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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No.: 2020-000735

Portrait Homes - South Carolina, LLC and Portrait Homes - Persimmon Hill, LLC,	Plaintiffs,
v.	
Pennsylvania National Mutual Casualty Insurance Company and The Persimmon Hill Homeowners Association, Inc.	Defendants.
AND	
The Persimmon Hill Homeowners Association, Inc.	Third-Party Plaintiff,
v.	
Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. d/b/a JJA Framing,	Third-Party Defendants

Of which Pennsylvania National Mutual Casualty Insurance Company is the Appellant,

And

Portrait Homes - South Carolina, LLC, Portrait Homes - Persimmon Hill, LLC, and The Persimmon Hill Homeowners Association, Inc., are the Respondents.

RETURN OF RESPONDENT THE PERSIMMON HILL HOMEOWNERS ASSOCIATION, INC. TO APPELLANT'S PETITION FOR REHEARING

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PROCEDURAL AND FACTUAL BACKGROUND

This Court thoroughly set forth the factual and procedural background of this appeal in the December 13, 2023, Opinion. *See Portrait Homes v. Pa. Nat'l Mut. Cas. Ins. Co.*, Op. No. 6038 (S.C. Ct. App. filed Dec. 13, 2023). For brevity, it is not repeated here.

ARGUMENT

To prevail on their petition for rehearing, Pennsylvania National Mutual Casualty Insurance Company (hereinafter referred to as "Penn") "must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). "'The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.'" *Id*. (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)). The arguments presented by Penn in its Petition for Rehearing were not overlooked or misapprehended by this Court. On the contrary, the arguments were carefully evaluated and addressed by this Court in a thoroughly written Opinion. Here, Penn reargues the same points it previously presented. Therefore, Penn's Petition for Rehearing should be denied.

I. As to Appellant's Arguments Regarding an Insured's Rights, Duties and Obligations Under the Policies

In the December 13, 2023, Opinion, this Court correctly affirmed the trial court's finding that coverage was afforded under eight (8) policies of insurance issued by Penn. Contrary to Penn's assertion, this Court did not overlook "fundamental tenets of insurance law." Penn claims the Court misapprehended the law and misstates the Opinion of this Court by arguing this Court held that an insured cannot decline coverage available to the insured under a policy of insurance. The facts and circumstances of this case required extensive factual inquiry by the trial judge in which the trial

court ultimately determined that Penn misled its insured and the insured did not knowingly and voluntarily relinquish his rights, including the right to a defense, under Penn's insurance policies. Contrary to Penn's assertion, this Court did not hold that an insured cannot decline coverage, but rather reviewed the evidence and concluded that there was factual evidence supporting the trial court's findings.

This Court goes through an extensive discussion of countless supportive findings in the Facts/Procedural History of its December 13, 2023, Opinion. *See Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 16-39). While not intending to cover the supportive findings exhaustively, as this has already been previously briefed and many contained in this Court's Opinion, these findings begin from the inception of Penn's opening of its claim file in this matter and continue throughout the entirety of Penn's handling of the claim. The testimony of Greg Gross as noted in this Court's Opinion was:

> fifteen . . . days after opening this claim, . . . Gross met with his superiors including his regional claim's office team leader, Gary Gibson, and Penn National's home office in-house legal counsel, Adam Parsons, to discuss the handling of this claim. . . . Gross testified that "when a lawsuit is filed against a Penn National Insured," two things must happen – the pleadings have to trigger coverage and the "second hurdle [the insured must] jump through" is "to request a defense from Penn National." The court stated "Gross testified that this second hurdle was not a term or condition contained in any of the insuring agreements that he had ever seen at Penn National, and that he told management he did not believe imposing this requirement of specifically having to request a defense was proper." . . . [N]one of the four other insurance companies at which he had previously worked adjusting claims had this requirement.

