

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young Sr., Circuit Court Judge

Case No. 2014-CP-08-02757

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SC Court of Appeals

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,

AND

The Persimmon Hill Homeowners Association, Inc.,Third-Party Plaintiff,

v.

Jose Castillo d/b/a JJA Framing and
JJA Construction, Inc. d/b/a/ JJA Framing,Third-Party Defendants,

Of which Pennsylvania National Mutual Casualty Insurance Company is the Appellant,

And

Portrait Homes - South Carolina, LLC, Portrait Homes - Persimmon Hill, LLC,
and The Persimmon Hill Homeowners Association, Inc. are the Respondents.

FINAL BRIEF OF RESPONDENTS
PORTRAIT HOMES - SOUTH CAROLINA, LLC AND
PORTRAIT HOMES - PERSIMMON HILL, LLC

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding Portrait Homes proved the prerequisites to coverage under the endorsement providing additional insured coverage based on the existence of a written contract between Portrait Homes and a Named Insured?
2. Did the trial court err in considering extrinsic evidence to determine the identity of the entities covered as additional insureds and the location of the work covered where the information manually entered into the endorsement identifying the address of the entities to be covered and the location of the work to be covered contained latent ambiguities?
3. Did the trial court rule Portrait Homes was entitled to coverage under the Penn National Policies based on the doctrine of waiver?
4. If an insurer breaches the insurance contract by refusing to pay a settlement, and the settlement is paid by another insurer on behalf of the insured, can the insured pursue the claim for breach of the duty to indemnify where the recovery will flow to the insurer who paid the settlement and the limits of that insurer's policy will be replenished for the benefit of the insured?
5. Where an insurance policy covers liability for property damage "only if ... the 'property damage' occurs during the policy period," and further states that "'property damage' which occurs during the policy period ... includes any continuation, change or resumption of that ... 'property damage' after the end of the policy period," does the policy cover liability for property damage occurring after the end of the policy period if the property damage occurring after the end of the policy period is a continuation of the property damage which was occurring during the policy period?

6. Is an insured who successfully sues an insurer in contract for breach of the duty to defend and breach of the duty to indemnify entitled under the common law to recover reasonable attorney's fees?

STATEMENT OF THE CASE

In 2012, the Persimmon Hill HOA and a class of unit owners filed separate lawsuits against Portrait Homes - South Carolina, LLC and Portrait Homes - Persimmon Hill, LLC (collectively, "Portrait Homes") seeking to recover for construction defects at the Persimmon Hill project.¹ In 2014, Portrait Homes filed this coverage litigation against Penn National and other insurers for other subcontractors. The complaint sought declaratory relief relating only to the duty to defend. The complaint sought declarations that Portrait Homes qualified as additional insured under the insurers' liability policies issued to certain subcontractors; Portrait Homes as an additional insured was entitled to a defense in the underlying litigation; and Portrait Homes was owed for the defense costs up to the date the insurers began providing Portrait Homes with a defense in the underlying litigation.

The claims against all the other insurers except Penn National were eventually resolved.

After the claims against Portrait Homes in the underlying litigation were settled in 2016 for \$3,850,000, 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 sole cause of action asserted by Portrait Homes on its own behalf was for breach of contract.²

¹ *The Persimmon Hill HOA v. Portrait Homes - South Carolina, LLC et al.*, Case No. 2012-CP-08-03065; *Cheryl L. Waker, on behalf of herself and other initially situated v. Portrait Homes - South Carolina, LLC et al.*, 2012-CP-08-03066.

² A claim for bad faith against Penn National relating to the additional insured coverage was also asserted at trial, but not by Portrait Homes. In an effort to try to protect itself and foster settlement of the claims in the underlying litigation, Portrait Homes had assigned the bad faith claim to the Persimmon Hill HOA, whose attorneys presented (successfully) the bad faith claim relating to the

The coverage case eventually made its way to trial in February 2019. The issues were tried non-jury before the Honorable Roger M. Young Sr. Following four days of testimony, the trial was recessed. The trial resumed in May and lasted another three days.

In October 2019, the trial court issued its *Order Regarding Additional Insured Coverage*. With regard to Portrait Homes's contract claims for breach of the duty to defend and breach of the duty to indemnify, the trial court found Portrait Homes qualified as an additional insured under five of the Penn National policies and Penn National had breached the duty to defend and the duty to indemnify. For breach of the duty to defend, the trial court awarded damages of \$42,791.24. For breach of the duty to indemnify, the trial court awarded damages—following application of a modified time on risk analysis—of \$2,500,000 (5 policies × \$500,000 limits per policy). The trial court awarded prejudgment interest relating to both awards.

The trial court also ruled Portrait Homes was entitled to the attorney's fees and costs associated with the coverage litigation. The trial court instructed Portrait Homes's attorney to submit an affidavit regarding the attorney's fees and costs and to address the relevant factors governing such an award. After submission of the affidavit and a hearing, the trial court awarded attorney's fees and costs to Portrait Homes relating to the successful breach of contract claims in the amount of \$250,003.26. *Post-Trial Motions and Punitive Damages Order*, pp. 37-40 (RI pp. 144-147).

After the *Order Regarding Additional Insured Coverage* was issued, Penn National moved to alter or amend the judgment. With the exception of an issue relating to the interplay between the award to Portrait Homes for breach of contract relating to the duty to indemnify and the award to Persimmon Hill HOA as a judgment creditor, the trial court denied Penn National's Motion.

additional insured coverage. The Persimmon Hill HOA will be addressing the additional insured bad faith claim in its appellate brief.

Post-Trial Motions and Punitive Damages Order, p. 1 (RI p. 108). Penn National filed this appeal.

STANDARD OF REVIEW

“The determination of coverage under an insurance policy is an action at law.” *Auto-Owners Insurance Co. v. McGraw*, 377 S.C. 512, 515, 660 S.E.2d 271, 272 (Ct. App. 2008). “In an action at law tried without a jury, an appellate court’s scope of review extends merely to the correction of errors of law.” *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). “In an action at law, tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without any evidence which reasonably supports the findings.” *Republic National Bank v. DLP Industries, Inc.*, 314 S.C. 108, 110, 441 S.E.2d 827, 829 (1994). “In a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for the trial judge.” *Golini v. Bolton*, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct. App. 1997).

STATEMENT OF FACTS³

1. Portrait Homes, JJA Framing, and the Persimmon Hill Project

Portrait Homes oversaw development and construction of a townhome community in Berkeley County known as Persimmon Hill. The project was a large development, ultimately consisting of 388 townhome units in 74 buildings. (RI p. 371, lines 10-23 / Trial Transcript I, p. 455, lines 10-23.) JJA Framing was the primary framing subcontractor and framed the vast majority of the units at Persimmon Hill. JJA Framing was the subcontractor responsible for installing the wooden framing members, the windows and doors, the flashing around the windows and doors, and the secondary weather barrier. (RI p. 373, lines 1-16 / Trial Transcript I, p. 458, lines 1-16; RI p. 460, lines 20-23 / Trial Transcript II, p. 358 lines 20-23.)

³ This recitation of the facts borrows liberally and often verbatim from the trial court’s discussion of the facts. *See Order Regarding Additional Insured Coverage*, pp. 2-11 (RI pp. 52-61).

Construction began at Persimmon Hill in 2002 and was completed in 2006. (RI p. 371, line 24 - p. 372, line 9 / Trial Transcript I, p. 455, line 24 - p. 456, line 9), and JJA Framing became involved early on and worked through completion of the project. (RIV pp. 1579-1598 / Defendant Penn National's Exhibits 40 and 41.)

JJA Framing was owned and operated as a sole proprietorship by Jose Castillo. JJA Framing had begun working as a subcontractor for the Portrait Homes organization in North Carolina. After JJA Framing began doing more and more work for Portrait Homes on multiple projects in the Charleston area, JJA Framing moved to the Charleston area. (RI p. 384, line 12 - p. 385, line 16 / Trial Transcript I, p. 476, line 12 - p. 477, line 16.)

In December 2004—while JJA Framing was working at Persimmon Hill—articles of incorporation for JJA Construction Inc. were filed with the North Carolina Secretary of State's Office. (RIV pp. 1599-1600 / Defendant Penn National'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. (RI p. 459, lines 5 - p. 460 line 11 / Trial Transcript II, p. 357, lines 5 - p. 358. line 11.) They “had the same location, same employees, same trucks, same telephone number and same federal ID number[.]” (RI p. 460, lines 4-6 / Trial Transcript II, p. 358, line 4-6). The trial court found as a matter of fact that “[t]he evidence convincingly shows that JJA Construction Inc. was not a separate legal entity [from JJA Framing.]” *Post-Trial Motions and Punitive Damages Order*, p. 4 (RI p. 111).

