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S.C. SUPREME COURT

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; Portrait Homes – Persimmon Hill, LLC; and The Persimmon Hill Homeowners Association, Inc.,	Plaintiffs,
v.	
Pennsylvania National Mutual Casualty Insurance Company and The Persimmons 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

PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

CERTIFICATION OF COUNSEL **1**

QUESTIONS PRESENTED FOR REVIEW **1**

STATEMENT OF THE CASE **2**

1. Persimmon Hill Litigation 2

2. Present Litigation 4

ARGUMENT IN SUPPORT OF PETITION **6**

I. The Court Of Appeals' Decision Conflicted With This Court's Precedent When The Court of Appeals Held That Even Though The Insured Failed To Comply With The Policy Conditions Of Notice And Cooperation And Affirmatively Declined A Defense, Penn National Nevertheless Breached Its Duty To Defend When It Did Not Defend The Insured In The Underlying Lawsuit. 6

II. The Court Of Appeals Contradicted Precedent From This Court When It Held That Ambiguities In A Different Portion Of An Insurance Policy Allowed It To Refer To Extrinsic Evidence To Interpret Whether Portrait Homes Was Insured Under Otherwise Unambiguous Additional Insured Endorsements 11

A. Form 2037 Additional Insured Endorsement 13

B. Form 71 1145 Additional Insured Endorsement 14

III. The Court Of Appeals' Decision Awarded Portrait Homes And The HOA The Entirety Of The Limits Under The Penn National Policies Without Determining How Much Of The Default Judgment And Settlement Constituted Covered Damages And Allocating Any Such Covered Damages Based On Penn National's Pro-Rata Time-On-The-Risk, Contrary To Prior Supreme Court Decisions 17

IV. The Court Of Appeals Failed to Follow This Court's Precedent In Deciding Whether Plaintiffs Satisfied Their Burden Of Proving Bad Faith 21

V. The Court Of Appeals Contradicted Established Precedent From This Court When It Awarded The HOA and Portrait Homes Double Damages For Bad Faith And Punitive Damages 23

VI. The Court Of Appeals' Award Of Attorneys' Fees To Portrait Homes Is Contrary To This Court's Prior Decisions 24

CONCLUSION **25**

TABLE OF AUTHORITIES

Cases **Page(s)**

Adamson v. Marianne Fabrics, Inc.,
301 S.C. 204, 391 S.E.2d 249 (1990) 24

B.L.G. Enter. v. First Fin. Ins. Co.,
334 S.C. 529, 514 S.E.2d 327 (1999) 6, 11

Builders Mut. Ins. Co. v. Island Pointe,
431 S.C. 93, 847 S.E.2d 87 (2020) 18, 19

Collins Entm't v. White,
363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2009)...13

Crossley v. State Farm Mut. Auto. Ins. Co.,
307 S.C. 354, 415 S.E.2d 393 (1992) 21

Crossman Cmtys. v. Harleysville Mut. Ins. Co.,
395 S.C. 40, 717 S.E.2d 589 (2011) 18, 19, 20, 21

Crossmann Cmtys v. Harleysville Mut. Ins. Co.,
2013 U.S. Dist. LEXIS 138941 (D.S.C. 2013)...18

Diamond State Ins. Co. v. Homestead Indus., Inc.,
318 S.C. 231, 456 S.E.2d 912 (1995) 12

Factory Mut. Liab. Ins. Co. v. Kennedy,
256 S.C. 376, 182 S.E.2d 727 (1971) 9

Hatchett v. Nationwide Mut. Ins. Co.,
244 S.C. 425, 137 S.E.2d 608 (1964) 7, 8, 9

Hawkins v. Greenwood Dev. Corp.,
328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997)...12

Hegler v. Gulf Ins. Co.,
270 S.C. 548, 243 S.E.2d 443 (1978) 25

Howard v. State Farm Mut. Auto. Ins. Co.,
316 S.C. 445, 450 S.E.2d 582 (1994) 21

Inman v. Imperial Chrysler-Plymouth, Inc.,
303 S.C. 10, 397 S.E.2d 774 (Ct. App. 1990)..24

Jackson v. Speed,
326 S.C. 289, 486 S.E.2d 750 (1997) 24

Joe Harden Builders v. Aetna Cas. & Sur. Co.,
326 S.C. 231, 486 S.E.2d 89 (1997) 20

Magnolia N. Prop. Owners Ass'n v. Heritage Cmtys.,
397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012)..23

Merit Ins. Co. v. Koza,
274 S.C. 362, 264 S.E.2d 146 (1980) 7, 8, 9, 10

Neumayer v. Phila. Indem. Ins. Co.,
427 S.C. 261, 831 S.E.2d 406 (2019) 6, 10

Nichols v. State Farm Mut. Auto. Ins. Co.,
279 S.C. 336, 306 S.E.2d 616 (1983) 24

North Am. Rescue Prods. v. Richardson,
411 S.C. 371, 769 S.E.2d 237 (2015) 17

Piggy Park Enter. v. Schofield,
251 S.C. 385, 162 S.E.2d 705 (1968) 23

Portrait Homes-S.C. v. Pa. Nat'l Mut. Cas. Ins. Co.,
2023 S.C.App. LEXIS 145 (Ct. App. 2023) 8, 9, 10, 12

Schulmeyer v. State Farm Fire & Cas. Co.,
353 S.C. 491, 579 S.E.2d 132 (2003) 14, 17

Sloan Constr. Co. v. Central Nat'l Ins. Co.,
269 S.C. 183, 236 S.E.2d 818 (1977) 13, 25

Sprinx Oil Co. v. Federated Mut. Ins. Co.,
310 S.C. 477, 427 S.E.2d 649 (1993) 12

Tucker v. State Farm Mut. Auto Ins. Co.,
232 S.C. 615, 103 S.E.2d 272 (1958) 9, 11

Twin City Fire Ins. Co. v. Ben-Arnold-Sunbelt Beverage Co.,
433 F.3d 365 (4th Cir. 2005)..10

Yarborough v. Phoenix Mut. Life Ins. Co.,
266 S.C. 584, 225 S.E.2d 344 (1976) 11

Statutes

S.C. Code Ann. § 15-32-520...24

Other Authorities

Ethics Advisory Opinion 2019 19-04 10

Rule 1.8, RPC, Rule 407, SCACR..10

CERTIFICATION OF COUNSEL

Counsel for Petitioner Pennsylvania National Mutual Casualty Insurance Company ("Penn National") certifies the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 24, 2024.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in declining to follow settled precedent holding that an insurer has no duty to defend an insured that (1) expressly declines a defense by its insurer in a suit against it, and/or (2) breaches its duties to provide notice and cooperate such that a default judgment is entered against the insured.

