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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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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	

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PENN NATIONAL'S CONSOLIDATED REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Penn National petitioned this Court for a writ of certiorari because the Court of Appeals' decision conflicts with this Court's precedent on issues of exceptional importance, including:

- The legal significance of an insured's failure to comply with its notice and cooperation obligations;
- The appropriate standard for a bad-faith claim under South Carolina law and whether the award of double damages – once as actual damages for bad faith and then again as a punitive damages – is proper;
- The proper analysis of Additional Insured endorsements in commercial insurance policies;
- How and under what circumstances the pro-rata time-on-risk allocation for progressive damages can be modified or altered; and
- When attorneys' fees should be awarded in declaratory judgment actions addressing insurance coverage.

In their separate responses (although incorporating each other's arguments), the HOA and Portrait Homes have not identified any reason or justification grounded in this Court's precedent that supports the Court of Appeals' decision confirming an award of over $11 million to Portrait Homes and approximately $16 million to the HOA. Indeed, in most arguments, the HOA and Portrait Homes failed to cite any precedent by this Court at all. Penn National respectfully requests that this Court grant its petition in order to clarify important aspects of South Carolina law and to correct the Court of Appeals' erroneous application of this Court's precedents.

I. The Court Of Appeals Failed To Comply With This Court's Well-Established Precedent That A Default Judgment Resulting From The Insured's Breach Of The Notice And Cooperation Provisions Prejudices Its Insurer As A Matter Of Law.

In this case, the Court of Appeals held that the HOA, as judgment-creditor of Penn National's insured, is entitled to recover under the Penn National Policies due to Penn National's failure to defend its insured in the Persimmon Hill Litigation. Penn National justified its failure

to defend based on its insured's violation of the notice and cooperation provisions contained in the Penn National Policies, which resulted in a default judgment of $4,156,976.89, to Penn National's substantial prejudice. The Court of Appeals held that the insured's acknowledged violation of the Policies' notice and cooperation provisions was inconsequential, that Penn National was required to defend the insured notwithstanding the materiality of the breach, and that Penn National's failure to defend required it to pay its coverage limits to satisfy the default judgment. The Court of Appeals' decision is directly contrary to this Court's precedent and should be reversed, and the HOA's response provides no justification for a contrary result.

In a recent decision, this Court reaffirmed the validity and materiality of notice and cooperation provisions contained in policies of insurance. *Covil Corp. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, Op. No. 28221 (S.C. Sup. Ct. filed July 24, 2024) (Howard Adv. Sh. No. 28 at 20). "Historically, we have recognized that a notice provision in an insurance policy is a material term and that an insured's failure to provide the insurer with timely notice can lead to the forfeiture of coverage." *Id.* at 24 (citing *Lee v. Metro. Life Ins. Co.*, 180 S.C. 473, 486-87, 186 S.E.2d 376, 381 (1936)). This Court then reaffirmed the notice-prejudice rule where the rights of innocent third-parties are compromised by an insured's breach of its contractual obligations, and created a material breach standard for when the rights of innocent third-parties are not implicated. *Id.* at 24-28. Here, because the HOA purportedly is an innocent third-party, application of the notice-prejudice rule must be analyzed. Penn National's rights were prejudiced as a matter of law when Castillo did nothing to prevent the entry of a default judgment against him after failing to comply with the Penn National Policies' notice and cooperation provisions. The straightforward application of black-letter law should have resulted in the conclusion that Penn National did not have coverage for the default judgment entered against Castillo.

In its Response, the HOA does not dispute that neither Castillo nor anyone else associated with his companies (1) notified Penn National of any alleged faulty construction at the Persimmon Hill project; (2) provided written notice to Penn National of the Persimmon Hill Litigation; (3) sent copies of the Summons and Complaint served upon him in the Persimmon Hill Litigation to Penn National; or (4) cooperated with Penn National in the defense of the Persimmon Hill Litigation, all of which were required by the notice and cooperation provisions contained in the Penn National Policies. The uncontested facts are that at no time did Castillo ever tender the Persimmon Hill Litigation to Penn National for a defense, respond to any requests that he contact Penn National about the Persimmon Hill Litigation, or provide Penn National with his contact information when requested to do so. In fact, Castillo testified at trial that he told Penn National not to defend him. (RI p.472). The HOA does not mention, let alone dispute, that Castillo clearly breached the Policies' notice and cooperation provisions.