2. Portrait Homes's Risk Management Program and the Contracts Between Portrait Homes and JJA Framing

Portrait Homes relied exclusively on subcontractors to construct the dwelling units; Portrait Homes performed none of that work using its employees. (RI p. 367, lines 11-19 / Trial Transcript I, 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. (RI p. 367, line 20 - p. 368, line 20 / Trial Transcript I, p. 451, line 20 - p. 452, line 12.)⁴

Portrait Homes sought to accomplish both prongs through two types of contracts it entered with subcontractors. First, a contract called a Master Agreement was executed. A Master Agreement applied to all work performed by a subcontractor on any project. Second, a contract called a Housing and Purchase Order Contract was executed. A Housing and Purchase Order Contract applied only to the specific project identified in the document.

Shawn Belcher, the Purchasing and Estimating Manager for the Charleston Division of Portrait Homes from January 2004 through June 2009, 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 (RI p. 365, line 1 - p. 367, line 3 / Trial Transcript I, p. 449, line 1 - p. 451, line 3), and the hold harmless and insurance obligations in the Housing and

⁴ 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).

Purchase Order Contract and in the Master Agreement were intended to be complementary. (RI p. 377, lines 8-21 / Trial Transcript I, p. 463, lines 8-21.)

Belcher identified a Master Agreement between Portrait Homes and Jose Castillo d/b/a JJA Framing. (RI p. 375, lines 1-8 / Trial Transcript I, p. 460, lines 1-8.) The Master Agreement required JJA Framing to “carry general liability insurance and ... provide Portrait with a Certificate of Insurance naming Portrait as an additional insured hereunder. The coverage available to Portrait as an additional insured shall ... provid[e] coverage for completed operations[.]” (RIII p. 1142, ¶ 8.3 / Plaintiff’s Exhibit 37, p. 2, ¶ 8.3.)

Belcher also identified the Housing and Purchase Order Contract between Portrait Homes and JJA Framing applicable to the Persimmon Hill project. (RI p. 376, line 2 - p. 377, line 1 / Trial Transcript I, p. 462, line 2 - p. 463, line 1.) The Housing and Purchase Order Contract contained sections addressing the minimum insurance limits and required JJA Framing to provide “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 [Portrait Homes] as additional insured.” (RIII p. 1153, ¶ 7B / Plaintiff’s Exhibit 38, p. 4, ¶ 7B.) The contract stated: “All insurance and coverages shall be in form and substance ... satisfactory to [Portrait Homes.]” (*Id.* ¶ C.)

In 2005, Portrait Homes received a certificate of insurance prepared by the W. Lee Taylor Agency⁵ relating to the 2005-06 Penn National Policy. Below INSURED, the following is typed:

JJA Construction, Inc.
Jose A Castillo

⁵ All the policies were placed with Penn National through the W. Lee Taylor Agency located in Charleston.

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, entitled Automatic Additional Insured -- Owners, Contractors, and Subcontractors (Completed Operations), is attached to the certificate of insurance. (RII pp. 609-610 / Plaintiff's Exhibit 5.)

3. The Penn National Policies⁶

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 | |

4. The Underlying Lawsuits

⁶ RII pp. 629, 679, 764, 821, 894 and RIII pp. 949, 1011, 1071 / Plaintiff's Exhibits 13A, 14, 17, 21, 27, 29, 33, and 34.

In 2012, the Persimmon Hill HOA and a class of unit owners filed separate lawsuits seeking to recover for construction defects at Persimmon Hill. (RI p. 484 - RII p. 515 / Plaintiff's Exhibits 1 and 2.) 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.” (RII pp. 550-51 / Plaintiff's Exhibit 3, pp. 36-37; RII p. 600 / Plaintiff's Exhibit 4, p. 41.)

Hood Law Firm was hired by Admiral Insurance Company—who issued liability policies to Portrait Homes—to defend Portrait Homes in the two cases. (RI p. 265, lines 2-4 / Trial Transcript I, p. 76, lines 2-4; RI p. 288, line 2 - p. 290, line 11 / Trial Transcript, I p. 140, line 1 - p. 142, line 11.)

5. Portrait Homes's Tender and Penn National's Response

In reviewing the documents relating to the Persimmon Hill project, the attorneys at Hood Law Firm found the certificate of insurance referencing the 05-06 policy issued by Penn National. In June 2013, Hood Law Firm Attorney Tyson Nettles tendered the claims against Portrait Homes to Penn National for defense and indemnity as an additional insured. (RII p. 611 / Plaintiff's

Exhibit 6.)

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 involving JJA Framing. (RI p. 299, line 2 - p. 301, line 23 / Trial Transcript I, p. 206, line 2 - p. 208, line 23.)

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. (RII p. 614 / Plaintiff's Exhibit 7.) Based on this second certificate of insurance, Nettles sent another tender letter to Penn National in May 2014. (RII p. 616 / 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.

(RII p. 619 / Plaintiff’s Exhibit 9, p. 2) (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. 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 | Record on Appeal |
|-----------------------------|---|---|---|
| "doesn't jibe"; "not right" | Adjuster Greg Gross | p. 299, lines 9-10; p. 434, lines 23-24 | p. 304, lines 9-10 p. 358, lines 23-24 |
| “inaccurate” | Home Office Counsel Adam Parsons | Trial Transcript II, p. 172, line 11 - p. 173, line 8 | p. 453, line 11 - p. 454, line 8 |
| "opposite of what was true" | Penn National Expert Bernd Heinze | Trial Transcript II, p. 520, lines 8-22 | p. 476, lines 8 - 22 |

6. Settlement in Underlying Cases

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 primarily by Hood Law Firm. John Blanton O’Neal, IV, an attorney currently with twenty years of experience practicing mainly in the fields of construction law and insurance coverage work, was the lead attorney responsible for the representation. 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.” (RII p. 272, lines 2-10 / Trial Transcript I, 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.” (RI p. 273, line 19 - p. 274, line 14 / Trial Transcript I, p. 107, line 19 - p. 108, line 14.)

The plaintiffs’ repair estimate 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. (RI p. 274, line 15 - p. 275, line 17 / Trial Transcript I, p. 108, line 15 - p. 109, line 17; RI p. 285, line 5-19 / Trial Transcript I, p. 119, lines 5-19.)

The claims brought against Portrait Homes in the underlying construction defect cases were settled for \$3,850,000. The settlement was paid by insurers (mainly Admiral Insurance Company) who issued policies directly to Portrait Homes, rather than having been paid by Portrait Homes personally. The settlement was approved by the circuit court. (RI p. 275, line 24 - p. 276, line 17 / Trial Transcript I, p. 109, line 24 - p. 110, line 17; RI p. 294, line 23 - p. 295, line 8 / Trial Transcript I, p. 183, line 23 - p. 184, line 8.)

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.” (RI p. 279, lines 7-19 / Trial Transcript I, 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. (RI p. 282,

line 10 - p. 284, line 7 / Trial Transcript I, p. 116, line 10 - p. 118, line 7.) 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.

(RI p. 285, lines 5-19 / Trial Transcript I, p. 119, lines 5-19.)

O'Neal testified the entire amount of the \$3,850,000 settlement was attributable to JJA Framing's work. (RI p. 280, line 23 - p. 281, line 14 / Trial Transcript I, p. 114, line 23 - p. 115, line 14.) O'Neal believed the settlement was fair and reasonable. (RI p. 286, lines 12-15 / Trial Transcript I, p. 120, lines 12-15.)

The trial court found 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. *Order Regarding Additional Insured Coverage*, p. 48 (RI p. 98).

ARGUMENTS

1. The Trial Court Did Not Err in Finding Portrait Homes Proved the Prerequisites to Coverage Under the Endorsement Providing Additional Insured Coverage Based on the Existence of a Written Contract Between Portrait Homes and a Named Insured

Three of the Penn National policies (05-06, 06-07, 07-08) contain Endorsement 71 11 45,

entitled Automatic Additional Insureds -- Owners, Contractors and Subcontractors (Completed Operations), which provides additional insured coverage to:

Any person(s) or organizations(s) (referred to below as additional insured) with whom you⁷ 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”.

(RII p. 948 / Plaintiff’s Exhibit 28; RII p. 1009 / Plaintiff’s Exhibit 30) (footnote added). The determination regarding whether Portrait Homes satisfied the initial requirements for additional insured coverage under Endorsement 71 11 45 focuses on whether Portrait Homes had a written contract with the Named Insured shown in the Penn National Policy Declarations *or* with “any other person or organization qualifying as a Named Insured under th[e] policy.” Because all agree Portrait Homes had a written contract relating to the Persimmon Hill project with Jose Castillo d/b/a JJA Framing, the critical issues became (1) whether Jose Castillo d/b/a JJA Framing “qualified as a Named Insured under the policy”, or (2) whether JJA Construction Inc.—a Named Insured under the three policies containing Endorsement 71 11 45—was bound by the written contracts between Portrait Homes and Jose Castillo d/b/a JJA Framing. An affirmative answer to *either* question meant the first part of Endorsement 71 11 45 was satisfied. The trial court determined the evidence supported an affirmative answer to *both* questions.

