out its policy provision which, when read as a whole, clearly shows that Harleysville's proposed deposit falls far short of complying with the contractual interest provision in its policies. Second, Harleysville cites no case related to its policy provision regarding interest. The reason is there is not one case giving merit or credence to Harleysville's proposed deposit.

Harleysville issued two forms of policies (over a period of time) to the judgment debtors: a commercial general liability policy (R _____) and a commercial blanket excess liability policy. (R. _____) On pages 6 and 4 respectively of these policies, the following policy provision is included:

> 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 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. (R. ____) [Emphasis Supplied]

This provision is denominated as the **standard interest provision** by the many Courts that have discussed this provision. Our Appellate Courts have not addressed this provision but many State and Federal Courts have, as detailed in the arguments that follow.

It is important for an understanding of this **standard interest provision** to first look at its purpose. The purpose of this provision is to protect the insured from the accrual of

post-judgment interest while the insurance carrier appeals in an attempt to lesson or eliminate its liability for the judgment. This provision recognizes that it is simply not equitable to saddle the insured (as Harleysville is proposing to do) with post-judgment interest because of the decision of the carrier to appeal. Since the insurance carrier controls the litigation, the insured is precluded from paying the judgment and therefore, it is only right for the carrier to pay the accumulation of post-judgment interest until it has satisfied its obligation under the policy. In other words, Harleysville must cease its appeal and pay its liability before post-judgment interest will cease running against Harleysville.

As provided in the **standard interest provision**, Harleysville is provided an escape route to stop their liability for interest. They can pay the judgment, offer to pay or deposit in Court the part of the judgment that is "within the applicable limit of insurance." The terms pay, offer to pay or deposit in Court are read together and therefore any deposit into Court is the same as a tender of payment and thus must be made available to the judgment creditors. In other words, Harleysville must satisfy its obligation for part or all of the judgment that is "within the applicable limits of insurance." At this point, the judgment debtors are then responsible for any balance of the judgment and post-judgment interest. In order for Harleysville to pay, or offer to pay or deposit in Court that part of the judgment that is "within the applicable limit of insurance", the final amount of Harleysville's liability has to be known.[3] Otherwise, Harleysville can deposit any amount and stop the accrual of

[3] Harleysville makes several statements in its Brief acknowledging the amounts proposed to be deposited are not final determinations of their liability. Statements such as: The responsibility for judgment at this time (Harleysville's Br. p. _____); Harleysville was willing and able to deposit an amount sufficient to cover the largest possible total amount Harleysville could be ultimately determined to owe (Harleysville's Br. p. _____); Harleysville disagrees with respondents on what is owed (Harleysville's Br. p. _____); the amount may change based on a subsequent Supreme Court ruling (Harleysville's Br. p. ____); the fact that Harleysville's interest may change (Harleysville's Br. p. ____); Based on the petitions for rehearing the

interest and cast the interest burden on the judgment debtors while Harleysville continues to appeal. This is the antithesis of Harleysville's contractual obligation. In addition, the proposed deposit reduces the interest rate on the deposited funds from the statutory rate provided in the policies to the rate of the Court's deposit which the Court has made clear it has no right to do.[4] The Court should uphold the trial Judge's Order and refuse to aid Harleysville to escape its contractual obligations.

STANDARD OF REVIEW

The granting or denial of a Rule 67 Motion is not a "ministerial function" as Harleysville urged in the trial Court (R. ____). The decision is left to the sound discretion of the Trial Judge. *South Carolina Dept. of Trans. v. First Carolina Corp. of S.C., 369 S.C. 150, 152, S.E.2d 533, (2006)* ("The 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 discretion") An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005).* Harleysville addresses the trial Judge's comment about "sole discretion" in the April 27, 2017 Order. Nowhere in the May 31, 2007 Order did the Judge mention "sole discretion" as so it would be of no use to discuss this term used in a prior Order. The trial Judge did not abuse his discretion.

---

amounts of the judgment could go down, up or stay the same (Harleysville's Br. p. ____); Harleysville asserts it owes no judgments or interest (Br. Fn. 1).

