

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-08-2757

Portrait Homes - South Carolina, LLC and)
Portrait Homes - Persimmon Hill, LLC,)

Plaintiffs,)

v.)

Pennsylvania National Mutual Casualty)
Insurance Company and The Persimmon)
Hill Homeowners Association, Inc.,)

Defendants,)

Order
Regarding Additional Insured Coverage

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.)

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SC Court of Appeals

This case has its roots in prior litigation involving a townhome development where significant construction defects and resulting damages were discovered years after work was completed. The Court is asked to decide who must shoulder the financial burden for the damages caused by the framer's shoddy work: the developer/general contractor who oversaw construction but performed no actual construction work, or the insurer for the framer—a subcontractor who played a starring role in contributing to many of the problems giving rise to the underlying construction defect litigation. For different reasons, the insurer for the framer

refused to defend either the framer or the developer/general contractor in the underlying lawsuits and paid no money on behalf of either to resolve the claims against them.

In this lawsuit, the developer/general contractor seeks to force the framer's insurer to reimburse the developer/general contractor for a portion of the defense costs and for the settlement paid on the developer/general contractor's behalf to buy peace. The outcome turns on the interconnecting relationships among the developer/general contractor, the framer, and the framer's insurer. The controlling documents governing those relationships are the contracts between the developer/general contractor and the framer, and the insurance policies issued by the framer's insurer under which the developer/general contractor claims coverage as an additional insured. But there are many other documents that one by one shape the outcome in this case and point the direction to where responsibility for the loss ultimately should fall. Common sense and good faith guide the analysis as the Court seeks to honor the intent of the parties to the contracts at issue and seeks to elevate substance over form.

Overview of the Parties and the Court's Decision

Portrait Homes South Carolina, LLC and Portrait Homes - Persimmon Hill, LLC ("Portrait Homes") oversaw development and construction of a townhome community in Berkeley County known as Persimmon Hill. Portrait Homes brought this lawsuit against Pennsylvania National Mutual Casualty Insurance Company ("Penn National") seeking coverage as an additional insured under multiple commercial general liability policies issued by Penn National initially to Jose Castillo d/b/a JJA Framing Company and then to JJA Construction, Inc., who was also alleged to have been doing business as JJA Framing.

Portrait Homes had hired JJA Framing as a subcontractor to perform the majority of the framing work at the Persimmon Hill project. Years after the project was completed, the

Persimmon Hill Homeowners Association, Inc. and a class of unit owners sued Portrait Homes based in part on allegedly defective work performed by JJA Framing. Portrait Homes initially sought in this case to require Penn National to participate in Portrait Homes's defense in the underlying lawsuits. After the claims in the underlying lawsuits against Portrait Homes were settled, Portrait Homes amended its pleadings in this case to seek damages for breach of the duty to indemnify as well as for breach of the duty to defend.

The Court concludes Penn National breached its duty to defend, its duty to indemnify, and acted in bad faith by denying Portrait Homes's claim to be an additional insured under five of the Penn National policies. Portrait Homes is entitled to recover the attorney's fees and costs it spent in defending the underlying lawsuits and the amount paid to settle the claims (up to Penn National's policy limits). Portrait Homes is also entitled to prejudgment interest on both awards. Finally, Portrait Homes is entitled to recover its attorney's fees and costs incurred in successfully pursuing the coverage claim in this case and punitive damages.

II. Factual Background

A. JJA Framing

Jose Castillo owned and operated a framing business known as JJA Framing. In 2002, the business had a mailing address of 3000 Colvard Parkway, Charlotte, NC 28269. JJA Framing began working as a subcontractor for the Portrait Homes organization in North Carolina. After JJA Framing began working for Portrait Homes on multiple projects in the Charleston area, JJA Framing moved to this area.

One of the projects JJA Framing worked on as a subcontractor to Portrait Homes was the Persimmon Hill project in Berkeley County. The Persimmon Hill project was a large development, ultimately consisting of 388 townhome units in 74 buildings. JJA Framing was

responsible for installing the wooden framing members, the windows and doors, the flashing around the windows and doors, and the secondary weather barrier. JJA Framing was the primary framer and framed the vast majority of the units in the Persimmon Hill development (Trial Transcript, p. 458, lines 9-16; Shawn Belcher; Trial Transcript II, p. 358 lines 20-23; Jose Castillo).

In December 2004—while JJA Framing was working at the Persimmon Hill Project—articles of incorporation for JJA Construction Inc. were filed with the North Carolina Secretary of State's Office (Defendant's Exhibit 62). Castillo testified the sole proprietorship known as JJA Framing and the corporation JJA Construction Inc. were the same business and a singular entity. They "had the same location, same employees, same trucks, same telephone number and same federal ID number[.]" (Trial Transcript II, p. 357, line 5 - p. 358, line 11).

B. Portrait Homes's Risk Management Program

Shawn Belcher, the Purchasing and Estimating Manager for the Charleston Division of Portrait Homes from January 2004 through June 2009, testified Portrait Homes relied exclusively on subcontractors to construct the dwelling units; Portrait Homes performed none of that work using its employees (Trial Transcript, p. 451, lines 11-19). Portrait Homes's reliance on subcontractors to perform the actual construction, for which it was ultimately responsible left Portrait Homes vulnerable to claims and lawsuits arising from a subcontractor's defective work.

Portrait Homes sought to reduce those risks in two ways: first, by requiring each subcontractor to defend and indemnify Portrait Homes for claims and lawsuits arising from the subcontractor's work; and second, by requiring each subcontractor to have Portrait Homes named as an additional insured on the subcontractor's liability insurance policies. (Trial Transcript, p. 451, line 20 - p. 452, line 12). Portrait Homes's two-pronged, belt and suspenders

approach is common in the construction industry. *See generally* Donald S. Malicki and Jack P. Gibson, *The Additional Insured Handbook* 57-60 (7th ed. 2013).

Portrait Homes sought to accomplish both prongs through two types of contracts it entered with subcontractors. First, a contract called a Master Agreement, which was a gateway document that qualified a subcontractor to work for Portrait Homes on any project, was executed. Second, a contract called a Housing and Purchase Order Contract, which was specific to a particular project, was executed. Belcher testified both contracts had to be in place before a subcontractor could work on a project or get paid for any work on a particular project. Belcher testified the form of the contracts would be periodically updated, but the substance of the hold harmless and insurance requirements did not change. The Housing and Purchase Order Contract could also be updated during the course of a project if, among other reasons, the pricing for the work or the scope of the work changed. Belcher testified both contracts governed a subcontractor's work at a particular project (Trial Transcript, p. 449, line 1 - p. 451, line 3), and the hold harmless and insurance obligations in the Housing and Purchase Order Contract and in the Master Agreement were intended to be complementary (Trial Transcript, p. 436, lines 2-21).

Belcher identified a Master Agreement between Portrait Homes and Jose Castillo d/b/a JJA Framing dated October 25, 2002 (Plaintiff's Exhibit 37). Belcher verified the signature of the Portrait Homes representative as well as Castillo's signature (Trial Transcript, p. 461, line 18 - p. 462, line 1).¹ The hold harmless and insurance requirements were contained in Section 8 and provided in part:

¹ Belcher's job responsibilities included interfacing personally with the subcontractors, executing new contracts with subcontractors, and overseeing contracts with the subcontractors—like JJA Framing—who were already in place when he was hired (Trial Transcript, p. 446, line 5 - p. 447, line 3). Belcher testified he dealt personally with Jose Castillo (and his son) on behalf of JJA Framing (Trial Transcript, p. 457, line 10 - p. 459, line 8).

8.1. The Work performed, materials furnished or services provided under this Agreement by the Contractor shall be at the risk of the Contractor exclusively. To the fullest extent permitted by law, *Contractor shall indemnify, defend (at Contractor's sole expense) and hold harmless Portrait, affiliated companies of Portrait, their partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns ("Indemnified Parties")*, from and against any and all claims for bodily injury or death, damage to property, demands, damages, actions, causes of action, suits, losses, judgments, obligations and any liabilities, costs and expenses (including but not limited to investigative and repair costs, attorneys' fees and costs, and consultants' fees and costs) ("Claims") which arise or are in any way connected with the Work performed, Materials furnished, or Services provided under this Agreement or any purchase order contract, contract, or memorandum executed pursuant to this Agreement by Contractor or its agents.

8.3. Upon execution of this Agreement, and prior to Contractor's commencing (in the broadest possible sense of the word) any work or services or supplies, the *Contractor shall carry general liability insurance and the Contractor shall provide Portrait with a Certificate of Insurance naming Portrait as an additional insured hereunder. The coverage available to Portrait as an additional insured, shall not be less than \$1,000,000 combined single limit per occurrence and a \$1,000,000 general aggregate providing coverage for completed operations*

8.4. The *insurance coverage required under paragraph 8.3 shall be of sufficient type, scope, and duration to ensure coverage of the Contractor and Portrait for liability related to any manifestation date within the applicable statutes of limitation and/or repose*

(Plaintiff's Exhibit 37) (emphasis added).

Belcher also identified the Housing and Purchase Order Contract between Portrait Homes and JJA Framing applicable to the Persimmon Hill project (Plaintiff's Exhibit 38). The subcontractor is identified on the first page as "JJA Framing," and Jose A. Castillo's signature is written below the subcontractor's name ("JJA Framing") in the signature block. The contract is dated March 6, 2002.² Belcher verified the signature of the Portrait Homes representative as well as Castillo's signature. A scope of work for the framing (Plaintiff's Exhibit 39) and a

² The earliest certificate of occupancy for the units worked on by JJA Framing is December 18, 2003 (Defendant's Exhibit 41).

standard billing sheet (Plaintiff's Exhibit 40) were also signed by the parties and attached to the Housing and Purchase Order Contract.

The contract was amended in August 2003 when the scope of work (Plaintiff's Exhibit 41) and standard billing sheet (Plaintiff's Exhibit 42) were changed. Belcher verified the initials of the Portrait Homes representative as well as Castillo's initials next to the handwritten amendment. The contract was amended again in February 2004. Belcher verified his initials and Castillo's initials next to that amendment (Trial Transcript, p. 468, line 9 - p. 470, line 4).

The Housing and Purchase Order Contract contains sections addressing the hold harmless and insurance requirements. The minimum insurance limits are set out in the beginning of Paragraph 7A followed by:

Together with such other insurance and coverages as Contractor by written notice prior to the commencement of the Work shall have directed the Subcontractor to carry and maintain.

B. *Subcontractor shall not commence the Work unless and until it has obtained the above insurance and delivered to Contractor a certificate or memorandum evidencing such coverage (including the name of the carrier, policy number, limits and expiration date) and evidencing payment thereof by Subcontractor, and naming the Contractor, the owner of the project and any additional parties, as additional insured.*

C. All insurance and coverages shall be in form and substance, and issued by credit rated companies, satisfactory to Contractor.

(Plaintiff's Exhibit 38) (emphasis added). The document provides that "the terms and provisions of this Contract shall inure to and be binding upon Subcontractor's heir, executors, legal representatives, successors and assigns." (Plaintiff's Exhibit 38, p. 5).