A. Jose Castillo d/b/a JJA Framing Qualified as a Named Insured Under the 05-06, 06-07, and 07-08 Policies Because Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. d/b/a/ JJA Framing Were the Same Business

⁷ The policies define “you” as “the Named Insured shown in the Declarations, *and any other person or organization qualifying as a Named Insured under this policy.*” *E.g.*, Form CG 00 01 10 01, page 1 of 16 (RII p. 860 / Plaintiff’s Exhibit 21, p. 40) (emphasis added).

The first three Penn National policies (02-03, 03-04, 04-05) were issued to Jose Castillo d/b/a JJA Framing Company; the next three (05-06, 06-07, 07-08) were issued to JJA Construction Inc. The trial court found “[t]he 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.” *Order Regarding Additional Insured Coverage*, p. 20 (RI p. 70). The trial court discussed at length the evidence supporting its conclusion,⁸ and Portrait Homes incorporates the trial court’s discussion of some of the pieces of evidence here:

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) [RII p. 817].

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) [RII p. 820].

⁸ *Order Regarding Additional Insured Coverage*, pp. 15-27 (RI pp. 65-77).

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) [RII pp. 822-23]. Endorsement 71 11 45 first appears on the 12/05/05-06 policy (Plaintiff’s Exhibit 21, p. 29) [RII p. 849].

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) [RII p. 889]. 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.⁹ Under Comments, the following has been entered: “Insured is not incorporated - files taxes on a Schedule C” (Plaintiff’s Exhibit 25) [RII p. 891].

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) [RII p. 892].

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) [RII p. 894]. The 2006-07 policy also contains Endorsement 71 11 45 (Plaintiff’s Exhibit 27, p. 20) [RII p. 913].

The policy was renewed effective 12/05/07-08. The named

⁹ Castillo testified he remembered speaking with Penn National about premium audits. (RI p. 463, lines 9-13 / Trial Transcript II, p. 366, lines 9-13.)

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) [RII p. 949]. The 2007-08 policy also contains Endorsement 71 11 45 (Plaintiff’s Exhibit 29, p. 23) [RII p. 971].

Order Regarding Additional Insured Coverage, pp. 16-18 (RI pp. 66-68) (footnote added).

In essence, Jose Castillo d/b/a JJA Framing continued to qualify as a named insured under the policies issued to JJA Construction Inc. for this fundamental reason: Jose Castillo d/b/a JJA Framing and JJA Construction Inc. d/b/a JJA Framing were the same business. Jose Castillo so testified at trial:

Q. [Y]ou had a framing business; is that correct?

A. Yes.

Q. And you’ve been a framer for more than 25 years?

A. Yes.

Q. And in the early years, let’s call it, you did business as Jose Castillo doing business as JJA Framing, correct?

A. Yes.

Q. And then in late 2014 [2004], a company was formed¹⁰ named JJA Construction, Inc., and it was doing business as JJA Framing, correct?

A. Yes.

Q. And that was about December of 2004?

A. Yes.

Q. And did you view these two business entities as being separate

¹⁰ Articles of incorporation for JJA Construction Inc. were filed with the North Carolina Secretary of State in December 2004. (RIV p. 1599 / Defendant Penn National’s Exhibit 62.) When shown the document at trial, Castillo testified he had never seen the document before and did not remember why the business had been incorporated. (RI p. 470, line 12 - p. 471, line 18 / Trial Transcript II, p. 379, line 12 - p. 380, line 18.)

entities or did you view them as a singular business, JJA Framing?

A. The same job.

Q. The same business?

A. The same business.

Q. If it's okay with you, I will just refer to JJA Framing forward throughout our discussion today and if you feel at any point in time we need to separate it out into Jose Castillo, d/b/a JJA Framing and JJA Construction, Inc. d/b/a JJA Framing, please let me know, okay?

A. Yes.

Q. And so the sole proprietorship had the same location, same employees, same trucks, same telephone number and same federal ID number as this JJA Construction, Inc. d/b/a/ JJA Framing, correct?

A. Yes.

Q. So that, in part, is part of why it's always viewed as a singular entity, correct?

A. Yes.

(RI p. 459, line 2 - p. 460, line 11 / Trial Transcript II, p. 357, line 2 - p. 358, line 11) (footnote added).

The trial court found legal guidance in *Auto-Owners Insurance Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013).¹¹ 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

¹¹ This discussion is incorporated verbatim from the *Order Regarding Additional Insured Coverage*, pp. 19-20 (RI pp. 69-70).

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.¹² 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. [lessee]” 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 29 *Am. Jur. Insurance* § 240 (1940)); *Auto-Owners Insurance Co. v. Madison at Park West POA, 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.”).

Jose Castillo testified he would have told Penn National his sole proprietorship JJA Framing and JJA Construction Inc. were “one in the same” if they had asked him, but no one asked him. (RI p. 467, lines 3-16 / Trial Transcript II, p. 370, lines 3-16.) Penn National’s independent

¹² 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.

adjuster Gayle McLeod testified that when she met with Jose Castillo he answered every question she asked him and she would have asked Castillo whatever Penn National instructed her to ask. (RI p. 440, lines 13-16 / Trial Transcript II, p. 118, lines 13-16; RI p. 435, line 23 - p. 437, line 7 / Trial Transcript II, p. 99, line 23 - p. 101, line 7.) But Penn National did not instruct her to ask him about the relationship between Jose Castillo d/b/a JJA Framing and JJA Construction Inc. d/b/a JJA Framing. Penn National did not ask the question because Penn National did not want to know the answer.

B. The Contracts Between Portrait Homes and Jose Castillo d/b/a JJA Framing Also Bound JJA Construction Inc. d/b/a/ JJA Framing

The trial court found that even if Jose Castillo d/b/a JJA Framing was not considered to be included as a named insured under the policies issued to JJA Construction Inc., the terms of Endorsement 71 11 45 were still satisfied because JJA Construction Inc.—a named insured—was bound by the contracts between Jose Castillo d/b/a JJA Framing and Portrait Homes. *Order Regarding Additional Insured Coverage*, p. 25 (RI p. 75); *Post-Trial Motions and Punitive Damages Order*, p. 3 (RI p. 110).

The trial court noted the underlying lawsuits alleged that both Jose Castillo and JJA Construction Inc. were doing business as JJA Framing. *Order Regarding Additional Insured Coverage*, p. 22 (RI p. 72) (citing Plaintiff's Exhibit 3, p. 3 [RII p. 517], Plaintiff's Exhibit 4, p. 3 [RII p. 562]). The trial court noted the established rule in South Carolina that “[f]or purposes of determining whether a duty to defend was owed to Portrait Homes, Penn National was required to take those allegations as true.” *Order Regarding Additional Insured Coverage*, pp. 22-23 (RI pp. 72-73) (citing *Manufacturers and Merchants Mutual Insurance Co. v. Harvey*, 330 S.C. 152, 157, 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)). The trial court cited to a number

of exhibits showing that Penn National adjuster Gregg Gross recognized the underlying lawsuits alleged both Jose Castillo and JJA Construction Inc. were doing business as JJA Framing, and that Gross had provided that information to Penn National home office counsel Adam Parsons. *Order Regarding Additional Insured Coverage*, pp. 23-24 (RI pp. 73-74) (citing HOA’s Exhibit 4 [RIII p. 1209], Plaintiff’s Exhibit 54 [RIII p. 1174], Defendant Penn National’s Exhibit 78 [RIV p. 1601], and Plaintiff’s Exhibit 9 [RII p. 618]).

In addition to Jose Castillo’s testimony that JJA Construction Inc. did business as JJA Framing, (RI p. 459, lines 11-14 / Trial Transcript II, p. 357, lines 11-14,) documents introduced at trial connected JJA Construction Inc. to work performed at the Persimmon Hill project. (RIII pp. 1161, 1164, and 1165 / Plaintiff’s Exhibits 43, 44, and 45; RI p. 379, line 5 - p. 384, line 11 / Trial Transcript I, p. 471, line 5 - p. 476, line 11.)

Jose Castillo signed both the Master Agreement (RIII p. 1141 / Plaintiff’s Exhibit 37) and the Housing and Purchase Order Contract (RIII p. 1151 / Plaintiff’s Exhibit 38). Handwritten above Castillo’s signature in the Master Agreement in the section identifying the party to the contract is “Jose Castillo d/b/a JJA Framing” (RIII p. 1144 / Plaintiff’s Exhibit 37, p. 4), and handwritten above Castillo’s signature in the Housing and Purchase Order Contract in the section identifying the party is “JJA Framing” (RIII p. 1155 / Plaintiff’s Exhibit 38, p. 6). With respect to the Master Agreement, Penn National argues “[t]hat styling indicates that the contract binds Castillo and not the trade name [JJA Framing] more generally. Thus, even if JJA Construction Inc. did business under the trade name ‘JJA Framing,’ the documents failed to establish a written contract between the named insured on the policies at issue with Portrait Homes.” Brief of Appellant, p. 54.

