ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	FOR THE NINTH CIRCUIT
Portrait Homes – SC, LLC, and Portrait Homes – Persimmon Hill, LLC, Plaintiffs, v. Pennsylvania National Mutual Casualty Insurance Company, and The Persimmon Hill Homeowners Association, Inc., Defendants.	Civil Action No.: 2014-CP-08-2757 **ORDER AS TO PERSIMMON HILL HOMEOWNERS ASSOCIATION, INC.'S CLAIMS OF BAD FAITH, BREACH OF CONTRACT AND DECLARATORY JUDGMENT AGAINST PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY**
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.	RECEIVED APR 27 2020 SC Court of Appeals

This case began as a declaratory judgment action filed by Portrait Homes – SC, LLC, and Portrait Homes – Persimmon Hill, LLC (hereinafter collectively referred to as "Portrait") against Pennsylvania National Casualty Insurance Company (hereinafter "Penn National") for Portrait's claim that it was an additional insured under various insurance policies issued to Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. d/b/a JJA Framing (hereinafter "JJA"), the primary framer, window, and window flashing installer in the construction of the project known as Persimmon Hill in Goose Creek, South Carolina. The Persimmon Hill Homeowners Association, Inc. (hereinafter "HOA") was named a party in this declaratory judgment action and asserted

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

crossclaims against Penn National seeking a declaratory judgment as to whether Penn National's policies provided insurance coverage to its insureds, JJA. Subsequent to the filing of the HOA's crossclaims against Penn National for a declaration of coverage, JJA assigned all of its rights as an insured under Penn National's policies, including bad faith, to the HOA following the HOA obtaining judgment against JJA. The trial of this case was to determine if Portrait was an additional insured under Penn National's insurance policies issued to JJA, whether the judgment obtained by the HOA against JJA was covered in whole or in part under Penn National's policies and whether Penn National committed bad faith along with the determination of damages, if any. The issues were tried non-jury. The trial began in February. Following four days of testimony, the trial recessed. The trial resumed in May and lasted another three days. The issues are now ripe for adjudication.

This Order only addresses the determination of whether the judgment the HOA obtained against JJA is covered in whole or in part under Penn National's policies and whether Penn National acted in bad faith along with the damages, if any, for these claims. The determination of whether Portrait is an additional insured under Penn National's policies is addressed in a separate order.

Based upon careful consideration of the evidence over the seven (7) days of trial, weighing the credibility and testimony of the witnesses, and giving the proper weight to the evidence in this case, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves a coverage dispute and claims of bad faith over eight (8) years of Commercial General Liability ("CGL") policies that Penn National sold to Jose Castillo d/b/a JJA Framing Company, JJA Framing Company, and JJA Construction Inc.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Portrait was the developer and general contractor of the townhomes known as Persimmon Hill (hereinafter "Persimmon Hill" or "the Project"). (Pl. Exs. 1, 2, 3, and 4). It was determined during the underlying case that JJA was the subcontractor of Portrait who framed, and installed the windows, window flashings, and weather barrier in approximately 85% of the units at Permission Hill. Trial Tr. vol. 1, 97. Portrait believed that the majority of the water intrusion damages were a result of JJA's defective work. Trial Tr. vol. 1, 116-120. Persimmon Hill consists of 388 townhome units in 74 buildings located in Goose Creek, South Carolina. The Persimmon Hill community is governed by covenants and restrictions that are recorded in Berkeley County and impose rights and obligations for the Association to perform in the governance, operation, and maintenance of the community including the right and obligation to bring the construction defect lawsuit (hereinafter referred to as "the underlying lawsuit").

Penn National first became aware of the Persimmon Hill construction defect action by letter from Portrait's counsel dated June 5, 2013. This letter transmitted the amended complaint in the underlying lawsuit, the HOA's forensic engineering report, and also put Penn National on notice of the HOA's claims against its insured JJA and Portrait's demand for additional insured status under the JJA insurance policies. (Pl. Ex. 6). The claim was assigned to Penn National's adjuster Greg Gross who was an experienced claims handler in adjusting commercial general liability claims. At the outset of the claim, Mr. Gross and Penn National knew after receiving the June 5, 2013, correspondence containing the engineering report that JJA's liability exposure in the underlying lawsuit was likely in the millions of dollars. Trial Tr. vol. 1, 335-336; 436. Penn further knew that the HOA's pleadings triggered coverage for JJA under the Penn policies. Trial Tr. vol. 1, 335. The HOA's Complaint alleged, among other things, water intrusion caused damage and deterioration to the townhomes at Persimmon Hill as a result of improper construction to include

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

the flashing and window installation performed by JJA. (Pl. Exs. 1, 2, 3, 4, and 6). The Complaint asserted claims of negligence, gross negligence, breach of warranties, and unfair trade practices against Portrait, JJA and other defendants. *Id.*

Fifteen (15) days after opening this claim, Greg Gross met with his superiors including his regional claim's office team leader, Gary Gibson, and Penn National's home office in-house legal counsel, Adam Parsons, to discuss the handling of this claim. (Pl. Ex. 58, 2). It was determined that Penn National would not retain counsel on JJA's behalf until JJA specifically requested a defense. *Id.* The Penn National unilaterally imposed requirement of an insured having to specifically request a defense prior to Penn National hiring defense counsel is separate and distinct from the notice and cooperation conditions found in the insuring agreement under the Duties in the Event of Occurrence, Claim or Suit Section. Mr. Gross testified that "when a lawsuit is filed against a Penn National insured, they've got to do two things: Number one is the pleadings have to trigger coverage . . . . Then there is a second hurdle they've got to jump through which is, they got to request a defense from Penn National . . . [.]" Trial Tr. vol. 1, 331. Mr. Gross testified that this second hurdle was not a term or condition contained in any of the insuring agreements that he had ever seen at Penn National, and that he told management he didn't believe imposing this requirement of specifically having to request a defense was proper. Trial Tr. vol. 1, 332. Adjuster Greg Gross further testified that it was not a requirement of any of the four (4) other insurance companies he had previously been employed at adjusting claims. *Id.* at 333.

Penn National's adjusting of the HOA's claims against JJA included attempting to send correspondence to JJA on three (3) separate occasions and hiring an independent claims adjuster to cold call JJA to inquire whether JJA wanted Penn National to provide a defense. Penn National's first effort to contact JJA was after its adjuster could not locate JJA's contact information in an

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

internet search. E-mail and phone contact information for JJA were available in the Penn National system, but there was no meaningful effort made to locate this information. Penn National's first correspondence was the first of three Reservation of Rights ("ROR") letters to JJA dated September 21, 2013, sent by certified mail to 9496 Highway 78, Lot 2, Ladson, South Carolina 29458. (HOA Ex. 14). Also, on September 21, 2013, Penn National's adjuster made a claim's log entry: "Effective 07/29/2009 the insured address is changed to 11227 Eastfield Rd., Huntersville, NC 28078." (Pl. Ex. 58, 7). The first sentence of the ROR states, "Penn National Insurance acknowledges receipt of the above referenced claim." (HOA Ex. 14). The ROR further maintained that "construction defects appear to be resultant in water intrusion and deterioration as a result" and "[i]t appears from the contracts/purchase orders in the file that construction commenced in 2002." (HOA Ex. 14). Penn National noted the date of loss as December 5, 2003. *Id.* The ROR was "cut and paste" correspondence that also misapplied policy language for the Duty in the Event of an Occurrence Section that had been amended by an Extended Coverage Endorsement. The ROR went on to state it was "not a denial of coverage, but rather to inform JJA of potential coverage issues. Any actions taken by Penn National in the investigation of this matter, or in negotiating for a compromise settlement, or in making any settlement, or in defending this claim, or in any way acting or failing to act, shall not constitute an admission of liability or an admission of coverage." *Id.* On the same day, the following plan was noted in Penn National's claims log:

> PLAN: ROR has been sent to the insured today via certified mail. If the insured receives and requests a defense on these complaints, there is a probable defense obligation due to the negligence count in the complaint and the trigger of coverage in South Carolina. Diaried two weeks for acceptance of ROR. If letter comes back unclaimed will issue CQR[1] to HOC[2] for review of coverage (i.e., insured has not demanded a defense to date).

[1] CQR refers to Coverage Question Report. Trial Tr. vol. 1, 340-341.
[2] HOC refers to Home Office Counsel, Adam Parsons. Trial Tr. vol. 1, 339.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

(Pl. Ex. 58, 8).[3] This correspondence was never received by JJA because Penn National sent it to a four (4) year old former address. Penn National did not have a certified mail green card receipt signed by JJA for this ROR in its file.

