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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

Case No. 2014-CP-08-02757

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.

RESPONDENTS PORTRAIT HOMES – SOUTH CAROLINA, LLC
AND PORTAIT HOMES – PERSIMMON HILL, LLC’S RETURN TO APPELLANT’S
PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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ARGUMENTS

This Court's lengthy opinion affirming the trial court's lengthy orders thoroughly analyzed the issues in dispute. This Court did not overlook or misapprehend any of the material points of law or fact. Penn National's Petition for Rehearing should be denied.

1. This Court did not err in affirming the trial court's determination that Portrait Homes proved it was an additional insured under five of the Penn National Policies

Penn National issued eight commercial general liability policies. Portrait Homes sought status as an additional insured under five of those policies based on two types of endorsements: (1) Endorsement 71 11 45 entitled Automatic Additional Insureds -- Owners, Contractors, and Subcontractors (Completed Operations); and (2) Endorsement CG 20 37 entitled Additional Insured -- Owners, Lessees or Contractors - Completed Operations. The trial court concluded Portrait Homes qualified as an additional insured under both types of endorsements.

- A. Portrait Homes qualified as an additional insured under Endorsement 71 11 45 because Portrait Homes had a written contract requiring completed operations coverage with JJA Framing, an organization qualifying as a Named Insured under the policies containing this endorsement

Endorsement 71 11 45 provides additional insured coverage in material part as follows:

Any person(s) or organizations(s) (referred to below as additional insured) with whom you are required in a written contract or agreement to name as an additional insured for the "products-completed operations hazard", but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work", at the location or project designated and described in the contract or agreement, performed for that additional insured and included in the "products-completed operations hazard".

A person's or organization's status as an additional insured under this endorsement ends when the obligation to provide additional insured status for the "products-completed operations hazard" in the written contract or agreement ends.

(RII p. 948 / Plaintiff's Exhibit 28: Endorsement 71 11 45 0105; RII p. 1009 / Plaintiff's Exhibit 30: Endorsement 71 11 45 0906.)

The endorsement requires Portrait Homes to have a written contract with “you”, which is defined in the commercial general liability coverage form in all the Penn National Policies to be “the Named Insured shown in the Declarations, *and any other person or organization qualifying as a Named Insured under this policy.*” (See, e.g., RII p. 860 / Plaintiff's Exhibit 21, p. 40.) (emphasis added). Portrait Homes had a written contract requiring additional insured coverage with JJA Framing, but JJA Framing was not listed as the Named Insured on the Declarations Pages of the three policies containing Endorsement 71 11 45 — JJA Construction Inc. was. The question became whether JJA Framing was a “person or organization qualifying as a Named Insured under th[e] polic[ies].” The critical factual issue at trial was whether Jose Castillo dba JJA Framing and JJA Construction Inc. dba JJA Framing were in essence the same business. The trial court's conclusion that they were — amply supported by the evidence introduced at trial — laid the foundation for the determination that Portrait Homes qualified as an additional insured under those three Penn National Policies, both because Jose Castillo dba JJA Framing continued to qualify as a Named Insured on the policies in which JJA Construction Inc. was listed on the Declarations Pages, and because JJA Construction Inc. was bound by the contracts signed in the name of JJA Framing by Jose Castillo. Either way, Portrait Homes satisfied the requirements of the endorsement. Order Regarding Additional Insured Coverage, pp. 12-21. (RI pp. 62-71.)

Recognizing at trial the weakness of the contrary position, Penn National asserted a new argument: Even if Endorsement 71 11 45's requirement of a written contract with the Named Insured was satisfied, the additional requirement that the contract call for completed operations coverage for the additional insured was not. Penn National argued that while there was a contract

requiring completed operations coverage — the Master Agreement — that contract did not apply to the Persimmon Hill project. For the reasons explained at length in the Order Regarding Additional Insured Coverage, pp. 21-22 (RI pp. 71-72), and more so in the Post-Trial Motions and Punitive Damages Order, pp. 4-9 (RI pp. 111-116), the trial court correctly rejected this additional argument as well.