Penn National’s argument that a contract designating the party as “Jose Castillo d/b/a JJA

Framing” somehow does not bind the business operated as JJA Framing is supported by neither common sense nor South Carolina common law. *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*, 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 bound JJA Framing, and because JJA Construction Inc. did business as JJA Framing, the contracts also bound JJA Construction Inc. Because JJA Construction Inc. was a named insured under the three Penn National policies containing Endorsement 71 11 45, the requirement under the endorsement that there be a written contract with a named insured was satisfied for this reason as well.

C. The Applicable Contracts Required Completed Operations Coverage

Penn National next argues that even if Portrait Homes had a written contract with the named insured under the three policies containing Endorsement 71 11 45, the terms of the endorsement still were not satisfied because the contract did not require the additional insured to be covered for completed operations. Brief of Appellant, pp. 56-59. This argument rests on the premise that the Master Agreement—which explicitly required the additional insured to be covered for completed operations—was not applicable to JJA Framing’s work at Persimmon Hill. Penn National conceded the Housing and Purchase Order Contract governed JJA Framing’s work at

Persimmon Hill, but the Housing and Purchase Order Contract did not explicitly require the additional insured coverage to include completed operations. Without a contract that explicitly required the additional insured to be covered for completed operations, Penn National argues, the final element of Endorsement 71 11 45 would not be satisfied.

Penn National's argument that the Master Agreement did not apply to JJA Framing's work at Persimmon Hill was rejected by the trial court on two independent, factual grounds:

- (i). The Master Agreement and the Housing and Purchase Order Contract *both* governed JJA Framing's work at Persimmon Hill.
- (ii). Even if the particular Master Agreement introduced at trial was not applicable to JJA Framing's work at Persimmon Hill, there would have existed an earlier Master Agreement with the same requirement of completed operations coverage for the additional insured that would have been in place prior to the execution of the Housing and Purchase Order Contract.

Both findings are supported by the evidence.

- (i). The Master Agreement and the Housing and Purchase Order Contract Both Governed JJA Framing's Work at Persimmon Hill

Penn National argues the Master Agreement did not apply to JJA Framing's work at Persimmon Hill because the Master Agreement was executed after the Housing and Purchase Order Contract, and the language of the Master Agreement indicates "the Master Agreement only applies prospectively and does not impact pre-existing Housing and Purchase Order Contracts, such as the one governing the work at Persimmon Hill." Brief of Appellant, pp. 56-57. Penn National ends up reaching the wrong answer because it begins by asking the wrong question. The issue is not whether the Master Agreement applies to the Housing and Purchase Order Contract; the issue is whether the Master Agreement applies to JJA Framing's work at Persimmon Hill.

While the Master Agreement does state its terms are incorporated into future purchase order contracts and its terms prevail over inconsistent terms in those future purchase order

contracts, the Master Agreement also states its terms take effect immediately—“[t]his Agreement shall be in full force and effect from the date of signing”¹³—and apply to *all* work being performed by JJA Framing regardless of the location:

It is the intent of the parties that these terms and conditions apply to *any* provision of services and/or materials by Contractor regardless of whether these terms and conditions are referenced in *any* purchase order, subsequent contract memo, etc. during the term of this Agreement. In the event that the terms and conditions of this Agreement conflict with the terms and conditions of *any* purchase order contract or other agreement entered into by and between Portrait and the Contractor, the terms of this Agreement shall prevail and be controlling.

(RIII p. 1141 / Plaintiff’s Exhibit 37, p. 1, ¶ 3) (emphasis added). The terms of the Master Agreement, including the term requiring that the additional insured coverage for Portrait Homes cover completed operations, applied to JJA Framing’s work at Persimmon Hill. Both the Master Agreement and the Housing and Purchase Order Contract governed JJA Framing’s work at Persimmon Hill. 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

¹³ The Master Agreement states it was “entered into this 25th day of October, 2002” (RIII p. 1141 / Plaintiff’s Exhibit 37, p. 1, first sentence), and that “this Agreement shall be in full force and effect from the date of signing.” (*Id.* at p. 1, ¶ 4.) Castillo signed the Master Agreement on November 5, 2002. (RIII p. 1144 / Plaintiff’s Exhibit 37, p. 4.) Whether the Master Agreement took effect in late October or early November of 2002 is immaterial to the issues on appeal.

immaterial.”).

Penn National points out that “[t]he Master Agreement does not mention the Persimmon Hill project at all.” Brief of Appellant, p. 56. The point is correct, but immaterial. The Master Agreement does not mention any particular project. This is so because the Master Agreement was not intended to apply only to a particular project like Persimmon Hill. Rather, the Master Agreement was intended to apply to *all* projects on which JJA Framing was working. Because Persimmon Hill was one of the projects on which JJA Framing was working at the time the Master Agreement was signed, the Master Agreement applied to JJA Framing’s work at Persimmon Hill.

JJA Framing’s work at Persimmon Hill spanned 2002-2006. (RII p. 391, lines 16-21 / Trial Transcript I, p. 511, lines 16-21; RIV p. 1579 and 1589 / Defendant Penn National’s Exhibits 40 and 41.) Because our focus is on additional insured coverage for *completed* operations as opposed to *ongoing* operations, the focus is on the dates JJA Framing *completed* its work and not on the dates JJA Framing started its work at Persimmon Hill. While JJA Framing may have started working prior to the date the Master Agreement was signed, JJA Framing had completed no work by that date.¹⁴ The Master Agreement’s requirement that JJA Framing provide additional insured coverage to Portrait Homes for completed operations applied to JJA Framing’s work at Persimmon Hill, all of which was completed after the Master Agreement was signed.

Furthermore, even if Penn National were to be correct in its argument that the Master Agreement applied only to JJA Framing’s work on a project for which a Housing and Purchase Order Contract was executed after the date the Master Agreement was executed, Penn National’s argument is unavailing because the Housing and Purchase Order Contract was amended after the

¹⁴ The earliest certificate of occupancy for the units worked on by JJA Framing is December 18, 2003, which is over a year after the Master Agreement was signed. (RIV p. 1589 / Defendant Penn National’s Exhibit 41.)

date the Master Agreement was executed. The Housing and Purchase Order Contract is dated March 6, 2002. The contract was amended on August 15, 2003, when the scope of work (RIII p. 1158 / Plaintiff's Exhibit 41) and standard billing sheet (RIII p. 1160 / Plaintiff's Exhibit 42) were changed. (RIII p. 1155 / Plaintiff's Exhibit 38, p. 6.)¹⁵

While Penn National's lawyers in their appellate brief (page 59) seek to downplay the significance of the amendments to the Housing and Purchase Order Contract *after* the Master Agreement was initially signed, Penn National adjuster Gregg Gross did not. In an email to Home Office Counsel Adam Parsons on August 26, 2014, Gross wrote:

First, the applicable contract for the site between Portrait Homes and the insured was executed on 8-15-03 [the date the Housing and Purchase Order Contract was first amended]. The applicable subcontractor is listed as "JJA Framing". Section 7.B. of the contract states (highlighted in yellow in IR on page 4 of the contract) that the insured shall add Portrait as an Additional Insured on the insured's policy.

It is the opinion of the CSO [Gross] that Portrait would qualify as an "Additional Insured" under our endorsement 71 1145 01/05 for the policy years of 12-5-05 to 12-5-08 only.

(RIV p. 1605 / Defendant Penn National's Exhibit 78, p. 5.) The amendment of the Housing and Purchase Order Contract after the execution of the Master Agreement leaves no doubt both the Master Agreement and the Housing and Purchase Order Contract governed JJA Framing's work at Persimmon Hill.

(ii). A Master Agreement Signed Before the Housing and Purchase Order Contract Would Have Existed as Well

Even if the Master Agreement (RIII p. 1141 / Plaintiff's Exhibit 37) is determined not to have applied to the Persimmon Hill project because the Master Agreement was signed after the

¹⁵ The Housing and Purchase Order Contract was amended again in February 2004. (RIII p. 1155 / Plaintiff's Exhibit 38, p. 6.)

Housing and Purchase Order Contract (RIII p. 1151 / Plaintiff's Exhibit 38) was initially signed, the trial court also found as a matter of fact that there would have been another Master Agreement requiring completed operations coverage in place between Portrait Homes and JJA Framing before the Housing and Purchase Order Contract was initially signed. *Post-Trial Motions and Punitive Damages Order*, pp. 6-8 (RI pp. 113-15).