Portrait Homes, Op. No. 6038 (Howard Adv. Sh. No. 48 at 21). There is no dispute that the pleadings at issue triggered coverage in this case, and the policy benefits for which the insured had already paid required Penn to provide a defense. This and the misleading acts of Penn towards Mr.

Castillo were a part of the trial court's factual analysis in finding Mr. Castillo did not decline a defense.

Further, this Court held, "[i]n the present case, evidence supports the trial court's finding Castillo did not decline coverage. Castillo's interaction with McLeod during the cold call in his garage did not amount to him declining coverage as Penn National contends; Castillo had a limited amount of information at the time of that interaction." *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 42). "[T]he trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law." *Butler Contracting, Inc. v. Court Street, LLC,* 369 S.C. 121, 127, 631 S.E.2d 252, 255-56 (2006).

Here, the trial court factually found that "Ms. McLeod[1] asked if JJA wanted Penn National to defend JJA in the underlying case but did not disclose any other relevant information regarding the claim that had been known to Penn National since receiving Portrait's counsel's correspondence on June 5, 2013." (RI p. 13). This included not disclosing "that Penn National knew that the liability exposure to JJA was in the multi-millions of dollars, the severity of the defects and damages identified in the engineer's report and that the lawyer that would be providing the JJA defense was already a paid for policy benefit." (RI p. 36). Judge Young further found that Penn misled Castillo and failed to provide him important information that Penn had in its possession which was material. Judge Young found that if this important information had been disclosed by Penn's IA to Castillo, Castillo would have responded to her that he *wanted* a defense

[1] Penn National now indicates that it hired Gayle McLeod to provide Mr. Castillo with an opportunity to comply with the conditions of the Penn National policies. This, however, is contrary to the trial court's factual findings in this case. *See* RI p. 12 ("I am going to have IA go to home of [Mr. Castillo] and determine . . . what their intentions are with this lawsuit. Are they requesting a defense?").

– as testified to by Castillo. (RI p. 466, lines 4-14). Judge Young personally witnessed the demeanor of Mr. Castillo, and his factual finding of no waiver has evidentiary support. Therefore, Penn's argument that the Court's holding that Penn "misled" Mr. Castillo is wholly unsupported by the evidence is simply without merit. This determination of whether Mr. Castillo *knowingly and voluntarily* waived his policy rights and a defense, as Penn contends, is a factual inquiry. Penn must show this Court, consistent with the applicable standard of review, that Judge Young's factual determination is wholly unsupported by the evidence to prevail on this point. Penn cannot sustain this burden. The record contains overwhelming evidence and reasonable inferences from evidence that fully support Judge Young's factual findings in this regard.

II. As to Appellant's Argument Regarding Substantial Prejudice

Penn argues that it showed it was substantially prejudiced in this case by its insured's failure to comply with its contractual duties as a matter of law despite Penn knowing about the existence of the lawsuit at issue prior to Mr. Castillo being served. This Court disagreed with Penn's arguments as to substantial prejudice, and therefore, did not need to address whether the trial court erred in failing to find Castillo violated the notice and cooperation clauses. *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 48) ("[I]n addition to showing Castillo did not provide it with notice, Penn National must also show prejudice because this case involves an innocent third party."). Penn now argues this Court overlooked that Penn was unable to stop a default judgment from being entered despite it having a duty to defend its insured pursuant to its own policy language. Penn claims Mr. Castillo refused to allow Penn to hire counsel to defend him. In addition to this argument being in direct contravention of Penn's own policy language, a major flaw with this argument is that the first time Penn ever raised this issue was well after judgment was obtained and only after the HOA sought to collect on the judgment as noted in the

trial court's order. It is clear from factual findings that this argument was created by Penn to try to find cover and attempt to create substantial prejudice for Penn's own self-created circumstances. In determining Penn was not substantially prejudiced, the trial court made factual findings regarding Penn's policy language, claims file, reservation of rights letters, testimony of witnesses, investigation of the claim, or lack thereof, Gayle McLeod's cold call meeting with Mr. Castillo in his garage, and Penn's request for an extension of time, amongst other factual findings, in determining Penn was not substantially prejudiced. (RI pp. 34-40, 133-136).

