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., Respondents,

v.

Pennsylvania National Mutual Casualty Insurance Company, Appellant.

Of whom Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), by and through counsel, and pursuant to South Carolina Appellate Court Rules 221(a) and Rule 240, hereby respectfully moves and petitions the Court for a rehearing of the Court's opinion issued on December 13, 2023 ("December 13 Opinion"), affirming the trial court's entry of judgment in favor of the Persimmon Hill Homeowners Association, Inc. ("HOA"), Portrait Homes – South Carolina, LLC and Portrait Homes – Persimmon Hill, LLC (collectively, "Portrait Homes"). *Portrait Homes – South Carolina, LLC, et al. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, Op. No. 6038 (S.C. Ct. App. filed Dec. 13, 2023) (Howard Advance Sheet No. 48 at 15). Penn National further suggests rehearing *en banc* pursuant to Rule 219(b) of the South Carolina Appellate Court Rules. Consideration by the full court is necessary to maintain uniformity of decisions and because this matter involves questions of exceptional importance, including but not limited to questions relating to an insured's affirmative duties and rights under policies of insurance, an insurer's right to decline coverage based on an insured's actions, the proper construction of additional insured endorsements, the appropriate standard that an insured must meet for proving a bad faith claim, and how and under what circumstances the pro-rata time-on-the-risk allocation for claims of progressive damages can be modified or altered.

The Court misapprehended the law when it held in the December 13 Opinion that an insured cannot decline coverage available to the insured under a policy of insurance and further, that the insured did not have to comply with the conditions contained in that policy in order for coverage to be afforded. The Court overlooked the undisputed evidence that the insured's failure to comply with policy conditions resulted in a default judgment being

entered against the insured, which constitutes prejudice as a matter of law under South Carolina precedent. In addition, the Court failed to construe the insurance policy, including the additional insured endorsements, according to their plain and unambiguous terms. Instead, the Court found that because of potential ambiguities in unrelated portions of the policy, the court was not bound to assess coverage based on the four corners of the policy and, instead, could look to extrinsic evidence to interpret the policies, contrary to the well-established canons of insurance policy construction adopted by the South Carolina appellate courts.

In reviewing the amount of damages, the Court failed to find whether the amounts awarded by the trial court were actually covered under the insurance policies and also did not adhere to the Supreme Court's mandate in *Crossmann Cmtys. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), that claims of progressive property damages are to be allocated among all insurance policies during the period of progressive damages on a pro-rata time-on-the-risk basis. Further, the Court did not properly hold the Plaintiffs to their burden of proof regarding their claims of bad faith. Specifically, Plaintiffs were required to prove more than just the existence of alleged "bad acts." In order to prove a claim of bad faith, the Plaintiffs were required to prove that a causal connection existed between the alleged wrongful conduct and the refusal to provide benefits under the policy. In so doing, the Court overlooked the undisputed evidence that Penn National actually had a reasonable basis to support its decision to deny coverage. Because of the existence of a reasonable basis for the decisions made by Penn National, Plaintiffs' claims for bad faith were untenable as a matter of law. Finally, the Court did not consider the evidence in support of Plaintiffs' punitive damages claims to ensure that such evidence actually met the heightened standard required by South Carolina precedent. Instead, the Court merely found that the evidence of bad faith, by itself, justified

the imposition of punitive damages, thereby awarding a double recovery to the Plaintiffs for the same conduct.

This Court should grant Penn National's Petition for Rehearing and reverse the judgment entered by the trial court in favor of the Plaintiffs based on the arguments herein, as well as all arguments previously raised by Penn National in its prior briefs and at oral argument, which Penn National incorporates herein by reference.

I. The Court Misapprehended The Law On An Insured's Rights, Duties And Obligations Under The Penn National Policies.

In the December 13 Opinion, this Court affirmed the trial court's finding that coverage was afforded under eight policies of insurance issued by Penn National and therefore awarded the HOA, as judgment-creditor, $4 million, the full amount of coverage under each policy of insurance, as well as $1,213,170.40, the interest on the entirety of the default judgment, for a total of $5,213,170.40. In so doing, this Court overlooked fundamental tenants of insurance law that (1) an insured is obligated to comply with the duties ascribed to it in the insurance policy as a condition of coverage; and (2) an insured has the duty to read and be acquainted with its policy of insurance.

Penn National issued commercial general liability policies which are at issue in the present appeal as follows:

Policy No.	*Effective Dates*	*Named Insured*	*Occurrence Limit*	*A.I. Endors.*	*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; Portrait Homes Construction Co.	2003-04 Policy
GL9 060617	12/05/04 – 12/05/05	Jose Castillo d/b/a JJA Framing	$500,000	CG 2037	Pasquinelli Construction Co.; Pasquinelli Management, LLC;	2004-05 Policy

	03/02/05[1]	JJA Construction, Inc.			Portrait Homes Construction Co.	
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

A. The Evidence Was Undisputed That The Penn National Insured Both Failed And Refused To Comply With Policy Conditions.

It is axiomatic 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). The Penn National Policies all contained the same conditions, which stated:

> **SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS**
>
> **2. Duties In The Event Of Occurrence, Offense, Claim Or Suit**
>
> **a.** You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
>
> **(1)** How, when and where the "occurrence" or offense took place;
> **(2)** The names and addresses of any injured persons and witnesses; and
> **(3)** The nature and location of any injury or damage arising out the "occurrence" or offense.
>
> **b.** If a claim is made or "suit" is brought against any insured, you must:
>
> **(1)** Immediately record the specifics of the claim or "suit" and the date received; and

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

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
(2) Authorize us to obtain records and other information;
(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

(RII pp. 726-27, 793-94, 869-70, 933-34; RIII pp. RII pp. 990-91)

Accordingly, 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, including providing dates of service; (3) *immediately* send copies to Penn National of any demands, notices, summons, or legal papers received in connection with any lawsuit; and (4) cooperate with Penn National in the defense of the lawsuit. See also, *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Castillo*, 2019 U.S. Dist. LEXIS 49319, *6 (W.D.N.C. 2019) (enumerating these conditions in the same Penn National Policies and granting judgment in favor of Penn National because Castillo failed to comply with these provisions with regard to a different lawsuit).