B. The trial court correctly determined as a matter of law that Endorsement CG 20 37 was ambiguous, and correctly determined as a matter of fact that Portrait Homes qualified as an additional insured under this endorsement

Penn National quarrels with the trial court and this Court’s conclusion that Endorsement CG 20 37 was infected with ambiguity. Penn National accuses this Court of finding “ambiguities – not in the language at issue in the additional insured endorsements but in the Penn National Policies overall.” Petition, p. 15. Penn National continues: “Based on those alleged ambiguities, this Court found that it was able to look to extrinsic evidence to alter *all* of the terms of the Penn National Policies not just ambiguous provisions[.]” Petition, p. 15 (emphasis added). Penn National concludes: “Therefore, the result of an ambiguous provision is not, as this Court held, that the entire policy is subject to extrinsic evidence and should be interpreted in favor of coverage, but that the ambiguous provision itself should be construed in favor of the insured.” Petition, pp. 15-16. Penn National mischaracterizes this Court’s analysis.

Contrary to Penn National’s assertion, this Court (nor the trial court) looked to extrinsic evidence to alter *all* of the terms of the Penn National Policies. Rather, this Court (and the trial court) focused the analysis as to Endorsement CG 20 37 on the endorsement itself. The ambiguity arose because typed below the preprinted language in the endorsement of “Location and Description of Completed Operations [to be covered for the additional insured],” an address was manually filled in that corresponded to JJA Framing’s own address in North Carolina. (RII pp.

696-98 / Plaintiff's Exhibit 14, pp. 18-20: 2003-04 policy; RII p. 767 / Plaintiff's Exhibit 17, p. 4: 2004-05 policy.)

The obvious scrivener's error created an ambiguity, which opened the door to extrinsic evidence to aid the fact-finder in interpreting the endorsement. Penn National notes in its Petition that "[a] fundamental tenet of insurance policy construction is: 'When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.' *B.L.G. Enterprises v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999)." Petition, p. 14. Portrait Homes agrees the quote from *B.L.G. Enterprises* states a fundamental tenet of South Carolina insurance law. But Penn National omits the corollary, which is also a fundamental tenet of South Carolina insurance law: "If the court decides the language is ambiguous, however, evidence may be admitted to show the intent of the parties, and the determination of the parties' intent becomes a question of fact for the fact-finder." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014). Another fundamental tenet is: "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Insurance Co. v. Homestead Industries, Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995).

In its role as the fact-finder, the trial court determined the location to be covered included the Persimmon Hill project where JA Framing was working for Portrait Homes (as opposed to JJA Framing's own address, where JJA Framing was presumably not working for anyone), and the organization listed in the endorsement was broad enough to include Portrait Homes – South Carolina, LLC and Portrait Homes – Persimmon Hill, LLC even though they were not specifically among the Pasquinelli/Portrait entities listed in the endorsement. The evidence supporting the trial

court's decision is addressed in detail in the Order Regarding Additional Insured Coverage, pp 27-34. (RI pp. 77-84.)

2. Portrait Homes's claims for breach of the duty to defend and for breach of the duty to indemnify are supported by South Carolina case law

Penn National continues to argue Portrait Homes has no claim for breach of contract — both as to the duty to defend and the duty to indemnify — because Portrait Homes has sustained no damage. Penn National supports its argument as to the claim for breach of the duty to defend with a mischaracterization of what the trial court actually awarded. As to the claim for the breach of the duty to indemnify, Penn National refuses to recognize the impact of binding South Carolina precedent.

A liability policy provides two primary benefits: a duty to defend an insured against claims *possibly* covered by the policy, *City of Hartsville v. S.C. Municipal Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 576 (2009) (“If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend.”), and a duty to indemnify an insured against claims *actually* covered by the policy. *Auto-Owners Insurance Co. v. Rhodes*, 405 S.C. 584, 596-97, 748 S.E.2d 781, 787 (2013) (“[T]he insurer’s liability to the insured is ultimately established by what is developed at trial. So a determination of the duty to indemnify cannot be made at a preliminary stage in the proceedings[.]”). Although interrelated, an insurer’s duty to defend is separate and distinct from its duty to indemnify an insured for a claim covered by the policy. *City of Hartsville*, 382 S.C. at 544, 677 S.E.2d at 578. South Carolina treats a claim for breach of the duty to defend differently than a claim for breach of the duty to indemnify based on whether the insured actually paid anything itself.