2. Whether the Court of Appeals erred in holding that ambiguity in other parts of an insurance policy allows a court to use extrinsic evidence to override the plain meaning of unambiguous additional insured provisions in the policy, and in holding that an additional insured is entitled to damages for an insurer's failure to defend it even though it was fully defended by its own insurer.

3. Whether the Court of Appeals erred when it failed to follow this Court's precedents requiring that construction defect judgments and settlements be allocated between covered and non-covered liabilities and that covered liabilities be allocated to insurers by time on the risk.

4. Whether the Court of Appeals erred when it found that the Plaintiffs met their burdens of proving that Penn National engaged in bad faith when Penn National had a reasonable basis upon which to deny coverage at the time of the denial and Plaintiffs failed to show what damages were proximately caused by any bad faith.

5. Whether the Court of Appeals erred in affirming an award of an amount of damages for bad faith and the same amount as punitive damages when the evidence relied upon by the Court to justify two separate awards was the same, resulting in a double recovery.

6. Whether the Court of Appeals erred in awarding attorneys' fees and costs to the alleged additional insured in defending against the underlying lawsuit and prosecuting the present action where the additional insured's defense costs and settlement amount in the underlying lawsuits were paid by the additional insured's own insurer.

STATEMENT OF THE CASE

The present declaratory judgment action arises out of construction defect litigation from the construction of Persimmon Hill, a community of three hundred eighty-eight townhomes located in Berkeley County, South Carolina ("Persimmon Hill project"). Plaintiff-Appellees Portrait Homes – South Carolina, LLC and Portrait Homes – Persimmon Hill, LLC (together, "Portrait Homes") were responsible for the construction and development of the Persimmon Hill project. Portrait Homes hired Jose Castillo, a sole proprietor doing business as JJA Framing, as a subcontractor to perform framing work on some, but not all, of the townhome units. The Persimmon Hill project was completed in 2006.

1. Persimmon Hill Litigation

In 2012, Plaintiff-Appellee Persimmon Hill Homeowners Association, Inc. ("HOA") filed a lawsuit against Portrait Homes, claiming that defective construction on the Persimmon Hill project caused water intrusion into the homes, resulting in rot and deterioration ("Persimmon Hill Litigation"). At all times, Portrait Homes was defended in the Persimmon Hill Litigation by attorneys retained by its own insurer, Admiral Insurance Company. In 2013, the HOA amended its Complaint in the Persimmon Hill Litigation to include subcontractors, including JJA Construction, Inc. d/b/a JJA Framing and JJA Framing.

Penn National issued a series of insurance policies ("Penn National Policies") to Jose Castillo d/b/a JJA Framing Company and later, to JJA Construction, Inc. The Penn National Policies at issue are:

Policy No.	*Effective Dates*	*Named Insured*	*Occurrence Limit*	*A.I. Endors.*	*Additional Insured (A.I.)*	*Reference*
GL9 060617	12/05/02 – 12/05/03	Jose Castillo d/b/a JJA Framing	$500,000	None relevant		2002-03 Policy
GL9 060617	12/05/03 – 12/05/04	Jose Castillo d/b/a JJA Framing	$500,000	CG 2037	Pasquinelli Construction Co.; Pasquinelli Management, LLC;	2003-04 Policy

					Portrait Homes Construction Co.	
GL9 060617	12/05/04 – 12/05/05 03/02/05[1]	Jose Castillo d/b/a JJA Framing JJA Construction, Inc.	$500,000	CG 2037	Pasquinelli Construction Co.; Pasquinelli Management, LLC; Portrait Homes Construction Co.	2004-05 Policy
GL9 060617	12/05/05 – 12/05/06	JJA Construction, Inc.	$500,000	71 1145	Named in contract with Named Insured	2005-06 Policy
GL9 060617	12/05/06 – 12/05/07	JJA Construction, Inc.	$500,000	71 1145	Named in contract with Named Insured	2006-07 Policy
GL9 060617	12/05/07 – 01/31/08	JJA Construction, Inc.	$500,000	71 1145	Named in contract with Named Insured	2007-08 Policy
GL9 0649575	07/09/08 – 11/03/08 8/15/08[2]	JJA Framing Co. JJA Construction, Inc.	$500,000	None		2008 Policy
GL9 0649575	07/09/09 – 07/09/10	JJA Construction, Inc.	$500,000	None		2009-10 Policy

On June 5, 2013, Portrait Homes tendered the Persimmon Hill Litigation to Penn National for defense and indemnity, claiming that it was an additional insured under the policies that Penn National issued to JJA Framing and JJA Construction. Penn National investigated Portrait Homes' tender under the five Penn National Policies that contained additional insured endorsements. Ultimately, Penn National denied coverage for Portrait Homes under its Policies. With regard to the 2003-04 and 2004-05 Policies, Penn National determined that Portrait Homes was not listed on the additional insured endorsement and therefore was not entitled to additional insured coverage. The additional insured endorsements in the 2005-06, 2006-07, and 2007-08 Policies did not list specific additional insureds, but stated that additional insured coverage would be provided to third-party entities where the named insured had entered into a written contract that required it to provide additional insured coverage to the third-party entity. Because no written contract obligated Penn National's named insured to procure additional insured coverage for Portrait Homes, Penn National denied additional insured coverage for Portrait Homes under the 2005-06, 2006-07, and 2007-08 Policies.

1 On this date, the named insured on the Policy was changed to JJA Construction, Inc.

Castillo was served with the Persimmon Hill Litigation on September 8, 2013. Contrary to the express conditions contained in the Penn National Policies, Castillo did not provide notice to Penn National of the Persimmon Hill Litigation.