Mr. Gross also was directed to hire an independent adjuster to go to the Berkeley County Courthouse to review the Clerk of Court's file for an affidavit of service to see if and when JJA was served. (Pl. Ex. 58, 2; HOA Ex. 16; and Penn Ex. 22). The independent adjuster, Gayle McLeod, of Capstone ISG made two (2) trips to the Berkeley County courthouse to see if the Clerk's file contained an affidavit of service on JJA in the underlying case. (Pl. Ex. 58; Penn Ex. 82). As of the time of the independent adjuster's first trip to the courthouse, JJA had not been served. (Pl. Ex. 58, 3). During the second visit to the courthouse, the independent adjuster noted there was an affidavit of service on JJA in the Clerk of Court's file wherein JJA had been served on September 8, 2013. (Pl. Ex. 58, 9). The independent adjuster then advised Penn National that JJA had been served. (Pl. Ex. 58, 9; Penn Ex. 82). Penn National did not attempt to contact JJA to inquire about service utilizing the phone and e-mail contact information for JJA that were contained in its file, however, Penn National did utilize this contact information to reach JJA to perform year end premium audits to determine how much, if any, additional insurance premiums JJA owed. Trial Tr. vol. 1, 270-274; Trial Tr. vol. 2, 366.

From June 5, 2013, when Penn National was first put on notice of this claim by Portrait's counsel's correspondence and the time the independent adjuster advised Penn National that JJA had been served, there were already five (5) different entries in Penn National's claims log noting that JJA was required to request a defense before Penn National's duty to defend was triggered. (Pl. Ex. 58, at 2, 3, 8, and 9). Moreover, just one week prior to the independent adjuster informing

[3] In South Carolina, all contracts of insurance on property, lives, or interests are considered to be made in this State and are subject to South Carolina laws. S.C. Code Ann. § 38-61-10.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Penn National that JJA had been served, Penn National's adjuster had planned to deny coverage. This entry in the claim log states: "I emailed IA[4] today to check again to see if service has been perfected against the insured. If not, will send CQR to GG[5] for review to send to HOC to recommend that no coverage be afforded any entity as the insured has not come forward requesting a defense *and/or in violation of the conditions portion of the policy*." (Pl. Ex. 58, 9) (emphasis added).

After the independent adjuster informed Penn National that JJA had been served, Penn National's adjuster noted the following plan in the claim log on March 13, 2014:

> PLAN:
> I am going to have IA go to the home of the above and determine from the registered agent what their intentions are with this lawsuit. Are they requesting a defense? If no answer at that point, we have done everything we can do to discuss the case with the insured and will then issue a CQR requesting denial of coverage for defense of the lawsuit and the tender from the GC.

(Pl. Ex. 58, 9). Capstone ISG, the same company hired to go to the courthouse to determine if an affidavit of service as to JJA had been filed, was hired to complete this additional, but limited, task. The instructions given by Penn National to Gayle McLeod at Capstone ISG for her additional task were:

1) Make a cold call to the insured to inquire about suit representation,
2) Inquire if insured wishes that Penn National handle suit on their behalf.
3) Obtain contact information on Jose Castillo.

(HOA Ex. 7).

During this time while Penn National had hired an independent adjuster to make a cold call on JJA to ask if JJA wanted the policy benefits to which it was already entitled, counsel for the HOA submitted notice of the claim to Penn National by letter dated April 24, 2014. This

[4] IA refers to Independent Adjuster. Trial Tr. vol. 1, 342.
[5] GG refers to Gary Gibson. Trial Tr. vol. 1, 341.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

correspondence stated that no one had filed an Answer on behalf of their insured and that if no answer were filed within fifteen (15) days an Order of Default and Judgment would be sought. (HOA Ex. 8). This notice came nearly eleven (11) months after Portrait's counsel had initially notified Penn National of the Persimmon Hill litigation. Penn National acknowledged receipt of the correspondence from the HOA's counsel on May 8, 2014, e-mailing the HOA's counsel requesting a 30-day extension of time therein to respond to the complaint to which the HOA counsel agreed to the extension. (HOA Ex. 9). No Answer was ever filed. Trial Tr. vol. 1, 364-365. An Order of Default was entered on December 22, 2014, more than seven (7) months after Penn National requested an extension. (HOA Ex. 12). At no point in time during the pendency of the underlying case did Penn National consider filing a declaratory judgement action or having separate adjusters for the liability and coverage aspects of the claim.

On the Saturday morning of May 10, 2014, Gayle McLeod made a cold call on JJA by showing up unannounced and walking into the open garage of Mr. Castillo's home in Huntersville, North Carolina, and knocking on his backdoor. (HOA Ex. 24; Trial Tr. vol. 2, 91). According to Ms. McLeod, she spoke with Mr. Castillo (JJA) in his garage for ten (10) minutes. Trial Tr. vol. 2, 96-97. Mr. Castillo had not physically mailed the Complaint to Penn National although Penn National knew the details of the claim. Ms. McLeod asked if JJA wanted Penn National to defend JJA in the underlying case but did not disclose any other relevant information regarding the claim that had been known to Penn National since receiving Portrait's counsel's correspondence on June 5, 2013. Penn National could have had Ms. McLeod inform JJA of the details of the HOA's forensic engineer report it reviewed and also could have disclosed that the liability exposure to JJA, including Mr. Castillo personally, was multi-millions of dollars; facts known to Penn National for over eleven (11) months prior to Ms. McLeod's cold call. Penn National also could have had

Ms. McLeod inform Mr. Castillo that the defense she was inquiring as to whether or not JJA wanted was a policy benefit that already existed as part of JJA paying insurance premiums to Penn National for eight (8) years. JJA would be waiving a policy benefit to which it was entitled at no cost if JJA declined a defense. Ms. McLeod did not provide this information to Mr. Castillo during the cold call because she was not asked to do so by Penn National. Mr. Castillo (JJA) responded that he did not want a defense. Trial Tr. vol. 2, 96-97. Without providing JJA the requisite information that Penn National had in its possession, Penn National misled JJA with respect to the claim, coverage and policy benefits to which it was entitled. Penn National's own claims adjuster testified that there would be no reason or benefit to an insured to decline a defense. Trial Tr. vol. 1, 365-366. Mr. Castillo is sixty-one (61) years old and has a 6th-grade education. He is able to only speak conversational English. Trial Tr. vol. 2, 361. Mr. Castillo, who traveled from Huntersville, North Carolina and testified voluntarily at trial without being under subpoena, testified that had Ms. McLeod asked him "would you like Penn National to hire a lawyer" for which he had already paid for, he would have told her yes to Penn National hiring counsel to defend JJA in the underlying case. *Id.* at 397. During this cold call, Ms. McLeod did not obtain a signed or recorded statement from Mr. Castillo because Penn National did not ask her to do so in violation of its own claims handling manual which requires a recorded statement be taken from the named insured. Trial Tr. vol. 2, 120; HOA Ex. 21.

Penn National acknowledges that as of the time of Ms. McLeod's discussion with Mr. Castillo in his garage, JJA had met the Duties in the Event of an Occurrence, Claim or Suit section of the policy, albeit Penn National was not applying the correct Duties provision. Penn National further acknowledged at this point when Mr. Castillo and Ms. McLeod had the discussion in his

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

garage, there was not anything JJA had refused to do that Penn National had asked him to do. Trial Tr. vol. 1, 367.

Penn National could have asked Ms. McLeod to investigate the claim while performing the in-person cold call on JJA, but she did not because she was not asked to do so. Ms. McLeod testified regarding her speaking with Mr. Castillo:

> Q: Did you ask him about the Persimmon Hill project?
> A: No.
> Q: Did you ask him what his scope of work was?
> A: No.
> Q: Did you ask him where he kept his file materials for the project?
> A: No.
> Q: Did you tell him it was important that you get a copy of those or, at least, be allowed to look at them?
> A: No.
> Q: Did you even ask him if he had worked on the Persimmon Hill project or not?
> A: No.
> Q: Did you ask him to do anything whatsoever that could have helped with the investigation of this claim or his defense?
> A: No.

Trial Tr. vol. 2, 121. Had Ms. McLeod asked Mr. Castillo for the Persimmon Hill project file, pay records, or anything else to help Penn National investigate the claim, Mr. Castillo would have cooperated and attempted to provide the requested information. *Id.* at 370-371. Moreover, had Penn wanted to inquire as to the details of JJA's business operations, Mr. Castillo would have told them that JJA Framing was his sole proprietorship and operated as one in the same business as JJA Construction, Inc. with both having the same location, same employees, same trucks, same telephone number and same federal ID number. Trial Tr. vol. 2, 357-358.[6] An insurance company performing an adequate investigation of a claim is not limited to obtaining information solely from its insured and should seek relevant claims information from other sources that may have such

[6] There was a policy name change form submitted March 2, 2005. Pl. Ex. 18.

information as required in the Penn National claims adjusting practices manual. (HOA Ex. 21). Penn National had the opportunity to investigate the claim by obtaining information from JJA, Portrait, other Penn National insureds with small liability exposure that were also Defendants in the underlying case or their counsel, the HOA's counsel, or from other sources including former employees of the named insured. Greg Gross testified that the opportunity to investigate the claim existed but Penn National made the decision not to perform an investigation because the insured did not request a defense. Trial Tr. vol. 1, 370.