The consent for representation and the contractual agreement for Penn to provide representation for Mr. Castillo is found in the insuring agreement: "We will have the right and duty to defend the insured against any "suit" seeking those damages. . . ." (RII pp. 653, 717, 784, 860, 924, RIII pp. 981, 1043, 1096)(emphasis added). Therefore, the consent to provide a defense was given by Mr. Castillo/JJA when the policy premiums were paid for each of the eight (8) years of premiums. The trial court noted "JJA and Penn National have already agreed that Penn National has the right and obligation to defend JJA pursuant to the terms of the insuring agreement[.]" (RI p. 37). The trial court went on to find that the policy language specifically states the policies "can be amended or waived only by endorsement issued by Penn National and made part of this policy." (RI p. 37). The trial court held the "duties and obligations of the parties to the insuring agreement can't be altered orally." (RI p. 37). The trial court ultimately found that it was Penn's own breach of the insurance policies that resulted in the default and damages award. (RI p. 39).

Undoubtably there are circumstances where the conduct of the insured results in substantial prejudice to an insurance carrier as shown in many cases cited in this Court's opinion when it was evaluating the evidence as to whether there was substantial prejudice to Penn in this case. A clear example of the existence of substantial prejudice is where the carrier was unaware that a lawsuit

against its insured was filed, and a default was obtained. Such is not the case here because Penn was aware of the existence of the lawsuit through Portrait Homes even before the insured was served. (RI pp. 8, 11). Penn further requested an extension of time which was granted as noted in the trial court's findings. It was seven (7) months from the time Penn requested the extension of time until the default was entered. (RI p. 13). The trial court evaluated the testimony including that of Gross who testified that Penn made the decision to not conduct any investigation of this claim. (*See* RI p. 333, lines 1-17). The trial court further factually found that Penn had opportunities to investigate but chose not to do so, including when McLeod made a cold call on Mr. Castillo in his garage. (RI pp. 15-16). Further, Judge Young specifically ruled that this basis asserted by Penn for failing to defend JJA, namely – a supposed requirement that the insured affirmatively request a defense – was not mentioned in any ROR letters by Penn and was therefore waived. (*See* RI p. 135). The trial court further held "this new argument was not part of any consideration for Penn National in not providing JJA defense and indemnity in the underlying case, and therefore, need not be considered." (RI pp. 37-38).

Penn argues further that this Court relied *solely* on an ethics advisory opinion to find that Penn had Mr. Castillo's consent to retain an attorney to represent them in the Persimmon Hill litigation. This, however, is not the case. This Court noted that the trial court found the facts of *Twin City and Eastwood Construction* distinguishable from the facts here as Penn never attempted to hire counsel for Castillo. Furthermore, this Court noted, "the ethics opinion relied upon by the trial court, while not controlling, is instructive and persuasive authority, and it *did not serve as the only basis for the court's decision." Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 49)(emphasis added). The trial court held that the default was a result of Penn's own actions and/or

inactions, and therefore, there was no substantial prejudice to Penn. There is ample factual evidence to support this finding. (RI pp. 134-135).

This Court affirmed and the trial court found as a factual matter that Mr. Castillo did not waive his right to a defense in this case which is the foundation of Penn's claim of it being substantially prejudiced. This Court further noted that "[b]ecause Penn National knew of the lawsuit well before Castillo, it was not prejudiced by Castillo's failure to forward the paperwork or contact it. Penn National had the opportunity to respond to the suit[.]" *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 48). This Court further noted that "[b]ased on its own knowledge of the suit, Penn National had opportunities, of which it did not take advantage, to at least attempt to protect itself. Accordingly, the trial court did not err in finding Penn National was not substantially prejudiced due to lack of notice by Castillo." *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 48). There is nothing in Penn National's Petition for Rehearing that hasn't already been considered and extensively reviewed by this Court and already addressed in this Court's December 13, 2023, Opinion.