The HOA merely states that Castillo's non-compliance with the Policies' notice provisions was irrelevant to the holding that Penn National breached its duty to defend the Castillo companies in the Persimmon Hill Litigation. The Penn National insured, however, did more than fail to comply with the notice provisions contained in the Penn National Policies. Castillo affirmatively and expressly directed Penn National not to defend him in the Persimmon Hill Litigation, a fact Castillo confirmed in his trial testimony. (RI p.472). Then, Castillo sat on his hands and did nothing more to address the claims asserted against his companies in the Persimmon Hill Litigation, allowing a default judgment to be entered against him. The entry of a default judgment against the insured conclusively establishes prejudice to the insurer. *See, Merit Ins. Co. v. Koza,* 274 S.C. 362, 364, 264 S.E.2d 146, 147 (1980) ("Here, prejudice is clearly established by the fact that a default judgment was entered against the insured."). Therefore,

Castillo's non-compliance prejudiced Penn National as a matter of law and barred coverage for the default judgment.

Despite this Court's clear precedent, the HOA argues that Penn National did not suffer any prejudice because Penn National had notice of the Persimmon Hill Litigation from a third-party and had an opportunity to respond to the lawsuit on behalf of its insured.[1] According to the HOA, once Penn National received notice of the Persimmon Hill Litigation from a third-party, it should have disregarded Castillo's explicit instructions and defended him and his companies in the Persimmon Hill Litigation anyway. The HOA's argument has no merit. First, this Court has never held that the forwarding of notice of a lawsuit by a third party is sufficient to satisfy the insured's obligations under the insurance policy. *See*, *Merit*, 274 S.C. at 365, 264 S.E.2d at 147-48. *See also*, *Founders Ins. Co. v. Richard Ruth's Bar & Grill, LLC*, 761 Fed.Appx. 178, 183 (4th Cir. 2019) ("Even where an insurer has actual knowledge of a potential claim or occurrence triggering coverage under the policy, the insured is not relieved of his contractual obligation to provide the legal papers to the insurer unless the insurer waives that policy provision."). Here, Portrait Homes' tender of the Persimmon Hill Litigation to Penn National for additional insured coverage did not obviate Castillo's own duty to comply with the notice and cooperation provisions, as only Castillo had the right to demand a defense from Penn National.

Furthermore, even if a third party's forwarding of suit papers somehow satisfied the

[1] Throughout its Response, the HOA constantly states that Penn National "provided a defense" to Castillo's companies and then "abandoned" its defense. (HOA Response, pp. 8, 10, 11, 18, 21, 22). This is actually not true. Counsel for the HOA sent a letter to Penn National indicating that Castillo had been served with the Persimmon Hill Litigation and stating, "Failure to hire counsel and participate in this matter within fifteen (15) days of your receipt of this letter will result in an Order of Default and Judgment sought against your insured." (RII p.1230). Several days later, the Penn National adjuster emailed the HOA's counsel and requested a thirty day extension to respond to the Complaint. (RII p.1231). When the Penn National adjuster sent this email, Castillo had not tendered the Persimmon Hill Litigation to Penn National for defense and had not contacted or otherwise responded to requests for contact from Penn National. (RI pp. 425-26; RII pp. 1228-29). Penn National did not "provide a defense" to Castillo as consistently characterized by the HOA. It merely requested additional time to secure its insured's cooperation, which its insured refused to provide. (RI pp. 427-33; RII pp. 1232-33).

notice provisions in the Penn National Policies, which it does not, actions by third parties cannot possibly satisfy the cooperation provisions contained in those Policies. Without the insured's cooperation, Penn National could not have investigated the allegations asserted against its insured or taken any other actions. *See*, *Factory Mut. Liab. Ins. Co. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971) (insured's failure to cooperate prejudices insurer's ability to conduct a reasonable investigation of the accident and adequately defend the action). *See also, Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 434, 137 S.E.2d 608, 613 (1964).

