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SC Court of Appeals

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

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.

Appellate Case No. 2020-000735

**RECORD ON APPEAL
VOLUME V OF V**

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STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

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.)

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.)

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

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

THIS MATTER is before the Court following a bench trial held on February 4-7, 2019 and May 7-9, 2019. Having considered the testimony of the witnesses, both in court and by way of deposition, the exhibits, and arguments of counsel, the Court issues the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the South Carolina Rules of Civil Procedure. To the extent that the any findings of fact constitute conclusions of law, or vice-versa, they shall be so regarded.

Introduction and Procedural History

This insurance coverage action was originally initiated by Plaintiffs Portrait Homes-South Carolina, LLC and Portrait Homes-Persimmon Hill, LLC (collectively, "Portrait Homes"), claiming additional insured status under insurance policies issued by Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National") to Third-Party Defendants Jose Castillo d/b/a JJA Framing or JJA Construction, Inc. for claims asserted against Portrait Homes in two underlying construction defect lawsuits (together, the "Persimmon Hill Litigation") in relation to a townhome project known as Persimmon Hill in Berkeley County, South Carolina. The underlying lawsuits are respectively captioned "*The Persimmon Hill Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC, et seq.*", Case No. 2012-CP-08-03065 (the "Persimmon Hill HOA Lawsuit"), and "*Cheryl L. Waker, on behalf of herself and others similarly situated v. Portrait Homes-South Carolina, LLC, et seq.*", Case No. 2012-CP-08-03066 (the "Persimmon Hill Class Action Lawsuit"), filed in the Court of Common Pleas, Berkeley County, South Carolina. The Persimmon Hill Homeowners Association (the "HOA") asserts cross-claims against Penn National in this action, seeking collection on a default judgment entered against its insureds, Jose Castillo and JJA Construction, Inc., entered in the Persimmon Hill Litigation. The HOA also asserts bad faith claims against Penn National under the policies that it claims were assigned to it by Jose Castillo. Neither Jose Castillo nor JJA Construction, Inc. has ever entered an appearance in this matter or otherwise answered the pleadings despite being served with the HOA's summons and third-party complaint on or about 13 December 2016 by Michael W. Sloop. On the first day of trial, the parties waived their right to a jury and instead proceeded with a bench trial with the undersigned as the presiding judge.

FINDINGS OF FACT

A. Relevant Insurance Policies Issued by Pennsylvania National Mutual Casualty Insurance Company

1. Penn National issued policy number GL9 0601617 to named insured Jose Castillo DBA JJA Framing Company effective from December 5, 2002 through December 5, 2003 (the "2002-03 Policy"). [Plaintiffs' Exhibit No. 13A]. The 2002-03 Policy does not extend additional insured status for completed operations automatically; rather, the policy extends such coverage only where specifically included by endorsement CG 20 37 1001. [*Id.* at p. 8]. The 2002-03 Policy contains no endorsement extending such coverage to Portrait Homes. [Trial Transcript, Vol. 2, at 49:15-21]. The 2002-03 Policy provides only one such extension of coverage, and it is executed in favor of two entities: Centex Homes 2728 Holding Co and Centex Real Estate Corp. [Plaintiffs' Exhibit No. 13A, at p. 8]. Thus, neither Portrait Homes entity is an additional insured under the 2002-03 Policy.

2. Penn National issued policy number GL9 0601617 effective December 5, 2003 through December 5, 2004 (the "2003-04 Policy"). [Plaintiffs' Exhibit No. 14]. The 2003-04 Policy was issued to named insured Jose Castillo DBA JJA Framing Company. [*Id.* at p. 2]. The 2003-04 Policy also does not extend additional insured status for completed operations automatically; rather, the policy extends such coverage only where specifically included by endorsement. The "Additional Insured – Owners, Lessees or Contractors – Completed Operations" endorsement – form CG 20 37 1001 – provides that the policy's "Who Is An Insured" section is amended to include as an insured "the person or organization shown in the [endorsement's] Schedule [of specifically-named entities], but only with respect to liability arising out of '[the named insured's] work' at the location designated and described in the schedule of this