In 2005, Portrait Homes received a certificate of insurance prepared by the W. Lee Taylor Agency relating to the 2005-06 Penn National Policy. Below INSURED,

the following is typed: JJA Construction, Inc.
Jose A Castillo

Near the bottom of the form, the following is typed:

1. Portrait Homes - South Carolina, LLC and all wholly owned subsidiaries and Pasquinelli Management, LLC are named as additional insureds.
2. Coverage includes contractual liability coverage.
3. Coverage shall be primary and non-contributory and includes a 71 1145 0105 and 71 0741 0105. (attached)

Endorsement 71 11 45 0105 is attached to the certificate of insurance (Plaintiff's Exhibit 5).

C. Penn National Policies

Penn National issued the following policies:

Policy Period	Named Insured	AI Endorsement	Notes
12/05/02-03	JJA FRAMING COMPANY CASTILLO JOSE D/B/A	CG 20 37	AI limited to Centex Homes
12/05/03-04	JJA FRAMING COMPANY CASTILLO JOSE D/B/A	CG 20 37	AI for Pasquinelli/Portrait added during policy term
12/05/04-05	JJA FRAMING COMPANY CASTILLO JOSE D/B/A	CG 20 37	Change in named insured effective 03/02/05 to JJA Construction Inc
12/05/05-06	JJA CONSTRUCTION INC	71 11 45	01/05 Version of 71 11 45
12/05/06-07	JJA CONSTRUCTION INC	71 11 45	01/05 Version of 71 11 45
12/05/07-08	JJA CONSTRUCTION INC	71 11 45	09/06 Version of 71 11 45; policy cancelled effective 01/31/08
07/08/08-09	JJA FRAMING COMPANY	N/A	Change in named insured to JJA Construction Inc. effective 08/05/08
07/09/09-10	JJA CONSTRUCTION INC	N/A	

All the policies were placed with Penn National through the W. Lee Taylor Agency located in Charleston.

D. The Underlying Lawsuits

In 2012, the Persimmon Hill HOA and a class of unit owners filed separate lawsuits against Portrait Homes - South Carolina, LLC; Portrait Homes - Persimmon Hill, LLC; and

Pasquinelli Homebuilding, LLC seeking to recover for construction defects at the Persimmon Hill project. In March 2013, amended pleadings were filed adding a large number of subcontractors who had worked on the project, including JJA Construction, Inc. d/b/a JJA Framing and Jose Castillo d/b/a JJA Framing. The amended pleadings alleged that JJA Construction, Inc. d/b/a JJA Framing and Jose Castillo d/b/a JJA Framing installed framing, windows and doors, secondary weather barrier, and window and door flashings at the townhomes located at the Persimmon Hill project. The amended pleadings alleged the negligence of the defendants—including JJA Construction, Inc. d/b/a JJA Framing and Jose Castillo d/b/a JJA Framing—had caused damages to the plaintiffs caused by continuous exposure to moisture and water intrusion “resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the townhomes” as well as “the loss of use and enjoyment of their property by virtue of the defects and damages aforesaid.” (Plaintiff’s Exhibit 3, pp. 36-37; Plaintiff’s Exhibit 4, p. 41).

Hood Law Firm was hired to defend Portrait Homes in the two cases. John Blanton O’Neal, IV, an attorney currently with nineteen years of experience practicing mainly in the fields of construction law and insurance coverage work, was the lead attorney responsible for the representation. C. Tyson Nettles was one of the attorneys with Hood Law Firm working under O’Neal.

E. Portrait Homes’s Tender and Penn National’s Response

In reviewing the documents relating to the Persimmon Hill project, the attorneys at the Hood Law Firm found the certificate of insurance referencing the 05-06 policy issued by Penn National. In June 2013, Nettles wrote Penn National and noted it was believed that JJA Framing’s work contributed to the damages alleged in the lawsuits and demanded a defense and

indemnification as an additional insured under the Penn National policy on behalf of Portrait Homes (Plaintiff's Exhibit 6). The letter contained a CD with the amended pleadings in both cases and various other documents, including the plaintiffs' expert Robert Sisroy's report.

The tender letter was received by Penn National and assigned to claims adjuster Greg Gross. Gross was responsible for both the additional insured claim by Portrait Homes and the direct claim by the named insured. Gross began monitoring the claims to determine whether the named insured had been served in the underlying lawsuits.

In the continuing review of the documents in Portrait Homes's files, the attorneys at Hood Law Firm discovered another certificate of insurance referencing a different Penn National policy issued to JJA Framing. The certificate of insurance referenced the 04-05 policy and also referenced additional insured coverage (Plaintiff's Exhibit 7). Based on this second certificate of insurance, Nettles sent another letter to Penn National in May 2014. The letter referenced the policy dates as shown on the certificate of insurance and included a sharefile link to an updated set of documents relating to the matter. Nettles repeated the demand contained in his first letter: "Portrait is entitled to a defense and to indemnification as an additional insured under the referenced policies for any and all sums that hereinafter are paid or expended by Portrait to defend against and to resolve these potential claims." (Plaintiff's Exhibit 8).

On September 30, 2014, Gross responded on behalf of Penn National to Portrait Homes's tender. Gross listed the two underlying lawsuits and stated Penn National's understanding of the facts: "Portrait Homes was the General Contractor of the site. JJA Construction, Inc. d/b/a JJA Framing; Jose Castillo d/b/a JJA Framing (hereinafter, 'JJA') installed framing; windows; doors; secondary weather barrier; and window and door flashings at the site." Gross noted the complaints alleged "various construction defects and resultant loss of use. The construction

defects appear to be resultant in water intrusion and deterioration as a result.” Gross acknowledged that the underlying lawsuits had been tendered for defense and for indemnity. Gross then stated Penn National’s coverage determination and the rationale for the decision:

This is a completed operations type claim. As such, the sole avenue to additional insured status would be through an endorsement providing additional insured status for completed operations. *The above noted policies do not contain such an endorsement.* Accordingly, the tendering party, Portrait Homes-South Carolina, LLC do not qualify as an additional insured for this occurrence. Therefore, Penn National Insurance is rejecting the aforementioned tender for defense and/or indemnity from Portrait Homes-South Carolina, LLC at this time.

(Plaintiff’s Exhibit 9) (emphasis added).

Gross’s letter was the sole written communication ever sent by Penn National in response to Portrait Homes’s tender, and the rationale provided in Gross’s letter was the sole basis provided to Portrait Homes for the denial of the additional insured tender.

F. Present Case

In December 2014, Portrait Homes filed this coverage litigation against Penn National and other insurers for other subcontractors seeking a defense in the underlying cases. The claims against all of the other insurers were eventually resolved. After the claims against Portrait Homes in the underlying cases were settled in the spring of 2016, the pleadings in this case were amended to seek damages for breach of the duty to indemnify as well as damages for breach of the duty to defend.

The issues were tried non-jury. The trial began in February. Following four days of testimony, the trial was recessed. The trial resumed in May and lasted another three days. The issues are now ripe for adjudication.

III. Portrait Homes Qualifies as an Additional Insured

Portrait Homes seeks status as an additional insured under the Penn National policies based on two types of endorsements: 71 11 45 entitled Automatic Additional Insureds - Owners, Contractors and Subcontractors (Completed Operations); and CG 20 37 entitled Additional Insured - Owners, Lessees or Contractors - Completed Operations. Portrait Homes is entitled to additional insured coverage under both types of endorsements.

A. Endorsement 71 11 45

Endorsement 71 11 45³ provides additional insured coverage in material part as follows:

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

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

(Plaintiff's Exhibit 28: Endorsement 71 11 45 0105 and Plaintiff's Exhibit 30: Endorsement 71 11 45 0906). Based on the Master Agreement and on the Housing and Purchase Order Contract, Portrait Homes asserts it had sufficient written contracts to qualify as an additional insured under this endorsement.

Adam Parsons, Penn National's home office counsel, disagreed. In an email to Greg

³ The endorsement is attached to the 2005/06, 2006/07, 2007/08 policies. The version on the last policy changes from the edition promulgated in January 2005 (0105) to September 2006 (0906). For present purposes, there are no material differences between the two versions of the endorsement.

Gross dated September 11, 2014—a few weeks prior to Gross sending the denial letter on behalf of Penn National to Portrait Homes—Parsons set out his position for why Portrait Homes did not qualify under Endorsement 71 11 45:

The first thing to notice is that there is no contract between Portrait Homes and JJA Framing, Inc. The only contract is between Portrait Homes and Jose Castillo, an individual, who does business under the fictitious name JJA Framing. So under any contract of insurance after March 2, 2005, there is no written contract under which “you” (JJA Framing, Inc.) are required to name Portrait Homes as an insured (as would be required by the 71 11 45).

(Plaintiff’s Exhibit 78, pp. 1-2) (emphasis in original). Parsons summarized his position: “To the extent that Portrait Homes demands insured status under a JJA Framing, Inc. policy, they are not afforded same because they have no contract with JJA Framing, Inc.”⁴

The endorsement requires Portrait Homes to have a written contract with “you”, which is stated in the commercial general liability coverage form in all the Penn National policies to be “the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.” (See, e.g., Plaintiff’s Exhibit 21, p. 40). Parsons contended that because the named insured on the three policies to which Endorsement 71 11 45 was attached was listed as “JJA CONSTRUCTION INC,” and because the written contract Portrait Homes had in place for the Persimmon Hill project was with “JJA Framing” (or “Jose Castillo d/b/a JJA Framing”), the written contract was not a sufficient written contract to qualify Portrait Homes as an additional insured.

At trial, Penn National relied on Parsons’s argument as the primary basis justifying the denial of Portrait Homes’s tender with respect to Endorsement 71 11 45. Parsons’s argument appears rational on the surface, but his argument cannot withstand mild scrutiny. To understand

⁴ Parsons mistakenly used the name *JJA Framing, Inc.* as opposed to *JJA Construction, Inc.*

why, we start on the Declarations Page of each policy in which the named insured is listed as "JJA CONSTRUCTION INC".

Right below the box with the preprinted language NAMED INSURED AND ADDRESS in which JJA CONSTRUCTION INC and an address are typed in, the preprinted category FORM OF BUSINESS appears. Penn National had to make a choice as to the information to be typed in after those preprinted words, and Penn National chose the following as the form of business to describe the named insured: INDIVIDUAL. The discrepancy between the named insured being listed with "INC" in its name and the form of business being classified as an individual (as opposed to a corporation) alerts us to the issue. The gentlest of tugs on that contradictory thread would have caused Parsons's argument to unravel.

Had Parsons chosen to investigate the discrepancy on the Declarations Page by simply reviewing the documents in Penn National's own underwriting file, he would have realized a critical point: Jose Castillo d/b/a JJA Framing Company—the named insured under the first three Penn National policies—was intended to continue to be insured under the policies issued in the name of JJA Construction Inc. The full truth lay just below the surface, but Parsons chose not to investigate the facts that were in plain view in Penn National's underwriting file.⁵

In addition, had Parsons taken into account the allegations in the underlying complaints that Jose Castillo and JJA Construction Inc. were both doing business as JJA Framing, he would have realized his conclusion that the contract with JJA Framing did not implicate JJA Construction Inc. was untenable.