[4] The **standard interest provision** provides Harleysville will pay all interest on the full amount of the judgment that accrues after entry of the judgment... this means the rate of interest is set at the statutory rate which is 7.75% for 2017. This is the rate Harleysville agreed to pay to protect its insureds. The deposit in Court proposed by Harleysville would substantially reduce the statutory rate provided in the policy to the substantial detriment of its insureds (judgment debtors).

ARGUMENTS

I. THE ORDER DATED MAY 31, 2017 IS THE APPLICABLE AND FINAL ORDER. HARLEYSVILLE'S ARGUMENTS OF ISSUES CONTAINED IN THE APRIL 27, 2017 ORDER ARE INCONSEQUENTIAL.

As noted in the Statement of the Case, Judge Hyman issued an Order dated April 27, 2017 denying leave to Harleysville to make a deposit under Rule 67. After all parties filed Rule 59(e), SCRCP motions, the Judge issued a completely new Order dated May 31, 2017 and filed a duplicative Order on June 7, 2017. At the conclusion of the May 31, 2017 Order, Judge Hyman provided "Based on the foregoing reasons it is ORDERED, ADJUDGED AND DECREED that Harleysville's Motion be, and the same is hereby denied." (R. ____) Some of the issues in his April 27, 2017 Order were not included in his May 31, 2017 Order and could therefore not have been a "basis" for his May 31, 2017 Order. Harleysville's argument of the issues in the April 27, 2017 Order that were not included in the May 31, 2017 Order are inconsequential. In particular, Harleysville's Statement of Issues on Appeal numbers 2 and 3 regarding: (2) considering that a Rule 67 deposit stops the accrual of post-judgment interest against the debtor as a factor, (3) the timing of the deposit and the discussion of "sole" discretion in the April 27, 2017 Order. These issues were not included in the May 31, 2017 Order and addressing them is of no consequence.

II. HARLEYSVILLE'S PROPOSED DEPOSIT IS NOT IN CONFORMITY WITH THE PURPOSE OF THE STANDARD INTEREST PROVISION CONTAINED IN THEIR POLICIES.

To get a full understanding of the **standard interest provision** requiring Harleysville to pay interest on the entire judgment until it has satisfied its obligation for all or part of the judgment, the Court should look at the purpose of this provision. Although the South Carolina Appellate Courts have not considered this provision, many State and Federal Courts have. The decisions are uniform in holding that the purpose of this provision is to protect the insured from liability for post-judgment interest while the insurer appeals to lesson or eliminate its liability on the judgment. *River Val. Cartage Co. v. Hawkeye-Security Ins. Co., 17 Ill. 2d 242, 161 N.E.2d 101 (1959)* (The Court, discussing the **standard interest provision**, stated that under the terms of the policy the insurer has complete control of the litigation. The insured cannot settle with the Plaintiff without releasing the insurer from its obligation. Any delay that may cause the accumulation of interest is thus the responsibility of the insurer. And until the insurer has discharged its obligations under the policy, the standard interest requires it to bear the entire expense of this delay.); *Stamps v. Consolidated Underwriters, 208 Kan. 630, 493 P.2d 246 (1972)* (Under the **standard interest provision** where the insurer controls the litigation and appeal, insurer should be required to pay interest on the entire judgment until the insurer 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**, because 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.); *Southeast Atlantic Cargo Operators, Inc. v. First State Ins. Co., 216 Ga. App. 791, 456 S.E.2d 101 (1995)* (Under the "standard interest clause", where the insured is in

control of the litigation and made the decision not to pay the judgment but to appeal, it makes since that the insurer should pay interest on the entire amount of the judgment until it has satisfied its obligation under the policy.)

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 its cause of the delays in concluding the case. In *Crook 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. Thereafter, the injured party 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. *Id. at pp. 446-447*

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 post-judgment interest until it satisfies its liability. Harleysville's proposal is to have the Court allow them to make the deposit of a contingent amount, which even if it stopped the interest on the amount deposited (which it doesn't) it would leave the insureds with a balance of $4,750,823.16 to pay interest on while Harleysville continues

its appeal. This proposal is in clear violation of the interest provision in Harleysville's policies. *Western Cas. And Sur. Co. v. Preis, 695 S.W.2d 579, 586 (Tex. App. 1985)* (The insurance company should pay interest because it protects the insured from additional interest or costs incurred because of actions taken by insurer.) In *Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (1995)*, the Court stated that a judgment creditor was not entitled to interest on the judgment during an unsuccessful appeal. The rational for the rule is that a judgment creditors' appeal delays his right to the judgment and the debtor therefore, should not be required to pay interest. As the Court said in *Security Ins. Co. of Hartford v. Houser, 191 Colo. 189, 552 P.2d 308 (1976)*:

> ...we must not ignore the purpose of the standard interest clause. The insurer controls any litigation from which liability might ensue and further controls settlement negotiations. Thus, the accrual of interest may be attributable to the insurer's decision to contest a judgment by appeal. Consequently, it is reasonable to impose the entire expense of accrued interest upon the insurer in view of the 'company's right to control the conduct of the suit and its power to escape liability for interest through the payment or tendering of its part of the judgment into the court. *Id. at p. 191*

In this case, Harleysville elected to appeal and allow interest to accrue on the entire judgment at its, Harleysville's, expense.[5] Harleysville now attempts to stop the accrual of post-judgment interest by depositing into Court the amount the Supreme Court has said is due, and of course, continue their appeal. Meanwhile, the Harleysville insureds are accumulating post judgment interest because of Harleysville's delays for which they have no remedy. The trial Judge's Order should be upheld.

[5] Harleysville's proposed tender set out in its Motion (R. ____) includes interest on the entire judgment at the statutory rate, the amount that may be due, and estimated costs. The judgment creditors have made demand on Harleysville to pay the same amount Harleysville attempts to pay into Court.

III. HARLEYSVILLE'S PROPOSED DEPOSIT UNDER RULE 67 IS NOT IN CONFORMITY WITH THE PROVISION OF ITS POLICY OBLIGATING HARLEYSVILLE TO PAY ALL INTEREST ON THE FULL AMOUNT OF THE JUDGMENT THAT ACCRUES AFTER ENTRY OF THE JUDGMENT AND BEFORE HARLEYSVILLE HAS PAID, OFFERED TO PAY OR DEPOSITED IN COURT THE PART OF THE JUDGMENT THAT IS WITHIN THE APPLICABLE LIMITS OF INSURANCE.

A. HARLEYSVILLE CANNOT USE RULE 67 TO ALTER OR AFFECT ITS CONTRACTUAL OBLIGATIONS WITH ITS INSUREDS.

In Harleysville's Statement of Issues on Appeal, Harleysville asks in issue No. 4 if the trial Judge erred in "holding that South Carolina's existing precedent regarding Rule 67 deposits was inapplicable to this matter because this matter involves insurance policies?" (Br. ____) This is a clear misstatement of Judge Hyman's holding. What Judge Hyman stated was the cases involving a deposit under Rule 67 "are distinguishable from the present case because none involved an insurance policy". (R. ____) This is a correct statement because none of the South Carolina cases regarding deposit under Rule 67 address the **standard interest provision** contained within Harleysville's policies. In its Brief, Harleysville states numerous times that it complied with Rule 67 and thus the deposit should have been allowed. In fact, in its memo to the trial Judge, Harleysville advanced the argument that if Rule 67 were complied with (notice to the adverse party and tender of the funds) the trial Judge's decision was at that point ministerial (R. ____). Harleysville apparently believes that the Judge was in err in considering Harleysville's contractual obligation to pay post-judgment interest.

Although the South Carolina Appellate Courts have not had the occasion to interpret the **standard interest provision**, the South Carolina Supreme Court has made it clear that Rule 67 cannot be used to lesson or affect the contractual obligations of the