On August 11, 2014, Penn National sent additional ROR correspondence by certified mail to JJA again to the four-years-stale prior old former Ladson, South Carolina address rather than the correct Huntersville, North Carolina address. Similar to the prior correspondence, this too was "cut and paste" correspondence that misapplied policy language for the Duty in the Event of an Occurrence Section that had been amended by an Extended Coverage Endorsement. The correspondence stated that if Penn National didn't hear from JJA by August 31, 2014, "Penn National will be faced with no alternative to deny coverage based upon a breach of the above noted conditions of the policy as, to date, we have had no cooperation from anyone from the above noted insured." (HOA Ex. 15). This correspondence was never received by JJA. Penn National also did not have a certified mail green card receipt signed by JJA for this ROR in its file.

Penn National sent the third and final ROR correspondence to JJA on October 2, 2014. (Pl. Exs. 35 and 36). This correspondence was sent by certified mail to both the four-years-stale prior Ladson, South Carolina, address and the correct Huntersville, North Carolina address. (Pl. Exs. 35 and 36). Just as with the prior two ROR letters, this was also "cut and paste" correspondence that misapplied policy language for the Duty in the Event of an Occurrence Section that had been amended by an Extended Coverage Endorsement. The certified letter mailed to the Huntersville,

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

North Carolina, address was returned to sender as unclaimed. (Pl. Ex. 58, 16). Mr. Castillo testified that he leaves his house at sunup to go to work and returns home at sundown and isn't at home during daytime hours when mail delivery occurs. His working hours were 7:00 am to 7:00 or 8:00 pm at this time. Trial Tr. vol. 2, 367. This correspondence also could have been sent with a carbon copy regular first-class mail which would have been delivered to his residence with regular postal delivery which does not require a signature, but it was not. The ROR provided the following reasoning for declining coverage:

> Our office sent a representative of Capstone ISG to the residence of Jose Castillo located at 11227 Eastfield Road in Huntersville, North Carolina. Mr. Castillo explained to the representative of Capstone, ISG that he did not want Penn National to defend him or JJA for the aforementioned lawsuits. Therefore, Penn National Insurance will not provide a defense and/or indemnity for these lawsuits at this time.

(Pl. Exs. 35 and 36). The Penn National adjuster acknowledged that JJA never received this correspondence either. Trial Tr. vol. 1, 376. JJA was never informed by Penn National that it was denying coverage. Trial Tr. vol. 2, 372.

On December 16, 2014, Penn National's adjuster entered the following two (2) entries: 1) Coverage disclaimers in place. No further pushback. File closed to archives; 2) Coverage disclaimer; close if no push. (Pl. Ex. 58, 17). Thereafter on January 15, 2015, the adjuster's supervisor, Gary Gibson, entered the following entry:

> Reviewed on TL diary. I note the activity since my last review. Coverage was previously declined. The NI[7] has not pursued further. The file has been closed w/o payment.
> I will not continue to follow this file. GHG[8] should advise me of any adverse developments.

Id.

[7] NI refers to Named Insured.
[8] GHG refers to Greg H. Gross.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Penn National had the opportunity to investigate the claim and provide a defense to JJA but chose not to. As a result of Penn National's failure to provide JJA a defense, an Order of Default was entered against JJA on December 22, 2014, nearly nineteen (19) months after being on notice of the lawsuit. (HOA Ex. 12). Penn National was also put on notice of the entry of default by correspondence dated July 1, 2015, from HOA's Counsel, but did nothing. (Pl. Ex. 58, 17; HOA Ex. 12). On July 13, 2015, their claims file noted: "Our office has received a court order of default. Copy in file. Coverage disclaimer in place due to no cooperation from the insured. Our file remains closed." (Pl. Ex. 58, 17). Over a year later, on July 13, 2016, a Default Judgment was entered against JJA in the amount of $4,156,976.89 by the Honorable Dale Van Slambrook. (HOA Ex. 13). Post judgment interest has been accruing at the statutory rate. After the entry of the Judgment, JJA assigned all of its rights under the Penn National policies to the HOA by written assignment dated December 13, 2006. (HOA Ex. 20). The assignment provides that the HOA will try to collect the judgment amount from Penn National through this case prior to seeking to levy JJA's assets. I find this assignment to be a valid assignment of JJA's policy rights and claims to the HOA for all of the rights and claims of Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. d/b/a JJA Framing as testified to by Mr. Castillo at the trial.

LAW

"A suit for a declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund,* 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (quoting *Felts v. Richland County,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "A suit to determine coverage under an insurance policy is an action at law." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. James*, 337 S.C. 86, 93, 522 S.E.2d 345, 348-49 (Ct. App. 1999)). A breach of contract claim is an action at law. Bad faith is a tort action that

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

is an action at law. *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983).

It is well settled law in South Carolina that "[i]nsurance policies are subject to the general rules of contract construction." *B.L.G. Enterprises v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (citing *Diamond State Ins. Co. v. Homestead Industries, Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (2005); *Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Sloan Constr. Co.*, 269 S.C. at 185, 236 S.E.2d at 820 (citing *First National Bank of S.C. v. U.S.F. and G. Co.*, 373 F. Supp. 235, 239 (D.C. 1974); *Blanton v. Nationwide Mutual Ins. Co.*, 247 S.C. 148, 146 S.E.2d 156 (1966); 5 Corbin on Contracts, § 1037).

"An insurance policy is to be liberally construed in favor of the insured and strictly construed against the insurer." *Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 628–29, 663 S.E.2d 492, 495 (2008) (citing *Kraft v. Hartford Ins. Companies*, 279 S.C. 257, 305 S.E.2d 243 (1983)). "[E]xclusions in an insurance policy are always construed most strongly against the insurer." *Id.* at 629, 663 S.E.2d at 495 (citing *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002)). "Any ambiguity in the policy must be construed most favorably to the insured." *State Auto Property & Casualty Co. v. Brannon*, 310 S.C. 388, 391, 426 S.E.2d 810, 811 (Ct. App. 1992) (citing *Turkett v. Gulf Life Insurance Co.*, 279 S.C. 309, 306 S.E.2d 602 (1983)). "[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 104

(Ct. App. 2006) (citing *B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535–36, 514 S.E.2d 327, 330 (1999)).

"The court should not torture the meaning of policy language in order to extend or *defeat coverage* that was never intended by the parties." *State Auto Prop. & Cas. Co. v. Brannon*, 310 S.C. 388, 391, 426 S.E.2d 810, 811 (Ct. App. 1992) (emphasis added) (citation omitted). "Ambiguous or conflicting terms in an insurance contract should be construed liberally in favor of the insured and strictly construed against the insurer." *Spinx Oil Co. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 481, 427 S.E.2d 649, 651 (1993) (citation omitted). Additionally, "[f]orfeitures of insurance contracts are not favored in South Carolina." *Puckett v. State Farm Gen. Ins. Co.*, 314 S.C. 371, 374, 444 S.E.2d 523, 524 (1994) (citing *Johnson v. South State Ins. Co.*, 288 S.C. 239, 341 S.E.2d 793 (1986)).

"If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980)). "The defense of such suits by the insurer is a valuable right of the insured for which he pays and to which he is entitled by the very words of the policy." *Nationwide Mut. Ins. Co. v. Simmonds*, 315 S.C. 404, 407, 434 S.E.2d 277, 278 (1993) (quoting *American Casualty Company v. Howard*, 187 F.2d 322, 327 (4th Cir. 1951)). "An insurance company fails to defend at its own peril. . . ." *Stroup Sheet Metal Works, Inc. v. Aetna Cas. & Sur. Co.*, 268 S.C. 203, 212-13, 232 S.E.2d 885, 888 (1977). "Where an insurer refuses to undertake the defense of an action against the insured based upon a claim within the coverage of the insurance policy, it thereby breaches the contract of insurance and is liable to the insured for all damages resulting to such insured as a direct result of such refusal and breach." *Fuller v. Eastern Fire &*

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Casualty Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) (citing *Liberty Mutual Ins. Co. v. Atlantic Coast Line Ry. Co.*, 66 Ga. App. 826, 19 S.E.2d 377 (1942); *Butler Bros. v. American Fidelity Co.*, 120 Minn. 157, 139 N.W. 355 (1913)). Further, "[a]n insurer who unreasonably refuses or fails to settle a covered claim within the policy limits is liable to the insured for the entire amount of the judgment obtained against the insured regardless of the limits contained in the policy." *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001) (citing *Trotter v. State Farm Mut. Auto Ins. Co.*, 297 S.C. 465, 475, 377 S.E.2d 343, 349 (Ct. App. 1988)). "An insurer's duty to defend is separate and distinct from its obligation to pay a judgment rendered against an insured." *City of Hartsville v. S.C. Mut. Ins. Co.*, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009) (citing *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 236 S.E.2d 818 (1977)). "However, these duties are interrelated." *Id.* The obligation to pay "those sums the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies" arises out of the insuring agreement. (Pl. Exs. 13A, at 25; 14, at 39; 17, at 21; 21, at 40; 27, at 31; 29, at 33; 33, at 33; and 34, at 26).