The Supreme Court of South Carolina has found that similar notice and cooperation clauses are valid and enforceable. *Neumayer v. Philadelphia 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 Complaints in the Persimmon Hill Litigation[2] on September 8, 2013. It is also undisputed that at no time did Mr. Castillo, or anyone else associated with JJA Framing or JJA Construction, Inc., either provide written notice to Penn National of the Persimmon Hill Litigation or send copies of the Summons and Complaint to Penn National, as the conditions of the Policies clearly and unambiguously required the insured to do. 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 Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. in the Persimmon Hill Litigation. See, *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 435, 137 S.E.2d 608, 613 (1964) (finding that it is "well settled" that the insured's failure to adhere to the notice provisions will bar recovery under the policy); *Prior v. South Carolina Med. Mal. Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655, 657 (Ct. App. 1991) (the named insured's failure to provide notice of the underlying lawsuit for four months after he was served violated the policy and precluded coverage).

After Penn National was notified of the Persimmon Hill Litigation by Portrait Homes (as a result of their demand for "additional insured" coverage under the Penn National Policies),

[2] The coverage issues in this appeal arise out of two underlying construction defect actions related to a townhome project where Portrait Homes served as the developer and general contractor: (1) *The Persimmon Hill Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC,* et seq.", Case No. 2012-CP-08-03065 (the "Persimmon Hill HOA Lawsuit"); and (2) "*Cheryl L. Waker, on behalf of herself and others similarly situated v. Portrait Homes-South Carolina, LLC,* et seq.", Case No. 2012-CP-08-03066 (the "Persimmon Hill Class Action Lawsuit" and, together with the Persimmon Hill HOA Lawsuit, the "Persimmon Hill Litigation"). The Complaints in both cases were amended on March 20, 2013 to add "JJA Construction, Inc. d/b/a JJA Framing" and JJA Framing.

Penn National hired an independent adjuster, Gayle McLeod, to determine if the Penn National Named Insureds were served with the Persimmon Hill Litigation. Penn National learned on February 19, 2014 from its own investigation that Mr. Castillo had been personally served with the Persimmon Hill Litigation over five months earlier. Although it was not required to do so under the Penn National Policies, Penn National directed Ms. McLeod to find Mr. Castillo. Ms. McLeod came to Mr. Castillo's residence on ***two*** separate occasions. On March 26, 2014, Ms. McLeod came to Mr. Castillo's residence, left notes on his front door and on both vehicles parked at the residence requesting that Mr. Castillo contact Ms. McLeod, and also left contact information with a neighbor. [HOA Exh.7 (RIII p. 1228)] It is undisputed that Mr. Castillo did not contact Ms. McLeod after this visit.[3]

Ms. McLeod attempted to meet with Mr. Castillo for a second time on May 15, 2014. At that time, Ms. McLeod saw Mr. Castillo in his garage and approached him. Ms. McLeod identified herself and stated that she was there on behalf of Mr. Castillo's insurer, Penn National, regarding the Persimmon Hill Litigation. McLeod testified that she explained that the Persimmon Hill Litigation papers named Mr. Castillo individually. Ms. McLeod requested that Mr. Castillo contact Penn National immediately about the Persimmon Hill Litigation and provided him with the Penn National adjuster's name and contact information. Mr. Castillo told Ms. McLeod that he no longer operated JJA Construction, and **that he was not interested in defending against the lawsuit. Significantly, Mr. Castillo stated that he did not want Penn National to defend him in the Persimmon Hill Litigation.** Ms. McLeod asked Mr. Castillo for his contact information so that Penn National could speak with him directly. Mr. Castillo refused to provide his information to Ms. McLeod. Mr. Castillo then ended

[3] This Court did not refer to this first visit in its December 13 Opinion.

the conversation by walking inside his house and closing the door behind him. (RIII p. 1232; RI pp. 348-49, 427-32, 472)

The purpose of Ms. McLeod's interactions with Mr. Castillo was not to require Mr. Castillo to affirmatively ask for a defense of the Persimmon Hill Litigation, as indicated by this Court in its December 13 Opinion. Instead, Penn National sought out Mr. Castillo to provide him with an opportunity to comply with the Conditions of the Penn National Policies. However, even after these interactions between Mr. Castillo and Ms. McLeod, Mr. Castillo did not cooperate with Penn National by calling the Penn National adjuster as requested by Ms. McLeod. It is undisputed that **Mr. Castillo never attempted to contact Penn National in any fashion to discuss the Persimmon Hill Litigation at any time**. In fact, there is no evidence that Mr. Castillo took any affirmative actions at all to comply with his duties and obligations under the Conditions of the Penn National Policies. Because Mr. Castillo failed to cooperate with Penn National, no coverage is afforded to him under the Penn National Policies for the Persimmon Hill Litigation. *Tucker v. State Farm Mut. Auto Ins. Co.*, 232 S.C. 615, 622, 103 S.E.2d 272, 276 (1958).

In its December 13 Opinion, this Court did not focus on what Mr. Castillo did – or more accurately did not do – to comply with the conditions of the Penn National Policies. Instead, this Court found that by seeking to talk to Mr. Castillo about the Persimmon Hill Litigation, Penn National was imposing an "extra" duty not otherwise found in the Penn National Policies on Mr. Castillo to request a defense. The Court then found that Mr. Castillo, on behalf of himself and JJA Construction, Inc. could not decline their right to a defense under the Penn National Policies.

First, contrary to this Court's holding, it is clear that under South Carolina law (as well as

other jurisdictions), a policyholder may choose to decline the benefits of his policy, including a defense. See, e.g., *Tucker*, 232 S.C. at 624-25, 103 S.E.2d at 277 (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); *Twin City Fire Ins. Co. v. Ben-Arnold-Sunbelt Beverage Co.*, 433 F.3d 365, 374 (4th Cir. 2005) (applying South Carolina law) (finding that the insured may refuse the defense conducted by the carrier and fund its own defense); *State Nat'l Ins. Co. v. Eastwood Construction LLC*, 2018 U.S. Dist. LEXIS 232002, at *46 (D.S.C. 2018) (indicating that the insured may "relieve the insurer of all obligations under the terms of the policy"). See also, *National Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 608 (Tex. 2008) ("Potential insureds, for a variety of reasons, might well opt against seeking a defense from an insurer."); *Hartford Acc. & Indem. Co. v. Gulf Ins. Co.*, 776 F.2d 1380, 1383 (7th Cir. 1985)) ("An insurance company is not required to intermeddle officiously where its services have not been requested."). Here, it is undisputed that Mr. Castillo did, in fact, decline Penn National's defense of him and his companies in the Persimmon Hill Litigation.[4]

This Court's focus on Mr. Castillo's declination of a defense, however, misses the mark. Coverage, including the duty to defend, was not denied by Penn National based on

[4] This Court's conclusion that Mr. Castillo's declination of a defense was somehow not valid because Penn National "misled" Mr. Castillo about the particulars of the suit is wholly unsupported by the evidence. Contrary to the Court's conclusion, there is no evidence in the record from which to reasonably conclude that Penn National engaged in such conduct. There is no evidence in the record that, for example, Penn National sought to encourage Mr. Castillo to refuse the defense by minimizing the risk he faced or misrepresenting the policy terms. Further, Mr. Castillo knew the potential liability to which he was exposed because (1) he had been served with the Complaint in the Persimmon Hill Litigation, (2) could read the allegations and claims being asserted against him and his companies in that Litigation, (3) had the information regarding his companies' work that was performed on the buildings at issue in the Persimmon Hill Litigation, and (4) therefore knew the potential extent of his liability (better than even Penn National).