parties. In *Renaissance Enterprises v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E.2d 617 (1999)*, the Court held that there is nothing in Rule 67 indicating a deposit into Court will affect the parties' contract regarding interest. The Court also noted that the Federal Rule of Civ. P. 67 allowing a deposit in Court is substantially the same and the Federal Court has uniformly held that Rule 67, Fed. Rule Civ. P. "cannot be used as a means of altering the contractual relationships and legal duties of the parties", citing *LTV Corp. v. Gulf States Steel, Inc., 969 F.2d 1050 (D.C. App. 2006)*. The Court also cited *Prudential Ins. Co. v. BMC Industries, Inc., 630 F. Supp. 1298 (S. D.N.Y. 1986)* holding that "Stopping the 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." The Court said in conclusion, a deposit into Court pursuant to Rule 67 does not stop the accrual of interest provided by contract. *Renaissance, supra*. In *Turner Coleman v. Ohio Const. & Eng., Inc., 272 S.C. 289, 251 S.E.2d 738 (1979)* the plaintiff was awarded a judgment on a promissory note. On appeal, the appellant contended the statutory interest rate applied and not the higher rate contained in the note citing *S.C. Code Ann 34-31-20*. The Supreme Court disagreed. The Court held that the agreement of the parties for the rate of interest in the promissory note prevailed over the statute. The Court opined that if this were not the case, creditors could default on their agreements to get a lower rate of interest. The exact scheme Harleysville is attempting by its proposed deposit. The trial Judge did not abuse his discretion in considering the **standard interest provision** in Harleysville's policies.

B. THE PROPER INTERPRETATION OF THE STANDARD INTEREST PROVISION DOES NOT ALLOW HARLEYSVILLE TO MAKE THE PROPOSED DEPOSIT AND STOP ITS LIABILITY FOR POST-JUDGMENT INTEREST ON THE UNDERLYING RIVERWALK AND MAGNOLIA JUDGMENTS.

This **standard interest provision** set forth below is what Harleysville contracted for. There is nothing in the **standard interest provision** that allows Harleysville to make a deposit in Court which reduces the statutory interest rate that is accruing against the insureds while Harleysville continues its appeal.

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 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. (R. ____) [Emphasis Supplied]

As noted above, there are three actions which allow Harleysville to escape from its contractual obligation to pay interest on the underlying Riverwalk and Magnolia judgments ("underlying judgments"): 1) they can pay the judgments; 2) they can offer to pay the judgments; or 3) they can deposit in Court the part of the judgments that are within the "applicable limit of insurance". Harleysville says that it is making the deposit in Court as its policies allow and by doing this it eliminates our obligation to pay interest on the underlying judgments. Harleysville misreads its own policies.

It must be kept in mind that the underlying judgments are final judgments, entered of record and are accruing interest at the statutory rate as mandated by law. *S.C. Code Ann. 34-31-20* ("(B) A money decree or judgment of a Court enrolled or entered must draw interest according to law.") The Harleysville D.J. action has determined that Harleysville owes certain amounts of the judgments, which sums are subject to petitions for rehearing. Harleysville believes that it can deposit these contingent sums in Court, out of the reach of

the judgment debtors, and stop its liability for interest on the underlying judgments even though it continues its appeals. This is a total lack of understanding of its duty during its appeal to pay the statutory rate of interest on the entire judgment which protects its insureds from liability for interest caused by Harleysville's delay. Harleysville must satisfy its liability for the judgment before its interest liability on the entire judgment will cease.

The terms "pay, offer to pay or deposit in Court" must be read together because to stop the accrual of statutory interest by Harleysville, their part of the judgment must be paid to the judgment creditors; this is the only way to stop their obligation to pay interest on "the full amount of the judgment". *Horry County v. Woodward, 291 S.C.1, 351 S.E.2d 877 (1986)* (Payment of a judgment into Court is for the use of the person entitled thereto in order to stop the accrual of interest.)[6]

In a strikingly similar case involving an insurance policy with an interest provision for all intents identical to that in the Harleysville policy, 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 carrier's petition provided as follows:

> 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.[7]
>
> 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

[6] Superseded by statute on other grounds. See *S.C. Dept. of Transp. V. First Carolina Corp. of S.C., 369 S.C. 150, 631 S.E.2d 533 (2006).*

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

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 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. *Id. at p. 533* [Emphasis supplied]

The lower Court granted the petition. On appeal, the Appellate Court reversed. The Court held 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, would 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 on the entire judgment, they were required to pay, tender or deposit into Court their limit of liability without contingency and make them available to the judgment creditor. In the Cohen case and 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.[8]