Finally, and significantly, Castillo expressly directed Penn National not to defend him and his companies in the Persimmon Hill Litigation. (RI pp. 427-32; 472). Under South Carolina law, an insured clearly has the right to decline benefits under his insurance policy. *See, Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 622, 103 S.E.2d 272, 276 (1958). Once Castillo did so, Penn National could not hire an attorney to represent him or his companies in the Persimmon Hill Litigation. Rule 1.8, RPC, Rule 407 SCACR. *See also, Twin City Fire Ins. Co. v. Ben-Arnold-Sunbelt Beverage Co.*, 433 F.3d 365, 374 (4th Cir. 2005).

The HOA also argues that because Penn National did not raise in its declination of coverage letter the issue of its inability to retain counsel to represent its insured after the insured expressly declined a defense, it somehow waived that argument, citing *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017). *Heritage*, however, cannot support the weight ascribed to it by the HOA. First, the *Heritage* case addressed reservation of rights letters, not declination of coverage letters. Under the former, the insurer agrees to defend the insured in an underlying litigation while reserving its rights to decline coverage thereafter. *Id.* at 337-38, 803 S.E.2d at 297. Because the insurer has the right to control the defense, the *Heritage* Court found that it was crucial to inform the insured of all bases under the policy upon which

coverage may later be denied and that failure to do so resulted in waiver of those bases. *Id.* at 339, 803 S.E.2d at 298 (internal quotations and citations omitted). Therefore, when an insurer issues a reservation of rights letter, any basis for denial of coverage under the policy not raised and adequately explained in the letter is waived. *Id.* at 342-44, 803 S.E.2d at 300-01.

Here, however, Penn National did not issue a reservation of rights letter to Castillo in which it undertook the defense of Castillo's companies, but a declination of coverage letter. (RII pp. 1268-80). The concerns recognized in *Heritage* do not apply when the insurer declines coverage because the insurer does not control the insured's defense. Penn National's failure to raise its inability to retain counsel in the face of Castillo's direction not to hire counsel in its declination of coverage letter does not constitute a waiver of this position.[2] The HOA's position to the contrary is wholly without merit.[3]

It is important that South Carolina law is clear as to the parties' responsibilities when an insured directs its insurer not to defend the insured in litigation. This Court held in *Tucker* that an insured can decline the benefits of insurance coverage, but the Court of Appeals makes that holding a hollow one by rendering an insurer liable to the insured's judgment creditors when it complies with the insured's instructions. Clarity as to this aspect of South Carolina law is essential to guiding insurers faced with the Hobson's choice of refusing to honor its own

[2] The HOA places great emphasis on the fact that Castillo never received letters from Penn National because the letters were "knowingly" sent to Castillo at an incorrect address. The facts are otherwise. After Portrait Homes tendered the Persimmon Hill Litigation for additional insured coverage, Penn National sent a letter to Castillo requesting that he contact Penn National to discuss the litigation. This letter was sent to the South Carolina address contained in the Declarations of the 2009-10 Policy, the final policy issued by Penn National to JJA Construction, Inc. (RIII pp. 1072, 1247). Penn National sent a second letter to the same address. (RIII p.1254). Both letters were also copied to the insurance agent. (*Id.*) Neither letter was returned. Thereafter, Penn National sent the declination of coverage letter to both the South Carolina address and to the North Carolina address (where the independent adjuster was able to speak to Castillo). (RIII pp. 1268, 1275). However, Penn National's attempts to contact its insured do not eliminate or somehow waive the insured's duty to provide notice to Penn National of the Persimmon Hill Litigation or cooperate in its defense.