Shawn Belcher, the Purchasing and Estimating Manager for the Charleston Division of Portrait Homes from January 2004¹⁶ through June 2009, testified about the two types of contracts Portrait Homes entered with subcontractors: A Master Agreement, which was a gateway document that qualified a subcontractor to work for Portrait Homes on any project; and a Housing and Purchase Order Contract, which was specific to a particular project. 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 insurance requirements did not change. Specifically, Belcher testified:

Q. Did a sub have to have both a master agreement and a housing purchase order contract specific to a project in place in order to work on the project?

A. Yes, sir.

Q. Would they get paid if they didn't have those two documents in place?

A. No, sir.

Q. Okay. Did those documents ever change in form over time?

A. There were small changes along the way, but nothing of --

¹⁶ Belcher testified that when he began working with Portrait Homes, his predecessor in his position provided training and reviewed the status of the active projects with him. (RI p. 364, lines 17-25 / Trial Transcript I, p. 448, lines 17-25.) Belcher testified the contracts with JJA Framing applicable to Persimmon Hill were already in place when he came on board in January of 2004 and he assumed responsibility for managing the contracts for the remainder of the project. (RI p. 373, line 17 - p. 374, line 1 / Trial Transcript I, p. 458, line 17 - p. 459, line 1).

nothing substantial.

Q. Okay. And did those contracts -- and we'll look at them for this particular project. They contained defense and indemnification obligations?

A. Yes, sir.

Q. That ran both to the subcontractor and to the subcontractor's insurance company? That was the goal?

A. Yes, sir.

(RI p. 366, line 8 - p. 367, line 3 / Trial Transcript I, p. 450, line 8 - p. 451, line 3). Belcher's testimony¹⁷ and the payments¹⁸ to JJA Framing support the trial court's factual finding that before the Housing and Purchase Order Contract for Persimmon Hill was entered into, there would have been an earlier Master Agreement in place between Portrait Homes and JJA Framing containing the same requirement of additional insured coverage for completed operations. *See* Rule 406, SCRE ("Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.").

Thus, even if the particular Master Agreement introduced at trial did not apply to JJA Framing's work at Persimmon Hill, there would have been a prior Master Agreement containing the same requirement of additional insured coverage for completed operations.

¹⁷ Blanton O'Neal, who served as Portrait Homes's Rule 30(b)(6) designee for deposition purposes and as Portrait Homes's corporate representative at trial, testified similarly about Portrait Homes's two contract system. (RI p. 266, line 11 - p. 268, line 15 / Trial Transcript I, p. 85, line 11 - p. 87, line 15; RI p. 287, lines 9-16 / Trial Transcript I, p. 139, lines 9-16.)

¹⁸ Belcher testified JJA Framing was paid for its work at Persimmon Hill. (RI p. 392, line 6 - p. 393, line 2 / Trial Transcript I, p. 513, line 6 - p. 514, line 2).

D. The Certificate of Insurance Relating to the 05-06 Policy Is Relevant to the Issue of Whether the Additional Insured Coverage Included Completed Operations

Penn National asserts the trial court erred in “finding that the certificate of insurance issued for the 2005-06 Policy affords Portrait Homes additional insured status[.]” Brief of Appellant, p. 55. The trial court did note the certificate of insurance provided additional support for the finding that the contracts governing JJA Framing’s work at Persimmon Hill required the additional insured coverage to include completed operations. *Order Regarding Additional Insured Coverage*, pp. 25-27 (RI pp. 75-77); *Post-Trial Motions and Punitive Damages Order*, pp. 8-9 (RI pp. 115-16). However, contrary to Penn National’s assertion, the trial court did not base its finding that Portrait Homes qualified for additional insured coverage under Endorsement 71 11 45 on the certificate of insurance. While acknowledging the preprinted disclaimer language on the certificate, the trial court nevertheless concluded “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.” *Order Regarding Additional Insured Coverage*, p. 27 (RI p. 77). The certificate of insurance was relevant because both the Master Agreement and the Housing and Purchase Order Contract required JJA Framing to provide Portrait Homes a certificate of insurance evidencing the contractually-required additional insured coverage. (RIII p. 1142 / Plaintiff’s Exhibit 37, p. 2, ¶ 8.3; RIII p. 1153 / Plaintiff’s Exhibit 38, p. 4, ¶ 7B.) The trial court found the evidence relevant, not decisive. *See* Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

2. The Trial Court Did Not Err in Considering Extrinsic Evidence to Determine the Identity of the Entities Covered as Additional Insureds and the Location of the Work Covered Where the Information Manually Entered Into the Endorsement Identifying the

Address of the Entities To Be Covered and the Location of the Work
To Be Covered Contained Latent Ambiguities

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. This endorsement is entitled Additional Insured - Owners, Lessees or Contractors - Completed Operations. 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 names are filled in:

PASQUINELLI CONSTRUCTION CO
PASQUINELLI MANAGEMENT LLC &
PORTRAIT HOMES CONSTRUCTION COMPANY

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

3000 COLVARD PKWY
CHARLOTTE MECKLENBURG NC 28269

(RII pp. 696-98 / Plaintiff’s Exhibit 14, pp. 18-20: 2003-04 policy; RII p. 767 / Plaintiff’s Exhibit 17, p. 4: 2004-05 policy.) Both categories contain latent ambiguities.¹⁹

¹⁹ An ambiguity is latent where “the uncertainty arises, not upon the words of the ... instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe.” *In re Estate of Fabian*, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997) (quoting *Jennings v. Talbert*, 77 S.C. 454, 456, 58 S.E. 420, 421 (1907)). The alternative is a patent ambiguity, where the uncertainty arises immediately upon reading the words themselves

A. The Address Manually Entered Below Location to Be Covered
Contains a Scrivener's Error Creating a Latent Ambiguity

In an email to adjuster Greg Gross contained in the coverage claims file, home office counsel Adam Parsons provided his rationale for why he concluded 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.

(RIV p. 1602 / Defendant Penn National's Exhibit 78, p. 2.) While Gross—not Parsons—conveyed Penn National's final decision on coverage to Portrait Homes, Parsons—not Gross—made the final decision. (RI p. 303, lines 7-16 / Trial Transcript I, p. 298, lines 7-16; RI p. 305, line 17 - p. 307, line 4 / Trial Transcript I, p. 301, line 17 - p. 303, line 4; RI p. 457, lines 1-16 / Trial Transcript II, p. 352, lines 1-16.)

The problem with Parsons's rationale is that it is based on a factual mistake. The trial court found the address listed under Location And Description of Completed Operations in Endorsement CG 20 37 was an obvious scrivener's error. *Order Regarding Additional Insured Coverage*, p. 28 (RI p. 78). 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. (RII p. 625 / Plaintiff's Exhibit 13, p. 1: 2002-03 policy; RII p. 680 / Plaintiff's Exhibit 14, p. 2: 2003-04 policy; RII p. 765 / Plaintiff's

and before any attempt is made to apply them to the object which they describe. *In re Estate of Fabian*, 326 S.C. at 353, 58 S.E.2d at 421. The significance of the distinction appears to be fading, with both types of ambiguities now calling for interpretation by the fact finder. *Harbin v. Williams*, 429 S.C. 1, 8, 837 S.E.2d 491, 495 (Ct. App. 2019).

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. (RII p. 621 / Plaintiff’s Exhibit 12, p. 1.) The trial court concluded that to find the parties intended to limit Portrait Homes’s status as an additional insured to liability arising out of JJA Framing’s work at JJA Framing’s own office would be nonsensical. *Order Regarding Additional Insured Coverage*, p. 29 (RI p. 79).

Relying in part on the certificate of insurance issued by the Taylor Agency²⁰ relating to the Endorsement CG 20 37 in the 2004-05 policy in which the information typed below Location And Description of Completed Operations is: “Work done for the above referenced organization” (RII p. 615 / Plaintiff’s Exhibit 7), the trial court found the additional insured coverage was intended to cover work performed by JJA Framing at all Portrait Homes locations. *Order Regarding Additional Insured Coverage*, p. 30 (RI p. 80).

After finding the parties intended the additional insured coverage to apply to all projects where JJA Framing performed work on Portrait Homes’s behalf, the trial court implied 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. *Order Regarding Additional Insured Coverage*, p. 30 (RI p. 80) (citing *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.”)).

To interpret Endorsement CG 20 37 as limiting coverage to liability arising out of JJA Framing’s work at JJA Framing’s own office would render the additional insured coverage

²⁰ The trial court found as a matter of fact that in issuing the certificate of insurance, the Taylor Agency was acting as an agent for JJA Framing and Penn National. *Order Regarding Additional Insured Coverage*, p. 27 (RI p. 77).

virtually meaningless. Such an interpretation should 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.’”); *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.”).

B. The Address Manually Entered Below the Entities to Be Covered
Contains a Latent Ambiguity

At trial, Penn National’s lawyers distanced themselves from the *actual* reason (the address discrepancy) supporting the denial of additional insured coverage to Portrait Homes under Endorsement CG 20 37.²¹ 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.