endorsement performed for [the additional insured] and included in the ‘products-completed operations hazard.’” [*Id.* at pp. 18-20]. The 2003-04 Policy defines the “products-completed operations hazard” as including “all ‘bodily injury’ or ‘property damage’ occurring away from premises [the named insured] own[s] and arising out of...[the named insured’s] work’,” while carving out various types of damage that are not relevant to the instant claim and litigation. [*Id.* at p. 53]. The 2003-04 Policy contains such an endorsement extending coverage to three specifically-identified Portrait Homes entities: Pasquinelli Construction Company, Pasquinelli Management LLC, and Portrait Homes Construction Company. [*Id.* at pp. 18-20]. The Portrait Homes entities that are the Plaintiffs in this action are not named as additional insureds on this endorsement or on any other additional insured endorsement for completed operations coverage. [*Id.*].

3. Penn National issued policy number GL9 0601617 to Jose Castillo DBA JJA Framing Company from December 5, 2004 through December 5, 2005 (the “2004-05 Policy”). [Plaintiffs’ Exhibit No. 17]. Like the 2002-03 Policy and 2003-04 Policy, the 2004-05 Policy did not automatically confer additional insured status for completed operations and instead required execution of a specific endorsement in order to confer such status. [*Id.*]. The 2004-05 Policy contained a single CG 20 37 1001 endorsement that named Pasquinelli Construction Company, Pasquinelli Management LLC, and Portrait Homes Construction Company as additional insureds for completed operations coverage [Plaintiffs’ Exhibit No. 17, at pp. 2, 4]. The CG 20 37 1001 endorsement contained in the 2004-05 Policy is identical to that attached to the 2003-04 Policy, including that it did not name the Portrait Homes plaintiffs as additional insureds. *Compare* [Plaintiffs’ Exhibit No. 14, at pp. 18-20] *with* [Plaintiffs’ Exhibit No. 17, at p. 4] (showing identical CG 20 37 1001 endorsements other than the different addresses provided for the Portrait Homes entities on two of the endorsements in the 2003-04 Policy).

4. Castillo provided to Portrait Homes, and Portrait Homes accepted, a certificate of insurance for the 2004-05 Policy dated December 5, 2004. [Plaintiffs' Exhibit No. 7]. The certificate denotes the following entities as the "Certificate Holder[s]": Pasquinelli Construction Co.; Pasquinelli Management, LLC; and Portrait Homes Construction Co. [*Id.*]. Attached to the certificate is a copy of a CG 20 37 1001 endorsement indicating that the same three entities (Pasquinelli Construction Co.; Pasquinelli Management, LLC; and Portrait Homes Construction Co) are included as additional insureds, subject to the endorsement's other limitations and restrictions. [*Id.* at p. 2]. The certificate clarifies that it "is issued as a matter of information only and confers no rights upon the certificate holder" and that it "does not amend, extend or alter the coverage afforded by [the policies to which it applies]." [*Id.* at p. 1]

5. On December 15, 2004, Castillo executed articles of incorporation to form an entity known as JJA Construction, Inc. [Defendant's Exhibit No. 62; Trial Transcript, Vol. 2, at 380:4-16]. These executed articles of incorporation were filed with the North Carolina Department of the Secretary of State on December 17, 2004. [Defendant's Exhibit No. 62]. On March 2, 2005, during the term of the 2004-05 Policy, Penn National received a Policy Change Request. [Plaintiffs' Exhibit No. 18]. Effective from March 2, 2005 through the end of the policy period, the named insured on the 2004-05 Policy was changed to identify a newly formed corporate entity, JJA Construction, Inc. [Plaintiffs' Exhibit No. 17, at p. 9; Plaintiffs' Exhibit No. 19].