[3] The HOA also utilizes this same argument with regard to the issue of allocation of damage. For the same reasons, HOA's argument is equally unavailing with regard to the allocation issue.

insured's instructions not to defend and exposing itself to any default judgment and, as discussed below, significant bad faith damages for following its insured's instructions.

II. Portrait Homes' Response Fails To Show That The Additional Insured Endorsements Contained In The Penn National Policies Were Ambiguous.

It is well-established that the court's role in construing policies of insurance is to give effect to the plain and unambiguous language contained therein.

> The judicial function of a Court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. It is not the province of the Courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended.

S.S. Newell & Co. v. American Mut. Liab. Ins. Co., 199 S.C. 325, 332, 19 S.E.2d 463, 466 (1942). *See also, Covil*, Op. No. 28221 at 26.

Here, the additional insured provisions contained in the Penn National Policies are unambiguous. Pursuant to their terms, the Penn National Policies do not provide additional insured coverage to Portrait Homes for the Persimmon Hill Litigation. Despite this bedrock canon of insurance policy construction long endorsed by this Court, the Court of Appeals found that it could rely on extrinsic evidence to construe otherwise unambiguous terms in the Penn National Policies if any term in the insurance policy is ambiguous, no matter how unrelated such other term might be to the scope of additional insured coverage.[4] Portrait Homes merely suggests that Castillo and Portrait Homes intended that Portrait Homes be an additional insured under the Penn National Policies. Castillo's undisclosed intentions, however, are immaterial to the

[4] Portrait Homes argues that the ambiguities in the Penn National Policies were latent and therefore it was appropriate to use extrinsic evidence to broaden coverage. This Court, however, does not endorse the use of extrinsic evidence to vary the terms of an insurance policy based on latent ambiguities. It is only when the terms of the policy are capable of more than one meaning that a court can use parol evidence to interpret the ambiguous term. *Williams v. Gov't Emples. Ins. Co.*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014).

construction of the Penn National Policies and do not justify the Court of Appeals' broadening of the otherwise plain language of the Penn National Policies in contravention of this Court's precedent. *See, Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) ("Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.").

With regard to the Form 2037 Additional Insured Endorsement contained in the 2003-04 and 2004-05 Policies, it is clear that additional insured coverage was only extended to the specific entities listed in the Schedule. (RII pp. 696, 767). Portrait Homes-South Carolina, LLC and Portrait Homes-Persimmon Hill, LLC are not listed in the Schedule. Therefore, there is no additional insured coverage for Portrait Homes under these two Penn National Policies.

Portrait Homes argues that because the address contained in the "Location and Description of Completed Operations" contained a scrivener's error, the Court of Appeals was allowed to strike the location and replace it with the location of all construction projects on which Castillo and his companies worked. Portrait Homes then argues that this then justified the addition of other **companies** not actually named in the Schedule to be afforded additional insured status. There is simply no law to support this extraordinary judicial expansion of additional insured coverage under the Penn National Policies or the use of parol evidence to construe otherwise unambiguous contract language.[5] *See, C.A.N. Enter. v. S.C. Health & Human Servs. Fin. Comn'n*, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988) ("Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible.").

[5] The only case cited by Portrait Homes in support of its arguments is *Southern Realty & Construc. Co. v. Bryan*, 290 S.C. 302, 350 S.E.2d 194 (Ct. App. 1986), a case that does not arise in the insurance coverage context or address principles of insurance policy construction. In *Southern Realty*, the mortgagee sought reformation of the contract citing mutual mistake of the parties. Here, however, there is no evidence that the parties to the Penn National Policies, i.e. Penn National and its insured, both intended for Portrait Homes to be included in the Schedule contained in the 2037 Additional Insured Endorsement. Therefore, *Southern Realty* is inapplicable.