The entities named in the underlying lawsuits who tendered the additional insured claims to Penn National were:

Portrait Homes - South Carolina, LLC

Portrait Homes - Persimmon Hill, LLC

²¹ On appeal, Penn National makes no mention of the actual reason for denying coverage under Endorsement CG 20 37.

Pasquinelli Homebuilding, LLC²²

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

Pasquinelli Construction Co
Pasquinelli Management LLC &
Portrait Homes Construction Company

The endorsement includes as an additional insured “the person *or organization* shown in the Schedule.” Consideration of who was meant to be covered in the *organization* shown in the Schedule thus was central to the inquiry.

A close analysis of Endorsement CG 20 37 included with the 03-04 policy reveals another latent ambiguity. To understand why, we need to first note that there are three versions—not one—of CG 20 37 attached to the 03-04 policy. In each, the block in the Schedule where the Name of Person or Organization is typed in lists the same three Pasquinelli/Portrait Homes entities. However, each block contains additional information—an address, and the address is different in each version of the endorsement. Those different addresses muddied the waters as to who was intended to be included as additional insureds. To see why, we need some background information on how those three versions of Endorsement CG 20 37 became a part of the 03-04 policy.

When the 03-04 policy was issued, the policy did not contain any CG 20 37 endorsements relating to Portrait Homes. During the term of the 03-04 policy, three separate requests were submitted at the same time by the Taylor Agency to Penn National’s underwriting department to “add a General Liability Additional Insured Form, CG 20 37 10/01 in favor of the following: Pasquinelli Construction Co., Pasquinelli Management, LLC and Portrait Homes Construction Company.” (RII pp. 751-53 / Plaintiff’s Exhibit 15). Each request contained those same three names, but each request listed a different address below the names:

²² Pasquinelli Homebuilding, LLC was in bankruptcy so the additional insured claim as to it was dropped.

4411-101 West Market Street
Greensboro, NC 27407

9205-120 Monroe Road
Charlotte, NC 28270

7410 Northside Drive, Suite 107
Charleston, SC 29420

The underwriting file shows three versions of CG 20 37 1001 were then added to the policy. The names and addresses listed in the Schedule in each version of Endorsement CG 20 37 1001 track the language of the request forms. Penn National charged a separate premium of \$250 for each endorsement for a total additional premium of \$750. (RII p. 754 / Plaintiff's Exhibit 16).

Those three versions of CG 20 37 1001 then became a part of the 03-04 policy. (RII pp. 689-99 / Plaintiff's Exhibit 14, pp. 11-21).

What to make of listing the same entities with three different addresses? The parent Pasquinelli/Portrait Homes entities were based in Chicago, (RI p. 386, line 22 / Trial Transcript I, p. 482, line 22,) and there was no evidence JJA Framing worked in the Chicago area. Before working in South Carolina, JJA Framing had worked for Portrait Homes in North Carolina. (RI p. 385, lines 7-10 / Trial Transcript I, p. 477, lines 7-10.) Each of the jobs in both states would have been under the umbrella of a state-specific entity, and each job would have had a project-specific contract as well.

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). (RI p. 369, lines 7-22 / Trial

Transcript I, p. 453, lines 7-22: Belcher; RI p. 263, line 9 - p. 264, line 25 / Trial Transcript I, 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. (RI p. 369, line 3 - p. 370, line 6 / Trial Transcript I, 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: 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” (RIII pp. 1141-42 / Plaintiff’s Exhibit 37, pp. 1-2.) 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 addresses listed with the names in the schedule in Endorsement CG 20 37 shows the intent to encompass all the entities in the organization, including 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.

The address of 7410 Northside Drive, Suite 107, Charleston, SC 29420 was the address for the Charleston Division of Portrait Homes. (RI p. 362, line 20 - p. 363, line 4 / Trial Transcript I, p. 445, line 20 - p. 446, line 4.) Shawn Belcher was headquartered in that office, and he managed all the Charleston area developments from there—not just Persimmon Hill, but a number of others

as well. (RI p. 384, line 20 - p. 385, line 16 / Trial Transcript I, p. 476, 20 - p. 477, line 16.)

The entities listed on the CG 20 37 endorsements were not located at the Charleston, South Carolina address (or, inferentially, at the two North Carolina addresses). The state-specific entity (Portrait Homes - South Carolina, LLC) and the Charleston area project-specific entities (like Portrait Homes - Persimmon Hill, LLC) would have been. As the inclusion of the three different addresses suggests, those entities (the state-specific and project-specific entities) were intended to be included as additional insureds through Endorsement CG 20 37.²³

C. The Trial Court Did Not Err in Construing the Latent Ambiguities in Endorsement CG 20 37 to Find Additional Insured Coverage for Portrait Homes

Once a written contract is determined to be ambiguous, “evidence may be admitted to show the intent of the parties, and the determination of the parties’ intent becomes a question of fact for the fact-finder.” *Williams v. Government Employees Insurance Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014). Parol evidence is admissible to determine the parties’ intent, and

in attempting to ascertain this intention, [the fact-finder] will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into. *Bruce v. Blalock*, 241 S.C. 155, 127 S.E.2d 439 (1962). The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language.

Klutts Resort Realty, Inc. v. Down’Round Development Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). Furthermore, when the contract at issue is an insurance policy, if the language is

²³ The 04-05 policy contained only one version of Endorsement CG 20 37, and it referenced the Greensboro address. (RII p. 767 / Plaintiff’s Exhibit 17, p. 4.) No evidence was presented at trial that the additional insured coverage for Portrait Homes was intended to be dropped for work in South Carolina in 2004-05, a period in which JJA Framing was working for Portrait Homes in South Carolina on multiple projects (including Persimmon Hill).

ambiguous or capable of two reasonable interpretations, the construction most favorable to the insured must be adopted. *Poston v. National Fidelity Life Insurance Co.*, 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990); *Beaufort County School District v. United National Insurance Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (“[A]n insurance contract which is ‘in any respect ambiguous or capable of two meanings must be construed in favor of the insured.’”) (quoting *Reynolds v. Wabash Life Insurance Co.*, 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968)).

The latent ambiguities in Endorsement CG 20 37 authorized the consideration of extrinsic evidence to determine the parties’ intention. The trial court found the parties intended Portrait Homes - South Carolina, LLC and Portrait Homes - Persimmon Hill, LLC to be included within the organization to be covered, and the coverage was intended to cover all projects where JJA Framing performed work on Portrait Homes’s behalf. The trial court’s findings are supported by the evidence and are consistent with South Carolina law.

3. The Trial Court Did Not Rule Portrait Homes Was Entitled to Coverage Under the Penn National Policies Based on the Doctrine of Waiver

The trial court concluded Penn National “waived the ability to assert any exclusions or limitations on coverage.” *Order Regarding Additional Insured Coverage*, p. 38 (RI p. 88). The ruling was based on two grounds: One legal and based on principles discussed in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 336-344, 803 S.E.2d 288, 296-301 (2017) (insurer’s reservation of rights letters, which merely provided insured with policy provisions through a cut-and-paste approach, coupled with a generic statement that insurer reserved all its rights, held insufficient to effectively reserve the right to assert various policy exclusions); the other factual and based on the testimony of Penn National’s witnesses in this particular case. For the reasons provided by the trial court, *Order Regarding Additional Insured*

Coverage, pp. 34-38 (RI pp. 84-88); *Post-Trial Motions and Punitive Damages Order*, pp. 10-13 (RI pp. 117-20), the ruling was correct.

After the entry of the initial order, Penn National asked the trial court to reconsider. Penn National asserted the same contention then that it asserts now, accusing the trial court of impermissibly using the doctrine of waiver to grant coverage that would not otherwise have existed. The trial court responded:

Penn National misconstrues the Court's discussion of waiver. The Court did not rule Portrait Homes was entitled to coverage under the Penn National policies based on the doctrine of waiver. The Order notes:

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. 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)).

Order Regarding Additional Insured Coverage, pp. 37-38 [RI pp. 87-88]. Portrait Homes was required to prove it met the requirements to trigger coverage under the additional insured endorsements and the insuring agreements, and the Court found Portrait Homes met its burden of proof to do so. The Court did not rule coverage was created by waiver.

Post-Trial Motions and Punitive Damages Order, pp. 12-13 (RI pp. 118-19). Penn National continues to mischaracterize the scope of the trial court's ruling on waiver.

Regardless, because Penn National makes clear it is not asserting any exclusions or limitations as applying to the claim for additional insured coverage,²⁴ the issue appears to be moot.

²⁴ Brief of Appellant, p. 60 n.12.