⁵ Parsons admitted at trial he did not review the documents in the underwriting file as a part of his analysis of Portrait Homes's additional insured tender (Trial Transcript II, p. 186, line 13 - p. 187, line 13). Conversely, Gross testified he did review those documents (Trial Transcript, p. 229, lines 17-23).

(L) Documents in Penn National's Underwriting File

To understand who was intended to be insured under the policies issued in the name of JJA Construction Inc., the documents in Penn National's underwriting file need to be considered—beginning at the beginning of the relationship. In December 2002, Jose Castillo submitted a commercial insurance application through the Taylor Agency seeking commercial general liability insurance in the name of Jose Castillo d/b/a JJA Framing Company (Plaintiff's Exhibit 12). Acting on the application, Penn National issued its first policy effective 12/05/02-03. The Declarations Page is a standard insurance form with blanks into which specific information is typed, e.g. policy number, policy period, insurer, agent, etc. Below NAMED INSURED, the following is typed in:

JJA FRAMING COMPANY
CASTILLO JOSE DBA

After FORM OF BUSINESS, the following is typed in: INDIVIDUAL

After BUSINESS DESCRIPTION, the following is typed in: CARPENTRY

On the next page, the business description is expanded:

CARPENTRY - CONSTRUCTION OF RESIDENTIAL PROPERTY NOT EXCEEDING
THREE STORIES IN HEIGHT

The method for calculating the premium is typed in as: PREMIUM BASIS
65,000 PAYROLL

(Plaintiff's Exhibit 13, pp. 1-2).

The policy was renewed effective 12/05/03-04. The same information as on the first policy appears on the Declarations Page under the preprinted categories for policy number, named insured, form of business, business description, and method for calculating premium (Plaintiff's Exhibit 14, pp. 2-3).

The policy was renewed effective 12/05/04-05 with the same information typed in on the

Declarations Page (Plaintiff's Exhibit 17, pp. 2-3).

On March 2, 2005, during the period in which the 2004-05 policy was in effect, the Taylor Agency submitted to Penn National a request that the name on the policy be changed to "JJA Construction, Inc." Attached to the Taylor Agency's cover letter was a two-page document. On the first page, under PURPOSE (Check One), blanks appear to the left of a series of categories. The first category, which has a handwritten check in the adjacent blank, reads:

Name change only
Complete column A for former entity and column B for newly named entity
Complete only questions 1, 2 and 3 on page 2

Column A and column B have handwritten information filled in, and questions 1, 2, and 3 (but not 4, 5, and 6) on the second page have handwritten answers filled in. There is another category on the first page in the list several lines below "Name change only" which reads:

Formation of a new entity
Complete column A

There is no mark in the blank to the left of that description. On the second page, a couple of lines above Jose Castillo's signature, "Jose A Castillo JJA Construction Inc." is handwritten after "Name of insured" (Plaintiff's Exhibit 18).

Penn National issued Endorsement Number 1 effective 03/02/05 changing the name of the insured to JJA CONSTRUCTION INC. Penn National did not charge an additional premium for changing the name (Plaintiff's Exhibit 19).

The policy renewed effective 12/05/05-06. The named insured is now listed as JJA CONSTRUCTION INC. After FORM OF BUSINESS, the following is typed in: INDIVIDUAL. In fact, none of the information on the Declarations Page—not the policy number, form of business, business description, or premium basis—changes. The exact same information typed in on the three prior policies is typed in again (Plaintiff's Exhibit 21, pp. 2-3).

Endorsement 71 11 45 first appears on the 12/05/05-06 policy (Plaintiff's Exhibit 21, p. 29).

Penn National had the right to audit the policies to determine whether the advance premium charged when a policy was issued should be modified higher or lower based on actual circumstances. Penn National chose to audit the 2005-06 policy. Penn National issued a document entitled General Liability Auditors Assignment Copy dated 11/06/06 identifying the named insured as JJA CONSTRUCTION INC and stating: INSURED IS INDIVIDUAL (Plaintiff's Exhibit 24). The top of the first page has a note: Assigned to US Ins. - Phone 12/21/2006. Penn National's underwriting file contains a document with U S INSURANCE SERVICES on the top left and TELEPHONE AUDIT REPORT on the top right with certain information below. The insured is listed as JJA CONSTRUCTION INC with the effective dates of the 2005-06 policy and the policy number. An auditor is listed. An audit contact is listed: Jose Castillo. A telephone number is listed. Under Comments, the following has been entered: "Insured is not incorporated - files taxes on a Schedule C" (Plaintiff's Exhibit 25).

Based on the information obtained from the auditor, Penn National issued a General Liability Audit Statement dated 02/27/07 with calculations showing an additional premium being due. The named insured is listed as JJA CONSTRUCTION INC along with INSURED IS INDIVIDUAL (Plaintiff's Exhibit 26).

The policy was renewed effective 12/05/06-07. The named insured is listed as JJA CONSTRUCTION INC. None of the information typed in under the other categories—policy number, form of business, business description, or premium basis—changes in any way (Plaintiff's Exhibit 27). The 2006-07 policy also contains Endorsement 71 11 45 (Plaintiff's Exhibit 27, p. 20).

The policy was renewed effective 12/05/07-08. The named insured is listed as JJA

CONSTRUCTION INC. None of the information typed in under the other categories—policy number, form of business, business description, or premium basis—changes in any way (Plaintiff's Exhibit 29). The 2007-08 policy also contains Endorsement 71 11 45 (Plaintiff's Exhibit 29, p. 23).

In July 2008, a new application⁶ was submitted by the Taylor Agency on behalf of JJA Construction Inc. to Penn National (Plaintiff's Exhibit 32).

Penn National issued a new policy with a new policy number. The named insured was listed as JJA FRAMING COMPANY. The form of business continued to be listed as INDIVIDUAL. The business description continued to be listed as CARPENTRY and the premium basis continued to be listed as 65,000 PAYROLL (Plaintiff's Exhibit 33). The 2008-09 policy did not contain Endorsement 71 11 45 or any other type of endorsement providing additional insured coverage for completed operations.

The policy was amended effective 08/15/08 to change the name of the insured to JJA CONSTRUCTION INC. Penn National did not charge for changing the name (Plaintiff's Exhibit 33, p. 7).

The policy was renewed effective 07/09/09-10. The named insured was listed as JJA CONSTRUCTION INC. All the other information on the Declarations Page remained the same from the prior year (Plaintiff's Exhibit 34). The 2009-10 policy did not contain Endorsement 71 11 45 or any other type of endorsement providing additional insured coverage for completed operations.

The classification of JJA Construction Inc. on the Declarations Page as an Individual, therefore, is merely the tip of the iceberg. Once we look below the surface—as Parsons was

⁶ The 2007-08 policy was canceled effective 01/31/08 (Plaintiff's Exhibit 31).

required to do but never did—the small mountain of corroborating evidence is easily seen. A review of the documents in Penn National's underwriting file reveals the intent of the parties to the insurance contracts—both the insured and the insurer—to have Jose Castillo d/b/a JJA Framing Company continue to be insured under the policies issued to JJA Construction Inc. The change in the name of the insured from Jose Castillo d/b/a JJA Framing Company to JJA Construction Inc. was intended to be a “name change only” and not based on the formation of a new entity.

On the audit documents and on the Declarations Page of every policy issued by Penn National after the name change effective March 2, 2005, Penn National identified the named insured as an Individual. The classification of the form of business as an Individual on the policies issued to JJA Construction Inc.—though seemingly contradictory—accurately reflected the substance of who the parties intended to be insured under the policies. Thus, while Parsons was *technically* correct that Portrait Homes did not have a written contract with the named insured listed on the 2005-06, 2006-07, and 2007-08 policies, Parsons was *substantively* incorrect because the party with whom Portrait Homes did have a contract—Jose Castillo d/b/a JJA Framing—was intended to be insured under those policies.

The Court finds particular guidance in *Auto-Owners Insurance Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013). An underlying tort action was brought and a judgment obtained against Marion L. Eadon d/b/a C & B Fabrication. Eadon sought indemnity from Auto-Owners, who had issued a commercial general liability policy to two corporations, C & B Fabrication, Inc. and Low Country Signs, Inc. The parties stipulated that both corporations did business under the trade name C & B Fabrication and the named insured under the policy would be deemed to be listed accordingly. *Id.* at 559, 748 S.E.2d at 789.

Auto-Owners denied a duty to indemnify Eadon for his individual liability in the lawsuit resulting from actions “performed in his individual rather than in his covered, corporate capacity.” *Id.* at 597, 748 S.E.2d at 788. The Supreme Court rejected Auto-Owner’s argument and held Auto-Owners had a duty to indemnify Eadon under the policy.⁷ The Supreme Court stated: “The fact that Eadon operated his business under another name did not create a separate legal entity for insurance purposes.” *Id.* at 600, 748 S.E.2d at 789; *see also Williams v. South Carolina Farm Bureau Mutual Insurance Co.*, 251 S.C. 464, 469, 163 S.E.2d 212, 214 (1968) (whether policy issued to “Ocean View Motel [a fictitious entity] c/o Mack A. Hamilton, Jr. [lessée]” covered lessors/owners not listed as insureds in policy after motel destroyed by fire was question of fact for jury, and noting: “If it is clear an insurance company is not misled as to the identity of the applicant, there seems to be no reason why it should be allowed to avoid the risk on such account. Accordingly, an insurance policy may be issued to one in a name adopted by him.”) (quoting *American Jurisprudence*); *Auto-Owners Insurance Co. v. Madison at Park West Property Owners Association, Inc.*, 834 F. Supp. 2d 437, 444 (D.S.C. 2011) (In insurance coverage action arising from underlying construction defect litigation, commercial general liability policies specifically naming Tarragon as an insured also covered Northland Madison—who was not named as an insured—because the evidence supported “a finding that Tarragon and Northland Madison are, for all meaningful purposes, one and the same.”).

The evidence convincingly supports the conclusion Jose Castillo d/b/a JJA Framing was intended to be insured under the policies issued to JJA Construction Inc. Therefore, Parsons’s rationale for denying additional insured coverage under Endorsement 71 11 45—because Portrait

⁷ The judgment in the underlying tort action had been reversed and remanded for a new trial, which had not yet taken place when the Supreme Court decided the declaratory judgment action.

Homes's contract was with Jose Castillo d/b/a JJA Framing rather than with JJA Construction Inc.—is unavailing.

At trial, Parsons asserted an alternative argument as well. He contended that even if the Housing and Purchase Order Contract qualified as a written contract with the named insured, the contract was nevertheless insufficient to satisfy the terms of Endorsement 71 11 45. He argued the endorsement also mandated that the contract require coverage for completed operations and coverage for a definite period of time. Because the Housing and Purchase Order Contract did not specifically address those two issues, Parsons argued it was insufficient for those reasons as well.

Parsons had never considered the impact of the Master Agreement on the analysis. When confronted with the provisions in the Master Agreement that did require the additional insured coverage to include completed operations and did set out a period of time to be covered, Parsons initially responded the Master Agreement should not be considered because he did not believe two contracts could apply to the same project (Trial Transcript II, p. 343, line 16 - p. 345, line 18). He soon shifted course and acknowledged “the Court is going to decide what contracts govern these, these arrangements.” (Trial Transcript II, p. 347, lines 16-17).