Penn National's understanding that Mr. Castillo declined a defense under the Policies. Coverage, and the duty to defend, was obviated when Mr. Castillo failed to comply with his contractual obligations to provide written notice of the Persimmon Hill Litigation as soon as practicable, to immediately send copies of the Summons and Complaint to Penn National, and to cooperate with Penn National in the defense of the Persimmon Hill Litigation. "[B]reach of an insurance policy's notice clause automatically relieves the insurer of its obligations under the contract, including the payment of proceeds due, and the duty to defend and to indemnify the insured." *Wright v. UNUM Life Ins. Co.*, 2001 U.S. Dist. LEXIS 26063, *4 (D.S.C. 2001).

B. It Is Undisputed That The Insured's Breach Of Its Duties To Provide Notice And Cooperate Resulted In A Default Judgment Which Constituted Prejudice To Penn National As A Matter Of Law.

The breach of the insured's duties under an insurance policy bars coverage for the insured for the claim or lawsuit. *Hatchett*, 244 S.C. at 435, 137 S.E.2d at 613. Under South Carolina law, however, 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. Liability Ins. Co. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729-30 (1971). Contrary to this Court's holding, Penn National showed that it was substantially prejudiced in this case by its insured's failure to comply with its contractual duties as a matter of law.

The undisputed evidence showed that the insured did not communicate at all with Penn National after being served with the Persimmon Hill Litigation, did not call when notes requesting that he do so were left at his residence, and did not call the Penn National adjuster when asked to do so by Ms. McLeod. It is uncontroverted that when asked whether he wanted Penn National to provide a defense in the Persimmon Hill Litigation, Mr. Castillo responded

"no."

Because Castillo refused a defense of the Persimmon Hill Litigation, Penn National reasonably believed that it could not retain an attorney to defend him. Penn National's belief was based on the South Carolina Rules of Professional Conduct. Rule 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 (emphasis added). At no time did Mr. Castillo give consent to Penn National to represent him or JJA Construction in the Persimmon Hill Litigation. In fact, he expressly declined such representation. Therefore, Penn National believed that it was prevented from retaining an attorney to represent its insureds. See, *Twin City Fire Ins. Co.*, 433 F.3d at 374 ("Of course, an insured must consent to the counsel assigned by the insurance company.").[5]

This Court found 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. In reaching this decision, this Court relied solely 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 Mr. Castillo and his companies. Indeed, and this Court does not dispute that there is no South Carolina appellate court that has ever held that an insurer can appoint an attorney to represent an insured who has affirmatively declined a defense. And, despite the advisory ethics opinion, the fact remains that under the South Carolina Rules of Professional Conduct, an attorney cannot represent an insured

[5] This Court indicated in its December 13 Opinion that the *Twin City Fire Ins. Co.* decision is not binding on the Court because it was issued by a federal court. However, it was fundamentally reasonable for Penn National to have relied on a federal court case (which interpreted South Carolina law) at the time it made its decision where no South Carolina appellate court had addressed this issue.

without his consent.

It is undisputed that Mr. Castillo did not retain an attorney to represent either himself or JJA Construction in the Persimmon Hill Litigation. It is also undisputed that Mr. Castillo did not consent to allow Penn National to provide an attorney to represent him or his companies in the Persimmon Hill Litigation. Therefore, no appearance was made on behalf of Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. in the Persimmon Hill Litigation and a default judgment was entered against both defendants in the amount of $4,156,976.89.

It is also clear that South Carolina appellate courts have 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 Ins. Co. v. Koza*, 274 S.C. 362, 364, 264 S.E.2d 146, 147 (1980); *Neumayer*, 427 S.C. at 273 n.6, 831 S.E.2d at 412 n.6. But, this Court failed to even address this obvious prejudice suffered by Penn National in its December 13 Opinion.

Instead, this Court found that because Penn National had actual knowledge of the Persimmon Hill Litigation before the default judgment was entered, the entering of the default judgment did not substantially prejudice Penn National. However, this Court overlooked the fact that Penn National was unable to stop the entering of the default judgment precisely because its insureds refused to allow Penn National to hire counsel to defend them. 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."). See also, *CAMICO Mut. Ins. Co. v. Jackson CPA Firm*, 2016 U.S. Dist. LEXIS 177122 (D.S.C. 2016) (finding that the insurer suffered substantial prejudice from the insured's failure to notify of malpractice claims even though insurer was notified prior to the institution of the lawsuit).

The undisputed evidence at trial was that the Penn National insured failed to take any affirmative actions to comply with its duties under the Penn National Policies. When Penn National tracked the insured down, which it was not required to do under its Policies, the insured expressly declined a defense from Penn National to the Persimmon Hill Litigation. Therefore, Penn National's "hands were tied" and it could not retain an attorney to represent the insured in the Persimmon Hill Litigation. The insured continued to do nothing and a default judgment was entered against the insureds in the Persimmon Hill Litigation. Penn National was therefore substantially prejudiced by the insureds' breach of its contractual obligations and Mr. Castillo's failure to allow Penn National to represent the insureds in the Persimmon Hill Litigation. This Court's affirmance of the trial court's conclusion that the HOA as judgment creditor is entitled to coverage under the Penn National Policies is contrary to established South Carolina precedent. Penn National respectfully requests that the Court grant its petition for rehearing and reverse the judgment entered in favor of the HOA.

II. The Court Misapplied The Law In Holding That There Was Coverage For Portrait Homes Under The Penn National Policies Where Portrait Homes Clearly And Unambiguously Did Not Qualify As An Additional Insured Under The Penn National Policies.