After receiving notice of the Persimmon Hill Litigation from Portrait Homes, Penn National investigated whether its insured was served with the Complaint. After determining that its insured was served with the Complaint, Penn National realized that the insured had not complied with the conditions of the Penn National Policies by providing Penn National with notice of the Persimmon Hill Litigation. Although it did not have to do so, Penn National hired an independent adjuster, Gayle McLeod, to meet with Castillo about the Persimmon Hill Litigation. McLeod came to Castillo's residence on two separate occasions. On the first occasion, McLeod left notes on Castillo's door and his vehicles requesting that Castillo contact McLeod about the Persimmon Hill Litigation. When Castillo did not contact McLeod, she again went to Castillo's residence. The second time, McLeod saw Castillo in his garage and attempted to talk to him, identifying herself and the purpose of her visit. Castillo told McLeod that JJA Construction was no longer a viable entity and that he did not want Penn National to defend him in the Persimmon Hill Litigation, a statement that he reiterated at trial. As a result, Penn National did not defend JJA Construction or JJA Framing in the Persimmon Hill Litigation.

Ultimately, Portrait Homes settled all claims with the HOA for $3,850,000, an amount funded by Portrait Homes' insurers. After settling with other defendants in the Persimmon Hill Litigation, the HOA moved for and was awarded a default judgment against JJA Construction and JJA Framing in the amount of $4,156,976.98.

2. Present Litigation

In the present matter, Portrait Homes sought a declaration that it was entitled to

additional insured coverage under five of the Penn National Policies. The HOA, having received an assignment from Castillo, filed cross-claims against Penn National, seeking coverage for the default judgment entered against Castillo's companies under all eight policies. Both sought damages for Penn National's bad faith denial of coverage and for punitive damages. After a bench trial before Judge Roger M. Young, Sr., which occurred on February 4-7, 2019 and May 7-9, 2019, the court entered judgment against Penn National on all claims. Penn National moved for reconsideration, which was granted in part and denied in part. Final judgments were then entered against Penn National on March 23, 2020 as follows:

Judgment Entered In Favor Of Portrait Homes:	
Breach of Contract – Duty to Defend:	$42,791.24
Breach of Contract – Duty to Indemnity:	$2,500,000.00[2]
Prejudgment Interest:	$807,693.50
Bad Faith Refusal to Pay:	$3,892,791.24[3]
Punitive Damages:	$3,892,791.24[3]
Attorneys' Fees and Costs (in declaratory judgment action):	$250,003.26
TOTAL JUDGMENT:	**$11,386,070.48**
Judgment Entered In Favor of HOA (as assignee of JJA Construction/JJA Framing):	
HOA's Judgment Creditor Claim:	$5,213,170.40[4]
Bad Faith Refusal to Pay:	$5,370,147.29[5]
Punitive Damages:	$5,370,147.29[5]
TOTAL JUDGMENT:	**$15,953,464.98**

Penn National timely appealed the judgments to the Court of Appeals. After hearing oral arguments, the Court of Appeals, in a fifty-six page opinion authored by Judge Konduros, affirmed the judgments on December 13, 2023. Penn National timely petitioned for rehearing. On February 2, 2024, the Court of Appeals requested that Portrait Homes and the HOA file

[2] This amount represents the total per occurrence limits under the five Penn National Policies that contained additional insured endorsements ($500,000 x 5 = $2.5 million).

[3] This amount represents the total amount of the settlement entered between Portrait Homes and the HOA ($3,850,000) plus Portrait Homes' self-incurred defense costs in the Persimmon Hill Litigation ($42,791.24).

[4] This amount represents the total per occurrence limit under all eight Penn National Policies ($500,000 x 8 = $4 million) plus the interest on the full amount of the default judgment ($1,213,170.40).

[5] This amount represents the total amount of the default judgment ($4,156,976.89) plus interest on that amount ($1,213,170.40).

returns to the petition. The Court of Appeals then denied the petition for rehearing.

ARGUMENT IN SUPPORT OF PETITION

I. The Court Of Appeals' Decision Conflicted With This Court's Precedent When The Court of Appeals Held That Even Though The Insured Failed To Comply With The Policy Conditions Of Notice And Cooperation And Affirmatively Declined A Defense, Penn National Nevertheless Breached Its Duty To Defend When It Did Not Defend The Insured In The Underlying Lawsuit.

This Court has long recognized that insurers have the right under their insurance policies to limit their liability and impose conditions on their obligations as long as the limitations and conditions do not violate statutory provisions or public policy. *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999). Under the Penn National Policies, the Named Insured had the duty to: (1) notify Penn National *as soon as practicable* of an "occurrence" which may result in a claim against it; (2) provide *written* notice to Penn National *as soon as practicable* of a lawsuit brought against it; (3) *immediately* send copies to Penn National of any summons or legal papers received in connection with any lawsuit; and (4) cooperate with Penn National in the defense of the lawsuit. (RII pp. 662-63, 726-27, 793-94, 869-70, 933-34; RIII pp. 990-91, 1052-53, 1105-06). This Court has found that notice and cooperation clauses contained in insurance policies are valid and enforceable. *Neumayer v. Phila. Indem. Ins. Co.*, 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019).

It is uncontroverted that Jose Castillo was personally served with the Complaint in the Persimmon Hill Litigation on September 8, 2013 and that neither he nor anyone else associated with JJA Framing or JJA Construction provided notice of the suit to Penn National as required under the Penn National Policies. Under South Carolina law, this clear and undisputed breach of the notice provision in the Penn National Policies obviated all coverage under the Penn National Policies for Castillo d/b/a JJA Framing and JJA Construction in the Persimmon Hill Litigation.

See, *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 435, 137 S.E.2d 608, 613 (1964).

In its Opinion, however, the Court of Appeals ignored Castillo's inaction and held that Penn National, by taking the responsible step of contacting Castillo to determine his desires, somehow waived the notice and cooperation conditions in the Penn National Policies and was required to defend an insured that expressly declined a defense and that refused to cooperate in a defense. That holding is directly contrary to settled South Carolina law.