Parsons's Only-One-Contract Theory is not supported by South Carolina law. *See Moshtaghi v. The Citadel*, 314 S.C. 316, 321, 443 S.E.2d 915, 918 (Ct. App. 1994) (“Under South Carolina law, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole.”); *Klutts Resort Realty, Inc. v. Down'round Development Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) (“[W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction

comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial.”).

Parsons admitted that if his Only-One-Contract Theory was incorrect, the additional grounds would not support a denial because they were satisfied by provisions in the Master Agreement (Trial Transcript II, p. 343, line 16 - p. 344, p. 16; p. 349, lines 3-22). When the Master Agreement and the Housing and Purchase Order Contract are construed as one contract and considered as a whole, the provisions satisfy all the requirements of Endorsement 71 11 45.

(2) Allegations in Underlying Complaints

Parsons also did not consider how the additional insured analysis would be impacted by the allegations in the underlying complaints that both Jose Castillo and JJA Construction Inc. were doing business under the same trade name—JJA Framing. If those allegations were true, then a contract in the name of JJA Framing would bind both Jose Castillo and JJA Construction Inc. See *Cobb & Seal Shoe Store v. Aetna Insurance Co.*, 78 S.C. 388, 390, 58 S.E. 1099, 1099 (1907) (“A contract is good between the parties, no matter how incorrect the names used in the paper may be, if it appears they were intended as the names of the parties to be bound by the contract or to receive its benefits.”). If the contracts between Portrait Homes and JJA Framing also bound JJA Construction Inc., then the requirement under Endorsement 71 11 45 that there be a written contract with the named insured would be satisfied for this reason as well.

This part of the analysis is simpler than above because the underlying lawsuits *alleged* that both Jose Castillo and JJA Construction Inc. were doing business as JJA Framing (Plaintiff's Exhibit 3, p. 3: HOA Amended Complaint; Plaintiff's Exhibit 4, p. 3: Class Amended Complaint). For purposes of determining whether a duty to defend was owed to Portrait Homes,

Penn National was required to take those allegations as true. *See Manufacturers & Merchants Mutual Insurance Co. v. Harvey*, 330 S.C. 152, 167, 498 S.E.2d 222, 223 (Ct. App. 1998) (in determining whether a duty to defend exists, the allegations in a third-party's complaint must be taken as true).

Greg Gross recognized the underlying lawsuits alleged both Jose Castillo and JJA Construction Inc. were doing business as JJA Framing, and Gross provided that information to Parsons. However, neither Gross nor Parsons appear to have appreciated the significance of those allegations.

On the day Gross opened his file on both the direct claim and the additional insured claim, he recorded in his computer log notes that both underlying lawsuits named the defendants as "JJA Construction, Inc. d/b/a JJA Framing; Jose Castillo d/b/a JJA Framing, et. al." (HOA Exhibit 4, first page: Greg Gross log note dated 06/25/13). In the log note dated 09/21/13, Gross provides a more detailed analysis of the claim while stating in part: "Both complaints allege[] JJA Construction, Inc. d/b/a JJA Framing; Jose Castillo d/b/a JJA Framing, et. al. as the named defendant(s)." (HOA Exhibit 4, seventh page).

Within a couple of weeks of when Gross opened the file, a decision was made to submit the pertinent information relating to Portrait Homes's additional insured tender to Parsons by way of a Coverage Question Report for Parsons to make the final determination on whether to accept or deny Portrait Homes's tender. Gross submitted the Coverage Question Report to his supervisor Gary Gibson in May 2014, and Gibson submitted the Coverage Question Report to Parsons in June 2014. Gross notes in the Coverage Question Report: "The Complaints allege JJA Construction, Inc. d/b/a JJA Framing; Jose Castillo d/b/a JJA Framing, et. al. as the named defendant(s)." (Plaintiff's Exhibit 54, fourth page). Gross appears to recommend denial of

Portrait Homes's additional insured tender based on conduct by Jose Castillo construed to violate an insured's duty of cooperation (Plaintiff's Exhibit 54, p. 5).

Parsons informs Gross that the named insured's alleged non-cooperation does "not impact Portrait Homes' rights (if any) under the policy" and instructs Gross to "set forth the basis for declination of coverage and rejection of the tender from Portrait Homes in an email (without having to redo the CQR)." (Defendant's Exhibit 78, eighth page: email dated 06/16/14). In a response two months later, Gross again notes that the underlying complaints allege both Jose Castillo and JJA Construction Inc. were doing business as JJA Framing (Defendant's Exhibit 78, fifth page: email dated 08/26/14).

The basis set forth by Parsons in his email to Gross dated 09/11/14 for why Portrait Homes does not qualify as an additional insured under Endorsement 71 11 45 has been discussed above. But here it is important to note that while Gross has pointed out to Parsons that the underlying complaints allege that both Jose Castillo and JJA Construction Inc. were doing business as JJA Framing, Parsons does not list that information in his email back to Gross setting out the rationale for why Portrait Homes's additional insured tender should be denied. When Gross conveys the denial to Portrait Homes, his letter cites the underlying lawsuits and how Jose Castillo and JJA Construction Inc. are named. Gross continues: "Portrait Homes was the General Contractor of the site. JJA Construction, Inc. d/b/a JJA Framing; Jose Castillo d/b/a JJA Framing (hereinafter, 'JJA') installed framing; windows; doors; secondary weather barrier; and window and door flashings at the site." (Plaintiff's Exhibit 9: Denial Letter dated 09/30/14).

The significance of those allegations in the underlying complaints cannot be overstated. In determining whether a duty to defend was owed to Portrait Homes, Penn National was

required to take those allegations as true.⁸ If Jose Castillo and JJA Construction Inc. both did business as JJA Framing,⁹ then a contract in the name of JJA Framing bound both Jose Castillo and JJA Construction Inc. *See Long v. Carolina Baking Co.*, 190 S.C. 367, 377, 3 S.E.2d 46, 50 (1939) (“A corporation, as well as individuals, may have or be known by several names in the transaction of its general business so that it may enforce, as well as be bound by, contracts entered into in an adopted name other than the regular name under which it was incorporated.”); *see generally McCall v. IKON, d/b/a IKON Educational Services*, 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct. App. 2005) (holding default judgment obtained against trade name rather than actual legal entity nevertheless bound affiliated entities who were existing corporations recognized under South Carolina law, and noting: “If a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding.”). Because the contracts between Portrait Homes and JJA Framing bound both Jose Castillo and JJA Construction Inc., the requirement under endorsement 71 11 45 that there be a written contract with the named insured was satisfied.

(3) The Certificate of Insurance

Another piece of evidence is relevant to the inquiry regarding whether Portrait Homes is entitled to additional insured coverage under Endorsement 71 11 45. In 2005, Portrait Homes received a certificate of insurance prepared by the Taylor Agency relating to the 2005-06 Penn

⁸ A similar principle leads to the same result with respect to the duty to indemnify. Gross and his supervisor both recognized that when investigating a claim that has been tendered, Penn National had the obligation to resolve doubts or questionable coverage issues in favor of finding coverage (Trial Transcript, p. 210, line 14 - p. 211 line 7; Gross: Plaintiff's Exhibit 57; Gibson Deposition Excerpt p. 278, lines 9-12). *See Columbia College v. Pennsylvania Insurance Co.*, 250 S.C. 237, 253, 157 S.E.2d 416, 425 (1967) (“Under the universal rule adopted in this State, an ambiguity must be resolved in favor of the insured and construed most strongly against the insurer.”). Any doubt as to whether Jose Castillo and JJA Construction Inc. were both doing business as JJA Framing had to be resolved in a way that favored finding coverage.

⁹ Not only was that condition alleged to be true, Castillo testified at trial that those allegations were actually true (Trial Transcript II, p. 347, line 2 - p. 358, line 11).

National Policy. Below INSURED, the following is typed above an address:

JJA Construction, Inc.
Jose A Castillo

Near the bottom of the form, the following is typed:

1. Portrait Homes - South Carolina, LLC and all wholly owned subsidiaries and Pasquinelli Management, LLC are named as additional insureds.
2. Coverage includes contractual liability coverage.
3. Coverage shall be primary and non-contributory and includes a 71 1145 0105 and 71 0741 0105. (attached)

Endorsement 71 11 45 0105 is attached to the certificate of insurance (Plaintiff's Exhibit 5).

The document is relevant because it shows the parties believed the referenced policy (2005-06) provided additional insured coverage to Portrait Homes, and that belief could only be true if the parties believed the contracts between JJA Framing and Portrait Homes also bound JJA Construction, Inc.—the named insured under the 2005-06 policy. *See Payne v. Duke Power Co.*, 304 S.C. 447, 451, 405 S.E.2d 399, 401 (1991) (“The construction placed upon a contract by the parties themselves, if not determinative, is entitled to great weight.”).

An independent insurance broker like the Taylor Agency is generally considered to be the agent of the insured. *Allstate Insurance Co. v. Smoak*, 256 S.C. 382, 393, 182 S.E.2d 749, 754 (1971) (“Generally, an insurance broker is the agent of the insured, and not the insurer.”). However, “[u]nder certain circumstances, a broker may be an agent for an insurance company.” *Hitt v. Guaranty National Insurance Co.*, 329 S.C. 522, 530, 496 S.E.2d 417, 422 (Ct. App. 1997); *see Holmes v. McKay, Stelling and Associates*, 334 S.C. 433, 442, 513 S.E.2d 851, 855-56 (Ct. App. 1999) (“[F]or some purposes [,] an independent agent is the insurance company’s agent and not insured’s agent or broker when the company is one of the agent’s licensed

companies.”). Penn National’s insurance expert Bernd Heinze testified that for purposes of issuing the certificate of insurance, the insurance agent is generally considered to be acting on behalf of and as the agent of the insurer (Trial Transcript, p. 513, lines 4-10).

For purposes of issuing the certificates of insurance referencing the Penn National policies, the Court finds the Taylor Agency was acting for both the insured (JJA Framing) and the insurer (Penn National). While the form contains preprinted disclaimer language noting it is for information only and “does not amend, extend or alter the coverage afforded by the policy,” the information contained on the certificate is relevant to the issue in dispute and can be viewed as a piece of evidence to be considered along with all the other evidence.

B. Endorsement CG 20 37

The second basis on which Portrait Homes seeks additional insured coverage under the Penn National policies is through Endorsement CG 20 37, which was attached to the 2003-04 and 2004-05 policies. Unlike Endorsement 71 11 45, this type of additional insured endorsement does not require a written contract or agreement. Instead, this endorsement contains a schedule where the name of a person or organization is filled in and a location is filled in. Below the schedule, the following preprinted language appears:

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

In the CG 20 37 endorsements attached to the 2003-04 and 2004-05 policies, below Name of Person or Organization, the following is filled in:

PASQUINELLI CONSTRUCTION CO
PASQUINELLI MANAGEMENT LLC &
PORTRAIT HOMES CONSTRUCTION COMPANY

Below Location And Description of Completed Operations, the following is filled in:

3000 COLVARD PKWY
CHARLOTTE MECKLENBURG NC 28269

(Plaintiff's Exhibit 14, pp. 18-20: 2003-04 policy; Plaintiff's Exhibit 17, p. 4: 2004-05 policy).