There are also no ambiguities in the plain language contained in the Form 71 1145 Additional Insured Endorsement contained in the 2005-06, 2006-07, and 2007-08 Policies. Under this endorsement, the prerequisite to additional insured coverage is that the Named Insured, identified as JJA Construction, Inc. under these Policies, be required under a contract to add a third-party as an additional insured. (RII pp. 822, 849, 895, 913; RIII pp. 950, 971). Portrait Homes makes a convoluted argument based on other parts of the Policies to support the Court of Appeals' conclusion that an ambiguity in the endorsement allowed contracts entered into by JJA Framing, an entity not identified anywhere in these Policies, to form the basis for additional insured coverage. However, there is no ambiguity in the identity of JJA Construction Inc. as the **only** Named Insured on the 2005-06, 2006-07 and 2007-08 Policies. *See*, *Newell*, 199 S.C. at 332, 19 S.E.2d at 466 ("The Court has no power to interpolate into the agreement between an insurer and the insured a condition or stipulation not contemplated either by the law or by the contract between the parties.").

The cases cited by Portrait Homes are inapposite. *See, Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 599, 748 S.E.2d 781, 789 (2013) (parties entered into stipulation to resolve any ambiguities regarding the names of the business entities the parties intended to include as named insureds); *Williams v. S.C. Farm Bureau Mut. Ins. Co.*, 251 S.C. 464, 469, 163 S.E.2d 212, 214 (1968) (the named insured contained on declarations was not a legal entity).

More importantly, even assuming that the Court of Appeals could interpret the Named Insured under these Policies to be both JJA Construction and JJA Framing, Portrait Homes did not identify the prerequisite for additional insured coverage under the 71 1145 endorsement, specifically that a contract existed signed by JJA Framing that required additional insured coverage for Portrait Homes. Clearly, none was entered into evidence in this case. In its

Response, Portrait Homes only quotes the decision by the trial court that such a contract "would have existed" or "would have been in place." (Portrait Homes Response, p.17). Speculation is insufficient to support the finding of additional insured coverage, especially when the Housing and Purchase Order Contract actually executed by JJA Framing for the work on the Persimmon Hill project does not require additional insured coverage (RIII pp. 1152A-53) and does not refer to or otherwise incorporate any alleged pre-existing Master Agreement. (*Compare*, RIII pp. 1151-55 [governing Persimmon Hill project] and RIII pp. 1166-70 [governing Summerwood project and executed after Master Agreement entered into evidence was signed]).

The Court of Appeals contravened long-established precedent by creating ambiguities in the additional insured endorsements contained in the Penn National Policies where none existed. Indeed, not even Portrait Homes could find precedential support for the Court of Appeals' rulings. Instead, in its Response, Portrait Homes relied almost exclusively on the trial court's decisions. However, an appellate court is tasked with reviewing a trial court's determinations, not blindly following them. When those determinations are contrary to precedent and plain contract language, the Court of Appeals should correct those errors, not multiply them. Penn National respectfully requests that this Court grant its petition to review this issue.

III. Neither The HOA Nor Portrait Homes Was Able To Justify The Court Of Appeals' Failure To Determine Which Portions Of The Settlement And Default Judgment Constituted Covered Damages And To Allocate Any Such Covered Damages Based On Penn National's Pro-Rata Time-On-Risk.

After finding that Castillo's violation of the notice and cooperation provisions in the Penn National Policies, which resulted in the entry of a default judgment against his companies, did not prejudice Penn National, the Court of Appeals held that the entirety of the default judgment ($4,156,976.89) was covered under the Penn National Policies. The Court of Appeals also held that because Portrait Homes apparently qualified as an additional insured under five of the Penn

National Policies, Penn National was liable to pay the entirety of the settlement entered into between Portrait Homes and the HOA ($3,850,000), subject only to the limits of the five Penn National Policies. In reaching these decisions, the Court of Appeals failed to determine which portion of the default judgment constituted damages actually covered under the Penn National Policies and then to allocate any such covered damages, which were clearly progressive in nature, to Penn National based on its time-on-risk, consistent with this Court's decision in *Crossmann Cmtys. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) ("*Crossmann II*").