III. As to Appellant's Arguments Regarding Apportionment

Penn argues that coverage under its policies is not afforded for all damages sought by the HOA. Contrary to Penn's assertion, the HOA and Portrait Homes did present significant evidence regarding damages covered by Penn's policies, and the amount thereof, through the testimony of engineer Robert G. Sisnroy, P.E., and J. Blanton O'Neal, IV, counsel for Portrait Homes in the underlying case. JJA's scope of work included the installation of the windows, window flashings and weather barrier on approximately 85% of the 388 townhomes in the Persimmon Hill project, and JJA was the biggest subcontractor on the job -as is generally the case on a job of this type- and "their work is integrated throughout the project." (RI pp. 95, 97). Mr. Sisnroy testified that there

were approximately 4,000 windows installed in this project, and he did not find a single window location to be without problems. (RI p. 94). Mr. Sisnroy further testified that the rot caused by the water damage resulted in the oriented strand board (OSB) becoming so deteriorated that it could be removed by hand. *Id.* He further found that the rot extended beyond the oriented strand board (OSB) and into the structural members of the building and found this condition to be pervasive. *Id.* There was such a massive amount of water entering through the window-wall intersection that even curtains and plantation blinds were damaged. *Id.*

The trial court found as a factual matter that "JJA's faulty work in installing windows, window flashings, and weather barrier caused water intrusion and resulted in damage to non-defective wood walls, structural members, drywall, trim, curtains and plantation blinds." (RI p. 38). The trial court further held that "the damage to non-defective work constituted physical injury to tangible property satisfying the definition of 'property damage' in the Penn National policies." *Id.* at 38-39. The trial court heard testimony from J. Blanton O'Neal, IV, who "estimated approximately 50 percent of the plaintiffs' repair estimate of $12,700,000 was for repairing non-defective work that was damaged by JJA Framing's defective work." (RI p. 97). This damage to non-defective work resulting from JJA's defective work was described as well by Mr. Sisnroy as being pervasive throughout the Persimmon Hill project. (RI p. 38). Penn put up no evidence to dispute the testimony of Mr. Sisnroy or Mr. O'Neal.

While there is ample evidence to support the trial court's findings and determination that the damages awarded to the HOA are covered, Penn National failed to preserve this defense by sending its cut and paste Reservation or Rights ("ROR") letters to a four-year-old stale address and admitting that Castillo never received any of the three ROR letters issued by Penn. (RI pp. 16-17, 43). Penn had the opportunity to have its ROR correspondence provided to Mr. Castillo by

Gayle McLeod when she went to his home but chose not to. The South Carolina Supreme Court was very clear in *Harleysville* as to the requirement and purpose of an insurer informing its insured of the coverage defenses it may assert through ROR letters. *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 339, 803 S.E.2d 288, 298 (2017). The Court in *Harleysville* defined an ROR as the following: "A 'unilateral reservation of rights' is a notice given by the insurer that *it will defend* [the insured in the lawsuit] but reserves all rights it has based on noncoverage under the policy . . . ." *Id*. at 338, 803 S.E.2d at 297(quoting 14 Couch on Ins. § 202:38)(emphasis added). If a carrier does not adequately reserve its rights sufficiently specifying its coverage defenses through a proper ROR, then the carrier will be precluded from disputing coverage at a later time. 420 S.C. at 339, 803 S.E.2d at 298.

Penn further ignores the fact that it made the decision to gamble not only for itself but also with Mr. Castillo's financial assets by not providing Mr. Castillo a defense. Penn knew this gamble could result in a default judgment on a Complaint that alleged clearly covered damages for a liability exposure in the multi-millions of dollars. (RII pp. 531-532, 550-551). The trial court held that "Penn National had the opportunity to defend its insured but chose not to even after requesting a 30-day extension from Plaintiff's counsel to file an answer after its insured had been served. . . . Penn National had the opportunity to seek allocation of damages if it had provided a defense and participated in the underlying litigation on behalf of JJA." (RI p.142). The judge then found as a fact that the covered damages exceeded the policy amounts. (RI pp. 46-49). It is clear from the testimony heard by the trial court that the entirety of the default judgment was covered damages under Penn's policies. Therefore, Penn's request for an apportionment of the default judgment should be denied.