Harleysville opines that the *Cohen* case is inapplicable because under Pennsylvania law, unlike here, any deposit into Court is a "tender" because it immediately becomes the property of the judgment holder. (Harleysville's Br.; p. ____) Harleysville is mistaken. Under South Carolina law, a deposit in Court in order to stop the running of interest on a judgment must be unconditional and made available to the judgment holder. *McNeil v. Herring, 155 S.C.187, 152 S.E. 189 (1930)* (The Court approved a charge to the jury that "in order to stop interest and costs on the case, the law required you to go and deposit that money in the hands of the Clerk of Court, so that the man can go there and get it whenever

[8] At this point, Harleysville has two choices. One, they can deposit the entire amount of the judgment in Court and make the deposits available to the judgment creditors. Or two, pay the amount the Supreme Court says is due to the judgment creditors together with interest and costs, which they will accept, and Harleysville's liability for the payment of post-judgment interest will cease.

he wants it, but you have to deposit it unconditionally."); *Smith v. Sovereign Camp, W.O.W., 204 S.C. 193, 28 S.E.2d 808 (1944)* ("The weight of authority and reason favors the rule that to have the effect of stopping the running of interest... the tender must be kept good; and if made the basis of a plea of tender, or for affirmative relief must be brought into Court."); *Salinas v. Ellis, 26 S.C. 337, 2 S.E.121 (1887)* (Money paid into Court is done by Order of the Court and possession of it cannot be resumed by the debtor.) This is exactly the requirement of the **standard interest provision**. The full amount must be offered to the judgment creditor and if he refuses, it must be paid in Court unconditionally.

In this case, Harleysville's proposed deposit is intended by Harleysville to stop their liability for post-judgment interest on the underlying judgments without paying any part of the judgments. Harleysville has not explained how they can deposit money in Court, not make it available to the judgment creditors, and stop statutory interest from accruing on the underlying judgments. They have cited no case for this proposition because there are none. *Snow v. Smith, 416 S.C. 72, 91 n.7, 784 S.E.2d 242 n.7 (Ct. App. 2016)* (noting Appellant's cited no legal authority for their argument and it is therefore abandoned). Payment of a judgment into Court is deemed to be payment of money for the use of the person entitled thereto and stops the running of interest. *Horry County v. Woodward, 291 S.C. 1, 351 S.E.2d 877 (1986).* The only way to stop statutory interest from accruing is payment of the judgment, offer to pay the judgment and upon refusal, payment into Court of interests and costs, unconditionally.

In another similar case involving the **standard interest provision**, for all intents identical to the one under consideration here, the Court in *DiBenedetto v. Estate of DiBenedetto, 218 N.J. Super. 143, 526 A.2d 1161 (1986)* held:

> "It is therefore apparent that neither company met the conditions imposed by the policy language. That language permits the companies to avoid payment of interest on the entire judgment by placing their policy limits at the disposal of plaintiff. This escape was available only if the policy limits were paid or tendered *to plaintiff* or made accessible to him through a deposit with the court. The words "paid or tendered or deposited" must be read together. They require subjection of the policy proceeds to the control of plaintiff. The deposit made by Commercial Union was not a deposit which plaintiff could reach; it was made only to provide security in furtherance of the company's appeal. Furthermore, Commercial Union deposited only $103,813.70; it ignored the accrued interest *149 clearly due. Consequently, it did not deposit the "limit of the company's liability," an additional condition it was obliged to satisfy before the running of interest could stop." *Id. at pp. 148-149* [Emphasis supplied]

In *Doty v. Central Mut. Ins. Co., 186 So.2d 328 (La. 1966)* the Court held that under the **standard interest provision** interest continued to accrue until Central Mutual paid or tendered its policy limits and interest. In *Home Indem. Co. v. Muncy, 449 S.W.2d 312, 316 (1969)* the Court held that under the "standard interest clause" the interest is required to be paid by the Home Indem. Co. until the entire judgment is satisfied, which could be done by a deposit in Court of the total judgment and accrued interest. The Court treated "pay, offer to pay or deposit in Court" tantamount to "satisfying the terms of the judgment". The Court stated that this does no more than enforce the provision ("standard interest clause") the insurance company agreed to in its policy.

Harleysville's proposed deposit does not satisfy the purpose of or letter of the **standard interest provision** in its policy because it will not be made available to the judgment creditors and post-judgment interest on the entire judgments will continue to accrue against the insureds while Harleysville continues its appeal.