In the email to Gross dated September 14, 2014, Parsons provided his rationale for why Portrait Homes did not qualify as an additional insured under this type of endorsement:

The policy does include the CG 2037, which named Portrait Homes as an insured for the completed - operations hazard, "but only with respect to liability arising out of Castillo's work at 3000 Colvard Pkwy in Charlotte, NC."

As this tender is premised on Castillo's work in Berkeley County, South Carolina, the CG 2037 does not grant insured status.

(Defendants Exhibit 78, p. 2): Parsons's rationale is again *technically* accurate, but *substantively* inaccurate.

The address listed under Location And Description of Completed Operations is an obvious scrivener's error: the address listed was Jose Castillo d/b/a JJA Framing's own address. The Declarations Page for the 2002-03, 2003-04, and 2004-05 policies all show that same address listed under the category for NAMED INSURED AND ADDRESS. (Plaintiff's Exhibit 13, p. 1: 2002-03 policy; Plaintiff's Exhibit 14, p. 2: 2003-04 policy; Plaintiff's Exhibit 17, p. 2: 2004-05 policy). Jose Castillo's mailing address and the premises information shown on the commercial insurance application preceding the issuance of the first policy also listed the address as 3000 Colvard Pkwy, Charlotte, NC 28269 (Plaintiff's Exhibit 12, p. 1).

Lest there be any doubt that the Location And Description of Completed Operations listed in the endorsement for the 2003-04 and 2004-05 policies was a mistake, the same type of CG 20 37 endorsement was issued to Centex Homes and attached to the 2002-03 policy. Under

Location And Description of Completed Operations, that endorsement also listed the address as:

3000 COLVARD PKWY
CHARLOTTE MECKLENBURG NC 28269

(Plaintiff's Exhibit 13A, p. 8). Just as it is nonsensical that Portrait Homes's status as an additional insured would be limited to liability arising out of JJA Framing's work at JJA Framing's own office, so too is it nonsensical that JJA Framing would be performing work for both Portrait Homes and Centex Homes at that same address.

In the computer log entry in the claims file dated 09/21/03, Gross notes the declaration pages for the 2003-04 and the 2004-05 policies list "the insured's address as 3000 Colvard Parkway, Charlotte, NC." (HOA Exhibit 4, p. 3). Parsons's email dated September 11, 2014—setting out his rationale for why Endorsement CG 20.37 provided no additional insured coverage to Portrait Homes—was in response to an email from Gross dated August 26, 2014. In that email to Parsons, Gross states:

Policy periods 12/05/2003 to 12/05/2005 (2 years);
The named insured is Jose Castillo dba JJA Framing Company.
The declarations list the risk as "carpentry." The policy has a
\$500,000 per occurrence limit of liability coverage. It lists the
insured's address as 3000 Colvard Parkway, Charlotte, NC.

(Defendant's Exhibit 78, second page).

Parsons chose to shut his eyes to the information right in front of him. The address of 3000 Colvard Parkway in Charlotte filled in on the Schedule in the CG 20 37 endorsements was an obvious mistake. Gross admitted as much at trial (Trial Transcript, p. 254, line 5 - p. 255, line 18). If additional insured coverage for JJA Framing's defective work was not intended to be for work performed at 3000 Colvard Parkway in Charlotte, where was the coverage intended to apply? The answer can be found in another document exchanged between JJA Framing and

Portrait Homes.

In 2005, Portrait Homes received a certificate of insurance prepared by the Taylor Agency relating to the 2004-05 policy issued to Jose Castillo dba JJA Framing Company (Plaintiff's Exhibit 7). The form not only references CG 20 37, but also attaches a copy. While the names listed are the same as those listed in the endorsement attached to the policy, the information typed below Location And Description of Completed Operations is not. As opposed to the 3000 Colvard Parkway address listed in the endorsement attached to the policy, the language in the endorsement attached to the certificate of insurance states: "Work done for the above referenced organization". This document shows the additional insured coverage was intended to cover work performed by Jose Castillo dba JJA Framing Company at all locations.¹⁰

The Court finds the parties intended for the additional insured coverage to apply to all projects where JJA Framing performed work on Portrait Homes's behalf. The Court will imply that term into the Schedule of Endorsement CG 20 37 to fill in the blank left after striking the location listed (3000 Colvard Parkway) as an obvious mistake. *See Southern Realty and Construction Co. v. Bryan*, 290 S.C. 302, 311, 350 S.E.2d 194, 199 (Ct. App. 1986) ("Noncontradictory terms and conditions may be implied in a contract when the circumstances warrant it to effectuate the manifest intention of the parties.").

Penn National's insurance expert Bernd Heinze opined in his report that Penn National acted "reasonably and in good faith in its interpretation of the policy terms at issue in this matter, and in its subsequent denial of coverage for named insured Jose Castillo d/b/a JJA Framing, JJA Construction and denial of additional insured coverage for Portrait Homes based upon a plain

¹⁰ As with the consideration of the certificate of insurance relating to Endorsement 71 11 45, the Court again notes that it finds the certificate relating to the analysis of Endorsement CG 20 37 to be relevant, not decisive.

reading of the clear wording of the policies.” (Defendant’s Exhibit 87, p. 16). Although Heinze purports to analyze the grounds given by Parsons for denying Portrait Homes’s additional insured tender, Heinze in his report does not list Parsons’s *actual* rationale for denying coverage under Endorsement CG 20 37—the discrepancy between the address listed in the CG 20 37 endorsement and the address of the project that is the subject matter of the underlying lawsuits (Defendant’s Exhibit 87; Trial Transcript II, p. 475, line 10 - p. 477, line 15). In fact, Heinze’s report contains no discussion of why Portrait Homes’s tender should be denied under Endorsement CG 20 37.

At trial, Penn National’s lawyers appeared to distance themselves from Parsons’s rationale (the address discrepancy) for denying additional insured coverage to Portrait Homes under Endorsement CG 20 37. Penn National’s lawyers presented a new argument for why Penn National’s denial of Portrait Homes’s tender for additional insured coverage under Endorsement CG 20 37 was valid: the names of the tendering parties did not exactly match the names listed in the endorsement. Initially, the entities named in the underlying lawsuits who tendered the additional insured claims to Penn National parties were:

Portrait Homes - South Carolina, LLC
Portrait Homes - Persimmon Hill, LLC
Pasquinelli Homebuilding, LLC¹¹

The names listed in the Schedule in Endorsement CG 20 37 were:

Pasquinelli Construction Co
Pasquinelli Management LLC &
Portrait Homes Construction Company

The discrepancy between the names means Penn National’s argument is again *technically* correct. But the *substance* of the issue is more complicated.

¹¹ Pasquinelli Homebuilding, LLC was in bankruptcy so the additional insured claim as to it was dropped.

Shawn Belcher and Blanton O'Neal testified as to the structure of the Pasquinelli/Portrait Homes organization and how a particular project was developed. At the top of the organization was a Pasquinelli entity, then Portrait Homes Construction Company. Below that level in the corporate structure there would be a limited liability company formed for the work done in each state (e.g., Portrait Homes - South Carolina, LLC), and then a limited liability company for each particular project (e.g., Portrait Homes - Persimmon Hill, LLC) (Trial Transcript, p. 453, lines 7-22; Belcher; p. 73, line 9 - p. 74, line 25; O'Neal). The hold harmless and the insurance obligations from a subcontractor and its insurer were intended to protect all the entities in the Pasquinelli/Portrait Homes organization (Trial Transcript, p. 453, line 3 - p. 454, line 6).

The intent to have all the entities in the Pasquinelli/Portrait Homes organization protected is reflected in the Master Agreement under the section entitled Indemnifications and Insurance: Jose Castillo d/b/a JJA Framing was required to defend, indemnify, and hold harmless "Portrait, affiliated companies of Portrait, their partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns" (Plaintiff's Exhibit 37, pp. 1-2). It only makes sense that the entities in the Pasquinelli/Portrait Homes organization most likely to be sued for defective work at a particular project would be — first, the project-specific entity and second, the state-specific entity. The parent companies would not have been on the front lines of any legal battle asserting construction defects at a particular project. The list of names in the schedule in Endorsement CG 20 37 was intended to encompass the state-specific entities like Portrait Homes - South Carolina, LLC and the project-specific entities like Portrait Homes - Persimmon Hill, LLC, just as the location and description of the completed operations covered was intended to be broader than protection for liability arising out of JJA Framing's defective work at JJA Framing's own office at 3000 Colvard

Parkway in Charlotte.

To interpret Endorsement CG 20 37 as Penn National argues would render the additional insured coverage virtually meaningless. Such an interpretation must be rejected. *See South Carolina Farm Bureau Mutual Insurance Co. v. Kennedy*, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) (“[T]he literal interpretation of policy language will be rejected where its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely ‘illusory.’”); *Bell v. Progressive Direct Insurance Co.*, 407 S.C. 565, 580, 757 S.E.2d 399, 407 (2014) (“[T]he Court will look to the reasonable expectations of the insured at the time when he entered into the contract, if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print.”).

The refusal to enforce policy language that would lead to an absurd result is consistent with the principle of South Carolina law that contracts should be interpreted using common sense and good faith. *See Georgetown Manufacturing and Warehouse Co. v. South Carolina Department of Agriculture*, 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Cl. App. 1990) (“Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result.”); *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (“Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail.”); *see generally Parker v. Jefferson Standard Life Insurance Co.*, 158 S.C. 394, 397, 155 S.E. 617, 618 (1930). (“In the

construction of insurance contracts, it is vitally essential that the courts do not ignore the fact that the primary object of all insurance is to insure, and that, in cases of doubt, uncertainty, manifest ambiguity, or susceptibility of two equally reasonable interpretations, since the language used is the selection and arrangement of the insurer, such contracts must be liberally construed in favor of the insured.”).¹²

C. Summary

Portrait Homes is an additional insured under the 2003-04 and 2004-05 policies through Endorsement CG 2037; Portrait Homes is an additional insured under the 2005-06, 2006-07, and 2007-08 policies through Endorsement 71 11 45. Before considering the obligations to defend and to indemnify owed by Penn National to Portrait Homes and whether Penn National breached those obligations, the Court will discuss the impact of Penn National’s inaccurate denial letter on the coverage analysis.

IV. The Denial Letter: Waiver and Its Limits

The final determination as to whether Portrait Homes’s demand for additional insured coverage should be accepted or rejected was made by Adam Parsons, but Penn National assigned the task of conveying that final determination to Greg Gross. Gross’s letter dated September 30, 2014, was the only written communication Penn National ever sent to Portrait Homes responding to Portrait Homes’s tender. Gross states in the letter that Penn National is denying Portrait Homes’s tender for defense and for indemnity. The reason given by Gross is that the Penn

¹² At least with respect to the CG 20 37 Endorsements attached to the 2003-2004 policy, Penn National charged an additional premium (Plaintiff’s Exhibit 16). Penn National’s retention of the additional premium provides another basis for rejecting the argument that Endorsement CG 20 37 provides no meaningful additional insured coverage for Portrait Homes. See *Kelly v. South Carolina Farm Bureau Mutual Insurance Co.*, 316 S.C. 319, 325, 450 S.E.2d 59, 63 (Ct. App. 1994) (“Farm Bureau’s acceptance of the premium for this coverage estops it from claiming after a loss that no coverage exists.”); *Hall v. Allstate Insurance Co.*, 284 S.C. 62, 64, 324 S.E.2d 341, 343 (Ct. App. 1984) (“Allstate cannot retain Hall’s premium and at the same time deny him the benefit of his bargain under the policy.”).