A. The Court Misapprehended The Law Regarding The Effect Of Ambiguities In Insurance Policies.

In the December 13 Opinion, this Court also affirmed the trial court's finding that coverage was afforded under five Penn National Policies to Portrait Homes as an additional insured, and therefore awarded Portrait Homes $ 2.5 million, the full amount of indemnity coverage under each of those Policies, as well as $807,693.50 in interest, for a total of $3,307,693.50. In so doing, this Court misapplied well-established canons of insurance policy construction under South Carolina law.

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. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Because an insurance policy is to be interpreted according to the language contained therein, "[t]he court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully." *Id.* "An insurer's obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction." *MGC Mgmt v. Kinghorn Ins. Agency*, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999). See also, *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983) ("We must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary and popular meaning."); *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976) ("[I]n 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."); *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993) ("Parties to a contract of insurance have the right to make their own contract. It is not the function of the courts to rewrite or torture the meaning of the policy to extend coverage.").

This Court overlooked these bedrock principles when it relied on evidence extrinsic to interpret the Penn National Policies to determine whether Portrait Homes was entitled to additional insured coverage. It is axiomatic that an insurance policy is ambiguous only if it "may be fairly and reasonably be understood in more ways than one." *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct. App. 2004).

Whether an insurance policy is ambiguous is based on the language contained in the policy itself. *Harbin v. Williams*, 429 S.C. 1, 8, 837 S.E.2d 491, 495 (Ct. App. 2019). Extrinsic evidence may not be used to create an ambiguity where none exists. *Yarborough*, 266 S.C. at 591-92, 225 S.E.2d at 348.

At issue in the present case are the additional insured endorsements contained in the Penn National Policies. Penn National relied on the plain, unambiguous language in the additional insured endorsements in making its decision to deny coverage to Portrait Homes for the Persimmon Hill Litigation. This Court, however, found ambiguities – not in the language at issue in the additional insured endorsements but in the Penn National Policies overall. Specifically, the "ambiguities" found by this Court were (1) that the declarations page listed the "form of business" for JJA Construction, Inc. as "individual;" and (2) the location listed on the Schedule of the Form 2037 additional insured endorsement was Jose Castillo d/b/a JJA Framing's address. Based on these 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 the ambiguous provisions: "Accordingly, the trial court was not bound to the four corners of the contracts and could look at extrinsic evidence to interpret the policies." This holding is contrary to South Carolina precedent.

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). 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). 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. See, *Sprinx Oil Co. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 481, 427 S.E.2d 649, 651 (1993) (finding that the insurance policy provisions providing coverage for pollution "that commences on or after the Retroactive date shown in the declarations" was ambiguous and therefore should be construed in favor of providing coverage for any pollution first discovered during the policy period). See also, *Crossmann Cmtys.*, 395 S.C. at 47, 717 S.E.2d at 593 ("Accordingly, we construe the ambiguous definition of occurrence in favor of the insured, Crossmann, and find the insuring language of the policies was triggered by the damages caused by repeated water intrusion."). This Court overlooked this tenant of insurance policy construction when it used extrinsic evidence to alter the otherwise clear and unambiguous terms of the additional insured endorsements in the Penn National Policies.

The first policy issued by Penn National to Named Insured, Jose Castillo d/b/a JJA Framing, the 2002-03 Policy,[6] did not provide additional insured coverage to Portrait Homes. The next two policies, the 2003-04 Policy and the 2004-05 Policy both contained the Form CG 2037 Additional Insured Endorsement. The next three policies, the 2005-06 Policy, the 2006-07 Policy, and the 2007-08 Policy, all contained the Form 71 1145 Additional Insured Endorsement. The final two policies, the 2008 Policy and the 2009-10 Policy did not contain any additional insured endorsements. However, the clear and unambiguous language contained in the two additional insured endorsements used in the Penn National Policies do not provide additional insured coverage for Portrait Homes.

[6] See, Chart on pp. 3-4.

B. The Clear And Unambiguous Language Of The Form 2037 Additional Insured Endorsement Does Not Extend Additional Insured Coverage To Portrait Homes.

Whether Portrait Homes qualified as an additional insured under the 2003-04 Policy and the 2004-05 Policy is dictated solely by the terms of the additional insured endorsement attached to these policies. These Policies contained Form CG 2037, entitled, "Additional Insured – Owners, Lessees or Contractors – Completed Operations." This endorsement states:

SCHEDULE

Name or Person or Organization:
PASQUINELLI CONSTRUCTION CO PASQUINELLI MANAGEMENT LLC & PORTRAIT HOMES CONSTRUCTION COMPANY

Section II – Who Is An Insured is amended ***to include as an insured the person or organization shown in the Schedule***, but only with respect to liability arising out of "your work" at the location designated and described in the schedule of this endorsement performed for that insured and included in the "products-completed operations hazard."

(RII, pp. 696-98, 761-63) (emphasis added)

The Persimmon Hill Litigation did not assert claims against Pasquinelli Construction Co., Pasquinelli Management LLC or Portrait Homes Construction Company. Because the additional insureds actually named in the Schedule of the endorsement were not named as defendants in the Persimmon Hill Litigation, there is no additional insured coverage available under the 2003-04 Policy and the 2004-05 Policy. The defendants named in the Persimmon Hill Litigation were Portrait Homes – South Carolina, LLC and Portrait Homes – Persimmon Hill, LLC. However, neither of these two entities was named in the Schedule of the CG 2037 endorsement. Therefore, neither Portrait Homes – South Carolina, LLC nor Portrait Homes – Persimmon Hill, LLC

are entitled to additional insured coverage under the 2003-04 Policy and the 2004-05 Policy. Adhering to the bedrock principles of insurance policy construction, this Court 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 this Court nor the trial court found that the actual language of the CG 2037 endorsement ambiguous. Instead, this Court decided that the trial court was allowed to interpret the language according to testimony given at trial regarding the corporate structure of the Pasquinelli/Portrait Homes organization. Based on this testimony, the court found that the "parties," i.e. Jose Castillo d/b/a JJA Framing and Portrait Homes, intended that all organizations under the Pasquinelli/Portrait Homes umbrella, regardless of location, were covered under the CG 2037 endorsement. Missing from this "analysis" is any evidence that Penn National, as an actual party to the Penn National Policies, ever intended or agreed to provide such broad coverage when it issued the 2003-04 Policy and the 2004-05 Policy. See, *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (indicating that the intention of the parties to the insurance policy must be gleaned from the actual contractual language used). In fact, the undisputed evidence was that Penn National charged premium for each location noted in the CG 2037 endorsement. (RII, pp. 689, 754) Clearly, Penn National did not intend to extend such broad additional insured coverage without charging any premium.