6. Penn National issued Policy GL9 0601617 from December 5, 2005 through December 5, 2006 to the named insured JJA Construction, Inc. (the "2005-06 Policy"). [Plaintiffs' Exhibit No. 21]. The 2005-06 Policy contained an "Automatic Additional Insureds – Owners, Contractors and Subcontractors (Completed Operations)" endorsement, form 71 11 45 0105, that extended additional insured status to a person or entity for completed operations automatically

where required by a written contract between the named insured (now JJA Construction, Inc.) and that other person or entity. [*Id.* at p. 29; Plaintiffs' Exhibit No. 23]. The scope of coverage offered by this endorsement extends only to liability for "bodily injury" and "property damage" caused in whole or in part by the named insured's work for the additional insured at the location or project designated in the contract. [*Id.*]. The relevant language in the "Automatic Additional Insureds – Owners, Contractors and Subcontractors (Completed Operations)" endorsement reads as follows:

A. The following provision is added to **SECTION II – WHO IS AN INSURED:**

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

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

7. JJA Construction, Inc. provided to Portrait Homes, and Portrait Homes accepted, a second certificate of insurance, this time dated December 6, 2005 and concerning the 2005-06 Policy. [Plaintiffs' Exhibit No. 5]. The certificate denotes the following entities as the "Certificate Holder[s]": Pasquinelli Management, LLC; and Portrait Homes-South Carolina, LLC. [*Id.* at p. 1]. The certificate also attaches a copy of the "Automatic Additional Insureds – Owners, Contractors and Subcontractors (Completed Operations)" endorsement, form 71 1145, identical to the copy contained in the 2005-06 Policy. [*Id.* at p. 2-3]. This certificate was drafted and issued by JJA Construction, Inc.'s agent, the W. Lee Taylor, Jr. Agency. [*Id.* at 232:2-4, 237:7-9].

8. Penn National issued policy number GL9 0601617 to JJA Construction, Inc.

effective December 5, 2006 through December 5, 2007 (the “2006-07 Policy”). [Plaintiffs’ Exhibit No. 27]. The 2006-07 Policy contained the same “Automatic Additional Insureds – Owners, Contractors and Subcontractors (Completed Operations)” endorsement. [Plaintiffs’ Exhibit No. 27, at p. 20].

9. Penn National issued policy GL9 0601617 effective December 5, 2007 through December 5, 2008 to named insured JJA Construction, Inc. (the “2007-08 Policy”). [Plaintiffs’ Exhibit No. 29]. This policy contained the same automatic “Automatic Additional Insureds – Owners, Contractors and Subcontractors (Completed Operations)” endorsement as was included in the 2005-06 Policy and 2006-07 Policy. [*Id.* at p. 23; Plaintiffs’ Exhibit No. 30]. While the additional insured endorsement contained in the 2007-08 Policy was an updated form, the insuring language it contained is functionally identical to the language contained in prior versions of the endorsement contained in the 2005-06 Policy and 2006-07 Policy. [*Compare* Plaintiffs’ Exhibit Nos. 23 & 28 *with* Plaintiffs’ Exhibit No. 30]. Penn National cancelled the 2007-08 Policy on January 31, 2008 due to JJA Construction, Inc.’s failure to pay premiums owed. [Plaintiffs’ Exhibit No. 31].

10. Following a gap in coverage after the cancellation of the 2007-08 policy, JJA Construction, Inc. applied to Penn National for new coverage on July 8, 2008. [Plaintiffs’ Exhibit No. 32]. In response to this application for coverage, Penn National issued policy number GL9 0649575, effective July 9, 2008 through July 9, 2009. [Plaintiffs’ Exhibit No. 33, at p. 2]. The named insured was initially listed as JJA Framing Company, but was updated to JJA Construction, Inc. by endorsement dated August 15, 2008. [*Id.* at pp. 2, 7]. The 2008-09 Policy does not contain an additional insured endorsement covering completed operations. [Trial Transcript, Vol. 2, at 215:20-216:7]. Rather, the only additional insured endorsement attached to this policy applies to

ongoing operations. [Plaintiffs' Exhibit No. 33, at pp. 20-21].