4. If an Insurer Breaches the Insurance Contract by Refusing to Pay a Settlement, and the Settlement Is Paid by Another Insurer on Behalf of the Insured, the Insured Can Pursue the Claim for Breach of the Duty to Indemnify Where the Recovery Will Flow to the Insurer Who Paid the Settlement and the Limits of That Insurer's Policies Will Be Replenished for the Benefit of the Insured

Even if Portrait Homes was an additional insured under the Penn National policies, and even if Penn National breached the duty to indemnify by failing to pay the settlement on behalf of Portrait Homes, and even if the settlement of \$3,850,000 was actually paid, Penn National nevertheless contends Portrait Homes should not be allowed to recover the damages for breach of the duty to indemnify because Portrait Homes did not personally pay the settlement funds. Penn National's contention is incorrect as a matter of law and as a matter of equity.

Penn National's contention runs head long into the Supreme Court's decision in *Otis Elevator, Inc. v. Hardin Construction Co. Group, Inc.*, 316 S.C. 292, 450 S.E.2d 41 (1994). Otis Elevator sought contractual indemnification from Hardin Construction for a settlement paid to a third party. Otis Elevator had been installing elevators as a subcontractor to Hardin Construction on a project. Otis Elevator permitted Hardin Construction to use one of the elevators on a temporary basis, but required that Hardin Construction execute an indemnification agreement. An employee of another subcontractor was injured when he fell down the elevator shaft after accessing the elevator using a key provided by Hardin Construction. *Id.* at 294-95, 450 S.E.2d at 42-43.

The injured workman sued Otis Elevator. Hardin Construction refused Otis Elevator's request for a defense and indemnity. Otis Elevator eventually settled the case for \$892,000. Otis Elevator's insurer, Liberty Mutual Insurance Company, contributed \$642,000 to the settlement. Otis Elevator sued Hardin Construction for indemnification. *Id.* at 295, 450 S.E.2d at 43.

In Otis Elevator's action against Hardin Construction for indemnification, the jury returned a verdict against Hardin Construction for \$892,000. The trial court reduced the jury's verdict from

\$892,000 to \$250,000 to offset the amount paid by Otis Elevator's insurer. *Id.* at 295, 450 S.E.2d at 43.

One issue on appeal was the propriety of the offset by the trial court based on the portion of the underlying settlement that had been paid by Otis Elevator's insurer. The Supreme Court reversed the offset: "Otis Elevator contends the trial court erred in reducing the jury's verdict to \$250,000 to offset the amount that Otis Elevator's insurer, Liberty Mutual, paid in [settlement]. We agree." *Id.* at 300, 450 S.E.2d at 45. The Supreme Court announced the general rule: "[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." *Id.* at 300, 450 S.E.2d at 45-46 (quoting *Tillman v. Wheaton - Haven Recreation Ass'n*, 580 F.2d 1222, 1230 (4th Cir. 1978)).

Penn National argues the opposite: If one party (Portrait Homes) is entitled to indemnity from another (Penn National), the right to indemnity *is* defeated by the fact that the loss being indemnified for was actually paid by an insurance company (Admiral). The trial court was not persuaded by Penn National's argument.²⁵

Penn National attempts to distinguish *Otis Elevator*, relying principally on two federal district court decisions: *Pennsylvania National Mutual Casualty Ins. Co. v. Portrait Homes-South Carolina, LLC*, Civ. No. 3:18-CV-00561-KDB-DCK, 2019 WL 4491535 (W.D.N.C. Sept. 18, 2019); *Summer Wood POA, Inc. v. Pennsylvania National Mutual Casualty Ins. Co.*, Civ. No. 2:17-CV-3504-BHH, 2019 WL 4415805 (D.S.C. Sept. 16, 2019). Brief of Appellant, pp. 64-65.

Decisions from federal district courts are not binding on a state court. Neither should this

²⁵ In addressing *Otis Elevator* above, Portrait Homes again borrows liberally from the trial court's discussion. See *Post-Trial Motions and Punitive Damages Order*, pp. 15-16 (RI pp. 122-23).

Court find those two decisions persuasive. Although the decision from the federal district court sitting in North Carolina discussed *Otis Elevator*, the district court applied North Carolina law. 2019 WL 4491535, at 7. As to the decision by the federal district court sitting in South Carolina, the trial court in this case observed:

The Court notes the *Summer Wood* insurance coverage case began over two years *after* this case. It took over four years to get this coverage case involving Persimmon Hill to trial, but once that point was reached, the parties aggressively and exhaustively tried the merits of the dispute. Over the course of seven days of trial, twelve witnesses testified, each subjected to rigorous cross examination, and approximately ninety exhibits were introduced. In contrast, in the *Summer Wood* case, Judge Hendricks ruled on a summary judgment motion. The Court has considered Judge Hendricks's Opinion and Order [cited above], but declines to follow the reasoning in that decision.

Post-Trial Motions and Punitive Damages Order, p. 16 (RI p. 123).²⁶

In arguing an insured who does not personally pay a settlement or judgment sustains no recoverable damages for breach of the duty to indemnify, Penn National also cites *Sloan Construction Co. v. Central National Insurance Co.*, 269 S.C. 183, 236 S.E.2d 818 (1977) and *Hartford Accident and Indemnity Co. v. South Carolina Insurance Co.*, 252 S.C. 428, 166 S.E.2d 762 (1969). Brief of Appellant, p. 65. As noted by the trial court, those two cases involved parties seeking to recover against an insurer for defense costs, not for indemnity. *Post-Trial Motions and Punitive Damages Order*, pp. 14-15 (RI pp. 121-22).

Penn National ignores Portrait Homes's personal stake in the outcome of this case. Penn National ignores how Portrait Homes was hurt by having the limits of the liability policies issued directly to it diminished by the settlement payment, and Penn National ignores how Portrait Homes

²⁶ The ruling in the *Summer Wood* case is interlocutory and the case remains pending in the district court.

will benefit by having those limits replenished by the recovery for breach of the duty to indemnify.²⁷

In the end, Penn National appears to rest its argument on considerations of fairness: Allowing Portrait Homes to recover for a settlement it did not pay would amount to “an unjust windfall and double recovery.” Brief of Appellant, p. 65. Portrait Homes agrees notions of substantial justice and fair play should be taken into account in this case (and in every case). The ultimate destination for the funds sought to be recovered by Portrait Homes in this case for breach of the duty to indemnify was not hidden from the trial court. The trial court noted:

Portrait Homes acknowledged at trial that any recovery for breach of the duty to indemnify would indeed flow back to Admiral Insurance Company, but Portrait Homes also benefits from the recovery because the funds would replenish the Admiral Insurance Policies protecting Portrait Homes against other claims. (Trial Transcript, p. 188, l. 20 - p. 189, l. 16.)

Post-Trial Motions and Punitive Damages Order, p. 13 (RI p. 120).

It would in no way be unfair or unjust for the financial responsibility for the damages flowing from JJA Framing’s defective work to come to rest on Penn National’s shoulders. After all, Penn National agreed to accept that very risk in exchange for money. Portrait Homes and JJA Framing had already agreed that Portrait Homes should be protected for that risk by JJA Framing and by JJA Framing’s insurer. It is Penn National who seeks an unjust windfall.

5. Where an Insurance Policy Covers Liability for Property Damage “Only If ... the ‘Property Damage’ Occurs During the Policy Period,” and Further States That “‘Property Damage’ Which Occurs During the Policy Period ... Includes Any Continuation, Change or Resumption of That ... ‘Property Damage’ After the End of the Policy Period,” the Policy Covers Liability for Property Damage Occurring After the End of the Policy Period If the Property Damage Occurring After the End of the Policy Period Is a Continuation of the Property Damage Which Was Occurring

²⁷ Testimony at trial indicated there is another pending case against Portrait Homes. (RI p. 298, lines 3-21 / Trial Transcript I, p. 189, lines 3-21.)

During the Policy Period

The policy language—“property damage”²⁸ which occurs during the policy period ... includes any continuation, change or resumption of that ... ‘property damage’ after the end of the policy period”—is unambiguous. In accordance with established South Carolina law, the trial court simply interpreted the language according to its plain meaning. *See, e.g., Whitlock v. Stewart Title Guaranty Co.*, 399 S.C. 610, 614-15, 732 S.E.2d 626, 628 (2012).

Penn National initially attacks the trial court’s interpretation as being inconsistent with the time on risk approach adopted 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 Supreme Court in *Crossman II* abandoned the joint and several/all sums approach for determining insurance coverage for progressive property damage cases because that approach ignored “critical [policy] 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.

The trial court found the time on risk analysis to be applied in the present case had to be modified to account for new language contained in the Penn National policies. The trial court noted the commercial general liability policies being interpreted in *Crossmann II* all preceded the new edition of the standard coverage form promulgated by the Insurance Services Office in

²⁸ All the policies contain the following definition of “property damage”:

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

See, e.g., RII p. 731 / Plaintiff’s Exhibit 14, p. 53 (CG 00 01 10 01, page 15 of 16, ¶ 17) (remainder of definition omitted).