C. The Clear And Unambiguous Language Of The Form 71 1145 Additional Insured Endorsement Does Not Extend Additional Insured Coverage To Portrait Homes.

A different additional insured endorsement was used in the 2005-06 Policy, the 2006-07 Policy and the 2007-08 Policy. In these Policies, Form 71 1145 was used to provide additional

insured coverage. This form, entitled "Automatic Additional Insureds – Owners, Contractors and Subcontractors (Completed Operations)," stated in pertinent part:

> A. The following provision is added **to SECTION II – WHO IS AN INSURED**:
>
> 6. Any person(s) or organization(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 escribed in the contract or agreement, performed for that additional insured and included in the "products-completed operations hazard".

(RII pp. 849, 913; RIII p. 971) (emphasis added) As the language in this endorsement makes clear, additional insured coverage is extended to those organizations whom "you" are contractually bound to provide such coverage for completed operations. "You" is a specifically defined term in the Penn National Policies:

> 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 pp. 860, 924; RIII p. 981) The Declarations pages of these three policies identify the Named Insured as "JJA Construction, Inc." (RII pp. 822, 895; RIII p. 950)

Accordingly, under the 2005-06 Policy, the 2006-07 Policy and the 2007-08 Policy, additional insured coverage is only afforded to those organizations that JJA Construction, Inc. contractually agreed to add as additional insureds for completed operations. It is undisputed that JJA Construction, Inc. did not enter into any written contracts in which it agreed to provide additional insured coverage for Portrait Homes for completed operations. This Court should have ended its construction of the plain language of the additional insured endorsements contained in the 2005-06 Policy, the 2006-07 Policy and the 2007-08 Policy here, reversed

the trial court, and granted judgment in favor of Penn National regarding Portrait Homes' claim for additional insured coverage under these three policies.

However, instead of adhering to the canons of insurance policy construction to determine this issue, this Court affirmed the trial court's altering the terms of the additional insured endorsements by looking to extrinsic evidence, including Penn National's underwriting file to determine whether Jose Castillo d/b/a JJA Framing can be considered to be a Named Insured under these Penn National Policies. The trial court erred in so doing. "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." *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134.

In order to manufacture coverage for Portrait Homes under these three policies, the trial court found that contrary to the plain language of the Policies, the Named Insured on these three Penn National Policies was not just JJA Construction, Inc., as clearly indicated in the declarations pages, but also Jose Castillo d/b/a JJA Framing, which entity is not named anywhere in the Penn National Policies at issue. The Court also found that the only contract actually signed by Jose Castillo d/b/a JJA Framing for the construction at issue in the Persimmon Hill Litigation was a Housing and Purchase Order Contract ("Purchase Order") with Portrait Homes – South Carolina, LLC. However, that contract did <u>not</u> require Jose Castillo d/b/a JJA Framing to purchase additional insured coverage for completed operations as required by the plain language of the 71 1145 Additional Insured Endorsement before coverage could be afforded thereunder. Because the Purchase Order cannot satisfy the requirements of the 71 1145 Additional Insured Endorsement, the court then found that there "must have been" another agreement that met the requirements of the 71 1145 Additional Insured Endorsement even though no such agreement was ever introduced as an exhibit at trial and no one who has ever

seen or read such a prior agreement testified at trial.

These findings by the trial court, which were affirmed by this Court, cannot stand. The undisputed evidence is that the Named Insured under the 2005-06 Policy, the 2006-07 Policy, and the 2008-09 Policy is JJA Construction. Jose Castillo d/b/a JJA Framing is not listed as a named insured anywhere in the declarations or in any endorsement. There is no ambiguity regarding the identity of the "Named Insured" under these Policies. And, therefore, this Court improperly looked to extrinsic evidence to alter the terms of the 71 1145 Additional Insured Endorsement, contrary to the well-established tenants of insurance policy construction.

The trial court found that because JJA Construction constituted the same business that was previously operated as Jose Castillo d/b/a JJA Framing, that Jose Castillo d/b/a JJA Framing should qualify as a Named Insured under the Penn National Policies. This Court affirmed this finding even though the undisputed evidence was that JJA Construction is NOT the same business as Jose Castillo d/b/a JJA Framing. JJA Construction is a corporation duly incorporated under the laws of North Carolina, owned not only by Jose Castillo but jointly owned by Mr. Castillo and his son. Jose Castillo d/b/a JJA Framing is a sole proprietorship. These two entities are separate and are viewed as such under the law. (See, differences noted in "Confidential Request for Information," RII p. 818)

The December 13 Opinion is contrary to *Mangum v. Maryland Cas. Co.*, 330 S.C. 573, 500 S.E.2d 125 (Ct. App. 1998). In *Mangum*, Maryland issued a garage policy to Bob's, Inc. Bob's, Inc. was a closely held corporation whose sole shareholders were Mr. and Mrs. Magnum. The Magnum's son sought to stack underinsured motorist (UIM) coverage under the Maryland policy after he was injured in an accident. Only Class I insureds, defined as named insureds under a policy, are eligible to have UIM coverage stacked. Because the Magnum's were not

the named insured under the policy, Maryland denied additional coverage. The Magnum's argued that as sole shareholders of the corporation, they should qualify as Class I insureds because they are the same as the named insured. This Court disagreed:

> A corporation is not a natural person and maintains a separate and distinct identity apart from its shareholders. This oft-stated principle is equally applicable, whether the corporation has many or only one shareholder.

Id. at 576, 500 S.E.2d at 127. This Court affirmed the denial of coverage.

Similarly, here, the Named Insured under the Penn National Policies was a corporation. Therefore, the only entity that qualified as a "you" under the Policies was JJA Construction, and not Jose Castillo d/b/a JJA Framing. There is no document admitted into evidence that indicated that JJA Construction was doing business as JJA Framing. For example, there was no addendum to either the Purchase Order that changed the contracting party's name from Jose Castillo d/b/a JJA Framing to JJA Construction. To now find that the Purchase Order executed by Jose Castillo d/b/a JJA Framing should be construed as binding JJA Construction is wholly unsupported and contrary to South Carolina law. "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." *North Am. Rescue Prods. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015).