IV. As to Appellant's Arguments Regarding Time-On-Risk

Penn contends that this Court misapprehend the Supreme Court's decision in *Crossmann Cmtys v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) ("*Crossmann II")*. Penn overlooks that this case is extremely unique – one with facts and a procedural history that our South Carolina Courts may never see again. The facts in *Crossman II* were stipulated whereas the facts in this case were not stipulated but rather the allegations in the underlying complaint were admitted because of the default. The carriers in *Crossman II* provided a defense for their insureds in the underlying case whereas no defense was provided in this case by Penn. There was testimony in this case as to the extent of damage repairs being necessitated as of 2012 per Robert G. Sisnroy, P.E., whereas there was no testimony of an end date to the risk period in *Crossman II*. This case involves Penn as the sole carrier for the entire risk period while *Crossman II* had more than one carrier. Further, the policy language before the South Carolina Supreme Court in *Crossman II* is different from the policies in this case.

As cited by this Court, the *Crossmann II* formula "is not a perfect estimate of the loss attributable to each insurer's time on the risk. Rather, it is a *default rule* that assumes the damage occurred in equal portions during each year that it progressed." *Crossmann II* at 65, 717 S.E.2d at 602. This Court goes on to note that our Supreme Court ruled in *Crossman II* that the formula "is subject to alteration *at the discretion of the trial court*." *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 67) (quoting *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 411 S.C. 506, 522, 769 S.E.2d 453, 462 (Ct. App. 2015)). This Court concluded that the trial court did not err in its damage calculation because the trial court found the change in policy language meant the time on risk analysis changed as well, such that "the progressive property damage caused by continuous or repeated exposure to water intrusion occurring *after* the end of a policy period is deemed to be included in what is covered by the

policy." (RI p. 100). In addition to the testimony regarding the water intrusion damages, the Amended Complaint in the underlying action, which was deemed admitted when Penn let its insured go into default, provided, "Each year since completion new areas of damage occurred, separate and apart from any damage already in progress of occurring." (RII p. 551). Therefore, it has been admitted that new damage occurred in different policy years that was not already in the process of occurring and/or ongoing in the previous policy year(s) further supporting that each policy year of coverage was triggered as found by the trial court rather than a single policy year as Penn contends.

Penn ignores that it made the decision to gamble not only for itself but also with Mr. Castillo's assets by not providing Mr. Castillo a defense and allowing a default judgment. Penn cannot now claim it should reap the benefits and protections of the default time-on risk formula even if the default time-on-risk applied in this case, which it does not, as noted by both the trial court and this Court. Penn is seeking to benefit itself to the detriment of its insured by allocating the pro-rata uninsured period of time portion of the judgment to its insured when such allocated amount may have been reduced by defending the claim and/or by negotiated settlement should the Plaintiff have accepted a settlement offer made by Penn. This, though, would have required Penn to perform its defense and indemnity obligations. Penn chose poorly in its gamble to refuse to defend or indemnify its insured and should not reap the benefits of its poor decision to the detriment of its insured. "An insurance company fails to defend at its own peril. . . ." *Stroup Sheet Metal Works, Inc. v. Aetna Cas. & Sur. Co.*, 268 S.C. 203, 212-13, 232 S.E.2d 885, 888 (1977). "Where an insurer refuses to undertake the defense of an action against the insured based upon a claim within the coverage of the insurance policy, it thereby breaches the contract of insurance and is liable to the insured for all damages resulting to such insured as a direct result of such refusal

and breach." *Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)(citations omitted). Further, "[a]n insurer who unreasonably refuses or fails to settle a covered claim within the policy limits is liable to the insured for the entire amount of the judgment obtained against the insured regardless of the limits contained in the policy." *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001)(citing *Trotter v. State Farm Mut. Auto Ins. Co.*, 297 S.C. 465, 475, 377 S.E.2d 343, 349 (Ct. App. 1988)). Accordingly, the Court did not err in affirming the trial court's factual findings as it pertains to time-on-risk.