"As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition." *Williams v. Gov't Emples, Ins. Co.*, 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014) (citations omitted). The notice and cooperation conditions section of nearly every insurance policy (Duties in The Event of Occurrence, Claim or Suit) requires the insured to timely notify its insurer when a lawsuit is filed against the insured as explained by the South Carolina Supreme Court:

> Nearly every insurance policy contains a provision requiring the insured to timely notify its insurer when a lawsuit is filed against the insured. Common sense dictates that the insurer must have notice of a claim or lawsuit in order to properly investigate and defend against it, and these

clauses ensure that the insurer receives notice by imposing this obligation on the insured. *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971). . . . Courts eventually recognized the potential inequities in permitting an insurer to avoid coverage to an innocent third party merely because the at-fault party–the insured–did not inform its insurer of a lawsuit. Accordingly, many jurisdictions, including South Carolina, judicially adopted a notice-prejudice rule, whereby the insurer had the burden to show that it was substantially prejudiced by the failure of its insured to comply with the notice and cooperation provisions. *Vermont Mut. Ins. Co. v. Singleton By & Through Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 421 (1994) ("Where the rights of innocent third parties are jeopardized by a failure of the insured to comply with the notice requirements of an insurance policy, the insurer must show substantial prejudice to the insurer's rights."); *Factory Mutual*, 256 S.C. at 381, 182 S.E.2d at 729-30 ("[W]e think the sound rule to be that, in an action affecting the rights of innocent third parties under an automobile liability insurance policy, the noncompliance by the insured with policy provisions as to notice and forwarding suit papers will not bar recovery, unless the insurer shows that the failure to give such notice has resulted in substantial prejudice to its rights."); *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 67, 145 S.E.2d 673, 677 (1965) (placing the burden of proof on the insurer to demonstrate substantial prejudice). This rule prevented an insurer from relying on an immaterial breach by its own insured as a defense to paying an injured third party. Throughout the latter part of the twentieth century, the notice-prejudice rule continued to gain support, and it is now clearly the majority rule. *Century Sur. Co. v. Hipner, LLC*, 2016 WY 81, 377 P.3d 784, 788 (Wyo. 2016) ("A vast majority of jurisdictions now following the modern trend and have adopted the notice-prejudice rule."). . . . The driving force behind the notice-prejudice rule is that there is "no sound reason . . . to permit a mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled." *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d b727, 729 (1971). Rather than provide a "technical escape-hatch" for the insurer to deny coverage, the notice-prejudice rule balances both interests without a wholesale prohibition of these clauses. *See State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of Louisiana*, 56 So. 3d 1236, 1246 (La. Ct. App. 2011) ("The function of the notice requirements is simply to prevent the insurer from being prejudiced, not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract . . . ."); *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999) ("[I]nsurers have the right to limit their liability to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition.").

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Neumayer v. Phila. Indem. Ins. Co., No. 2016-001710, 2019 S.C. LEXIS 67, at *5-7, *15-16 (July 24, 2019). "[A]n insurer, seeking to relieve itself of liability because of the violation by the insured of a cooperation clause in the policy, has the burden of showing not only that the insured failed to cooperate within the meaning of the policy provision but that it was substantially prejudiced thereby." *Vaught v. Nationwide Mut. Ins. Co.*, 250 S.C. 65, 71, 56 S.E.2d 627, 630 (1967).

> A 'unilateral reservation of rights' is a notice given by the insurer that it will defend [the insured in the lawsuit] but reserves all rights it has based on noncoverage under the policy . . . ." 14 Couch on Ins. § 202:38. A reservation of rights is a way for an insurer to avoid breaching its duty to defend and seek to suspend operation of the doctrines of waiver and estoppel prior to a determination of the insured's liability. *Id.* Although a reservation of rights may protect an insurer's interests, it also is intended to benefit the policyholder by right to contest coverage, . . .
>
> 'A reservation of rights letter must give fair notice to the insured that the insurer intends to assert defenses to coverage or to pursue a declaratory relief action at a later date.' *United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp.*, 948 F. Supp. 263, 268 (S.D.N.Y. 1996). Moreover, because an insurer typically has the right to control the litigation and is in the best position to see to it that the damages are allocated, courts have found that where an insurer defends under a reservation of rights, an insurer has a duty to inform the insured of the need for an allocated verdict as to covered versus noncovered damages. *See Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346, 348 (1933) (observing that where an insurer reserves the right to control the defense, the insured is "directly deprived of a voice or part in such negotiations and defense" and noting that if an insurer's interests conflict with those of its insured, the insurer is "bound under its contract of indemnity, and in good faith, *to sacrifice its interests in favor of those of the [insured]*"); *see also Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 618 (Minn. 2012) (holding that "when an insurer notifies its insured that it accepts the defense of a [] [] claim under a reservation of rights that included covered and noncovered claims, the insurer not only has a duty to defend the claim, but also to disclose to its insured the insured's interest in obtaining a written explanation of the award that identifies the claims or theories of recovery actually proved and the portions of the award attributable to each"); *Id.* (reasoning that the "insurer is in a unique position to know the scope of coverage and exclusions in its policies" and "the duty to notify [the insured] is not onerous").
>
> 'If the insured does not know the grounds on which the insurer may contest coverage, the insured is placed at a disadvantage because it loses the opportunity to investigate and prepare a defense on its own.' *Desert Ridge*

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

> *Resort LLC v. Occidental Fire & Cas. Co. of N.C.*, 141 F. Supp. 3d 962, 967 (D. Ariz. 2015). Indeed without knowledge of the bases upon which the insurer might dispute coverage, 'the insured has no reason to act to protect its rights because it is unaware that a conflict of interest exists between the itself and the insurer.' *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491, 1498 (10th Cir. 1994) (internal quotation marks and citations omitted). Thus, '[t]he general rule precluding an insurer from raising new grounds contesting coverage in a subsequent action is justified in th[is] []context.' *Id.*

Harleysville Group Ins. v. Heritage Cmtys., Inc., 420 S.C. 321, 338-339, 803 S.E.2d 288, 297-298 (2017)

"[T]here is an implied covenant of good faith and fair dealing in every insurance contract 'that neither party will do anything to impair the other's rights to receive benefits under the contract.'" *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (quoting *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983)). "The elements of a cause of action for bad faith refusal to pay . . . benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992) (citations omitted). "An insured need not prove a breach of an express contractual provision as a prerequisite to bringing a bad faith cause of action." *BMW of N. Am., LLC v. Complete Auto Recon. Servs.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012) (citing *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996)). "An insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular facts of the case." *Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 400, 562 S.E.2d 659, 662

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

(Ct. App. 2002). "Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim or if the insurance company did not specifically deny the claim by the evidence it had before it at the time the suit was filed." *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994). The South Carolina Supreme Court has held "that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." *Nichols v. State Farm Mut. Auto Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). "Absent the threat of a tort action, the insurance company can, with complete impunity, deny any claim they wish, whether valid or not." *Id.* "It is well settled in South Carolina that when a defendant insured prevails in a declaratory judgment action, the insured is entitled to recover attorney's fees." *State Auto Prop. & Cas. Ins. Co. v. Raynolds*, 357 S.C. 219, 226, 592 S.E.2d 633, 637 (2004) (citing *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978)).

Penn National's Policies

Penn National issued a total of eight (8) commercial general liability insurance policies at issue in this case; six to Jose Castillo d/b/a JJA Framing Company, JJA Construction, Inc., and JJA Framing Company[9] bearing number GL9 060617 from December 5, 2002, to January 31, 2008. (Pl. Exs. 13A, 14, 17, 21, 27, 29, and 31) and two to JJA Framing Company and JJA Construction, Inc.[10] bearing number GL9 0649575 from July 9, 2008 to July 9, 2010. (Pl. Exs. 33

[9] From December 5, 2002, to March 2, 2005, the named insured was Jose Castillo d/b/a JJA Framing Company; from March 2, 2005, to January 31, 2008, the named insured was JJA Construction, Inc.
[10] From January 9, 2008, to August 15, 2008, the named insured was JJA Framing Company; from August 15, 2008, to July 9, 2010, the named insured was JJA Construction, Inc.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

and 34). The policies at issue are "occurrence-based" policies. (Pl. Exs. 13A, 14, 17, 21, 27, 29, 33, and 34). The Limits of Insurance stated on the declarations page for each of the eight policies were as follows:

- General Aggregate Limit (Other than Products-Completed Operations): $1,000,000.00;
- Products-Completed Operations Aggregate Limit: $1,000,000.00;
- Personal and Advertising Injury Limit: $500,000.00;
- Each Occurrence Limit: $500,000.00;
- Damage to Premises Rented to you Limit: $100,000.00; and
- Medical Expense Limit: $5,000.00

Id. The HOA and Penn National agree that the policy language applicable to the HOA's claims against JJA is substantially similar in all eight of the Penn National policies.