Even if JJA Construction can be bound by contracts to which it was not a party, the only contract that governed the work performed at Persimmon Hill was the Purchase Order. It is undisputed that the Purchase Order did not require that Portrait Homes be included as an additional insured for completed operations. Therefore, it does not meet the requirements of the 71 1145 endorsement. This Court overlooked this evidence when it affirmed the findings entered by the trial court.

To get around this obvious deficiency, the trial court found that the Master Agreement, which required that additional insured coverage for completed operations be provided to Portrait Homes, applied to change the terms of the Purchase Order. However, the Master Agreement actually admitted into evidence at trial was dated after the Purchase Order, and only applied to prospective contracts. Because the Purchase Order was executed by the parties eight months prior to the execution of the Master Agreement, the Master Agreement did not apply to change the terms of the Purchase Order.

Apparently acknowledging the Master Agreement did not apply retrospectively, 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 Jose Castillo, and that the earlier agreement required additional insured coverage for completed operations for Portrait Homes is wholly speculative and unsupported by any evidence at trial. In affirming the trial court's judgment, this Court merely recited the trial court's "findings" without confirming whether any evidence supported such "findings." Because there is no evidence that the required predicate for coverage under the 71 1145 Additional Insured Endorsement (i.e. the existence of a written contract that required the named insured to name Portrait Homes as an additional insured for the "products-completed operations hazard") actually existed, Portrait Homes is not entitled to additional insured coverage under the 2005-06 Policy, the 2006-07 Policy and the 2007-08 Policy. For this reason, this Court should grant Penn National's petition for rehearing in order to conform its decision to the evidence presented at trial and ensure its decision is consistent and

uniform with South Carolina law.

D. Portrait Homes Did Not Prove That It Suffered Any Damages Resulting From Penn National's Breach Of Its Policies.

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) ("The insured was not damaged because it was afforded a defense by Liberty.").

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) (affirming direct verdict because any calculation of damages by jury on plaintiff's breach of contract claim would have been pure speculation).

This Court found that Portrait Homes suffered damages from Penn National's failure to provide coverage to it as an additional insured because Portrait Homes apparently claimed it would refund Admiral for the amounts it paid to settle the Persimmon Hill Litigation. No evidence, however, was admitted at trial that supports this bald assertion by Portrait Homes. There was no evidence, documentary or otherwise, that Admiral and Portrait Homes entered into an agreement whereby Portrait Homes agreed to reimburse Admiral for its settlement payments. Copies of the Admiral policy were not entered into evidence to substantiate that Admiral

possessed any rights with regard to any recovery in this case. Without such evidence, this Court is only assuming that Portrait Homes will reimburse Admiral for the payments it made towards the settlement of the Persimmon Hill Litigation. This Court cannot find that Portrait Homes proved it was entitled to damages based on mere speculation.

In affirming the trial court's judgment in favor of Portrait Homes, this Court only cited one case, *Otis Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994). However, *Otis Elevator* addressed indemnification rights among tortfeasors, and did not address the situation of contribution among insurers. In fact, the holding of *Otis Elevator* has never been applied by any other court to govern contribution rights among multiple insurance carriers. Indeed, the only courts who have considered *Otis Elevator* in the insurance context have rejected its applicability. See, *Summer Wood Prop. Owners Ass'n v. Pennsylvania Nat'l Mut. Cas Ins. Co.*, 2019 U.S. Dist. LEXIS 157353, *17-19 (D.S.C. 2019); *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Portrait Homes – South Carolina,* 2019 U.S. Dist. LEXIS 160414, *18-19 (W.D.N.C. 2019).

Damages from a breach of contract serve to put the non-breaching party in the position he would have been in if the contract been performed. *Branche Builders v. Coggins,* 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). Applying the collateral source rule would contravene this principle by awarding the non-breaching party more damages than necessary to compensate it for the breach, constituting an impermissible windfall. *Crossmann Cmtys. v. Harleysville Mut. Ins. Co.*, 2013 U.S. Dist. 138941, at *82 (D.S.C. 2013). Because there is no evidence presented at trial to show that Portrait Homes suffered any damages resulting from Penn National's alleged breach of its duty to indemnify (a necessary element to a breach of contract claim), this Court should rehear this issue and reverse the grant judgment in favor of

Portrait Homes on its claim.

III. The Court Ignored Supreme Court Precedent In Allocating Damages.

A. The Court Was Required To Determine Which Portion Of The Default Judgment And Which Portion Of The Portrait Homes Settlement Constituted Covered Damages.

Coverage under the Penn National Policies is not afforded for all damages sought in the Persimmon Hill Litigation. 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 sum, we clarify 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).

In the Persimmon Hill Litigation, the HOA sought damages caused by the faulty workmanship of the construction of the townhouses resulting from improper design; 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 resulting from breach of warranty and unfair trade practices. All of these damages would not be covered as "property damage" caused by an "occurrence" under the Penn National Policies.

> [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.

Crossmann Cmtys v. Harleysville Mut. Ins. Co., 2013 U.S. Dist. LEXIS 138941,*51 (D.S.C. 2013). See also, *Builders Mut. Ins. Co. v. Lacey Constr.*, 2012 U.S. Dist. LEXIS 41588, *30 (D.S.C. 2012) (CGL policies not cover damages from breach of warranty and unfair trade

practices claims). Therefore, Penn National would only be 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, as judgment-creditor, and Portrait Homes had the burden of proving what portion of the default judgment and settlement constituted "property damage" caused by an "occurrence." *Builders Mut. Ins. Co. v. Island Pointe*, 431 S.C. 93, 102, 847 S.E.2d 87, 92 (2020) (finding that the insured has the burden of proving which portions of a general verdict fall within the coverage provided by the CGL policies).

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, finding that a general verdict obviated the need to segregate the damages into covered and non-covered damages. This Court failed to address this issue at all. However, the Supreme Court's decision in *Builders Mut. Ins. Co. v. Island Pointe*, 431 S.C. 93, 102, 847 S.E.2d 87, 92 (2020) decreed 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.

> [T]he Insurers most assuredly have a right to a determination of which portions of the Association's damage are covered under the commercial general liability (CGL) policies between the Insurers and the Insureds. As such, we reaffirm our prior holdings allowing insurance companies to contest coverage in a subsequent declaratory judgment action.

Id. at 97, 847 S.E.2d at 89; see also, *id.* at 108, 847 S.E.2d at 95 ("We, too, are concerned about the possibility an insurance company may be unjustly forced to cover damages that are otherwise properly excluded under a CGL policy."). For this reason alone, Penn National respectfully

requests that this Court grant its petition for rehearing, vacate the judgment entered against Penn National in the trial court, and remand this matter for determinations of which portion of the default judgment and settlement constituted covered damages under the Penn National Policies.