National policies do not contain an endorsement providing additional insured status for completed operations (Plaintiff's Exhibit 9, p. 2).

As everyone associated with Penn National who testified at trial conceded, the reason stated by Gross—the sole reason ever provided to Portrait Homes by Penn National—was false:

Characterization	Witness	Trial Transcript
"doesn't jibe"; "not right"	Greg Gross	p. 299, lines 9-10; p. 434, lines 23-24
"inaccurate"	Adam Parsons	Trial Transcript II, p. 172, line 11 - p. 173, line 8
"opposite of what was true"	Bernd Heinze	Trial Transcript II, p. 520, lines 8-22.

Each of those witnesses testified that in responding to Portrait Homes's tender, Penn National had an obligation to thoroughly explain the grounds for the denial (Trial Transcript, p. 211, lines 13-19; Greg Gross; Trial Transcript II, p. 165, line 14 - p. 166, line 3; Adam Parsons; Trial Transcript II, p. 480, line 24 - p. 481, line 3; Bernd Heinze). Heinze also expressed an obvious corollary: Penn National had an obligation to provide an explanation of its decision that was accurate (Trial Transcript II, p. 482, lines 10-13). Thus, we have a recognized duty on the part of Penn National to thoroughly and accurately explain the grounds for the decision to deny Portrait Homes's additional insured tender, and we have the testimony at trial of all the witnesses associated with Penn National that the denial letter did not comply with that duty.

Penn National made no real effort at trial to defend the reason given by Gross in the denial letter. Instead, Penn National attempted to justify the denial based in part on the grounds asserted in the email from Parsons to Gross dated 09/11/14, a few weeks before Gross sent the denial letter to Portrait Homes. Penn National also asserted at trial other reasons in support of

the denial first advanced by its attorneys during the coverage litigation.

Should Penn National be permitted to assert in the coverage litigation reasons that were not asserted in the denial letter? The answer turns on the concept of waiver in the context of disputes about insurance coverage.

The South Carolina Supreme Court's recent decision in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017) is instructive. "The question presented is whether a reservation of rights letter that merely provides the insured with a copy of the policy, coupled with a general statement that the insurer reserves all of its rights, is sufficient. We hold it is not." *Id.* at 336, 803 S.E.2d at 296. The insurance coverage dispute at issue in that case arose from two underlying construction defect lawsuits in which judgments had been rendered in favor of the property owners. The Supreme Court listed the defendants as: "Heritage Communities, Inc., (the parent development company), Heritage Magnolia North, Inc., and Heritage Riverwalk, Inc. (the project-specific subsidiary companies for each separate development), and Buildstar Corporation (the general contracting subsidiary that oversaw construction of all Heritage Development projects), to which we refer collectively as 'Heritage.'" *Id.* at 329, 803 S.E.2d at 293. Harleysville had issued multiple commercial general liability policies to the various Heritage entities for a portion of the period of time during which the property damage occurred. After receiving notice of the underlying lawsuits, Harleysville agreed to provide a defense to the Heritage defendants under a reservation of rights. Harleysville's letters to the Heritage defendants "were generic statements of potential non-coverage coupled with furnishing most of the Heritage entities with copies (through a cut-and-paste method) of the insurance policies." *Id.* at 330, 803 S.E.2d at 293.

The property owners—as judgment creditors—sought to collect under the Harleysville

policies. The Supreme Court noted that “it is axiomatic that an insured must be provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage.” *Id.* at 337-38, 803 S.E.2d at 297. The Supreme Court noted: “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.” *Id.* at 338, 803 S.E.2d at 297. The explanation has to be unambiguous and “[g]rounds not identified in the reservation of rights may not be asserted later by the insurer[.]” *Id.* at 339, 803 S.E.2d at 298. Concluding Harleysville failed to meet the required standard, the Supreme Court affirmed “the Special Referee’s finding that Harleysville’s reservation letters were insufficient to reserve its right to contest coverage of actual damages”. *Id.* at 343, 803 S.E.2d at 300. The Supreme Court continued: “Because we find Harleysville did not effectively reserve the right to contest coverage, we need not address Harleysville’s claims of error regarding various policy exclusions.” *Id.* at 343-44, 803 S.E.2d at 300-01; *see Washington v. National Service Fire Insurance Co.*, 252 S.C. 635, 641, 168 S.E.2d 90, 92 (1969) (“It is well settled that an insurer which has denied coverage on some other basis is precluded from defending against an action on a liability policy on the ground that the insured failed to comply with its requirements as to notice and forwarding of suit papers.”).¹³

And yet the concept of waiver has its limits even in the context of an insurance coverage dispute. “South Carolina courts have repeatedly and explicitly held that “[w]aiver cannot create coverage and cannot bring into existence something not covered in the policy.” *Liberty Mutual Insurance Co. v. Westport Insurance Corp.*, 664 F. Supp. 2d 587, 594 (D.S.C.) (2009) (Judge P:

¹³ The Supreme Court’s ruling in *Harleysville* that an insurer cannot later assert defenses to coverage not asserted in the reservation of rights letter is akin to the principal of error preservation that “a party may not argue one ground at trial and an alternate ground on appeal.” *State v. Dunbar*, 356 S.C. 138, 142; 587 S.E.2d 691, 694 (2003).

Michael Duffy) (quoting *Laidlaw Environmental Services (TOC), Inc. v. Aetna Casualty & Surety Co.*, 338 S.C. 43, 51, 524 S.E.2d 847, 852 (Ct. App. 1999)).

Waiver and estoppel cannot open the door to coverage, but they can determine the defenses available to the insurer once coverage has been established. Once the party seeking coverage brings himself within the terms of the insuring agreement, the burden shifts to the insurer to establish any exclusion or limitation on coverage. See *Owners Insurance Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005). Whatever can be waived by a deficient denial letter has been waived by Penn National's denial letter. Penn National has waived the ability to assert any exclusions or limitations on coverage.

V. The Additional Insured Endorsements

Five of the Penn National policies have an endorsement granting additional insured coverage for completed operations to Portrait Homes for liability relating to JJA Framing's work. The 2003-04 and 2004-05 policies have endorsement CG 2037, which covers the additional insured for liability "arising out of" the named insured's work. The 2005-06, 2006-07, and 2007-08 policies have endorsement 71 11 45, which covers the additional insured for liability "caused, in whole or in part, by" the named insured's work. The plain language of the latter phrase requires only that the additional insured's liability be caused in part by the named insured's work (as opposed to solely by the named insured's work). The causation language in the earlier endorsement is also interpreted expansively in favor of coverage. See *Town of Duncan v. State Budget and Control Board*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) ("The phrase 'arising out of' should be broadly construed in a clause of inclusion [in an insurance policy]; it should mean more than causation."). The coverage provided to Portrait Homes as an additional insured is not limited to its vicarious liability for JJA Framing's work. See *Capital City Real*

Estate, LLC v. Certain Underwriters at Lloyd's London, 788 F.3d 375, 380 (4th Cir. 2015) (“[W]hile it is true that the additional insured is covered for its vicarious liability stemming from the named insured’s operations, the insurer’s attempt to limit coverage to that alone ignores the [caused in whole or in part by] language of the additional insured endorsements.”) (quoting Scott C. Turner, *Insurance Coverage of Construction Disputes* § 42:4 (2015)).

VI. The Insuring Agreement

The basic coverage provided by the policies is set out in the 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 applies. 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.

(*E.g.*, Plaintiff’s Exhibit 27, p. 31). The policies define “property damage” as “(p)hysical injury to tangible property, including all resulting loss of use of that property.” The policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” (*E.g.*, Plaintiff’s Exhibit 27, pp. 44-45). In interpreting those terms in the context of a construction defect case, the South Carolina Supreme Court has “emphasize[d] the ‘difference’ between a claim for the costs of repairing or removing defective work, which is not a claim for ‘property damage,’ and a claim for the costs of repairing damage caused by the defective work, which is a claim for ‘property damage.’” *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 49, 717 S.E.2d 589, 593 (2011) (*Crossman II*) (quoting *United States Fire Insurance Co. v. J.S.U.B.*,

Inc., 979 So. 2d 871, 889 (FL 2007). “[T]he relevant occurrence is the repeated infiltration of water into the improperly constructed buildings, which is a progressive injury.” *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 351, 803 S.E.2d 288, 305 (2017). The law in South Carolina is now clear “that the cost of repairing faulty workmanship is not covered under CGL policies but resulting property damage beyond the defective work product itself is covered.” *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 336, 803 S.E.2d 288, 296 (2017).

“The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions.” *Auto Owners Insurance Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009). The insured bears the burden of proving a claim falls within the insuring agreement. *See Gamble v. Travelers Insurance Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968). The insurer bears the burden of establishing the applicability of an exclusion. *Owners Insurance Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005).

VII. Two Separate Duties

“A liability insurer has two separate and distinct duties to the insured. First, the insurer is obligated to pay sums the insured becomes obligated to pay. Second, the insurer must defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy.” *Nationwide Mutual Insurance Co. v. Tate*, 313 S.C. 444, 447, 438 S.E.2d 266, 268 (Ct. App. 1993).

A. Duty to Defend

Under South Carolina law, an insurer’s duty to defend is based on the allegations in the underlying complaint. *B.L.G. Enterprises, Inc. v. First Financial Insurance Co.*, 334 S.C. 529,

535, 514 S.E.2d 327, 330 (1999). "If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend." *City of Hartsville v. South Carolina Municipal Insurance*, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). In determining whether a duty to defend exists, the allegations in the complaint must be taken as true.

Manufacturers and Merchants Mutual Insurance Co. v. Harvey, 330 S.C. 152, 167, 498 S.E.2d 222, 230 (Ct. App. 1998). An insurer refuses to defend at its own peril. *Stroup Sheetmetal Works, Inc. v. Aetna Casualty & Surety Co.*, 268 S.C. 203, 212-13, 232 S.E.2d 885, 888 (1977).

The Amended Complaints in the underlying construction defect cases alleged faulty work by JJA Framing, including "failing to properly install windows and doors and related flashings and waterproofings" and "failing to properly install the secondary weather barrier." (Plaintiff's Exhibit 3, p. 15; Plaintiff's Exhibit 4, p. 19). The Amended Complaints alleged: "The townhome[] exteriors and common areas contain construction defects that have resulted in water intrusion, and deterioration." (Plaintiff's Exhibit 3, p. 12; see Plaintiff's Exhibit 4, p. 16). The Amended Complaints alleged:

[c]ontinuous exposure to moisture and water that intruded and continues to intrude into the subject townhomes causing and resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the townhomes. Each year since completion new areas of damage occurred, separate and apart from any damage already in progress of occurring. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as suffer the loss of use and enjoyment of their property by virtue of the defects and damages aforesaid.

(Plaintiff's Exhibit 3, pp. 36-37; Plaintiff's Exhibit 4, p. 41).