A. Because Portrait Homes personally paid for a portion of the costs of defense in the underlying litigation, Portrait Homes could recover against Penn National for

breach of the duty to defend, but limited to the costs of defense actually paid by
Portrait Homes

“It is uniformly held that when an insurer refuses to defend and the insured is compelled to conduct his own defense, the insured may recover from the insurer, the reasonable expenses of litigation, including costs and attorneys’ fees.” *Sloan Construction Co. v. Central National Insurance Co.*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). However, even if an insurer breaches its duty to defend, the insured cannot recover damages against that insurer if another insurer provides the insured with a defense at no cost to the insured. Nor can the insurer who paid for the defense recover against the other insurer: “We hold where two companies insure the identical risk and both policies provide for furnishing the insured with a defense, neither company, absent a contractual relationship, can require contribution from the other for the expenses of the defense where one denies liability and refuses to defend. The duty to defend is personal to both insurers; neither is entitled to divide the duty.” *Id.* at 187, 236 S.E.2d at 820. Immediately after announcing that rule, the Supreme Court noted the difference between the duty to defend and the duty to indemnify: “Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services.” *Id.* at 187-88, 236 S.E.2d at 820 (citation and additional quote marks omitted).

Recognizing the rule laid down in *Sloan*, Portrait Homes sought at trial to recover only the costs of defense it actually paid in defending against the underlying cases. Hood Law Firm was hired to defend Portrait Homes by Admiral Insurance Company, who issued policies directly to Portrait Homes. The underlying litigation lasted several years, and over the course of that span Hood Law Firm was paid \$352,000 by Admiral to defend Portrait Homes. Portrait Homes did not seek to recover the defense costs paid by Admiral. Rather, Portrait Homes sought to recover only the defense costs (\$42,791.24) paid personally to Hood Law Firm and another law firm, and that

is all the trial court awarded Portrait Homes in damages for Penn National's breach of the duty to defend.

The Petition for Rehearing asserts: "At trial, Portrait Homes did not dispute that its own insurer, Admiral Insurance Company, paid for its defense in the Persimmon Hill Litigation." Petition, p. 24. Penn National's assertion is only partially accurate. Portrait Homes did not seek to recover the portion of its defense costs that were paid by Admiral Insurance Company (\$352,000), and the trial court did not award any such defense costs as damages for breach of the duty to defend. Order Regarding Additional Insured Coverage, pp. 42-43. (RI pp. 92-93.) The trial court's award of damages (\$42,791.24) for breach of the duty to defend does not run afoul of the rule announced in *Sloan*.

B. Portrait Homes is not required to have personally paid the settlement to recover for breach of the duty to indemnify

Penn National in essence is arguing for an expansion of the rule governing a claim for breach of the duty to defend announced in *Sloan*, which limits an insured's recovery to the amount personally paid by the insured for the defense. Penn National argues the same limitation should apply to a claim for breach of the duty to indemnify. No South Carolina court has ever accepted that argument.¹

Penn National argues that even if it breached the duty to indemnify, Portrait Homes cannot bring a claim against it for that breach because Portrait Homes did not personally pay the settlement.² Penn National's argument fails to acknowledge the distinction between the duty to

¹ The federal district judge sitting in South Carolina who did accept Penn National's argument, *Summer Wood POA, Inc. v. Pennsylvania National Mutual Casualty Inc. Co.*, Civ. No. 2:17-CV-3504-BBH, 2019 WL 4415805 (D.S.C. Sept. 16, 2019), cited in Penn National's Brief (p. 65) and in the Petition for Rehearing (p. 25), has stayed that case awaiting the outcome of this appeal.

² Admiral and another insurer paid the settlement on Portrait Homes's behalf.

defend and the duty to indemnify noted above by the Supreme Court in *Sloan*. More importantly, the argument is contrary to the Supreme Court's later decision in *Otis Elevator, Inc. v. Hardin Construction Co.*, 316 S.C. 292, 330, 450 S.E.2d 41, 45-46 (1994) (“[I]f one party is entitled to indemnity from another, the right to indemnity is not defeated by the fact that the loss to be indemnified for was actually paid by an insurance company.”) (quoting *Tillman v. Wheaton - Haven Recreation Ass’n*, 580 F.2d 1222, 1230 (4th Cir. 1978)). Penn National argues the opposite: If one party (Portrait Homes) is entitled to indemnity from another (Penn National), the right to indemnity is defeated by the fact that the loss being indemnified for was actually paid by an insurance company (Admiral). Penn National's argument was correctly rejected by this Court.