B. The Court Failed To Properly Apply Pro-Rata Time-On-The-Risk Allocation To Determine What Amount Of Otherwise Covered Damages Should Have Been Allocated To The Penn National Policies.

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 should have allocated those covered damages based on the time-on-risk method adopted by the Supreme Court in *Crossmann Cmtys. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) ("*Crossmann II*"). The trial court failed to do so. Instead, the trial court created a new unprecedented method of allocating damages in order to ensure that the liability limits contained on all Penn National Policies were paid. This Court then affirmed this holding.

In *Crossmann II*, the Supreme Court held that in progressive property damage cases, such as in construction defect cases, the appropriate method of allocating damages is pro-rata time-on-the-risk:

> For these reasons, we reverse the trial court's order allocating the entire $7.2 million in stipulated damages to Harleysville and hold that the proper method for allocating damages in a progressive property damage case is to assign each triggered insurer a pro rata portion of the loss based on that insurer's time on the risk.

Id. at 63, 717 S.E.2d at 601. The *Crossmann II* Court also provided a default method in calculating an insurer's pro-rata time-on-the-risk:

> The basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk.

Id. at 65, 717 S.E.2d at 602. The trial court failed to adhere to *Crossmann II* in calculating the judgment rendered against Penn National.

This Court justified the trial court's refusal to follow *Crossmann II* by indicating that the Penn National Policies contained language different from the language in the CGL policies considered in *Crossmann II*. In so doing, this Court misapprehended the Supreme Court's decision in *Crossmann II*. In *Crossmann II*, the Supreme 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). 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.

This Court 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.").

Therefore, 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, and either properly apply the *Crossmann II* pro-rata time-on-the-risk allocation or find that only one Penn National Policy was triggered by the default judgment entered against the Penn National insured and the settlement paid on behalf of Portrait Homes.

IV. The Court Misapplied Settled Law In Its Analysis Of Whether Plaintiffs Satisfied Their Burden Of Proving That Penn National Engaged In 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 this Court 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. In order for a bad faith claim to be viable, the Plaintiffs must have proven that Penn National's refusal to pay them benefits under the Penn National Policies "resulted from [Penn National's] … 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 (even if those bases have not been adjudged to be incorrect), the entry of judgment in favor of the Plaintiffs should be reversed.

A. Penn National Had A Reasonable Basis to Deny Coverage to Mr. Castillo and His Companies.

This Court found that Penn National engaged in unreasonable conduct when it failed to investigate, failed to check its records for Mr. Castillo's contact information, its alleged knowledge that Mr. Castillo did not receive at least one of its letters, and its failure to inform Mr. Castillo of all of the pertinent information known to Penn National about the Persimmon Hill Litigation. None of this conduct can support a bad faith claim.

First, Penn National contests that the evidence at trial supports the finding that Penn National engaged in these acts. More importantly, however, none of the bad conduct attributed to Penn National by the court in this case formed the basis for Penn National's decision to deny coverage to Jose Castillo d/b/a JJA Framing and JJA Construction in the Persimmon Hill Litigation. Without this required showing, the bad faith judgment against Penn National cannot stand because the HOA failed to prove this essential element of a bad faith claim. As the federal court reasoned:

> If courts allowed insureds to create a genuine issue of material fact on a bad faith processing claim by engaging in a "nit-picky" analysis of each action the insurance adjuster took or did not take in handing claims, every bad faith action would survive a motion for summary judgment. There must still be an evaluation of the reasonableness of the insurer's conduct …

Founders Ins. Co. v. Richard Ruth's Bar & Grill, 2016 U.S. Dist. LEXIS 74432, *31 (D.S.C. 2016) (emphasis in original).

Second, it is clear that at the time that Penn National made the decision to deny coverage to Mr. Castillo and his companies, there existed reasonable grounds to do so. Mr. Castillo and his companies failed to comply with their contractual obligations to provide written notice of the Persimmon Hill Litigation as soon as practicable after being served, to immediately send copies of the Summons and Complaint served upon them, and to cooperate. Penn National's denial of coverage was reasonable. See, *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Castillo*, 2019 U.S. Dist. LEXIS 49319, *13 (W.D.N.C. 2019) (finding under identical circumstances that "coverage is not afforded to the JJA Defendants for the claims asserted against them in the Underlying Construction Defect Litigation because the JJA Defendants failed to comply with the conditions for coverage under the Penn National Policies."). Accordingly, the trial court's failure to grant judgment in favor of Penn National on the bad faith claim assigned to the HOA

constituted error and should have been reversed by this Court.

Finally, an essential element of a bad faith claim is that the insured suffered damages resulting from Penn National's conduct. Once it was determined that Penn National's conduct amounted to bad faith, neither the trial court nor this Court underwent any analysis of what damages were actually caused by Penn National's allegedly bad faith conduct. Instead, this Court merely found that Penn National engaged in bad faith and affirmed the award to the HOA the entirety of the default judgment entered against the Penn National insureds, plus interest accrued. The HOA was required to present evidence of the damages caused by Penn National's alleged bad faith conduct "with reasonable certainty or accuracy." *Magnolia N. Prop. Owners Ass'n v. Heritage Cmtys.*, 397 S.C. 348, 374, 725 S.E.2d 112, 126 (Ct. App. 2012). For example, the HOA was required to prove, if Penn National had not wrongfully denied coverage, that the judgment against Jose Castillo d/b/a JJA Framing or JJA Construction would have been less than the default judgment actually entered against them. The HOA presented no such evidence. To the contrary, the HOA contended that its judgment against the Penn National Insureds was justified and would have been entered even if they had been defended. Therefore, the trial court's judgment of bad faith damages amounts to nothing more than conjecture, guess or speculation, which is insufficient as a matter of law to support the bad faith judgment. *Piggy Park Enter. v. Shofield*, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968).

Without some evidence to show that the particular conduct found to be bad faith on behalf of Penn National resulted in the entirety of the default judgment against the Penn National insureds, this Court should not have let the amount of the judgment stand. See, *Liberty Mut. Fire Ins. Co. v. JT Walker Indus.*, 554 Fed.Appx. 176, 188 (4th Cir. 2014) (finding that bad faith damages were improper where insured did not prove what damages were sustained from

the bad faith conduct); *State Nat'l Ins.*, 2018 U.S. Dist. LEXIS 232022 at *67 (directing judgment to insurer after bench trial on bad faith claims because insured failed to show that any damages resulted from the insurer's denial of defense).