11. Penn National issued policy GL9 0649575 effective July 9, 2009 through July 9, 2010 (the "2009-10 Policy"). [Plaintiffs' Exhibit No. 34]. The named insured on the 2009-10 Policy was listed as JJA Construction, Inc. [*Id.* at p. 2]. On July 21, 2009, JJA Construction, Inc. submitted a policy change endorsement to update its mailing address to an address in Huntersville, North Carolina. [*Id.* at p. 52]. Like the 2008-09 Policy, the 2009-10 Policy contains no additional insured endorsement for completed operations and extends such coverage only for ongoing operations. [*See Id.* at p. 4 (the 2009-10 Policy's endorsement schedule, which does not reference any additional insured endorsement for completed operations; pp. 15-16 (additional insured endorsement for completed operations))].

Policy #	Effective Date	Named Insured	Endorsement Form	Additional Insured
GL9 060617	12/05/02 to 12/05/03	Jose Castillo d/b/a JJA Framing Co.		None
GL9 060617	12/05/03 to 12/05/04	Jose Castillo d/b/a JJA Framing Co.	CG 2037	Pasquinelli Construction Co. Pasquinelli Management LLC Portrait Homes Construction Co.
GL9 060617	12/05/04 to 03/02/05	Jose Castillo d/b/a JJA Framing Co.	CG 2037	Pasquinelli Construction Co. Pasquinelli Management LLC Portrait Homes Construction Co.
GL9 060617	03/02/05 to 12/05/05	JJA Construction, Inc.	CG 2037	Pasquinelli Construction Co. Pasquinelli Management LLC Portrait Homes Construction Co.
GL9 060617	12/05/05 to 12/05/06	JJA Construction Inc.	71 1145	Entity required to be named by JJA Construction, Inc under a contract
GL9 060617	12/05/06 to 12/05/07	JJA Construction Inc.	71 1145	Entity required to be named by JJA Construction under a contract
GL9 060617	12/05/07 to 1/31/08	JJA Construction Inc.	71-1145	Entity required to be named by JJA Construction under a contract
	1/31/08 to 07/09/08	(gap in coverage)		N/A
GL9 0649575	7/09/08 to 8/15/08	JJA Framing Co.		None
GL9 0649575	8/15/08 to 11/03/08	JJA Constr. Inc.		None
	11/03/08 50 07/09/09	(gap in coverage)		N/A
GL9 0649575	07/09/09 to 07/09/10	JJA Construction Inc.		None

12. Under each of the above policies, collectively referred to as the "Penn National Policies," the word "you" is defined as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." [Plaintiffs' Exhibit Nos. 13A, at p. 25; 14, at p. 39; 17, at p. 21; 21, at p. 40; 27, at p. 31; 29, at p. 33; 33, at p. 33; and 34, at p. 26]¹.

13. Each of the Penn National Policies contains the following "Conditions In The Event Of Occurrence, Offense, Claim Or Suit":

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

* * * *

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.

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

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

¹ Each of the Penn National policies contains the identical limit of coverage: \$500,000.00 per occurrence. Plaintiffs' Exhibit Nos. 13A, 14, 17, 21, 27, 29, 33, and 34.

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

[Plaintiffs' Exhibit Nos. 13A, at pp. 34-35; 14, at pp. 48-49; 17, at pp. 30-31; 21, at pp. 49-50; 27, at pp. 40-41; 29, at pp. 42-43; 33, at pp. 42-43; and 34, at pp. 35-36].

14. Each of the Penn National Policies contains an endorsement modifying the language shown in Paragraph 13 above. In the 2002-03 through 2007-08 Policy, this endorsement is titled "Extended Coverage Endorsement General Liability," while in the 2008-09 and 2009-10 Policies, this endorsement is titled "Commercial General Liability Pennpac Endorsement." These endorsements contain identical language modifying the duties, which provides as follows:

VII. Duties in the Event of Occurrence, Claim or Suit Redefined

* * *

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

[Plaintiffs' Exhibit Nos. 13A, at p. 44; 14, at p. 60; 17, at p. 40; 21, at p. 23; 27, at p. 16; 29, at p. 19; 33, at p. 19; and 34, at p. 14].