The HOA and Portrait Homes argue that the evidence presented at trial showed that the entirety of the settlement and judgment constituted covered damages under the Penn National Policies. However, the actual evidence referred to in both the HOA's and Portrait Homes' Responses do not provide a basis for that finding. To the contrary, the fact that JJA Framing allegedly worked on 85% of the townhomes and that 50% of the repair estimate prepared by the plaintiffs' expert in the Persimmon Hill Litigation could be attributable to JJA Framing's work (HOA's Response, pp. 16-17; Portrait Homes' Response, p.19) does not automatically result in the conclusion that 100% of the settlement and default judgment constituted covered damages. Contrary to the HOA's assertions, this Court has specifically held that apportionment of damages between covered and non-covered is appropriate in a subsequent declaratory judgment action. *See, Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 97, 847 S.E.2d 87, 89 (2020) ("[T]he Insurers most assuredly have a right to a determination of which portions of the Association's damages are covered under the commercial general liability 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."). The Court of Appeals here

failed to determine what portion of the settlement and judgment constituted covered damages.

Further, the damages in this case were progressive in nature, starting immediately after the first building was completed in 2003 (RIV pp. 1294-1598) and continuing until 2016 when the settlement was paid and default judgment entered. (RI p.276; RIII pp. 1240-45). Contrary to the HOA's allegations, Penn National did not insure Castillo d/b/a JJA Framing or JJA Construction, Inc. for the entirety of the progressive damages. The Penn National Policies were issued from December 5, 2002 through July 9, 2010 (with a lapse of coverage between January 31, 2008 through July 9, 2008). Thus, the Court of Appeals held Penn National liable for six years of progressive property damage that occurred after Penn National's coverage ceased. The Court of Appeals clearly erred in failing to allocate covered damages on a pro-rata time-on-risk basis pursuant to this Court's decision in *Crossmann II*.

Both the HOA and Portrait Homes argue that the difference in language between the policies at issue in *Crossmann II* and the Penn National Policies justifies the Court of Appeals' failure to allocate damages throughout the progressive damage period. However, the *Crossmann II* Court chose the pro-rata time-on-risk allocation method based not only on policy language but also on the objectively reasonable expectations of the contracting parties and important policy goals. *Id.* at 52-63, 717 S.E.2d at 595-601. If the Court of Appeals decided to disregard this Court's directive in *Crossmann II*, then the plain language in the Penn National Policies required allocation of all damages to a single policy period where a single policy limit would be available.

Both the HOA and Portrait Homes argue against the allocation of damages to one policy period. However, they cannot have it both ways. Either covered damages should have been allocated pursuant to the *Crossmann II* time-on-risk method or only allocated to a single policy at issue when the damages first started. The HOA's argument that the total amount of the default

judgment should be allocated to all Penn National Policies as a punishment for failing to defend Castillo and his companies in the Persimmon Hill Litigation is wholly without merit. *See, Freeman Dodge, Inc. v. MCC Fin. Servs.*, 272 S.C. 164, 166, 249 S.E.2d 897, 898 (1978) ("Mere breach of contract does not justify an award of punitive damages."). The cases cited by HOA are equally unavailing or do not stand for the propositions for which they were cited. *See, Stroup Sheet Metal Works, Inc. v. Aetna Cas. & Sur. Co.*, 268 S.C. 203, 213, 232 S.E.2d 885, 888 (1977) (insurers are only obligated to defend covered claims); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 90-91, 124 S.E.2d 602, 610 (1962) (insurer who did not defend underlying action responsible for loss of vehicle and taxation of costs, but not for loss of use of vehicle); *Doe v. S.C. Med. Malpractice Liab. Joint Under. Ass'n*, 347 S.C. 642, 557 S.E.2d 670 (2001) (no evidence of bad faith where insurer's actions were reasonable).

The HOA and Portrait Homes have not shown that the Court of Appeals' decision is consistent with this Court's precedent when it failed to determine what portion of the settlement and judgment constituted covered damages and then failed to allocate damages to Penn National consistent with this Court's precedent.

IV. The HOA Failed To Show That The Court Of Appeals' Decision Affirming The Bad Faith Award Was Consistent With This Court's Precedent.