Indeed, this Court's decision in *Merit Ins. Co. v. Koza*, 274 S.C. 362, 264 S.E.2d 146 (1980), is directly on point. In *Merit*, an automobile insurer was aware of an accident involving its insured, and the record was in conflict as to whether the insurer knew that its insured had been subsequently sued. *Id.* at 364-65, 264 S.E.2d at 147. Regardless, the insured did not respond to the lawsuit and was defaulted, and the underlying plaintiff sought recovery on the default judgment from the defaulted defendant's insurer. *Id*. This Court held that the insured's failure to forward suit papers to the insurer for a defense breached the automobile policy's notice clause, and that the insurer was prejudiced as a matter of law as a result of the default judgment entered against the insured. *Id.* As the HOA argued here, the underlying plaintiffs in *Merit* argued that the insurer's alleged knowledge of the lawsuit waived the policy's notice provision, and this Court held that it did not. As the Court explained, "mere knowledge by the Insurance Company of the fact that process has been served upon the insured does not of itself amount to a waiver or estoppel." *Id.* at 365, 264 S.E.2d at 147-48. In addition to knowledge that its insured had been sued, a waiver of notice conditions requires a "positive act" by the insurer on which "a waiver may be predicated." *Id.* This positive act typically is an act by the insurer "which lulls the insured into a feeling of security and renders it unconscionable for the insurer subsequently to raise the objection that such papers were not forwarded." *Id.* at 365, 264 S.E.2d at 147.

The facts here are like those in *Merit*. Penn National received notice of the Persimmon Hill Litigation from Portrait Homes through its demand for "additional insured" coverage under the Penn National Policies. As opposed to sitting on its hands, Penn National hired an independent adjuster, Gayle McLeod, to determine if Castillo had been served with the Persimmon Hill Litigation. Penn National learned from its investigation that Castillo had been served with the Persimmon Hill Litigation over five months earlier. (RIV p.1641). McLeod then visited Castillo's residence twice. Castillo did not respond to the notes McLeod left on her first visit, and affirmatively told McLeod during her second visit that he did not want Penn National to defend the Permission Hill Litigation. (RIII pp.1228-29, 1232-33).

Merit stands for the proposition that an insurer has no duty to defend an insured that decides not to forward suit papers to it, even if the insurer knows about the lawsuit, unless the insurer does something to "lull the insured into believing he did not have to fulfill his contractual obligation to forward the suit papers." *Merit*, 274 S.C. at 366, 264 S.E.2d at 148. Penn National did not lull Castillo into believing that he and his businesses would be defended in the Persimmon Hill Litigation without formal tender of the suit papers; to the contrary, Penn National complied with Castillo's express direction that it *not* provide him with a defense. Because Castillo failed to cooperate with Penn National, and declined a defense by Penn National, this Court's precedent dictates that no coverage is afforded to him under the Penn National Policies for the Persimmon Hill Litigation. *See*, *e.g.*, *id.* at 364-65, 264 S.E.2d at 147; *Hatchett*, 244 S.C. at 435, 137 S.E.2d at 613.

Against the weight of this precedent, the Court of Appeals' Opinion curiously held that an insured cannot decline the benefits of its policy. *Portrait Homes-S.C. v. Pa. Nat'l Mut. Cas. Ins. Co.*, 2023 S.C.App. LEXIS 145, *45 (Ct. App. 2023) ("*Opinion*"). The Court then went

further and found that even if an insured could choose to decline coverage, in this case Penn National did not provide Castillo with sufficient information for him to make a knowing declination of coverage. *Opinion* at *49-50. These holdings are not only incompatible with *Merit* and *Hatchett*, but also with this Court's holding that an insured can, indeed, decline its right to benefits under an insurance policy. *See*, *Tucker v. State Farm Mut. Auto Ins. Co.*, 232 S.C. 615, 624-25, 103 S.E.2d 272, 277 (1958) (finding that the insured's statement that he was "not going to have any more to do with this case" relieved insurer of duty to defend). Moreover, there is no obligation under the Penn National Policies, case law, or otherwise requiring Penn National to explain benefits available under the policy. Even if there were such an obligation, in this case Castillo had knowledge – superior to Penn National's – regarding his potential liability in the Persimmon Hill Litigation. Castillo had been served with the Complaint, could read the allegations and claims made against him and his companies, had information regarding his companies' work on the Persimmon Hill project, and therefore knew his potential liability. Armed with that knowledge, Castillo made the conscious decision to direct Penn National *not* to defend him or his businesses. Castillo was entitled to have his direction followed.

The breach of the insured's duties under an insurance policy, as occurred here, usually bars coverage for the claim or lawsuit. *Hatchett*, 244 S.C. at 435, 137 S.E.2d at 613. Where the rights of an innocent party are jeopardized by the failure of the insured to comply with its obligations under the policy, the insurer must show substantial prejudice to its rights before coverage of benefits to the third-party can be denied. *Factory Mut. Liab. Ins. Co. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729-30 (1971). However, this Court has consistently held that a default judgment resulting from the insured's failure to comply with its contractual obligations under the insurance policy constitutes substantial prejudice as a matter of law. *See*,

e.g., *Merit*, 274 S.C. at 364, 264 S.E.2d at 147; *Neumayer*, 427 S.C. at 273 n.6, 831 S.E.2d at 412 n.6. Contrary to this Court's precedent, the Court of Appeals held that Penn National was not substantially prejudiced by its insured's failure to comply with its contractual duties, even though it resulted in entry of a default judgment. *Opinion* at *60-61.

Because Castillo refused a defense of the Persimmon Hill Litigation, Penn National reasonably believed that it could not retain an attorney to defend him. South Carolina Rules of Professional Conduct 1.8(f)(1) states, "A lawyer shall not accept compensation for representing a client from one other than the client unless: the client gives informed consent." Rule 1.8, RPC, Rule 407, SCACR. The Fourth Circuit, interpreting South Carolina law, has held that counsel appointed by an insurer cannot represent an insured without the insured's consent. *See*, *Twin City Fire Ins. Co. v. Ben-Arnold-Sunbelt Beverage Co.*, 433 F.3d 365, 374 (4th Cir. 2005).

The Court of Appeals found, however, that Penn National had its insureds' consent to retain an attorney to represent them in the Persimmon Hill Litigation because consent can be implied from the purchase of the insurance policy. *Opinion* at *59-60. In reaching this decision, the Court relied on an ethics advisory opinion, Ethics Advisory Opinion 2019 19-04, *an opinion that had not been issued at the time that Penn National made its decision to deny coverage to Castillo and his companies* and, therefore could not have informed Penn National's decision. Finding implied consent here from the mere purchase of an insurance policy is particularly inapt because Castillo later expressly directed Penn National not to defend him and his businesses. Even if consent to insurer-provided legal representation could be inferred from the mere purchase of an insurance policy, Castillo clearly revoked that consent when he directed Penn National not to defend him, a fact he unequivocally confirmed in his trial testimony.