C. THE STANDARD INTEREST PROVISION DOES NOT ALLOW HARLEYSVILLE TO MAKE THE PROPOSED DEPOSIT BEFORE A FINAL DETERMINATION HAS BEEN MADE OF THE AMOUNT OF HARLEYSVILLE'S LIABILITY FOR THE JUDGMENTS.

The **standard interest provision** requires Harleysville to deposit in Court "the part of the judgment that is within the applicable limit of insurance." At this stage, it is not known what part of the judgment is within the "applicable limit of insurance" and therefore, Harleysville cannot satisfy its liability. Harleysville's liability will not be known until the remittitur is returned from the Supreme Court and filed in the lower Court. *McDowell v. S.C. Dept. of Soc. Services, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989)* Requiring a final determination of the amount due is consistent with the purpose of the **standard interest provision**, i.e., to protect the insured. If Harleysville is allowed to deposit a contingent amount and continue its appeal, the insured continues to be constrained from paying off its part of the judgment while Harleysville continues to appeal and controls the litigation. See *Lancer Co. v. Sunrise Removal Inc., 914 N.Y.S.2d 174 (2010)* (Where the policy provided that the accrual of interest would terminate upon payment of, offer to pay or depositing in Court of its share of the judgment, the policy did not provide a mechanism for the relinquishment of the insurers obligation to pay interest before the existence of a final judgment); *Stamps v. Consolidated Underwriters, 2008 Kan. 630, 493 P.2d 246 (1972)* (The insurer, who controls the litigation and appeal should be required to pay interest on the entire amount of the judgment until the insurer has satisfied its obligation under the policy). *McPhee v. American Motorists Co., Inc., 57 Wis 2d 669, 205 N.W.2d 152 (1973)* (Where the insurer controls the litigation and appeal, the accumulation of interest on the entire judgment should be born by the insurer until it has discharged its obligation under the policy. Otherwise, the insurer could place any amount into the Court which the insured could not accept and stop the accrual of interest.) *Id. at p. 679* Under Harleysville's theory

they can guess the amount that may be finally determined to be due by the Supreme Court and make that deposit and stop the accrual of interest.

D. THE STANDARD INTEREST PROVISION DOES NOT ALLOW HARLEYSVILLE TO DEPOSIT FUNDS WHICH ARE NOT ACCESSIBLE TO THE JUDGMENT CREDITORS AND STOP INTEREST FROM ACCRUING.

Harleysville's proposed deposit in Court with the stipulation that the funds will be held until the parties litigate the amount due does not comport with the **standard interest provision**. There is nothing in Harleysville's policies that allow a conditional, estimated payment, conditional offer to pay, or conditional deposit into Court. *Davis v. Allstate Ins. Co., 434 Mass. 174, 747 N.E.2d 141 (2001)* (Where Allstate's policy required it to pay post-judgment interest until it offered to pay the limits of coverage, Allstate was required to make an unconditional offer to pay to stop its obligation to pay post-judgment interest. There was nothing in the policy allowing a conditional offer.) Under Harleysville's theory, they could deposit any amount and cease their liability for interest on the entire judgment. At this stage, before Harleysville has determined its liability, in order to stop their liability for interest on the judgment, Harleysville must make a deposit of the full amounts of the underlying judgments with interest and costs, with no conditions. *Bossert v. Douglas, 1976 Ok. Civ. App. 55, 557P.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.) *Phillips Petroleum Co. v. Adams, 513 F.2d 355 (Tex. 1975)* (In order to stop post-judgment interest accrual, there must be an unconditional offer to give up the disputed fund and cease any dominion over the fund.) *U.S. v. American Home Assur. Co., 6 F. Supp. 3d 1371 (2014)* (The accrual of interest will continue when the depositor seeks to impose conditions upon

payment into the depository fund); *U.S. For Use of Garrett v. Midwest Const. Co., 619 F.2d 349 (5th Cir. 1980)* (In order to stop the accrual of interest under Rule 67, Midwest had to make the money available to Garrett without attempting to impose conditions on its acceptance.); *Knippen v. Glens Falls Ins. Co., 564 F.2d 525 (D.C. Cir. 1997)* (The insurance company must relinquish control over the money before the interest would cease.) *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 (D. Kan. 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.)