When Gross received the tender letter on behalf of Portrait Homes in June 2013, he noted: "The complaint is brought for various construction defects and resultant loss of use. The construction defects appear to be resultant in water intrusion and deterioration as a result."

(Plaintiff's Exhibit 58, pp. 1-2). Gross also noted that while "[s]pecific CO dates are not named in the complaint ..., [i]t appears from the contracts/purchase orders in the file that construction commenced in 2002." (Plaintiff's Exhibit 58, p. 2). Gross included a summary of the allegations in the Coverage Question Report he prepared a year later for submission to Parsons (Plaintiff's Exhibit 54, p. 1). Both Gross and Parsons conceded at trial that the allegations in the underlying complaints were the classic formulation triggering coverage under a commercial general liability policy (Trial Transcript, p. 295, line 18 - p. 296, line 14; Gross; Trial Transcript II, p. 169, line 11 - p. 170, line 14; Parsons).

Having concluded Portrait Homes was an additional insured under the Penn National policies, the Court has no difficulty concluding Penn National owed a defense to Portrait Homes in the underlying construction defect cases. By denying coverage, Penn National breached the duty to defend.

"It is uniformly held that when an insurer refuses to defend and the insured is compelled to conduct his own defense, the insured may recover from the insurer, the reasonable expenses of litigation, including costs and attorneys' fees." *Sloan Construction Co. v. Central National Insurance Co.*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). Portrait Homes seeks to recover defense costs of \$42,791.24 paid personally in defending the underlying cases.

Hood Law Firm defended Portrait Homes in the underlying cases, and John Blanton O'Neal, IV was the lead attorney responsible for the representation. The first call O'Neal received about defending Portrait Homes was from Portrait Homes's personal counsel. Hood Law Firm was then hired to defend Portrait Homes by Admiral Insurance Company, who issued policies directly to Portrait Homes (Trial Transcript, p. 140, lines 1-4; p. 141, line 5 - p. 142, line 11). The underlying litigation lasted several years, and over the course of that span Hood Law

Firm was paid \$352,000 by Admiral to defend Portrait Homes. Portrait Homes is not seeking to recover the defense costs paid by Admiral.¹⁴ Portrait Homes is seeking to recover the defense costs paid personally to Hood Law Firm and another law firm. The Court concludes Portrait Homes is entitled to recover \$42,791.24 in damages due to Penn National's breach of the duty to defend.

B. Duty to Indemnify

While the duty to defend is determined by the allegations in the complaint, the duty to indemnify is determined by what is proven at trial. *See Auto-Owners Insurance Co. v. Rhodes*, 405 S.C. 584, 596-97, 748 S.E.2d 781, 787 (2013). The insuring agreement in each of the policies 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". The funds Portrait Homes became legally obligated to pay based on the settlement were for "property damage" caused by an "occurrence" as those terms are defined in the Penn National policies and as they have been interpreted by the South Carolina Supreme Court.

Robert Sisroy testified at the trial of this case. Sisroy is a professional engineer licensed in South Carolina. Over the course of a 35-year career, he has investigated thousands of projects in South Carolina. He was qualified without objection as an expert in the field of investigating and identifying construction deficiencies and in preparing scopes of repair for fixing construction problems (Trial Transcript, p. 516, line 1 - p. 517, line 6).

Sisroy was hired by the Persimmon Hill HOA to investigate the construction problems at the project. He did so and issued a report dated December 19, 2012 (Plaintiff's Exhibit 53).

¹⁴ O'Neal testified that settlement funds recovered from other insurers alleged to owe coverage to Portrait Homes as an additional insured were applied to repay Admiral (Trial Transcript, p. 186, line 15 - p. 187, line 24).

Sisroy found the wood framing itself—the structural members of the walls—to have been of good quality (Trial Transcript, p. 519, lines 7-20). However, with respect to the installation of the windows, including the flashing, he found that work to have been poorly done in violation of the building code. Sisroy's report includes a hundred pages of photographs of problems around the windows. Sisroy testified there are approximately 4,000 windows in the project and he did not find a single window location without problems (Trial Transcript, p. 520, lines 2-15).¹⁵

Sisroy testified the improper installation of the flashing around the windows and the improper installation of the weather barrier led to water intrusion which caused rot to the wooden members around the windows and into walls. Sisroy testified the rot caused by the water coming in around the improperly flashed windows was extensive. Sisroy found oriented strand board (OSB) so deteriorated that he could remove it by hand. He found the rot extended beyond the OSB into the structural members of the building, and he found that condition to be pervasive (Trial Transcript, p. 524, line 9 - p. 527, line 9). In addition to damaging the framing, the water intrusion around the windows caused damage inside the units to drywall and interior trim. Sisroy testified there was such a massive amount of water entering through the window-wall intersection that even the curtains and plantation blinds were damaged (Trial Transcript, p. 521, line 5 - p. 522, line 25).

Sisroy testified the use and installation of the air infiltration barrier between the wood framing and the exterior cladding was improper and led to further damage to the framing associated with water getting behind the improperly installed brick and the improperly installed vinyl siding. Therefore, Sisroy concluded the installer of the air infiltration barrier—the

¹⁵ Sisroy did not find any problems with the windows themselves (Trial Transcript, p. 524, lines 1-3).

framer—also bore some responsibility for the damage to the wooden members of the building resulting from water intrusion at places other than around the windows (Trial Transcript, p. 564, line 22 - p. 566, line 8).

Jose Castillo testified at trial that JJA Framing was the main framer at the Persimmon Hill project (Trial Transcript II, p. 358, lines 20-23). O'Neal testified his office reviewed documents maintained by the applicable governing body and the documents in the job file (approximately 90,000 - 100,000 pages) to determine the subcontractors who worked on a particular unit (Trial Transcript, p. 97, line 21 - p. 98, line 14). On some of the units, the City of Goose Creek did not have a copy of the certificate of occupancy. On some units, there was no record of who the framer was. O'Neal explained the protocol in those situations:

[B]ased on our understanding of what we could find in the documents, understanding of how Portrait generally worked, and the fact that if you had one building that was framed, that we would have an entity that we could verify. If the one next to it was part of the same building and we didn't -- we couldn't find the documents, we would make an educated assumption on that as well, that you wouldn't change framers in the middle of the building.

(Trial Transcript, p. 98, line 20 - p. 99, line 4). Based on the analysis of records, O'Neal concluded JJA Framing was the framer on approximately 85% of the units (Trial Transcript, p. 97, lines 2-10; p. 98, lines 15-20).

The Scope of Work incorporated into the subcontract with Portrait Homes required JJA Framing to install the windows and the vapor barrier (Plaintiff's Exhibit 41). JJA Framing's faulty work in installing the windows and the vapor barrier caused water intrusion resulting in property damage to the wood walls, drywall, interior trim, and curtains and plantation blinds. In other words, JJA Framing's defective work caused property damage to non-defective work. The damage to the non-defective work constituted physical injury to tangible property, satisfying the

definition of “property damage” in Penn National’s policies.

As defined in the commercial general liability policies, “property damage” includes all resulting loss of use of both tangible property that has been physically injured and tangible property that has not been physically injured (*E.g.*, Plaintiff’s Exhibit 27, p. 45). Sisroy testified he doubted the townhomes could be lived in while repairs to the non-defective framing were being made (Trial Transcript, p. 529, line 12 - p. 531, line 15).

After Penn National denied coverage to Portrait Homes in the fall of 2014, the defense of Portrait Homes in the underlying construction defect cases continued to be handled by Hood Law Firm. O’Neal testified that for the remainder of 2014 and 2015 and into 2016, they were “going hot and heavy in defending the case for our clients. There are tens of depositions going on, expert reviews, expert reports, discovery all over the place.” (Trial Transcript, p. 106, line 2-10). O’Neal testified the prospects for the defense turned grim. The Persimmon Hill townhome community was a massive project and the construction defect litigation was one of the larger cases that had ever been filed in Berkeley County. O’Neal testified that “larger verdicts were starting to come out. And with the amount of damage that we saw in this, it was not a good outlook for the construction side of the case.” (Trial Transcript, p. 107, line 19 - p. 108, line 14).

The plaintiffs’ repair estimate—based on Sisroy’s scope of work— was \$12,700,000, and the estimate for loss of use was \$4,660,000. Facing potential actual damages of \$17,380,000 and exposure for punitive damages relating in whole or in part to JJA Framing’s work, O’Neal decided the prudent course of action was to attempt to negotiate a settlement on Portrait Homes’s behalf (Trial Transcript, p. 108, line 15 - p. 109, line 17; p. 119, lines 5-19).

Portrait Homes settled the claims brought by the plaintiffs in the underlying construction

defect cases by paying \$3,850,000.¹⁶ The settlement was approved by order filed with the Berkeley County Clerk of Court on March 7, 2016.¹⁷

O'Neal testified concerning how the settlement of \$3,850,000 related to the damage to non-defective work caused by JJA Framing's defective work. JJA Framing was the biggest subcontractor on the job—as is generally the case on a job of this type—and “their work is integrated throughout the project.” (Trial Transcript, p. 113, lines 7-19). O'Neal estimated approximately 50 percent of the plaintiffs' repair estimate of \$12,700,000 was for repairing non-defective work that was damaged by JJA Framing's defective work. As to the loss of use figure of \$4,660,000, O'Neal allocated 50 to 85 percent to JJA Framing (Trial Transcript, p. 116, line 10 - p. 118, line 10). O'Neal testified he also took into consideration the exposure for punitive damages:

Q. Were you concerned that Portrait's potential liability relating in whole or in part to JJA Framing's work could expose Portrait to punitive damages?

A. Yes.

Q. Was that a factor you took into consideration in deciding to settle these claims for \$3.85 million?

A. Ten years ago it would not have been because punitive damages were not seen very much in construction cases. Around this time we were beginning to see juries and judges come back with punitive awards on top of very large construction defect cases, and so it absolutely played into a determination of how to settle the cases.

¹⁶ Penn National contends the claim for breach of the duty to indemnify fails as a matter of law because the settlement was paid by insurers (mainly Admiral) who issued policies directly to Portrait, rather than having been paid by Portrait Homes personally. South Carolina law does not support Penn National's argument. *See Otis Elevator, Inc. v. Hardin Construction Co.*, 316 S.C. 292, 300, 450 S.E.2d 41, 45-46 (1994) (“[I]f one party is entitled to indemnity from another, the right to indemnity is not defeated by the fact that the loss to be indemnified for was actually paid by an insurance company.”) (quoting *Tillman v. Wheaton-Haven Recreation Ass'n.*, 580 F.2d 1222, 1230 (4th Cir. 1978)).

¹⁷ At the same time and also over the following months, the plaintiffs settled with the other defendants—except JJA Framing—for the total additional amount of \$5,671,899.68. Those settlements were also approved by the court.

(Trial Transcript, p. 119, lines 5-19).

O'Neal testified the entire amount of the \$3,850,000 settlement was attributable to JJA Framing's work (Trial Transcript, p. 114, line 23 - p. 115, line 14). O'Neal believed the settlement was fair and reasonable (Trial Transcript, p. 120, lines 12-15).