The undisputed evidence at trial was that Penn National's insureds failed to take

any actions to comply with their duties under the Penn National Policies, and then specifically directed Penn National not to defend them in the Persimmon Hill Litigation. This led to entry of a default judgment. Penn National was substantially prejudiced by the insureds' breach of their contractual obligations. The Court of Appeals' affirmance of the trial court's conclusion that the HOA as judgment creditor is entitled to coverage under the Penn National Policies is clearly in conflict with this Court's decisions and should not be allowed to stand. *See*, *Tucker*, 232 S.C. at 624, 103 S.E.2d ay 277 (affirming denial of coverage where the insured "simply tied the hands of the insurance company in the defense of that action.").

II. The Court Of Appeals Contradicted Precedent From This Court When It Held That Ambiguities In A Different Portion Of An Insurance Policy Allowed It To Refer To Extrinsic Evidence To Interpret Whether Portrait Homes Was Insured Under Otherwise Unambiguous Additional Insured Endorsements

A fundamental tenet of insurance policy construction is that "[w]hen a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Moreover, "in construing an insurance contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). The Court of Appeals' Opinion misapplied these well-established canons of insurance policy construction in holding that the Penn National Policies afforded additional insured coverage to Portrait Homes.

In denying additional insured coverage to Portrait Homes, Penn National relied on the plain, unambiguous language of additional insured endorsements in its Policies. The Court of Appeals, however, rejected the plain language of these endorsements because it found ambiguities in other provisions in the Penn National Policies, which it mistakenly held permitted courts to use extrinsic evidence to vary each and every term in the Policies, even terms that are

themselves clear and unambiguous. Specifically, the Court of Appeals found "ambiguities" in connection with (1) a declarations page that listed the "form of business" for JJA Construction, Inc. as "individual;" and (2) the fact that the location listed on the Schedule of the Form 2037 additional insured endorsement was Castillo's address. Based on these alleged ambiguities, the Court of Appeals held that "the trial court was not bound to the four corners of the contracts and could look at extrinsic evidence to interpret the policies," including policy provisions that were not themselves ambiguous. *Opinion* at *78. This holding is in direct conflict with decisions by this Court.

It is clearly established under South Carolina law that an insurance policy provision is ambiguous if it is reasonably capable of being understood in more than one way. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties." *Id.* at 592, 493 S.E.2d at 878-79. Ambiguities in an insurance policy are construed in favor of the insured. *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Id.*

As these principles make clear, where a policy term is ambiguous, extrinsic evidence may be considered as to the meaning *of that term*. Similarly, where extrinsic evidence is not dispositive, the ambiguous term should be construed in favor of the insured. It is no part of South Carolina law, or the law of any other jurisdiction, that finding a single ambiguity in an insurance policy permits an extrinsic evidence free-for-all whereby the plain meaning rule no longer applies to clear and unambiguous provisions within the policy. *See*, *Sprinx Oil Co. v.*

Federated Mut. Ins. Co., 310 S.C. 477, 481, 427 S.E.2d 649, 651 (1993). Instead of adhering to this fundamental tenet of insurance policy construction, the Court of Appeals used extrinsic evidence to alter the otherwise clear and unambiguous terms of the additional insured endorsements in the Penn National Policies.

Of the eight Penn National Policies at issue, only five Policies contained additional insured endorsements. The 2003-04 and 2004-05 Policies both contained the Form CG 2037 Additional Insured Endorsement. The 2005-06, 2006-07, and 2007-08 Policies contained the Form 71 1145 Additional Insured Endorsement. The unambiguous language contained in the two additional insured endorsements did not provide additional insured coverage to Portrait Homes. The Court of Appeals erred in finding that they did.[6]

A. Form 2037 Additional Insured Endorsement

The 2003-04 and 2004-05 Policies contained Form CG 2037, entitled "Additional Insured – Owners, Lessees or Contractors – Completed Operations." The coverage provision contained in this endorsement extended additional insured coverage to those entities specifically listed in a "Schedule." (RII pp. 696, 767). The only entities listed on the schedule are Pasquinelli Construction Co., Pasquinelli Management LLC and Portrait Homes Construction Company. The defendants named in the Persimmon Hill Litigation were Portrait Homes – South Carolina

[6] Furthermore, even if Portrait Homes qualified as an additional insured under some of the Penn National Policies, which it did not, the Court of Appeals erred in finding that Penn National breached its duty to defend and indemnify Portrait Homes in the Persimmon Hill Litigation for the simple reason that Portrait Homes did not suffer any damages proximately caused by any breach. At trial, Portrait Homes did not dispute that its own insurer, Admiral Insurance Company, paid for its defense in the Persimmon Hill Litigation. According to well-established law, Portrait Homes is not entitled to payment of its defense costs which another insurance company has funded. *Sloan Constr. Co. v. Central Nat'l Ins. Co.*, 269 S.C. 183, 189, 236 S.E.2d 818, 821 (1977). It is also undisputed that Portrait Homes did not pay any money towards the settlement of the Persimmon Hill Litigation; all settlement funds were paid by either Admiral or other insurance companies. There was no evidence presented at trial that Portrait Homes must reimburse either Admiral or the other insurers for the amount paid to settle the Persimmon Hill Litigation. Portrait Homes cannot maintain a breach of contract claim against Penn National when it cannot show that it was damaged as a result of any contract breach. *See*, *Collins Entm't v. White*, 363 S.C. 546, 560, 611 S.E.2d 262, 269 (Ct. App. 2009). On this separate basis, the Court of Appeals' decision should be reviewed by this Court.

and Portrait Homes – Persimmon Hill. Neither of these two entities was named in the Schedule of the CG 2037 endorsement. Therefore, Portrait Homes is not entitled to additional insured coverage under the 2003-04 and 2004-05 Policies. Adhering to the bedrock principles of insurance policy construction, the Court of Appeals should have reversed the trial court and judgment should have been entered in Penn National's favor on Portrait Homes' claim for additional insured coverage under these two Policies.