The insuring agreement for each policy is contained within the CG 00 01 1001 and provides:

> **SECTION I – COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
> **1. Insuring Agreement**
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance provides. We will have the right and duty to defend the insured against any "suit" seeking those damages. . . .
>
> b. This insurance applies to . . . "property damage" only if:
> 1) The . . . "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
> 2) The . . . "property damage" occurs during the policy period; and
> 3) Prior to the policy period no insured . . . knew that the . . . "property damage" had occurred . . . .
>
> c. . . . "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured . . . includes any continuation, change or resumption of that . . . "property damage" after the end of the policy period.

(Pl. Exs. 13A, at 25; 14, at 39; 17, at 21; 21, at 40; 27, at 31; 29, at 33; 33, at 33; and 34, at 26).

The policies define property damage as:

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Pl. Exs. 13A, at 39; 14, at 52; 17, at 35; 21, at 54; 27, at 45; 29, at 47; 33, at 47; and 34, at 40). Occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Pl. Exs. 13A, at 38; 14, at 53; 17, at 34; 21, at 53; 27, at 44; 29, at 46; 33, at 46; and 34, at 39). The insuring agreements also provide completed operations coverage. Completed operations is defined as:

a. Includes all . . . "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
   1) Products that are still in your physical possession; or
   2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
      a) When all of the work called for in your contract has been completed.
      b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
      c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. . . .
b. Does not include . . . "property damage" arising out of:
   1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
   2) The existence of tolls, uninstalled equipment or abandoned or unused materials; or
   3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

(Pl. Exs. 13A, at 38-39; 14, at 53; 17, at 34-35; 21, at 54; 27, at 45; 29, at 46-47; 33, at 46-47; and 34, at 39-40).

In the Supplementary Payment section, the agreement contained within the policies provides:

> **SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**
> 1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
>
> . . .
>
> g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
>
> These payments will not reduce the limits of insurance.

(Pl. Exs. 13A, at 32-33; 14, at 45-46; 17, at 27-28; 21, at 46-47; 27, at 37-38; 29, at 39-40; 33, at 39-40; and 34, at 32-33).

The insuring agreement also provides the following duties in the event of occurrence, offense, claim or suit:

> **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 of 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
> 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;

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

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 the insurance may also apply.

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

(Pl. Exs. 13A, at 34-35; 14, at 48-49; 17, at 30-31; 21, at 49-50; 27, at 40-41; 29, at 42-43; 33, at 42-43; and 34, at 35-36). An Extended Coverage Endorsement was attached to each policy redefining the above duties:

VII. DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT REDEFINED

a. The requirement in Condition 2.a of CONDITIONS (Section IV) that you must see to it that we are notified of an "occurrence" only applies when the "occurrence" or offense is known to:
1) You, if you are an individual;
2) A partner, if you are a partnership; or
3) An officer of the corporation or insurance manager, if you are a corporation.

b. The requirement in Condition 2.b. of CONDITIONS (Section IV) that you must see to it that we received notice of a claim or "suit" will not be considered breached unless the breach occurs after such claim or "suit" is know (sic) to:
1) You, if you are an individual;
2) A partner, if you are a partnership; or
3) An officer of the corporation or insurance manager, if you are a corporation.

(Pl. Exs. 13A, at 44; 14, at 60; 17, at 40; 21, at 23; 27, at 16; 29, at 19; 33, at 19; and 34, at 14). Each policy also contains a Common Policy Conditions form which contains Penn National's policy regarding any changes being made to their policies:

B. Changes
This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

> This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

(Pl. Exs. 13A, at 16; 14, at 27; 17, at 11; 21, at 15; 27, at 8; 29, at 10; 33, at 12; and 34, at 7).

Duty to Defend and Duty to Indemnify

In South Carolina, "[i]t is well settled that an insurer's duty to defend is based on the allegations of the underlying complaint." *B.L.G. Enterprises v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (citing *Federated Mut. Ins. Co. v. Piedmont Petroleum Corp.*, 314 S.C. 393, 444 S.E.2d 532 (Ct. App. 1994)). Therefore, "[a] liability insurer *must* defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy." *Id.* (emphasis added) (citing *Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 236 S.E.2d 818 (1977); *Nationwide Mut. Ins. Co. v. Tate*, 313 S.C. 444, 438 S.E.2d 266 (Ct. App. 1993)). The HOA's negligence cause of action in the amended complaint alleged that JJA's negligence caused damage to Plaintiff by the continuous exposure to moisture and water intrusion "resulting in damage to walls, deterioration and damages to the finishes and structural elements of the townhomes . . . ." (Pls. Ex. 3, 36-37; 4, 41). Penn National applied South Carolina law in adjusting the claim. Trial Tr. vol. 1, 371. Both Greg Gross and Adam Parsons conceded at trial that the allegations in the underlying complaint were the classic formulation triggering coverage under a commercial general liability policy. Trial Tr. vol. 1, 295-96; Trial Tr. vol. 2, 169-70.

It is not disputed that coverage under the JJA policies was triggered by the HOA's complaint, however, the reasons initially no coverage, including a defense, was afforded to JJA were twofold: 1) JJA did not specifically ask Penn National to defend JJA in the litigation and 2) Penn National claimed JJA didn't comply with the Duties in the Event of Occurrence, Claim or Suit section of the policy. Penn National and JJA had existing contracts through the insuring

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

agreements whereby Penn National "will have the right and duty to defend the insured against suit . . . ." (Pl. Exs. 13A, at 25; 14, at 39; 17, at 21; 21, at 40; 27, at 31; 29, at 33; 33, at 33; and 34, at 26). I find imposing this additional "hurdle" to coverage as testified to by adjuster Greg Gross is improper and not required to trigger a duty to defend under the JJA policies under South Carolina law that is applicable to this case. I find that there is no policy provision in the insuring agreement that imposes this additional obligation on JJA to specifically ask Penn National to defend JJA in any lawsuit for which it is a defendant. A closer examination of the Duties in the Event of Occurrence, Claim or Suit provision should be undertaken since it is actually a part of the policy.

JJA itself did not provide notice of the Complaint to Penn National when served, and it was not until JJA discussed it with the independent adjuster at the time of the cold call on May 10, 2014, that such "notice" of the claim came directly from JJA. Penn National concedes that the notice provision was complied with at this time. Trial Tr. vol. 2, 319-320. As to the issue of notice from JJA, Penn National applied the wrong policy provision for the Duties in the Event of Occurrence, Claim or Suit section of the policy in denying JJA a defense and indemnity. This section of the policy was redefined by an Extended Coverage Endorsement – Duties in The Event of Occurrence, Claim or Suit Redefined. The first two Reservation of Rights letters that were sent by certified mail to a four-years-stale prior address in Ladson, South Carolina, and the third Reservation of Rights Letter that was sent certified mail to Huntersville, North Carolina, none of which were received by JJA, did not contain the correct provision as redefined by the Extended Coverage Endorsement. The first time anyone from Penn National became aware of this error was at the trial of this case. Greg Gross testified:

> Q: So this first page of the exhibit, page 10 of 15 in the insuring agreement, these are the duties in the event of occurrence that were applied for the entirety of the JJA-Portrait claims that you adjusted, correct?
> A: Yes, sir.

Q: And these are not the duties in the event of an occurrence that are applicable to the claim. Do you agree with that? Because the ones that are applicable are in this endorsement, the extended coverage endorsement general liability?
A: Correct.
Q: And the first time that you have seen these or that Penn has considered that perhaps they have been applying the wrong duties is today? Do you agree with that?
A: For me, yes. I don't know about Penn National; I can't speak for it as a company.
Q: Okay. You haven't seen anything in the claims file that are different though, that we've gone through?
A: Correct.

Trial Tr. vol. 1, 436-437.

The applicable Duties in the Event of Occurrence, Claim or Suit Redefined as in the Extended Coverage Endorsement contains the following:

VII. DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT REDEFINED

c. The requirement in Condition 2.a of CONDITIONS (Section IV) that you must see to it that we are notified of an "occurrence" only applies when the "occurrence" or offense is known to:
   1) You, if you are an individual;
   2) A partner, if you are a partnership; or
   3) An officer of the corporation or insurance manager, if you are a corporation.

d. The requirement in Condition 2.b. of CONDITIONS (Section IV) that you must see to it that we received notice of a claim or "suit" will not be considered breached unless the breach occurs after such claim or "suit" is know (sic) to:
   1) You, if you are an individual;
   2) A partner, if you are a partnership; or
   3) An officer of the corporation or insurance manager, if you are a corporation.

(Pl. Exs. 13A, at 44; 14, at 60; 17, at 40; 21, at 23; 27, at 16; 29, at 19; 33, at 19; and 34, at 14). In Section 2(a), the requirement for Penn National to be notified of an "occurrence" doesn't trigger until the occurrence is known to the insured, partner if a partnership or officer if a corporation. Penn National was aware of the occurrence before JJA was because of the notice correspondence

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

from Portrait's counsel in June of 2013. The same logic applies to Section 2(b) in that Penn National is on notice of the claim or suit before JJA, and therefore JJA wasn't in breach of this provision. Penn National adjuster Greg Gross testified:

> Q: And so B [referring to 2B in the redefined duties] which talks about the notice requirements for a lawsuit specifically says, you must see to it that we receive notice of a claim or suit. One might be a breach unless the breach occurs after such claim is known to you. So the fact that Penn knew about this before Jose Castillo, it would be impossible for him to be in breach. Would you agree with that?
> A: As you say.