V. As to Appellant's Arguments Regarding Bad Faith

Penn argues that the HOA and Portrait failed to prove the causal link between the denial of benefits and the bad faith conduct by Penn. In addition, Penn argues that it had a reasonable basis for its decisions, and therefore, the bad faith ruling should be reversed. It further argues that there were no damages suffered from Penn's bad faith. These arguments, however, are completely without merit and ignore the numerous other instances that the trial court identified (both individually and collectively) of Penn National's unreasonable action in breach of the implied covenant of good faith and fair dealing. (RI p. 140).

a. As to JJA

As it pertains to the HOA as assignee[2] of Mr. Castillo's bad faith claims, the trial court found "Penn National required Mr. Castillo to specifically request a defense from Penn National prior to Penn National hiring counsel to provide a defense irrespective of whether the Complaint

[2] There is no issue regarding assignments in the trial or in this appeal. The Persimmon Hill HOA obtained the bad faith claim assignment (along with any related punitive damages claims) from Portrait as part of a partial settlement. The Persimmon Hill HOA also obtained claims from JJA via assignment after it obtained a judgment against JJA.

triggered coverage." (RI p. 137). The claims file is replete with claim notes that Mr. Castillo would not be provided a defense until he affirmatively requested one. (RIII pp. 1180, 1181, 1186, 1187). Judge Young, as fact finder, reviewed the evidence and witnessed the demeanor of the witnesses, including the Penn witnesses. The trial court's finding that Penn acted in bad faith, and recklessly so, is supported by the evidence and reasonable inferences, therefrom. The trial court was entitled to find that Penn was manufacturing reasons it knew were not in its policy to try to justify a denial of the defense and coverage here. In addition, the fact Penn undertook the defense/protecting in obtaining an extension for the time to respond to avoid default for JJA pursuant to its policy duty, ***before*** speaking directly with Mr. Castillo, completely undermines any supposed basis Penn had for first needing to have Mr. Castillo "request" a defense (to which he was already entitled under the policy), prior to taking action to defend him. *See Byerly v. Connor*, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992) (where "an act is voluntarily undertaken, the actor assumes a duty to use due care.").

The trial court further found Penn and Gayle McLeod misled Mr. Castillo by providing him limited and incomplete information during the Saturday morning cold call in the garage at his residence when asking Mr. Castillo if he wanted a defense for which he already paid. Mr. Castillo's response to being misled by Penn and McLeod is part of the foundation on which Penn relies for its farcical position that denying policy benefits for which an insured has already paid for by misleading the insured is reasonable conduct. Penn cites no authority to support its contention that an insurer misleading its insured to avoid having to defend complex multi-party litigation and pay millions of dollars in indemnity benefits is reasonable conduct by an insurer.

Therefore, there is clearly a causal link between Penn National's denial of benefits and its bad behavior (e.g., asking Mr. Castillo misleading questions). The trial court found as a matter of

fact that "Penn National knowingly misrepresented to JJA the coverages and policy benefits . . . by failing to disclose pertinent facts and information"; that "Penn National put its interests ahead of its insured by asking JJA whether it was requesting the valuable policy benefit of a defense to which it was already entitled. If the answer is yes then Penn National must do what it is already obligated to do, but if the answer is no then Penn National attempts to avoid potentially paying a claim of millions of dollars to an innocent third-party claimant"; and that the "conduct of Penn National was unreasonable, in bad faith and in breach of the duty of good faith and fair dealing to its insured." (RI p. 45). In other words, the trial court found as a factual matter that Penn's basis for denial was unreasonable because it was deliberately a bad faith attempt to get out of its responsibility and obligation. Therefore, Penn's assertion that its decision to deny coverage was based on reasonable grounds was found to be factually inaccurate by the trial judge. This fact finding by the trial judge is supported by evidence of record. Thus, this Court correctly affirmed.