It is important to note that neither the Court of Appeals nor the trial court found an ambiguity in the actual language of the CG 2037 endorsement identifying the requirements for additional insured coverage or the names listed in the schedule for additional insured coverage. Rather, the Court of Appeals found that the address on the schedule under the heading of "Location and Description of Completed Operations" was Castillo's own address. (RII pp. 696, 767). That, however, has nothing to do with *who* is entitled to additional insured coverage. That question was unambiguously answered by the additional insured endorsement provision requiring that an entity be expressly listed in the schedule to qualify for additional insured coverage. The Court of Appeals erred when it rewrote unambiguous language in the additional insured endorsement limiting coverage to only three companies specifically listed in the schedule to include Portrait Homes, an entity clearly not listed in the schedule. *See*, *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

B. Form 71 1145 Additional Insured Endorsement

With respect to the 2005-06, 2006-07, and 2007-08 Policies, Penn National included Form 71 1145, entitled "Automatic Additional Insureds – Owners, Contractors and Subcontractors (Completed Operations)." This endorsement, unlike the endorsement in the 2003-04 and 2004-05 Policies, did not require that additional insureds be specifically identified

in a policy schedule. Instead, Form 71 1145 provided additional insured coverage to companies that the Named Insured was contractually required to add as an additional insured on its policy. (RII pp.849, 913; RIII p.971). There is only one Named Insured under these three Policies - "JJA Construction, Inc." (RII pp.822, 895; RIII p.950). Accordingly, under the 2005-06, 2006-07, and 2007-08 Policies, additional insured coverage is only afforded to organizations that JJA Construction, Inc. contractually agreed to add as additional insureds for completed operations.

JJA Construction, Inc. did not enter into any written contracts in which it agreed to provide additional insured coverage for Portrait Homes. Because Form 71 1145 is unambiguous in identifying who qualifies for additional insured coverage, that should have ended the inquiry and required reversal of the trial court's award of additional insured coverage to Portrait Homes. However, the Court of Appeals affirmed the trial court's alteration of the clear and unambiguous terms of this endorsement by looking to extrinsic evidence to determine whether Castillo d/b/a JJA Framing, an entity not actually named anywhere on the Policies at issue, could be considered as a Named Insured under these Penn National Policies.[7] In doing so, the Court of Appeals erred.

The Court of Appeals compounded its error by failing to credit the fact that there was no evidence that even Castillo d/b/a JJA Framing entered into a written contract that required Portrait Homes to be added as an additional insured on its policies. The only contract actually

[7] The Court of Appeals appears to find ambiguity in the Penn National Policies' definition of "you:" "Throughout this policy the words, 'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." (RII, p.860). Castillo d/b/a JJA Framing is not listed as a Named Insured anywhere in the declarations or in any endorsement. Nothing in the Policies shows that Castillo d/b/a JJA Framing "qualifies" as a named insured. The trial court, however, found that because JJA Construction constituted the same business that was previously operated as Castillo d/b/a JJA Framing, that Castillo d/b/a JJA Framing should qualify as a Named Insured under the Penn National Policies. The Court of Appeals affirmed this finding even though the undisputed evidence was that JJA Construction is NOT the same business as Castillo d/b/a JJA Framing. JJA Construction is a corporation duly incorporated under the laws of North Carolina, owned not only by Castillo but jointly owned by Castillo and his son. Castillo d/b/a JJA Framing is a sole proprietorship. These two entities are separate and are viewed as such under the law. (*See*, RII pp. 817-19).

signed by Castillo d/b/a JJA Framing for the Persimmon Hill project was a Housing and Purchase Order Contract ("Purchase Order") with Portrait Homes – South Carolina. (RIII pp.1151-55). However, that contract did *not* require Castillo d/b/a JJA Framing to purchase additional insured coverage, as required for coverage by the plain language of the 71 1145 Endorsement.

Because the Purchase Order by itself cannot satisfy the requirements of the 71 1145 Endorsement, the trial court found that there "must have been" another agreement, such as a Master Agreement, that met the requirements of the 71 1145 Endorsement. However, the Master Agreement actually admitted into evidence at trial was dated *after* the Purchase Order, and only applied to *prospective contracts*, not to work already done. (RIII pp.1141-50). Based only on the existence of this subsequent contract, the trial court found that there "would have been" a previous master agreement that applied to change the terms of the Purchase Order. However, this alleged earlier master agreement was never entered into evidence at trial. No one who had read or drafted any earlier drafts of the master agreement testified at trial. The finding by the trial court that an earlier master agreement existed, that such an earlier agreement was actually executed by Castillo, and that the earlier agreement required additional insured coverage for Portrait Homes is wholly speculative and unsupported by any evidence at trial. In affirming the trial court's judgment, the Court of Appeals merely recited the trial court's "findings" without confirming whether any evidence supported such "findings."

In short, the trial court manufactured coverage for Portrait Homes under the 2005-06, 2006-07, and 2008-09 Policies by layering two clear legal errors on top of each other. First, the trial court improperly referred to extrinsic evidence to rewrite the policy language and add Castillo d/b/a JJA Framing as a Named Insured under the Policies. Then, the trial court simply

invented a "master agreement" that was not admitted into evidence and about which no witness testified and ruled that this invented master agreement would have required JJA Framing to procure additional insured coverage for Portrait Homes. The Court of Appeals should have reversed the trial court for violating South Carolina's plain meaning rule and for creating a master agreement that lacked evidentiary support. By affirming the trial court's deeply flawed reasoning, the Court of Appeals clearly erred.

In affirming that Portrait Homes was entitled to additional insured coverage under the Penn National Policies, the Court of Appeals addressed a novel issue: whether ambiguities in other parts of the Policies justify a court's referral to extrinsic evidence to interpret otherwise unambiguous provisions in a way to find coverage. This Court's precedent establishes that the Court of Appeals improperly manufactured coverage in this case. *See*, *North Am. Rescue Prods. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015) ("Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it."); *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134 ("Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage."). This issue requires clarification from this Court.

III. The Court Of Appeals' Decision Awarded Portrait Homes And The HOA The Entirety Of The Limits Under The Penn National Policies Without Determining How Much Of The Default Judgment And Settlement Constituted Covered Damages And Allocating Any Such Covered Damages Based On Penn National's Pro-Rata Time-On-The-Risk, Contrary To Prior Supreme Court Decisions

Even if the Court of Appeals' holding that Penn National had a duty to defend and indemnify had been correct, which it was not, the Court of Appeals further erred by holding Penn National fully liable for property damage spanning multiple years, some of which is not covered

under any circumstances. The Penn National Policies only provide coverage for “property damage” caused by an “occurrence” as those terms are defined in the Penn National Policies. In construction defect litigation, this Court has held that “negligent or defective construction resulting in damage to otherwise non-defective components may constitute “property damage,” but the defective construction would not.” *Crossman Cmtys. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011) (“*Crossmann II*”). Thus, the most a liability insurer could be responsible for was damage to non-defective components caused by the defective construction, and not for the cost to remedy the defective construction itself.