Penn National raises the specter of an “impermissible windfall” if Portrait Homes is allowed to recover. Petition, p. 25. But the testimony at trial established that any recovery against Penn National for failing to pay the settlement will flow back to the entity who actually paid the money - Admiral. The scales would then be balanced with the insurer who should have paid the settlement originally (Penn National) now being required to do so.

3. The trial court's determination of the amount of damages covered by the Penn National Policies is true to the plain meaning of the language used in the Penn National Policies

Penn National argues the trial court erred in failing to apply the default rule announced in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (*Crossmann II*), for determining what amount of damage was covered by the policies. The Petition for Rehearing contains this startling statement: “Regardless of the language contained in the Penn National Policies, the portion of the default judgment and settlement that represented covered damages should have been allocated to the applicable Penn National Policies based on their pro-rata time-on-the-risk.” Petition, p. 29 (emphasis added). Penn

National – an insurance company – argues the determination of what amount of damages is covered by the policies should ignore the language of the policies. Why? Because of the Supreme Court’s interpretation of different policy language in a different case (*Crossman II*).³ When an insurance company argues the language of the policy should be disregarded in interpreting the policy, the End Days may indeed be approaching. But they are not here yet, and Penn National’s argument — contrary to bedrock principles of South Carolina law insurance — should be rejected. See, e.g., *Whitlock v. Stewart Title Guaranty Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2018) (“The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language. ... Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.”) (citations and additional quote marks omitted).

CONCLUSION

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

³ As the trial court noted, the basic coverage form (CG 00 01) of the commercial general liability policies at issue in *Crossman II* was a different version than those involved in this case (July 1988 edition versus October 2001 edition) with critical differences in the language of the insuring agreement. Order Regarding Additional Insured Coverage, pp. 49-50. (RI pp. 99-100.)

s/Stanley C. Rodgers
Stanley C. Rodgers, Esquire
Law Office of Stanley C. Rodgers, LLC
55 Broad Street, Suite 200
Charleston, SC 29401
843-958-9881
scr@stanleyrodgers.com
S.C. Bar No. 64984

Attorney for Respondents
Portrait Homes – South Carolina, LLC
and Portrait Homes – Persimmon Hill,
LLC

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Charleston, South Carolina

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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, Stanley C. Rodgers, certify that I have served Respondents Portrait Homes – South Carolina, LLC, and Portrait Homes – Persimmon Hill, LLC’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:

John I. Malone, Esquire
David L. Brown, Esquire
Goldberg Segalla LLP
701 Green Valley Road, Suite 310
Greensboro, NC 27408

John T. Chakeris, Esquire
Alicia D. Petit, Esquire
Chakeris Law Firm
231 Calhoun Street
Charleston, SC 29401

Phillip W. Segui, Esquire
Segui Law Firm
720 S. Shelmore Boulevard, Suite 100
Mount Pleasant, SC 29464

s/Stanley C. Rodgers
Stanley C. Rodgers, Esquire
Law Office of Stanley C. Rodgers, LLC
55 Queen Street, Suite 200
Charleston, SC 29401
843-958-9881
scr@stanleyrodgers.com
S.C. Bar No. 64984

Attorney for Respondents
Portrait Homes - South Carolina, LLC and
Portrait Homes - Persimmon Hill, LLC

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SC Court of Appeals

**LAW OFFICE OF
STANLEY C. RODGERS, LLC**
55 Broad Street, Suite 200
Charleston, South Carolina 29401

Stanley C. Rodgers, Esquire
scr@stanleyrodgers.com

Telephone: 843-958-9881
Facsimile: 843-958-9882

February 22, 2024

VIA EMAIL 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 Co.
Appellate Case No. 2020-000735

Dear Ms. Kitchings:

I am attaching Respondents Portrait Homes – South Carolina, LLC, and Portrait Homes –
Persimmon Hill, LLC'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 best regards, I remain

Very truly yours,



Stanley C. Rodgers

SCR/hht

cc: John I. Malone (Via E-Mail only)
David L. Brown (Via E-Mail only)
Philip W. Segui Jr. (Via E-Mail only)
John T. Chakeris (Via E-Mail only)
Alicia D. Pullano (Via E-Mail only)