The Court finds the settlement of \$3,850,000 on behalf of Portrait Homes was fair and reasonable under the circumstances and the entire amount of the settlement was attributable in whole or in part to JJA Framing's work. The settlement was for "property damage" caused by an "occurrence" as those terms are used in the Penn National policies. The next step is to determine how much of the settlement is covered by the Penn National policies, which requires the Court to consider the time on risk doctrine:

VIII. Time on Risk Doctrine

In *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (*Crossmann II*), the South Carolina Supreme Court adopted the time on risk doctrine for determining insurance coverage for progressive property damage cases like those involving damage to buildings over an extended period of time resulting from water intrusion. The doctrine is designed to reach an approximation of the damage that occurred during a particular policy period. The fundamental basis for the doctrine rests in the language of the liability policies at issue in *Crossmann II*, which required coverage only for property damage that occurred during the policy period. The *Crossmann II* Court abandoned the joint and several/all sums approach because that approach ignored "critical language limiting the insurer's obligation to pay to sums that are attributable to property damage that occurred during the policy period." *Id.* at 60, 717 S.E.2d at 599.

Crossmann II relied heavily on the analysis by the Supreme Judicial Court of

Massachusetts in *Boston Gas Co. v. Century Indemnity Co.*, 910 N.E.2d 290 (2009). The South Carolina Supreme Court stated the *Boston Gas* case “provides the reading of the relevant policy language that we believe is correct[.]” 395 S.C. at 61, 717 S.E.2d at 600. The *Boston Gas* Court noted the insuring agreement in the standard CGL policy obligated “the insurer to pay only those damages caused by property damage that ‘occurs during the policy period.’” *Crossmann II*, 395 S.C. at 62, 717 S.E.2d at 600 (quoting *Boston Gas*).

The textual analysis stressed in *Crossmann II* is consistent with South Carolina’s long-standing rule that an insurance policy is a contract whose meaning depends first and foremost on the language used. See, e.g., *Whitlock v. Stewart Title Guaranty Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2018). The time on risk doctrine adopted in *Crossmann II* depended on the language of the particular policies at issue in that case.

While the policies at issue were liability policies containing standard language in the insuring agreement, it is critical to note that all the policies preceded the new edition of the standard coverage form promulgated by the Insurance Services Office in October 2001.¹⁸ The insuring agreement in the October 2001 edition of the CG 00 01 commercial general liability coverage form included a brand new provision: “[P]roperty damage’ which occurs during the policy period ... includes any continuation, change or resumption of that ... ‘property damage’ after the end of the policy period.” Compare Plaintiff’s Exhibit 27, p. 31 (October 2001 edition of CG 00 01) with Plaintiff’s Exhibit 64, p. 1 (July 1998 edition). Penn National’s insurance expert Bernd Heinze testified the standard commercial general liability coverage form has been

¹⁸ The effective dates of the liability policies being construed in *Crossmann II* are listed in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 411 S.C. 506, 512, 769 S.E.2d 453, 456 (Ct. App. 2015) (*Crossmann III*).

periodically updated through the years and the edition in effect prior to the October 2001 edition was the July 1998 edition (Trial Transcript, p. 491, line 2 - p. 493, line 4).

The change in policy language means the time on risk analysis—which was grounded in the policy language—changes as well. *See Walde v. Association Insurance Co.*, 401 S.C. 431, 438 n.4, 737 S.E.2d 631, 634 n.4 (Ct. App. 2012) (“emphasiz[ing] that legal analysis addressing contractual provisions should focus on the language of the contract.”). Because Penn National’s policies use the October 2001 edition of the CG 00 01 commercial general liability coverage form, the time on risk analysis must be altered so that it is true to the language used in the insurance contracts at issue in the present case. Property damage which occurs during the period of a Penn National policy “includes any continuation, change or resumption of that ... ‘property damage’ after the end of the policy period.” Therefore, 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.

IX. Application of Time on Risk Doctrine

Sisroy estimated the damage to the buildings would have started two months after the certificate of occupancy (Trial Transcript, p. 527, lines 10-18). He testified that although the damage would progressively have gotten worse over time until repairs were made (Trial Transcript, p. 562, lines 11-17; p. 564, lines 3-13), 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 Transcript, p. 541, line 14 - p. 543, line 11).¹⁹

The application of the time on risk doctrine as modified based on the new language in the

¹⁹ Sisroy testified the scope of repair would not have been significantly different even going back to 2010 (Trial Transcript, p. 543, line 12 - p. 544, line 6).

Penn National policies becomes a math exercise. Charts of the townhome units sorted by building permit date (Defendant's Exhibit 40) and by certificate of occupancy date (Defendant's Exhibit 41) were introduced at trial. The detailed analysis of damage by townhome unit with a summary is attached. The portion of the overall damages—represented by the settlement of \$3,850,000—recoverable in each of the five policy years exceeds the limit of each policy (\$500,000). The total amount covered by the Penn National policies, therefore, is \$2,500,000 (5 policy years x \$500,000/year).

X. Prejudgment Interest

Portrait Homes is entitled to prejudgment interest on the damages awarded for breach of the duty to defend (\$42,791.24) and on the damages awarded for breach of the duty to indemnify (\$2,500,000.00). *See Brooklyn Bridge, Inc. v. South Carolina Insurance Co.*, 309 S.C. 141, 145; 420 S.E.2d 511, 513 (Ct. App. 1992) (“Here, the evidence shows the sum due under the policy was capable of being reduced to certainty. The trial judge therefore properly awarded prejudgment interest from the date of the denial of coverage.”). The Court will use the date the order approving the settlement was filed (March 7, 2016) as the start date. The per diem is \$609.58 ($\$2,542,791.24 \times 8.75\% \div 365$ days).

XI. Attorney's Fees

A successful insured in coverage litigation can recover its attorney's fees associated with the coverage litigation. *See Hegler v. Gulf Insurance Co.*, 270 S.C. 548, 550-51, 243 S.E.2d 443, 444 (1978) (insured entitled to recover attorney's fees from insurer who sued “to relieve itself of coverage”; the insurer's action “amounted to a wrongful breach of its contractual obligation to defend. The legal fees incurred by [the insured], in successfully asserting his rights against [the insurer's] attempt in the declaratory judgment action to avoid its obligation to

defend, were damages arising directly as a result of the breach of the contract.”); *Gordan-Gallup Realtors, Inc. v. Cincinnati Insurance Co.*, 274 S.C. 468, 471-72, 265 S.E.2d 38, 40 (1980) (applying *Hegler* to situation in which insured rather than insurer initiated coverage lawsuit). Having successfully proven Penn National breached the insurance contracts, Portrait Homes is entitled to recover its attorney’s fees and costs associated with prosecuting the claims against Penn National in this case. Within thirty days of the entry of this Order, Portrait Homes’s attorney is directed to submit an affidavit regarding the attorney’s fees and costs along with a proposed order addressing each of the six factors governing an award of reasonable attorney’s fees listed in *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989).

XII. Bad Faith

Having found that Penn National breached its duty to defend and indemnify Portrait as an additional insured, 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 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 had a good faith duty to perform a reasonable investigation into Portrait’s claim for coverage as an additional insured. “An insurer has a good faith duty to investigate a claim.” *Flynn v. Nationwide Mut. Ins. Co.*, 281 S.C. 391, 315 S.E.2d. 817, 820 (Ct. App. 1984). The performance of a good faith investigation was critical in this case because Penn National had in its possession the JJA underwriting file which was not available to Portrait. The underwriting file contained a significant amount of information previously discussed in this Order that was important in the analysis for the determination of coverage for Portrait under the policies. The information contained in the underwriting file conclusively showed that Portrait should have been treated as an additional insured under the JJA policies. This information also conflicted with the rationale that Penn National was relying on internally as its basis for denial of the Portrait claim. Although the underwriting file was available to Penn National for use in its investigation of the claim, no meaningful efforts were undertaken by Penn National to review or consider any of its contents. Penn National also had the opportunity to speak with its insured JJA prior to the denial of Portrait’s claim. On May 10, 2014, Penn National’s independent adjuster was face to face with Jose Castillo at his home and had the opportunity to investigate Portrait’s claim but did not. The adjuster made no inquiry to Mr. Castillo about any matter related to Portrait’s claim. Had the adjuster done so, the investigation would have reached the same conclusion as would have been reached had Penn National reviewed its underwriting file—JJA

Framing and JJA Construction, Inc. were the same business and a singular entity. Trial Tr. vol. 2, 357-358. I find that Penn National breached its good faith duty to perform a reasonable investigation of this claim.

In response to the Portrait tender letters of June 5, 2013 and May 23, 2014 to Penn National requesting coverage for defense and indemnity as an additional insured under the JJA policies, the response from Penn National was the denial of coverage letter from Greg Gross dated September 30, 2014, nearly seventeen (17) months after the initial tender. Gross' letter states the sole basis of the denial is that "... the sole avenue to additional insured status would be through an endorsement providing additional insured status for completed operations. The above policies do not contain such an endorsement." (Pl. Ex. 9). This statement is false, and the policies do contain endorsements providing additional insured status for completed operations.

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). Because there were endorsements that existed in the policies for providing additional insured status for completed operations, Penn National misrepresented the coverages to Portrait that applied to the claim. Penn National adjuster Greg Gross, Penn National Home Office in-house legal counsel, Adam Parsons, and Penn National's insurance expert, Bernd Heinze, all conceded in their testimony at trial that this sole reason for the denial was false. Trial Tr. vol. 1, 299; 434; Trial Tr. vol. 2, 172-173; 520. I find that Penn National knowingly misrepresented the coverages under the policies to Portrait, and the denial of Portrait's claim was unreasonable and

in bad faith. Furthermore, I find that Penn National's actions were willful and in reckless disregard of Portrait's rights. I further find by clear and convincing evidence that punitive damages are appropriate in this case. 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.

Portrait Homes is awarded \$3,892,791.20 (\$3,850,000.00 amount it paid in settlement plus \$42,791.24 attorney's fees) in damages for the breach of the duty of good faith and fair dealing/bad faith. A hearing will be conducted at a later time to determine the amount of punitive damages. *See* S.C. Code Ann. § 15-32-520.

XIII. Conclusion

Portrait Homes qualified as an additional insured under five of the Penn National policies. Penn National breached the duty to defend by not providing a defense, and Penn National breached the duty to indemnify by not paying the settlement reached on behalf of Portrait Homes in the underlying construction defect litigation. As damages proximately caused by the breach of the duty to defend, Portrait Homes is entitled to recover the attorney's fees and expenses personally paid towards the defense. As damages proximately caused by the breach of the duty to indemnify, Portrait Homes is entitled to recover for the settlement—constrained by a time on risk analysis and the limits of the applicable policies. Portrait Homes is entitled to prejudgment interest on both sets of damages. Portrait Homes is also entitled to attorney's fees and costs in prosecuting this coverage case. The Court also finds Penn National acted in bad faith and acted willfully and recklessly disregarded Portrait Homes's rights when it breached the duty to defend and the duty to indemnify Portrait Homes in the underlying construction defect action. Portrait Homes is entitled to recover bad faith and punitive damages. A hearing will be

conducted at a later time to determine the amount of punitive damages.

IT IS SO ORDERED.

Berkeley, South Carolina



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