In the Persimmon Hill Litigation, the HOA sought damages resulting from improper design of the townhomes; failure to inspect during the construction process; failure to adhere to the building code and construction industry standards; and use of improper materials. The HOA also sought damages caused by breach of warranty and unfair trade practices. (RII pp.527-58). All of these damages would not constitute covered damages under the Penn National Policies. *See*, *Crossmann Cmtys v. Harleysville Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 138941,*51 (D.S.C. 2013) (“[I]mproper or faulty construction, including code violations, missing component parts, improper choice of component materials, defective design, failure to adhere to building plans and specifications and failure to adhere to manufacturer specifications fail to meet the insurance policy’s definition of “property damage” and are therefore not covered under the provisions of a commercial general liability policy.”).

Penn National is only liable to indemnify the HOA and Portrait Homes for that portion of the default judgment and settlement attributable to “damage to otherwise non-defective components.” The HOA and Portrait Homes had the burden of proving what portion of the default judgment and settlement constituted covered damages. *Builders Mut. Ins. Co. v. Island*

Pointe, 431 S.C. 93, 102, 847 S.E.2d 87, 92 (2020).

In the present case, neither the HOA nor Portrait Homes presented any evidence of what portion of the judgment or settlement constituted covered damages. The trial court erroneously found that they did not have to do so, finding that a general verdict obviated the need to segregate the damages into covered and non-covered damages. In its decision, the Court of Appeals failed to address this issue at all. However, this Court's decision in *Builders Mut. Ins. Co. v. Island Pointe*, 431 S.C. 93, 102, 847 S.E.2d 87, 92 (2020) held that the insurer is not bound to pay the entirety of a general verdict rendered against its insured in a construction defect case. Instead, in a subsequent declaratory judgment action, the insured and/or judgment creditor must prove which portion of the general verdict constitutes damages actually covered by the insurance policies. *Id*. at 97, 847 S.E.2d at 89.

Moreover, the damages complained of in the Persimmon Hill Litigation constituted progressive damages that occurred over a period of time. Therefore, after determining how much of the default judgment and settlement constituted covered damages under the Penn National Policies, the trial court then should have allocated those covered damages based on the pro-rata time-on-the-risk method, i.e., spreading the amount of covered damages over the period of progressive damages and assigning to each policy period that period's proportionate share of the damages. *Crossmann II*, 395 S.C. at 63, 717 S.E.2d at 601. The trial court failed to do so.

The Court of Appeals justified the trial court's refusal to follow *Crossmann II* by suggesting that the Penn National Policies contained language different from the language in the CGL policies considered in *Crossmann II*. In so doing, the Court of Appeals misapprehended this Court's decision in *Crossmann II*. The *Crossmann II* Court was tasked with determining an allocation method for progressive damages cases. In doing so, it fashioned a method which

not only took into consideration relevant policy language, but also considered case law, the objectively reasonable expectations of the contracting parties, and important policy goals. *Id.* at 52-63, 717 S.E.2d at 595-601. Therefore, in establishing pro-rata time-on-the-risk as the allocation method for progressive property damage claims in South Carolina, the Court decreed that each insurer whose policies were triggered during the period of progressive damages was only liable for the amount of loss allocated to its policy period:

> Trial courts may vary from this default formula where appropriate to the circumstances of a particular case, ***but they must remain faithful to the premise that each insurer is responsible only for a pro rata portion of the total loss, and each pro rata portion must be defined by the insurer's time on the risk.***

Id. at 66, 717 S.E.2d at 603 (emphasis added). 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.

The Court of Appeals attempted to obscure the trial court's divergence from the *Crossmann II* mandate by indicating that the trial court "modified" the pro-rata time-on-the-risk formula based on the language of the Penn National Policies, which was found to require that all progressive damages be attributed solely to one policy period. If that was actually the basis upon which the trial court "modified" the *Crossmann II* default rule, then all of the damages should have been allocated to one policy period, the policy during which the progressive damages first occurred. *See*, *Joe Harden Builders v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 236, 486 S.E.2d 89, 91 (1997) ("Under this theory, coverage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuring damages.").

Under the Court of Appeals' reasoning, only the first Penn National Policy in effect when

the damages first occurred resulting from the Penn National Named Insured's negligent construction should have been triggered for all ensuing damages. As a result of this "modified" approach, the maximum liability for Penn National should have been the single Policy limits of $500,000, and not the entirety of its limits under all Penn National Policies. Penn National respectfully requests that this Court grant its Petition so that, in the event Penn National is found by this Court to be liable for some of the property damage at issue in the Persimmon Hill Litigation, its liability is limited as required by *Crossmann II*.

IV. The Court Of Appeals Failed to Follow This Court's Precedent In Deciding Whether Plaintiffs Satisfied Their Burden Of Proving Bad Faith

The elements of a bad faith claim are: (1) the existence of a valid insurance policy; (2) the insurer's refusal to pay benefits due under the policy; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing; and (4) which causes damages to the insured. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396-97 (1992). "If there is reasonable ground for contesting a claim, there is no bad faith." *Id.* at 360, 415 S.E.2d at 397. Whether reasonable grounds existed for the denial depends on the circumstances existing at the time of the denial. *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994).

Although the Court of Appeals found that there was evidence to support allegations of unreasonable conduct by Penn National with regard to both its named insured and Portrait Homes, the Court failed to complete its analysis. For a bad faith claim to be viable, the Plaintiffs must prove that Penn National's refusal to pay them benefits under the Penn National Policies resulted directly from Penn National's allegedly unreasonable actions. Here, the Plaintiffs did not prove the causal link between the denial of benefits to the Plaintiffs and the identified "wrongful conduct" by Penn National. Without this causal link, Plaintiffs have not proven their

bad faith claim. Furthermore, if Penn National's decisions in this case were based on any reasonable grounds, there can be no bad faith. Because Penn National had a reasonable basis for its decisions, it did not engage in bad faith. The Court of Appeals' affirmance of the bad faith awards against Penn National conflicts with this Court's prior decisions.