The Court of Appeals' decision regarding bad faith in this case did not adhere to the principles this Court articulated in *Crossley v. State Farm Mut. Auto Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992). Specifically, while the Court of Appeals identified alleged bad conduct by Penn National, it did not plausibly find that those acts resulted in Penn National's decision to deny coverage or that the identified bad conduct proximately caused any damages. Further, the Court of Appeals did not analyze or even conclude that Penn National had no reasonable basis for its decision to deny coverage at the time it made that decision.

As opposed to demonstrating any causal connection between Penn National's alleged bad acts and the decision to decline coverage or pointing to evidence supporting the award of any resulting damages, the HOA merely reiterated the bad acts allegedly engaged in by Penn National that preceded its decision to deny coverage. The absurdity of the HOA's position is highlighted by the fact that millions of dollars in bad faith and punitive damages were awarded to Castillo for Penn National's failure to defend him even though he expressly directed Penn National not to defend him. (RI p.472). To say that Penn National must provide contract coverage to Castillo because of the notice-prejudice rule is one thing, but to say that Penn National should also pay millions to Castillo in exemplary damages is truly breathtaking.

V. Neither The HOA Nor Portrait Homes Showed That The Award Of Both Bad Faith Damages And Punitive Damages Was Appropriate Or Consistent With This Court's Precedent.

The Court of Appeals affirmed the trial court's award of both bad faith damages and punitive damages in the same amount to the HOA and Portrait Homes. As a result, Portrait Homes was awarded $3,892,791.24 in bad faith damages and again in punitive damages, for a total of $7,785,582.48. The HOA (as judgment-creditor of Castillo) was awarded $5,370,147.29 in bad faith damages and the exact same amount again in punitive damages, for a total of $10,740,294.58.[6] There is no basis in law or fact to support these awards.

The HOA curiously argued, without citation to any case law, that this issue was not preserved for review. That is simply not true. Penn National raised the issue of bad faith damages and punitive damages at trial and again in its Rule 59(e) Motion. (RV pp. 1818-29). Penn National raised these issues on appeal to the Court of Appeals and again in its petition for

[6] This award of punitive damages was assessed against Penn National where its insured consciously did not provide notice to Penn National, refused to cooperate with Penn National, and expressly directed Penn National not to defend. (RI pp. 428-33; 469-72).

rehearing and suggestion for rehearing en banc. At no previous time has the HOA argued that these issues were not preserved for appeal. The Court of Appeals ruled on these issues in its decision. This issue is appropriately before this Court on Penn National's petition for a writ of certiorari. *See, I'On, LLC v. Mt. Pleasant,* 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000).

VI. Portrait Homes Failed To Show That The Award Of Attorneys' Fees In This Case Comports With This Court's Precedent.

The general rule in South Carolina remains that a successful litigant in a civil action is not entitled to its attorneys' fees unless authorized by statute or contract. *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). In *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978), this Court found that the insurance policy allowed an insured to recover its attorneys' fees under specific and limited circumstances, i.e. where the insured has to defend a coverage action to maintain the insurer's defense of an underlying lawsuit. *Id.* at 550-51, 243 S.E.2d at 444-45. Here, however, Portrait Homes did not institute this action to require Penn National to defend it in the Persimmon Hill Litigation. Indeed, Portrait Homes was being fully defended in the Persimmon Hill Litigation by its own carrier, Admiral Insurance Company. Portrait Homes asserted a single cause of action against Penn National in the operative complaint, breach of contract, and sought reimbursement of the amount paid in settlement of the Persimmon Hill Litigation and defense costs. (RI pp. 216-21). The circumstances in this case do not mirror those involved in *Hegler*. In its Response, Portrait Homes failed to show that it did. Therefore, the general rule applies and Portrait Homes is not entitled to its attorneys' fees in this case. Penn National respectfully requests that this Court accept its petition regarding this issue.

CONCLUSION

For the above reasons, Penn National respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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