B. Penn National Had A Reasonable Basis To Deny Coverage To Portrait Homes.

As indicated above, the touchstone for a bad faith claim is whether the insurer's coverage denial was based on reasonably objective grounds as viewed at the time that the decision was made. *Crossley*, 307 S.C. at 360, 415 S.E.2d at 397; *Howard*, 316 S.C. at 448, 450 S.E.2d at 584. As indicated above, 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, this Court should have vacated the judgment entered in favor of the Portrait Homes on its bad faith claim.

Furthermore, Portrait Homes did not prove that it suffered any damages resulting from any alleged bad faith conduct of Penn National. As indicated above, an essential element of a bad faith claim is that the insured suffered damages resulting from the bad faith conduct. Again, neither the trial court nor this Court performed any analysis of what damages were suffered by Portrait Homes as a result of Penn National's allegedly bad faith conduct. Instead, the trial court merely found that Penn National engaged in bad faith and awarded the entirety of the settlement amount paid by Portrait Homes in the Persimmon Hill Litigation. However, the undisputed evidence was that Portrait Homes did not suffer any damages resulting from Penn National's alleged bad faith conduct. At all times, Portrait Homes was being defended in the Persimmon Hill Litigation by its own insurance carrier and the entirety of the settlement paid was funded by insurance carriers. Because there is no support for the bad faith damages assessed

against Penn National, the entry of judgment in favor of Portrait Homes should have been vacated. See, *Liberty Mut.*, 554 Fed.Appx. at 188; *State Nat'l*, 2018 U.S. Dist. LEXIS 232022 at *67.

V. The Court Misapprehended The Law Regarding The Level Of Proof Required To Succeed On A Punitive Damages Claim.

In assessing damages for claims of bad faith, a court may award damages proximately caused by the bad faith conduct and punitive damages for conduct that was willful, wanton or reckless in disregarding the insured's rights. 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). However, the HOA and Portrait Homes had the burden of proving any alleged misconduct by Penn National and any ensuing punitive damages by clear and convincing evidence. S.C. Code Ann. §15-33-135; *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). The HOA and Portrait Homes failed to meet their burden of proof in this case. As opposed to analyzing the evidence, the trial court just awarded the amount it already awarded as bad faith damages as punitive damages and this Court affirmed.

Here, however, there was no evidence that any alleged conduct by Penn National arose to the level of willful conduct or even evidenced a reckless disregard of the insured's rights. Instead of engaging in an analysis of whether Penn National's alleged conduct met the standard required for a punitive damages award, this Court merely found that the evidence supporting a bad faith claim was sufficient to support a claim for punitive damages. This Court's decision misapprehended the law. The two claims mandate different essential elements and different standards of proof. Compare, *Crossley*, 307 S.C. at 359, 415 S.E.2d at 396-97 with S.C. Code Ann. § 15-32-520 (D). If the claims were the same, as this Court 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) ("An award of punitive damages resulting from an act that may also result in liability for multiple damages is not allowed, for it would result in a double recovery for one wrongful act, even though it may not be necessary to establish willfulness or maliciousness as an element of the cause of action for statutory damages.") (quoting 22 Am. Jur. 2d, *Damages* §817 (1988)). Instead of awarding two damages for the same set of 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 did not do so, and instead found that both remedies were appropriate, Penn National respectfully requests this Court to grant its Petition for Rehearing and reverse the punitive damages judgments entered against Penn National.

VI. The Court Misapprehended South Carolina Law Regarding Whether Attorneys' Fees Were Properly Awarded To Portrait Homes.

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). The South Carolina Supreme Court has held that in a limited situation, an insurer in breach of its defense obligations to the insured may be liable to pay the insured's reasonable attorneys' fees. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 550-51, 243 S.E.2d 443, 444-45 (1978). In *Hegler*, the insurer agreed to defend the insured pursuant to a reservation of rights and immediately filed a declaratory judgment action seeking a finding that it did not have coverage for the underlying lawsuit. The Court ultimately held that because the insured was forced to defend the declaratory judgment action, and was ultimately successful, it was appropriate to award the insured's

attorneys' fees incurred in defending the declaratory judgment action, and such an award was justified by the insurance policy's contractual duty to defend language:

> If respondent had refused initially to defend, it would have undoubtedly have been liable for the payment of counsel fees incurred by appellant in the defense of the damage action. Instead, however, of refusing initially, respondent began the defense and then sought, through the declaratory judgment action, to avoid any obligation to continue to defend. In order to obtain respondent's continued defense of the action for damages, it was necessary for appellant to employ counsel to resist the contention by respondent of lack of coverage. There is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgement is prosecuted to resolve the question of coverage. In either event, an insured must employ counsel to defend – in the first instance in the damage action and in the second in the declaratory judgment action to force the insurer to provide the defense. In both, the counsel fees are incurred because of the insured's disclaimer of any obligation to defend.

Id. at 550, 243 S.E.2d at 444.

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.

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. Without any contractual obligation, the general rule – that attorneys' fees are not recoverable unless authorized by contract or statute – applies. Furthermore, South Carolina courts "have not awarded attorneys' fees as consequential damages

in [insurance bad faith] tort actions." *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, 554 Fed. App'x 176, 191 (4th Cir. 2014) (applying South Carolina law).

This Court overlooked the differences between the present case and Hegler when it held in the December 13 Opinion that Hegler justified the imposition of Portrait Homes' attorneys' fees on Penn National. Accordingly, Penn National respectfully requests that this Court grant its Petition for rehearing and vacate the award of attorneys' fees to Portrait Homes.

CONCLUSION

Penn National respectfully request that the Court grant rehearing and reverse the trial court for the reasons set forth herein. Penn National further request rehearing en banc because consideration by the full court is necessary to maintain uniformity of decisions and because this case involves questions of exceptional importance, as set forth above.

December 27, 2023.

/s/ John I. Malone, Jr.
John I. Malone, Jr.
jmalone@goldbergsegalla.com
S.C. State Bar No. 101962
David L. Brown (*Admitted Pro Hac Vice*)
dbrown@goldbergsegalla.com
GOLDBERG SEGALLA LLP
701 Green Valley Road, Suite 310
Greensboro, NC 27408
(336) 419-4900
Attorneys for Appellant Pennsylvania National Mutual Casualty Insurance Company