The Court of Appeals found that Penn National engaged in unreasonable conduct when it failed to investigate, failed to check its records for Castillo's contact information, its alleged knowledge that Castillo did not receive at least one of its letters, and its failure to inform Castillo of all the pertinent information known to Penn National about the Persimmon Hill Litigation. None of this conduct can support a bad faith claim. First, none of the bad conduct attributed to Penn National in this case formed the basis for Penn National's decision to deny coverage to JJA Framing and JJA Construction in the Persimmon Hill Litigation. In affirming the bad faith judgment against Penn National, the Court of Appeals has effectively eliminated an essential element of a bad faith claim, i.e. the refusal to pay benefits resulted from the insurer's unreasonable conduct or bad faith.

Second, it is clear that at the time Penn National made the decision to deny coverage to Castillo's companies, it had reasonable grounds to do so. Castillo failed to comply with his contractual obligations to provide written notice of the Persimmon Hill Litigation as soon as practicable after being served, to immediately send copies of the served Complaint, and to cooperate. Indeed, Castillo confirmed in this trial testimony that he told Penn National *not* to provide him with a defense. At the time Penn National made the decision to deny coverage to JJA Framing and JJA Construction, the bases for its denial were reasonable.

Similarly, with regard to Portrait Homes' claim for bad faith, Penn National made the decision to deny additional insured coverage to Portrait Homes based on the plain language

contained in the two additional insured endorsements attached to the Penn National Policies. Because Penn National's denial of coverage was based on reasonable grounds, the Court of Appeals erred when it did not vacate the judgment entered in favor of Portrait Homes on its bad faith claim.

Finally, an essential element of a bad faith claim is that the insured suffered damages resulting from an insurer's conduct. Once it was determined that Penn National's conduct amounted to bad faith, neither the trial court nor the Court of Appeals undertook any analysis of what damages were actually caused by Penn National's allegedly bad faith conduct. Instead, the Court of Appeals found that Penn National engaged in bad faith and then, without any analysis, merely confirmed the award to the HOA of the entirety of the default judgment entered against the Penn National insureds, plus interest accrued, and the entirety of the settlement paid on behalf of Portrait Homes, with interest. Both the HOA and Portrait Homes were required to present evidence of the damages caused by Penn National's alleged bad faith conduct "with reasonable certainty or accuracy."[8] *Magnolia N. Prop. Owners Ass'n v. Heritage Cmtys.*, 397 S.C. 348, 374, 725 S.E.2d 112, 126 (Ct. App. 2012). They did not do so. The Court of Appeals' affirmance of an award of bad faith damages based on nothing more than conjecture and speculation is contrary to this Court's prior decisions. *See*, *Piggy Park Enter. v. Schofield*, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968).

V. The Court Of Appeals Contradicted Established Precedent From This Court When It Awarded The HOA and Portrait Homes Double Damages For Bad Faith And Punitive Damages.

Under a claim for bad faith, an insured may recover actual damages proximately caused by the insurer's unreasonable conduct, and punitive damages if he proves by clear and

[8]With regard to Portrait Homes, the undisputed evidence was that it was being defended in the Persimmon Hill Litigation by its own insurance carrier and the entirety of the settlement paid was funded by other insurers.

convincing evidence that the insurer's actions were willful, wanton or reckless. S.C. Code Ann. § 15-32-520; *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). Instead of engaging in an analysis of whether Penn National's alleged conduct met the elevated standard required for a punitive damages award, the Court of Appeals merely found that the evidence supporting a bad faith claim was also sufficient to support the imposition of punitive damages. The Court's decision misapprehended the law. This Court has never held that punitive damages were automatically recoverable in every successful bad faith claim. *Nichols*, 279 S.C. at 340, 306 S.E.2d at 619. If the damages were the same, as the Court of Appeals found, then the HOA and Portrait Homes received a legally impermissible double recovery. *See*, *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990). *See also*, *Nichols*, 279 S.C. at 341, 306 S.E.2d at 619 ("Where the jury finds in favor of the plaintiff on both causes of action as here, the verdict then must be reformed as plaintiffs may only recover once for their actual damages.").

Instead of receiving a double recovery for the same conduct, the Plaintiffs should have been required to elect their remedies between damages from their bad faith claim and punitive damages. *See*, *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 15, 397 S.E.2d 774, 777 (Ct. App. 1990) ("As we have stated, there can be no double recovery for a single wrong. This is the basic purpose of the election of remedies doctrine."). Because the Court of Appeals did not do so, and instead found that both remedies were appropriate, Penn National respectfully requests that this Court grant its petition to provide clarity on this issue.

VI. The Court Of Appeals' Award Of Attorneys' Fees To Portrait Homes Is Contrary To This Court's Prior Decisions.

The general rule in South Carolina is: a victorious party in a civil action may not collect its attorneys' fees unless authorized to do so by statute or contract. *Jackson v. Speed*, 326 S.C.

289, 307, 486 S.E.2d 750, 759 (1997). In 1978, this Court created a limited exception to this rule where an insurer requires an insured to defend against a coverage action to maintain the insurer's defense of an underlying lawsuit. *Hegler v. Gulf Ins. Co*., 270 S.C. 548, 550-51, 243 S.E.2d 443, 444-45 (1978). Here, however, Portrait Homes was defended in the Persimmon Hill Litigation by its own insurer, Admiral. Therefore, it was not forced to pay its own defense costs in that litigation. Portrait Homes was also not forced to defend against a declaratory judgment action to ensure a continued defense in the Persimmon Hill Litigation. Without these two necessary prerequisites, the rationale for imposing attorneys' fees in *Hegler* does not apply to the present case.

Furthermore, in the present case, Penn National is not liable to Portrait Homes for its defense costs in the Persimmon Hill Litigation. *See*, *Sloan*, 269 S.C. at 186, 236 S.E.2d at 820. Therefore, the predicate for the *Hegler* decision, that there existed a contractual obligation that allowed the imposition of attorneys' fees, is missing. The Court of Appeals overlooked the differences between the present case and this Court's decision in *Hegler* when it held that *Hegler* justified the imposition of Portrait Homes' attorneys' fees on Penn National. Accordingly, Penn National respectfully requests that this Court grant its Petition to clarify when attorneys' fees may be awarded with regard to an insurer's breach of contract.

CONCLUSION

The Court of Appeals' decision is in conflict with prior decisions of this Court in multiple respects. Furthermore, this case involves multiple novel questions of law. Therefore, Penn National respectfully requests that this Court grants its Petition for Writ of Certiorari to review the decision by the Court of Appeals.

Respectfully submitted,

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