Penn further alleges that the trial court and this Court failed to analyze the damages caused by Penn's bad faith conduct. Contrary to Penn's assertion, the trial court found as a factual matter that but for its bad behavior, the default judgment would not have been entered: "As a result of Penn National's failure to provide JJA a defense, an Order of Default was entered against JJA on December 22, 2014, nearly nineteen (19) months after being put on notice of the lawsuit. (HOA Ex. 12). Penn National was also put on notice of the entry of default by correspondence dated July 1, 2015, from HOA's Counsel[.] (Pl. Ex. 58, 17; HOA Ex. 12)." (RI p. 164). Penn undertook to seek an extension to file an Answer to the HOA Complaint and had an opportunity to fully protect and defend its insured. Yet, it ultimately chose not to do so based, according to Penn, on an oral conversation in the insured's garage, the contents of which conversation the trial judge found to be in bad faith. "Over a year later, on July 13, 2016, a Default Judgment was entered against JJA

in the amount of $4,156,976.89 by the Honorable Dale Van Slambrook. (HOA Ex. 13).” (RI p. 164). Instead of protecting its insured’s interests, Penn solely looked out for its own interests in bad faith, and allowed its insured to go into default, when it easily could have prevented that outcome had it adhered to its duties under the insurance policies.

In affirming the trial court’s findings related to Penn’s unreasonable conduct, this Court specifically notes some of the evidence supporting the trial court’s finding of bad faith, “Penn National’s failure to investigate; its failure to check its own records for Castillo’s contact information; its knowledge Castillo never received any of its RORs; its application of terms not in the policy (requiring Castillo to request a defense); and its not informing Castillo of all the pertinent information known to it about the claim.” *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 52). Therefore, this Court properly affirmed the trial court’s ruling of bad faith as it pertains to the HOA as assignee of JJA’s claims against Penn National.

b. As to Portrait

As to Portrait, the trial court held Penn owed Portrait a duty of defense based on the allegations in the underlying complaint which caused damages to Portrait, and that Penn acted in bad faith in its breach of such duty. (*See* RI pp. 93-106, 127-129). The basis for denial of Portrait’s claim as set forth in Penn’s letter dated September 30, 2014, was “. . . the sole avenue to additional insured status would be through an endorsement providing additional insured status for completed operations. The above noted policies do not contain such an endorsement.” (RII p. 619). This basis for denial was simply untrue, and this misrepresentation was conceded by Gross in his testimony to be “not right”, by Adam Parsons to be “inaccurate” and by Penn’s expert, Bernd Heinze, to be the “opposite of what was true”. (RI p. 85). Therefore, the trial court held as a matter of fact that Penn National’s basis for denial was unreasonable. The trial court further held that Penn National’s

bad faith caused damage to Portrait. (RI p. 129). This was supported by the testimony of J. Blanton O'Neal, IV. (RI pp. 156-157).

In affirming the trial court's findings related to Penn's unreasonable conduct, this Court specifically notes some of the evidence supporting the trial court's finding of bad faith, which included failing to respond for seventeen months, which Penn acknowledged was untimely, providing an inaccurate reason for denying coverage to Portrait Homes, and failing to reasonably investigate Portrait's request for additional insured status. *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 64-65). Therefore, this Court properly affirmed the trial court's holding of bad faith damages as it pertains to Portrait.