Trial Tr. vol. 1, 438.

Penn National seeks to assert that some of the provisions in the original Duties section not contained within the redefined Duties section are yet still applicable. While the redefined section does not state this, to the extent that there are ambiguities in the policy, South Carolina law holds that ambiguities are to be construed in favor of the insured. *See Spinx Oil Co. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 481, 427 S.E.2d 649, 651 (1993) ("Ambiguous or conflicting terms in an insurance contract should be construed liberally in favor of the insured and strictly construed against the insurer.").

The purpose of the Duties in the Event of Occurrence, Claim or Suit, including the duties redefined by the Extended Coverage Endorsement, is to ensure that an insurance carrier can have notice of the claim so that it can properly perform an investigation and defend the lawsuit. It would be inequitable to permit an insurer to avoid coverage for an innocent third party just because the insured didn't notify the insurer of the lawsuit. The Supreme Court of South Carolina has adopted a notice-prejudice rule "whereby the insurer had the burden to show it was substantially prejudiced by the failure of its insured to comply with the notice and cooperation provisions." *Neumayer v. Phila. Indem. Ins. Co.*, No. 2016-001710, 2019 S.C. LEXIS 67, at *6 (July 24, 2019). "The purpose

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

of a notification requirement is to allow for investigation of the facts and to assist the insurer in preparing a defense." *Vt. Mut. Ins. Co. v. Singleton by & ex rel. Singleton,* 316 S.C. 5, 11, 446 S.E.2d 417, 421 (1994) (citing *Washington v. National Service Fire Ins. Co.*, 252 S.C. 635, 168 S.E.2d 90 (1969)). "[T]here is 'no sound reason . . . to permit a mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled.'" *Neumayer v. Phila. Indem. Ins. Co.*, No. 2016-001710, 2019 S.C. LEXIS 67, at *15-16 (July 24, 2019) (quoting *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971)).

Penn National had notice of the claim against JJA even before JJA was served with the complaint. In answering the question as to whether Penn National was substantially prejudiced, one must look to see what Penn National sought to do regarding this claim but was prevented from doing so because of the alleged prejudice. Penn National was not prevented from investigating this claim. According to the testimony of Greg Gross, Penn National never attempted to investigate the HOA's claim against JJA although opportunity to do so existed. The independent adjuster was face-to-face with Mr. Castillo (JJA) during her cold call and could have asked about facts and information that may have been helpful in investigating, evaluating and providing a defense but did not because she was not asked to. Mr. Castillo testified that had this been done, he would have sought to provide any information requested. Penn National also argues it was substantially prejudiced because JJA never responded to the three (3) Reservation of Rights letters that it sent as if somehow JJA should have responded to letters that were never received. Any information that Penn National could have wanted from JJA they had the opportunity to ask for directly when the independent adjuster met with JJA.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Lammey, et al. v. JJA Construction, Inc. et al., 2010-CP-10-607, was a lawsuit involving construction defects with a single-family home wherein Penn National provided JJA a defense. Penn National was put on notice by the Plaintiff's counsel that JJA had been sued and served via publication, and Penn National hired counsel to defend JJA unlike in this case. There was no evidence at trial that JJA specifically contacted Penn National to request a defense or contacted Penn National otherwise. Yet, Penn National hired JJA a lawyer to provide JJA a defense. An Answer was filed on JJA's behalf on February 18, 2011, being around two (2) years prior to Penn National being put on notice of the Persimmon Hill claim by Portrait. The allegations against JJA in *Lammey* were similar to that in this case, however, *Lammey* involved construction defect claims in a single-family residence whereas this claim involved 388 townhomes.

I find that Penn National did have the opportunity to ask JJA for any information it felt it needed in the investigation and evaluation of this claim. I further find this contention that Penn National could not provide a defense without the insured specifically requesting one to be without merit and contrary to Penn National's prior actions including specifically with regard to JJA.

Penn National also contends that it was per se substantially prejudiced when an Order of Default was entered against JJA and also when the Default Judgment was entered. Substantial prejudice can occur when an Order of Default or Default Judgement is entered against the insured and the insurer has no notice of the lawsuit. Such is not the case here – Penn National had notice of this lawsuit and knew of it before JJA knew about it and knowingly chose its course. I find that Penn National was not prejudiced by the actions or inactions of JJA, and Penn National knowingly made the choice to not perform any type of investigation into this claim even though it had the opportunity.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Penn National also contends that it was not required to provide JJA with a defense or indemnity because it was honoring JJA's wishes of not wanting a defense. I find this argument unpersuasive. After Penn National knew that JJA had been served, Penn National hired an independent adjuster to cold-call JJA to see if JJA wanted Penn National to provide a defense in the litigation. The independent adjuster arrived at Mr. Castillo's (JJA) home unannounced on a Saturday morning cold call. Penn National directed the independent adjuster to ask Mr. Castillo an extremely important question for which his answer, unknowingly to him at the time, would result in a judgment of $4,156,976.89 against JJA. When asked if JJA wanted a defense in the pending Persimmon Hill litigation, the trial testimony was that Castillo responded that he did not. Important information known only to Penn National and not JJA was not disclosed to Mr. Castillo when asking him to surrender an important and valuable policy benefit that had already been paid for with each of the eight (8) years of policies. The important information that was not disclosed to Mr. Castillo (JJA) included that Penn National knew that the liability exposure to JJA was in the multi-millions of dollars, the severity of the defects and damages identified in the engineer's report and that the lawyer that would be providing the JJA defense was already a paid for policy benefit.

Mr. Castillo testified had he been told a lawyer would have been provided to JJA at no cost that he would have told the independent adjuster that JJA wanted a lawyer. Penn National's disclosure of only a small portion of information such as this would have changed Mr. Castillo's answer to JJA wanting a defense as he had testified to. It's almost unfathomable that had Mr. Castillo (JJA) been told that a multi-million-dollar judgment would have been entered against JJA, including him personally, that he would have still told the independent adjuster that JJA didn't want a defense. South Carolina law is clear that being provided a defense is a valuable legal right

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

of an insured. "The defense of such suits by the insurer is a valuable right of the insured for which he pays and to which he is entitled by the very words of the policy." *Nationwide Mut. Ins. Co. v. Simmonds*, 315 S.C. 404, 407, 434 S.E.2d 277, 278 (1993) (quoting *American Casualty Company v. Howard*, 187 F.2d 322, 327 (4th Cir. 1951)).

There is no evidence in the record that Penn National provided any consideration to JJA in exchange for JJA allegedly agreeing to waive the valuable legal right of a defense which JJA had already paid and for which Penn National was obligated to undertake. Further the insuring agreement specifically provides that policy's terms which include Penn National having "the right and duty to defend the insured against suit . . ." can be amended or waived only by endorsement issued by Penn National and made a part of this policy. Therefore, the duties and obligations of the parties to the insuring agreement can't be altered orally. Additionally, Penn National by asking JJA to surrender the right to a defense while failing to disclose important and relevant information about the claim to its insured, breached the insuring agreement and the implied covenant of good faith and fair dealing that exists as a matter of South Carolina law in the insurance contract. I find for the foregoing reasons that Penn National had a duty to defend JJA under each of the eight (8) policies of insurance and that Penn National breached its duty to provide a defense.

Additionally, Penn National contends that it could not hire counsel for JJA without a specific request from JJA for a defense in part because a lawyer is ethically prohibited from filing an Answer and defending an insured without speaking with the insured and obtaining authorization to do so. Though this argument doesn't take into account that JJA and Penn National have already agreed that Penn National has the right and obligation to defend JJA pursuant to the terms of the insuring agreement, this defense is not contained anywhere within the ROR letters, Claims Log Entries, or ever been communicated to JJA prior to the judgment being obtained. I find that this

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

new argument was not part of any consideration for Penn National in not providing JJA defense and indemnity in the underlying case, and therefore, need not be considered.

The insuring agreement in each of the policies further required Penn National to pay those sums that the insured became legally obligated to pay as damages because of "property damage" caused by an "occurrence." Robert Sisnroy is a licensed professional engineer that investigated the construction at the Persimmon Hill project on behalf of the HOA. The construction of the Persimmon Hill project began in 2002 with the first certificate of occupancy issued in 2003. The last certificate of occupancy was issued in 2006. (Penn Ex. 16). His inspection of the exterior building envelope of the townhome buildings was extensive. He testified at trial that during his investigation that the wood framing itself of the walls to have been of good quality. Trial Tr. vol. 1, 519. Mr. Sisnroy also testified that he found the improper installation of the window flashings and weather barrier caused damage to the wall sheathing as well as the structural framing with this damage being a pervasive condition. Trial Tr. vol. 1, 524-527. Water intrusion also caused damage to the interior drywall, trim and even curtains and plantation blinds. Trial Tr. vol. 1, 521-522. JJA was the framer which involved the installation of the windows, window flashings and weather barrier on approximately 85% of the units. Trial Tr. 97-98. Mr. Sisnroy estimated the damage to the buildings would have started two months after the certificate of occupancy (Trial Tr. vol. 1, 527). Mr. Sisnroy testified that although the damage would progressively have gotten worse over time until repairs were made (Trial Tr. vol. 1, 562-564), the scope of repairs included in his report was based on conditions in 2012 and would not have changed even as the damage progressed (Trial Tr. vol. 1, 541-543). I find that JJA's faulty work in installing windows, window flashing, and weather barrier caused water intrusion and resulted in damage to non-defective wood walls, structural members, drywall, trim, curtains and plantation blinds. I find that the damage to non-

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

defective work constituted physical injury to tangible property satisfying the definition of "property damage" in the Penn National policies.