October 2001.²⁹ The insuring agreement in the October 2001 (10 01) 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* October 2001 Edition of CG 00 01 (RII p. 924 / Plaintiff’s Exhibit 27, p. 31) *with* July 1998 Edition (RIII p. 1196 / Plaintiff’s Exhibit 64, p. 1). The trial court correctly concluded “[t]he change in policy language means the time on risk analysis—which was grounded in the policy language—changes as well.” *Order Regarding Additional Insured Coverage*, p. 50 (RI p. 100). Because Penn National’s policies use the newer October 2001 edition of the CG 00 01 commercial general liability coverage form, the time on risk analysis must be modified to be true to the language used in the insurance contracts at issue in the present case. The trial court’s conclusion is a straight forward application of the new policy language.

A. Penn National’s Single Policy Theory Is Unsound

In the face of the unambiguous policy language, Penn National attempts to salvage the situation by arguing the time on risk analysis should be modified in such a way as to trigger only the policy in effect when the progressive damage begins. Penn National asserts that its policies “*specifically state* that any property damage that *first* occurs during its effective period ‘includes’ all ‘continuation’ of that property damage.” Brief of Appellant, p. 74 (emphasis added). Penn National continues: “Therefore, where, as here, continuous property damage is at issue, the added policy language would trigger only the policy on the risk at the time that physical injury occurred, not later-in-time policies.” Brief of Appellant, p. 75. Contrary to Penn National’s assertion, the

²⁹ The trial court noted “[t]he 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*).” *Order Regarding Additional Insured Coverage*, p. 49 n.18.

Penn National policies make no reference to property damage “that *first* occurs during its effective period.” Thus, the primary fallacy in Penn National’s argument founded on the added policy language concerning “property damage that *first* occurs during its effective period” is that the added language does not exist.

Another fallacy in Penn National’s single policy argument is that the argument is premised on progressive property damage relating to a single thing with a single beginning point. But the property damage in the instant case involved multiple townhouse units in multiple buildings with damages beginning at various times over a period of several years. Even if Penn National were correct that the property damage should be limited to the policy in effect when the property damage began, multiple policies would still be implicated.

B. The Trial Court Adequately Explained Its Modified Time on Risk Calculations

Penn National further complains that other than attaching an exhibit listing each townhouse unit on which JJA worked and the amount of damages recoverable under a particular policy for each such unit, the trial court did not explain the method for its allocation. Brief of Appellant, p. 72. The trial court’s calculations in Exhibit A applying the modified time on risk analysis to the facts of the present case are best understood on a granular level. For any particular unit on which JJA worked, the property damage occurring after the policy period for a particular policy along with the portion of the property damage occurring during the policy period of the initial policy implicated are recoverable under the policy in which the property damage began. The modified time on risk calculation takes the damage for a particular unit over the entire period of the progressive damage ($\$3,850,000$ settlement \div by 336 JJA units = $\$11,458.33$ per unit), and allows recovery for the entire amount of the damage for that particular unit under the policy in effect when the damage began. However, if the property damage for a particular unit began during a

policy that is exhausted, then the portion of the property damage actually occurring during the earlier exhausted policy would not be recoverable under any policy, but the portion of the continuing property damage occurring during (and after) a later policy that is not exhausted is recoverable under the later policy.

Examples from Exhibit A illustrate the mechanics of how the modified time on risk analysis applies in the present case:

i. 172 Darcy

This unit is the first unit shown on the second page of Exhibit A. The certificate of occupancy was issued on December 18, 2003. The property damage began 60 days later on February 16, 2004, which was during the policy effective 12/05/03-04. The majority of the property damage associated with 172 Darcy would have occurred after the end of the 03-04 policy, but the property damage occurring after the end of the 03-04 policy is covered by the 03-04 policy because the property damage was a continuation of the property damage which was occurring during the 03-04 policy period. Thus, all the property damage associated with 172 Darcy is recoverable under the 03-04 policy.

ii. 184 Darcy

This unit is shown near the bottom of the sixth page of Exhibit A. The certificate of occupancy was issued on August 15, 2006. The property damage would have begun 60 days later on October 14, 2006, which was during the Penn National policy effective 12/05/05-06. However, the property damage relating to 184 Darcy that occurred during the 05-06 policy and 06-07 policy is not recoverable under the 05-06 policy or 06-07 policy because coverage under those policies was exhausted by damages allocated to other units, so the portion of the damage to 184 Darcy that occurred during the 05-06 policy and the 06-07 policy is not recoverable. The portion of the

continuing damage (\$9,332.83) that occurred during and after the 07-08 policy is recoverable under the 07-08 policy.

iii. Summary

The same analysis applies to each unit under each implicated policy until all the damages are either paid or the policy is exhausted. Because each of the five implicated policies becomes exhausted, Portrait Homes is able to recover under its breach of contract claim only \$2,500,000 (\$500,000 per policy limit × 5 policies) of the \$3,850,000 in damages.

6. An Insured Who Successfully Sues an Insurer in Contract for Breach of the Duty to Defend and Breach of the Duty to Indemnify Is Entitled Under the Common Law to Recover Reasonable Attorney's Fees

Penn National challenges³⁰ the award of attorney's fees to Portrait Homes by attempting to distinguish *Hegler v. Gulf Insurance Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978). In *Hegler*, the Supreme Court considered "whether an insured is entitled to recover attorney's fees incurred by him in the successful defense of a declaratory judgment action brought by the insurer in an effort to relieve itself of coverage under an automobile liability insurance policy." *Id.* at 548, 243 S.E.2d at 443. The *Hegler* court opened its analysis by stating the general rule that attorney's fees are not recoverable unless authorized by contract or statute, and noting that no statutory basis for recovery of attorney's fees had been asserted. *Id.* at 549, 243 S.E.2d at 444. The court decided "[t]he legal fees incurred by [the insured], in successfully asserting his rights against [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." *Id.* at 550-51, 243 S.E.2d at 444. The court noted the unfairness of a contrary rule: "If the insurer can force [the insured] into a declaratory judgment

³⁰ Penn National does not appear to challenge the reasonableness of the attorney's fees awarded to Portrait Homes.

proceeding and, even though it loses in such action, compel him to bear the expense of such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above.” *Id.* at 551, 243 S.E.2d at 444-45 (*quoting* 7A Appleman, *Insurance Law and Practice*, § 4691, p. 512 (1962)).

The trial court found Penn National had breached the duty to defend Portrait Homes in the underlying construction defect litigation and Portrait Homes³¹ sustained damages as a result. The trial court also found Penn National had breached the duty to indemnify and Portrait Homes had sustained damages as a result. *Order Regarding Additional Insured Coverage*, pp. 42-51 (RI pp. 92-101). In such circumstances, the common law³² of South Carolina as articulated in *Hegler* authorizes the recovery of reasonable attorney’s fees by Portrait Homes, who was forced to prosecute this action to enforce its rights under the policies with Penn National. *See Gordon-Gallup Realtors, Inc. v. Cincinnati Insurance Co.*, 274 S.C. 468, 472, 265 S.E.2d 38, 40 (1980) (allowing a successful insured who was the plaintiff rather than the defendant to recover reasonable attorney’s fees, noting that “[the insured] was forced to prosecute this action to enforce its rights under the policy with [the insurer] just as the insured in *Hegler* was forced to defend an action to enforce his rights under the policy with his insurer”).

³¹ Admiral Insurance Company, who issued policies directly to Portrait Homes, hired Hood Law Firm to defend Portrait Homes in the underlying construction defect litigation and paid Hood Law Firm \$352,000 to do so. Portrait Homes did not seek to recover the defense costs paid by Admiral, and the trial court did not award to Portrait Homes any of the defense costs paid by Admiral. *Order Regarding Additional Insured Coverage*, pp. 42-43 (RI pp. 92-93).

³² Because the trial court found Penn National acted in bad faith as to Portrait Homes, the award of attorney’s fees is also supported by South Carolina Code Ann. § 38-59-40 (Rev. 2015) (Authorizing recovery of reasonable attorney’s fees not to exceed one-third of the judgment to an insured based on “a finding on suit of the contract made by the trial judge that the refusal was without reasonable cause or in bad faith . . .”). *See* Rules 208(b)(2) and 220(c), SCACR (allowing appellate court to affirm on any ground appearing in the record).

CONCLUSION

For the reasons stated, this Court should affirm the trial court's decision.

Respectfully Submitted,

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December 9, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young Sr., Circuit Court Judge

Case No. 2014-CP-08-02757

RECEIVED

Dec 09 2020

SC Court of Appeals

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,

AND

The Persimmon Hill Homeowners Association, Inc.,Third-Party Plaintiff,

v.

Jose Castillo d/b/a JJA Framing and
JJA Construction, Inc. d/b/a/ JJA Framing,Third-Party Defendants,

Of which Pennsylvania National Mutual Casualty Insurance Company is the Appellant,

And

Portrait Homes - South Carolina, LLC, Portrait Homes - Persimmon Hill, LLC,
and The Persimmon Hill Homeowners Association, Inc. are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 9, 2020

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