VI. As to Appellant's Arguments Regarding Punitive Damages

Penn argues there was no evidence that any alleged conduct by Penn rose to the level of willful conduct or even evidenced a reckless disregard of the insured's rights. Penn asserts that this Court merely found that the evidence supporting a bad faith claim was sufficient to support a claim for punitive damages. This, however, is not the case. As noted by this Court, "[m]any of the trial court's findings that support its bad faith determination also support its determination that Penn National's conduct was willful and reckless." *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 65). The facts that give rise to punitive damages were exhaustively argued to Judge Young, and much of the trial transcript quotes supporting these arguments are contained in the PowerPoint presented at the Rule 59(e) hearing and filed with the trial court. (RV pp. 1832-1899). The manner in which the Portrait and the JJA claims were to be handled was orchestrated by Penn's Home Office In-House Counsel, Adam Parsons. Judge Young found by clear and convincing evidence that punitive damages should be awarded, and Penn could not meet its burden of showing

the record is wholly unsupportive of such a finding. (*See* RI pp. 150-177).[3] This Court further enumerates some of the instances that warranted the imposition of punitive damages in favor of the HOA to include: "Penn National t[aking] a position unsupported by the policies or law that Castillo had to request a defense before it would provide one to him, despite the fact that his policies and his payments entitled him to one." *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 54). In addition, this Court noted that it appeared from Penn's own expert's testimony that Penn has engaged in similar behavior before. *Id.* This Court further enumerates some of the instances that warranted the imposition of punitive damages in favor of Portrait including Penn taking seventeen months to respond with an incorrect reason for denying coverage without reviewing its underwriting file. *Portrait Homes*, Op. No. 6038 (Howard Adv. Sh. No. 48 at 65). In addition, "Penn National internally indicated it was likely going to deny coverage two months before any coverage analysis took place." *Id.* Therefore, the trial court's punitive damages award was properly affirmed by this Court.

CONCLUSION

For the reasons stated herein, this Court should deny Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*.

[3] Penn National further argues that the HOA and Portrait should have been required to elect their remedies between damages from their bad faith claim and punitive damages. This argument has not been raised before and may not be raised for the first time in a rehearing petition. Nevertheless, in South Carolina "if [the insured] can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). Therefore, no election of remedies is required.

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February 22, 2024
Charleston, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No.: 2020-000735

Portrait Homes - South Carolina, LLC and Portrait Homes - Persimmon Hill, LLC,	Plaintiffs,
v.	
Pennsylvania National Mutual Casualty Insurance Company and The Persimmon Hill Homeowners Association, Inc.	Defendants.
AND	
The Persimmon Hill Homeowners Association, Inc.	Third-Party Plaintiff,
v.	
Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. d/b/a JJA Framing,	Third-Party Defendants

Of which Pennsylvania National Mutual Casualty Insurance Company is the Appellant,

And

Portrait Homes - South Carolina, LLC, Portrait Homes - Persimmon Hill, LLC, and The Persimmon Hill Homeowners Association, Inc., are the Respondents.

PROOF OF SERVICE

I, Alicia D. Pullano, certify that I have served *Respondent The Persimmon Hill Homeowners Association, Inc.'s Return to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc,* by electronic mail, on February 22, 2024, addressed to all attorneys of record, as follows:

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By: *s/ Alicia D. Pullano*
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February 22, 2024
Charleston, South Carolina

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February 22, 2024

Via E-Mail Only
The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *Portrait Homes – South Carolina, LLC, et al. v. Pennsylvania National Mutual Casualty Insurance Company*
Appellate Case No.: 2020-000735

Dear Ms. Kitchings:

Attached please find Respondent Persimmon Hill Homeowners Association, Inc.'s Return to Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* and Proof of Service for filing in the above-referenced matter.

With kind regards, I am

Sincerely,

Alicia Pullano
Alicia D. Pullano

ADP/cmmd
cc: John I. Malone, Jr. (*Via E-Mail Only*)
David L. Brown (*Via E-Mail Only*)
Stanley C. Rodgers (*Via E-Mail Only*)
Phillip W. Segui, Jr. (*Via E-Mail Only*)