"A liability policy contains two insuring provisions of major significance: one, providing for the payment by the insurer of sums the insured shall become obligated to pay, the other providing, in substance, for the defense of any suit alleging bodily injury or property damage and seeking damages payable under the terms of the policy." *Sloan Constr. Co. v. Central Nat'l Ins. Co.*, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977). "An insurance company fails to defend at its own peril . . . ." *Stroup Sheet Metal Works, Inc. v. Aetna Cas. & Sur. Co.*, 268 S.C. 203, 212-13, 232 S.E.2d 885, 888 (1977). The Supreme Court of South Carolina has held that "[w]here an insurer refuses to undertake the defense of an action against the insured based upon a claim within the coverage of the insurance policy, it thereby breaches the contract of insurance and is liable to the insured for all damages resulting to such insured as a direct result of such refusal and breach." *Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) (citing *Liberty Mutual Ins. Co. v. Atlantic Coast Line Ry. Co.*, 66 Ga. App. 826, 19 S.E.2d 377 (1942); *Butler Bros. v. American Fidelity Co.*, 120 Minn. 157, 139 N.W. 355 (1913)). I find that Penn National not only had a duty to defend but also had a duty to indemnify JJA. The JJA policies had coverage limits in the amount of $500,000.00 for each of the eight (8) years, but the HOA's claims and damages are not limited to the policy limits because of Penn National's breach of the duty to defend and duty to indemnify. (Pl. Exs. 13A, 14, 17, 21, 27, 29, 33, and 34). As a proximate cause of Penn National's breaching all of the insurance agreements, an Order of Default was entered against JJA and a Damages Award ultimately entered. I find that Penn National owes indemnity for the Judgement entered by the Honorable Dale Van Slambrook in the amount of $4,156,976.89 entered on July 13, 2016. (HOA Ex. 13). I further find that Penn National is responsible for the

full amount of the interest that accrued after the entry of the judgment. The payment of the accrued interest on the judgment will not reduce the policy limits:

> **SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**
> 3. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
> . . .
> g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
> *These payments will not reduce the limits of insurance.*

(Pl. Exs. 13A, at 32-33; 14, at 45-46; 17, at 27-28; 21, at 46-47; 27, at 37-38; 29, at 39-40; 33, at 39-40; and 34, at 32-33) (emphasis added). Therefore, the damages for the breach of the duty to defend/indemnify are $4,156,976.89 plus post judgment interest.

Bad Faith

Having found that Penn National breached its duty to defend and indemnify JJA, the Court now turns to whether or not the conduct of Penn National amounted to bad faith. Bad Faith refusal to pay first party benefits under a contract of insurance includes: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of the implied covenant of good faith and fair dealing on the contract; and (4) causing damage to the insured. *Howard v. State Farm Mut. Auto Ins. Co.*, 316 S.C. 445, 450 S.E.2d. 582 (1994). Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim. *Id.* In South Carolina, "there is an implied covenant of good faith and fair dealing in every insurance contract 'that neither party will do anything to impair the other's rights to receive benefits under the contract.'" *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (quoting *Nichols v. State Farm*

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Mut. Auto. Ins. Co., 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983)). "[I]f an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action." *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). "Further, if [the insured] can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." *Id.*

Penn National's adjuster, Greg Gross, testified as to the manner in which a claim should be adjusted:

> Q: When an adjustor for Penn National is investigating and deciding a claim, they've got to do it in a timely manner, correct?
> A: Yes.
> Q: They have to be thorough in their investigation and in their decision, correct?
> A: Yes.
> Q: And fairness requires them to be looking for coverage, not looking for a way to deny coverage, correct?
> A: Under normal circumstances, yes.
> Q: And resolving any doubts in favor of coverage and in favor of the insured, correct?
> A: Under normal circumstances, yes.
> . . .
> Q: Help the insured get the maximum benefits to which they're entitled to under their contract of insurance?
> A: Yes.
> Q: Treat the insured how you would want to be treated?
> A: Correct.
> Q: Resolve ambiguities in favor of your insured?
> A: Correct.
> Q: And apply the terms and conditions of the policy fairly?
> A: Correct.

Trial Tr. vol. 1, 293-294, 330. None of the above were done in handling JJA's claim.

As to the investigation in the underlying case, Penn National had a good faith duty to perform a reasonable investigation into the HOA's claims against JJA. *Flynn v. Nationwide Mut. Ins. Co.*, 281 S.C. 391, 395-396, 315 S.E.2d. 817, 820 (Ct. App. 1984) ("An insurer has a good

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

faith duty to investigate a claim."). This good faith duty to perform a reasonable investigation exists regardless of Penn National's contention that JJA did not comply with the Duties in the Event of an Occurrence, Claim or Suit provision. If an insurance carrier believes the insured has complied with the Duties, undoubtedly an investigation of the claim must be performed in providing a defense. If the insurer believes that the Duties have not been complied with, the insurer must still perform an investigation and show it was substantially prejudiced by the breach of the Duties in order for the denial of the claim to be proper under South Carolina law. *See Neumayer v. Phila. Indem. Ins. Co.*, No. 2016-001710, 2019 S.C. LEXIS 67, at *6 (July 24, 2019). The performance of a good faith investigation includes, in addition to contacting the insured, contacting witnesses and others that may have relevant information to assist the adjuster in the investigation, evaluation and defense of the claim. Penn National failed to contact any witnesses, hire any experts and failed to gather any material information through its own efforts to investigate this claim which it knew was a multi-million-dollar claim from the time the claims file was opened. Even when Penn National had someone face-to-face with JJA no investigation effort was made. The Penn National claims handling manual requires such investigation and also requires the taking of recorded statements. (HOA Ex. 21). Penn National's lack of investigation violates its own claims handling policies and procedures. I find that Penn National's failing to contact witnesses, failing to ask the insured for information helpful to investigate the claim when the independent adjuster was at his home and failing to interview others to obtain relevant information that may assist in the investigation, evaluation and defense of this claim is unreasonable and a breach of the good faith duty to investigate a claim.

When attempting to contact the insured, it is reasonable and logical for the adjuster to look at the existing company file for the insured's telephone number(s), email address(es) and mailing

address(es). While the adjuster looked at the Penn National file, including the underwriting file, the adjuster did not use the contact information contained within the underwriting file to contact JJA about this claim. Contrarily, Penn National used this contact information when it was benefitting itself by conducting year-end premium audits of JJA whereby it was seeking to determine if JJA owed additional premiums. Instead, an unsuccessful internet search was performed to locate contact information. Following the failed internet search, the adjuster sent JJA two (2) reservation of rights letters to an address that had been stale for four (4) years. The date of the first letter was also the same date of an entry in the claims log where the adjuster noted the insured's correct mailing address and the second ROR letter came after Penn National had sent Ms. McLeod to speak with Mr. Castillo at his correct mailing address. The third reservation of rights letter, which was the only letter sent to the correct address, was returned. Penn National knew or reasonably should have known that none of the ROR letters were received by JJA. The adjuster on the claim further testified that he was not aware of any communication that JJA had received from Penn National notifying JJA that the claim was denied. Trial Tr. vol. 1, 377. Penn National did not make any effort to determine why the insured wasn't receiving this correspondence or to communicate the contents to the insured at a different address or to the insured in a different manner such as the e-mail address it had on file. Penn National uses its attempts to send these three ROR letters (despite Penn National sending two of them to the wrong address and none being received by JJA) as an attempted demonstration of reasonable efforts to contact JJA. Penn National views its error in mailing the letters to the wrong address or JJA not receiving them as being unimportant in analyzing JJA's actions and more importantly inactions. Penn National then uses the lack of response by JJA to these letters sent to the wrong address to

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

support its contention that JJA was non-cooperative. I find the foregoing unreasonable and in breach of the good faith duty to investigate a claim and in bad faith.

Penn National further sought to apply terms of the policy that were more favorable to the insurer than those that had been amended by an extended coverage endorsement in the Duties in the Event of Occurrence Claim or Suit. Penn National also applied its own rules for conducting claim investigations which required an insured to specifically request a defense prior to an investigation being conducted or counsel being hired. Penn National acknowledges that this requirement is not contained anywhere in the insuring agreement. As such no investigation of this claim was performed by Penn National by its own admission. I find the foregoing unreasonable and in breach of the good faith duty to investigate a claim and in bad faith.