Harleysville wants the best of two worlds. It wants to deposit the contingent funds while waiting for the Supreme Court to act on the petitions for rehearing[9]; let the deposit act as a supersedeas[10]; continue its appeal; placing the interest burden on its insureds, while

---

[9] *Progressive Cas. Ins. Co. v. Drive Trademark Holding, LP, 680 F. Supp. 2d 639 (D. Del. 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.)

[10] Harleysville in its proposed order asked the Court to use the deposit as a supersedeas and provides a method of litigating to determine if the judgment creditors are entitled to the money. (R. _____) This is an

at the same time, denying the judgment creditors access to the money. This is a total win for Harleysville at the expense of their insureds and the judgment creditors. *Tiger River Pine Co.*, *infra*.

E. HARLEYSVILLE'S RELIANCE ON RULE 67 TO MAKE THE PROPOSED DEPOSIT IS MISPLACED.

Harleysville cites a number of South Carolina cases to justify its proposed deposit under Rule 67 (Br. p. _____) Although Harleysville's policy determines what deposit in Court can be made to stop the interest from accruing on the judgments as opposed to Rule 67, I will address Harleysville's contention that since Harleysville complied with Rule 67, the trial Judge abused his discretion in not allowing the deposit. The first case cited by Harleysville is *Manning v. Brandon Corp., 163 S.C. 178, 161 S.E. 405 (1931)*. Harleysville can take little comfort in this case since the trial court held that in order to make a valid tender or deposit to stop the accrual of interest, the deposit had to be made without contingencies. This is the law the Court was referring to when it said this has been the law "from the earliest decisions down to that time" which is quoted in Harleysville's Brief. (Harleysville's Br.; p. _____) Harleysville's proposed deposit has contingencies. The other South Carolina cases cited by Harleysville in which our Appellate Courts have discussed the use of Rule 67 to deposit judgments into Court are: *Russo v. Sutton*, *supra.*, *Duval v. Heritage Life Ins. Co., 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000)* and *Small v. Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d 884 (Ct. App.1998).*

---

ill-conceived attempt to place conditions on the deposit and deprive the judgment creditors of their right under the policy to the deposited funds and to post-judgment interest.

In *Russo*, the Court was addressing whether a judgment debtor's deposit "of a judgment into Court..." stays the accrual of post-judgment interest. The Court, quoting from *Horry County v. Woodward, 291 S.C. 1, 351 S.E.2d 877 (Ct. App. 1986)* noted "that a judgment debtor may stop the running of interest by paying the amount of the judgment into Court during the pendency of an appeal." 293 S.C. at 44, 358 S.E.2d 574, N.1. In *Duval,* the Court, citing *Russo*, emphasized that in order to stop the accrual of interest, the amount of the judgment had to be paid into Court. Likewise, in *Small*, the Court upheld the stoppage of post-judgment interest when the judgment debtor paid the amount of the judgment into Court. The Court stated: "Post judgment interest of fourteen percent accrues on all judgments until the judgment amount has been properly deposited with the Court pursuant to Rule 67..." *Id. at p. 65*. Harleysville is not paying the amount of the judgment in Court and we are unsure if Harleysville is offering to pay "that part of the judgment within the applicable limit of insurance."

The underlying judgments are final judgments entered of record and are accruing interest at the statutory rate as mandated by law. S.C. Code Ann. 34-31-20 ("(B) A money decree or judgment of a Court enrolled or entered must draw interest according to law.") Until the underlying judgments are paid, they will continue to draw interest at the statutory rate as required by law. No action by Harleysville, except the payment of its liability for the judgments plus interest and costs, will cause the cessation of Harleysville's liability for accrual of interest on the full amount of the judgments. This is why the payment, offer to pay or deposit in Court (**standard interest provision**) must be read together. All three methods of stopping the accrual of interest contemplate payment or deposit of the funds to extinguish Harleysville's liability. At that point, Harleysville has paid "that part of the

judgment that is within the limit of insurance" and interest ceases to accrue on that part of the judgment. Harleysville's proposal to deposit what the Supreme Court said may be their liability for the judgments has no affect upon the accrual of interest on the underlying judgments.