South Carolina Code Ann. § 38-59-20 does not provide a private cause of action for a plaintiff in the context of bad faith. It is, however, instructive when evaluating the conduct of Penn National. Knowingly misrepresenting to insureds pertinent facts or policy provisions relating to coverage at issue or providing deceptive or misleading information with respect to coverages is considered an unfair claims practice in South Carolina. S.C. Code Ann. § 38-59-20(2). When Mr. Castillo responded to Gayle McLeod's question as to whether JJA wanted Penn National to provide a defense in this litigation, Jose Castillo was unknowingly responding to an extremely important question for which the wrong answer would have a financially devastating impact. Penn National knew this because Penn National knew from the inception of this claim that it was a multi-million-dollar liability exposure for both JJA and for Penn National. Penn National misrepresented and misled JJA by failing to inform JJA of pertinent and important facts in responding to this all-important question and in misrepresenting through nondisclosure that a defense was a policy benefit for which JJA had paid and which was covered within the policy.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Misrepresentation of policy benefits and deceptive acts regarding coverage and benefits can occur by both providing misleading information and by failing to disclose relevant information. The testimony at trial from the adjuster was that there was no downside to an insured being defended, but rather, there was a lot of upside. Trial Tr. vol. 1, 365-366. Further Mr. Castillo testified that had he been told a lawyer would have been hired at no cost to him since this had been paid for in the premium payment that he would have responded to Ms. McLeod differently – and would have responded that JJA wanted a defense. I find that Penn National knowingly misrepresented to JJA the coverages and policy benefits for the policies at issue in this case by failing to disclose pertinent facts and information to JJA when asking whether JJA wanted a defense. I further find Penn National put its interests ahead of its insured by asking JJA whether it was requesting the valuable policy benefit of a defense to which it was already entitled. If the answer is yes then Penn National must do what it is already obligated to do, but if the answer is no then Penn National attempts to avoid potentially paying a claim of millions of dollars to an innocent third-party claimant. I further find the conduct of Penn National was unreasonable, in bad faith and in breach of the duty of good faith and fair dealing to its insured.

Throughout the pendency of this claim there were other instances of Penn National being unreasonable in the adjusting of this claim. As noted previously, the misapplication of policy language, sending RORs to a knowingly incorrect address and using the insured not responding to said letters as a basis to assert insured non-cooperation, noting in the claims log five (5) different times that JJA was required to request a defense before Penn National's duty to defend was triggered, noting in the claims log that the claim should be denied for non-cooperation just one week after Penn National knew the insured was served, violating its own claims manual policy and procedures, treating its insured differently in circumstances when the insured didn't request a

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

defense in the *Lammey* case wherein Penn National provided a defense in a small liability exposure case and in Persimmon Hill where it failed to provide a defense when the liability exposure was significant, and by requesting an extension to respond to the Complaint without any intention of doing so.

I find the aforementioned instances both individually and collectively of Penn National acting unreasonably are in bad faith and in breach of the duty of good faith and fair dealing to its insured. This Court finds that Penn National's conduct, in addition to being in conflict with the insuring agreements of the policies, is the exact type of conduct that South Carolina bad faith law seeks to deter.

Judgment Creditor

Penn National issued eight (8) commercial general liability policies of insurance to JJA bearing number GL9 060617 from December 5, 2002, to January 31, 2008, and bearing number GL9 0649575 from July 9, 2008 to July 9, 2010. These policies are valid and binding insuring agreements. The construction of the Persimmon Hill project began in 2002 with the first certificate of occupancy issued in 2003. The last certificate of occupancy was issued in 2006. (Penn. Ex. 16). Based on the testimony of Robert Sisnroy as to when damage began and the nature of the damage progression, I find that coverage is afforded in each of the eight (8) policies. Because of Penn National's refusal to provide a defense to JJA, a Damage Award was entered against Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. d/b/a JJA Framing jointly and severally in the amount of $4,156,976.89. The damage award was entered on July 13, 2016 by the Honorable Dale Van Slambrook. "The law is well settled in this jurisdiction that an injured party who brings suit against a liability carrier in order to collect on a judgment previously acquired against an insured is possessed of all rights of the insured and subject to all defenses that exist as between the insured

and the insurance carrier." *Lee v. Gulf Ins. Co.*, 248 S.C. 296, 298, 149 S.E.2d 639, 640–41 (1966) (citing *Crook v. State Farm Mut. Auto. Ins. Co.*, 231 S.C. 257, 98 S.E.2d 427 (1957)).

Penn National contends though that there should be an allocation made of covered damages versus non-covered damages. The Damage Award against JJA entered by Judge Van Slambrook represents the difference between the estimated cost to repair the Persimmon Hill project less the amount of settlement collected from the settling parties. It is a general verdict award. While it would be extremely difficult, if not impossible, to speculate as to what portion of the prior settlements or damage award was for what portion of the cost to repair and whether such was a covered or uncovered damage, such an analysis is unnecessary. It is well settled law in South Carolina that a general verdict is not subject to being parsed out between covered versus non-covered damages. *See Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 343 n.11 803 S.E.2d 288, 300 n.11 (2017); *Auto Owners Ins. Co. v. Newman*, 385 S.C.187, 684 S.E.2d 541 (2009).

Penn National also contends that the judgment should be subject to a time-on-risk analysis as set forth in *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) ("*Crossman II*") irrespective of Penn National refusing to defend and indemnify its insured. When the time-on-risk framework was developed in *Crossman II*, there was no need for the consideration of the insurer refusing to defend or indemnify because the carrier provided a defense – the question was one of the amount of the indemnity obligation.

Moreover, while the policies at issue were liability policies containing standard language in the insuring agreement, it is critical to note that the policies at issue in this case contain different

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

language than the policies analyzed in *Crossman II*. Notably, JJA's policies, contain the following addition:

> c. . . . "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. Of Section II – Who is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any *continuation, change or resumption of that* . . . "property damage" after the end of the policy period.

(Pl. Exs. 13A, at 25; 14, at 39; 17, at 21; 21, at 40; 27, at 31; 29, at 33; 33, at 33; and 34, at 26) (emphasis added). Therefore, should the time-on-risk analysis be applied, it must be altered so that it is true to the language used in the insurance contracts at issue in the present case: the progressive property damage caused by continuous or repeated exposure to water intrusion occurring *after* the end of a policy period is deemed to be included in what is covered by the policy.

Based on the foregoing, each of the eight (8) Penn National policies provided coverage in the amount of $500,000.00 per occurrence. Therefore, $4,000,000.00 of the HOA's judgment is covered under the Penn National policies. In addition, the supplementary payments section of the policies[11] provides for the payment of interest on the full amount of the judgment. The interest on the judgment is $1,213,170.40.[12]

Damages

For all of the foregoing reasons, I find that Penn National proximately caused the damages stated herein to JJA which have been assigned to the HOA. I also find that the HOA as a judgment creditor is entitled to recover damages under the Penn National policies. Having found that Penn National acted in bad faith, punitive damages may be recovered if it is proven that the insurer's conduct was in willful or reckless disregard to the insured's rights under the contract. *Nichols v.*

[11] *See* Pl. Exs. 13A, at 32-33; 14, at 45-46; 17, at 27-28; 21, at 46-47; 27, at 37-38; 29, at 39-40; 33, at 39-40; and 34, at 32-33.

[12] The interest calculation is through 9/18/19. The 2019 legal post judgment interest rate is 9.50.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). I find that the conduct of Penn National was in willful and reckless disregard of JJA's policy rights, and I find by clear and convincing evidence that punitive damages are appropriate in this case. For the foregoing reasons, I find that Penn National caused the following damages to JJA:

Breach of Duty to Defend and Duty to Indemnify	$5,370,147.29*[13]
Breach of Duty of Good Faith and Fair Dealing/Bad Faith	$5,370,147.29*

I further find that pursuant to S.C. Code Ann. Section 38-59-40 and *Hegler v. Gulf Insurance Company*, 270 S.C. 548, 550-551, 243 S.E.2d 443, 444 (1979), the HOA as assignee of JJA's claims are entitled to attorney's fees and costs in this action. The HOA's counsel shall submit sufficient documentation showing the amount of attorney's fees incurred to this Court within ten (10) days of the entry of this Order.

I find that the HOA as a judgment creditor is entitled to the following damages being covered under the Penn National policies:

Judgment Creditor Claim	$5,213,170.40*

The HOA must submit to this Court an election of remedies within ten (10) days of the entry of this Order. A hearing will be conducted at a later time to determine the amount of punitive damages. *See* S.C. Code Section § 15-32-520.

IT IS SO ORDERED!

Berkeley, South Carolina

[13] * Includes post judgment interest of $1,213,170.40 as of September 18, 2019.

ELECTRONICALLY FILED - 2019 Oct 22 4:33 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Berkeley Common Pleas

Case Caption: Portrait Homes-South Carolina, Llc , plaintiff, et al VS Pennsylvania National Mutual Casualty Insurance Company , defendant, et al

Case Number: 2014CP0802757

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134