The Court should deny the deposit.

IV. HARLEYSVILLE'S PAYMENT OF POST JUDGMENT INTEREST IS THE ONLY INCENTIVE HARLEYSVILLE HAS TO PAY THE JUDGMENTS.

Harleysville does not explain in its brief why it has allowed interest to accumulate on the judgments since 2009, which has now reached $9,121,516.22, an amount in excess of the principal amounts of the judgments. It is enigmatic why Harleysville, if it really thought its policy provided for the deposit it now proposes, would wait eight years and accumulate $9 million dollars in post-judgment interest before trying to make a deposit. Harleysville is a company with $183 billion dollars in assets and a surplus of $14.4 billion dollars (R. ____), so maybe the accrual of post-judgment interest is not motivation to pay. However, Harleysville's incentive should be compliance with their duty of good faith to their insureds, including complying with their policy terms and protecting their insureds from post-judgment interest. *Tiger River Pine Co. v. Maryland Cas. Co., 163 S.C. 229, 161 S.E. 491 (1931)* (The insurer cannot use its policy as a shield from liability and as a sword against its insured. Especially considering the insurer controls all aspects of the case.) The proposed deposit should be denied.

against its insured. Especially considering the insurer controls all aspects of the case.) The proposed deposit should be denied.

CONCLUSION

For the reasons hereinabove set fourth, the proposed deposit pursuant to Rule 67 should be denied and the lower Court's Order upheld.

Respectfully submitted,

Conway, South Carolina

July 31, 2017

THOMPSON & HENRY, P.A.

John P. Henry
SC Bar No.: 3053
phenry@thompsonlaw.com
Philip C. Thompson
SC Bar No.: 11062
pthompson@thompsonlaw.com
Thompson & Henry, PA
1300 Second Avenue, Third Floor (29526)
P.O. Box 1740
Conway, SC 29528
(843) 248-5741 (Phone)
(843) 248-6396 (Fax)
ATTORNEYS FOR RESPONDENT

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

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.

PROOF OF SERVICE

I, Stephanie Hall, an employee for Thompson & Henry, P.A., attorneys for the Respondents in the above-captioned action and/or actions, certify that I have this 31st day of July, 2017 mailed a copy and/or copies of the following:

1. **RESPONDENT'S INITIAL BRIEF;**
2. **DESIGNATION OF MATTER FOR THE RECORD ON APPEAL**

to the undersigned at his/her/their address(es) of record, with sufficient postage attached thereto, as follows:

Counsel Served:

C. Mitchell Brown
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

Robert C. Calamari
Nelson Mullins Riley & Scarborough, LLP
3751 Robert M. Grissom Parkway, Suite 300
Myrtle Beach, SC 29577-3165

Laura Johnson Evans
Smith Moore Leatherwood, LLP
25 Calhoun Street, Suite 250
Charleston, SC 29401

Brian P. Crotty
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201

Stephanie Hall

Conway, South Carolina

THOMPSON
& HENRY, P.A.
ATTORNEYS AT LAW
1300 SECOND AVENUE, THIRD FLOOR
POST OFFICE BOX 1740
CONWAY, SOUTH CAROLINA 2952

TELEPHONE
(843) 248-5741
FACSIMILE
(843) 248-6396

JOHN P. HENRY
phenry@thompsonlaw.com

July 31, 2017

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629 (29211)
1015 Sumter Street
Columbia, SC 29201

RE: *Harleysville v. Heritage*
Appellate Case No.: 2017-001272
Trial Court Case Nos. 2009-CP-26-11862; 2009-CP-26-10053

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Respondent's Reply to Initial Brief and Respondent's Designation of Matter for the Record on Appeal. Please file the originals and return a copy of each to me in the return envelope enclosed.

By copy of this letter to all counsel of record, I am herewith serving them with copies of the Brief and Designation.

Should there be any problem with the above, please notify me immediately.

With kindest regards, I am

Sincerely,
THOMPSON & HENRY, P.A.

John P. Henry

PCT/sbh
cc: C. Mitchell Brown, Esquire
Brian Crotty, Esquire
Robert C. Calamari, Esquire
Laura J. Evans, Esquire
Enclosures as noted.