B. The Persimmon Hill Project

1. Portrait Homes was responsible for construction and development of a townhome project in Berkeley County, South Carolina known as Persimmon Hill (the "Persimmon Hill Project"). *See, e.g.*, [Trial Transcript, Vol. 1, 503: 5-25]. The Persimmon Hill Project involved the construction of three hundred eighty-eight townhome units spread across seventy-four buildings. [*Id.* at 455:19-23]. Construction permits were issued beginning in 2002 while occupancy permits were issued on a rolling basis as buildings were completed from 2003 through the project's

completion in 2006. [*Id.* at 456:5-24; Defendant's Exhibit No. 16 (Certificates of Occupancy for buildings at the Persimmon Hill Project issued by the City of Goose Creek)].

2. Portrait Homes hired Jose Castillo, a sole proprietor doing business as JJA Framing, to perform framing work on certain buildings at the Persimmon Hill Project. [Trial Transcript, Vol. 1, 458:1-8]. The court refers to Castillo individually simply as "Castillo" while "JJA Framing" references his sole proprietorship business operation conducted under his fictitious business name. Together with his later-formed corporation, JJA Construction, Inc., the court refers to these parties collectively as "the Castillo Entities". This work involved framing of the units, house wrap, and installation of windows, exterior doors, and flashing. [*Id.*]. JJA Framing was one of several framers involved in the project and performed this work on a majority of the units built as part of the Persimmon Hill Project. [*Id.*]. However, neither Portrait Homes nor Castillo produced records to show on which buildings JJA Framing performed framing work and which buildings were framed by another entity. [*Id.* at 145:25-143:3]. The damage caused by the poor framing began occurring within two months after a building's occupancy certificate was issued. [*Id.* at 527:10-18].

3. The Court has considered two contracts between Portrait Homes and Castillo/JJA Framing, a "Master Agreement" and a "Housing and Purchase Order Contract." [Plaintiffs' Exhibit Nos. 37 (Master Agreement) & 38 (Housing and Purchase Order Contract)]. First, The Housing and Purchase Order Contract is dated March 6, 2002, was signed by the Purchasing Manager Dana Coble on behalf of Portrait Homes Construction Co. on the same date, and signed by Castillo on March 8, 2002. [Plaintiffs' Exhibit No. 38 at pp. 1, 6; Trial Transcript, Vol. 1, at 464:16-22]. The Housing and Purchase Order Contract is a project-specific document detailing the subcontractor's (here, "Jose Castillo d/b/a JJA Framing") duties with respect to specific projects, which were designated on the first page of the contract. [Plaintiffs' Exhibit No. 38 at p. 1]. The projects

identified on the first page of the contract are "Summerwood" and "Persimmon Hill." [*Id.*]. Castillo/JJA Framing's scope of work on these projects was defined in a separate document attached to the contract. [Plaintiffs' Exhibit Nos. 39 (March 6, 2002 Scope of Work Addendum) & 41 (August 15, 2003 Scope of Work Addendum)]. The Housing and Purchase Order Contract required Castillo/JJA Framing, as a pre-condition to commencing work thereunder, to procure various insurance coverage, present proof of the placement of such coverage and of payment for the policies, and to present a certificate of insurance "naming [Portrait Homes-South Carolina, LLC], the owner of the project, and any additional parties, as additional insured." [*Id.* at pp. 3-4]. The Housing and Purchase Order Contract did not specifically require that Castillo/JJA Framing procure any completed operations coverage nor that any policy issued to Castillo/JJA Framing to name any Portrait entity as an additional insured for completed operations coverage. [*Id.*].

4. Castillo/JJA Framing's Master Agreement with Portrait Homes-South Carolina, LLC is dated October 25, 2002, approximately seven months after the Persimmon Hill Housing and Purchase Order contract was executed on March 6, 2002. The Master Agreement was signed by Portrait Homes-South Carolina, LLC's Purchasing and Estimating Manager Dana Coble on November 1, 2002, and was signed by Castillo on November 5, 2002. [Plaintiffs' Exhibit No. 37, at pp. 1, 4; Trial Transcript, Vol. 1, at 461:18-462:1]. Per its terms, the Master Agreement took effect from the date of its signing. [Plaintiffs' Exhibit No. 37, at p. 1]. The Master Agreement specifically identifies Castillo as a sole proprietor in its introductory language. [*Id.*]. The Master Agreement provides a general set of terms that "shall be incorporated into any future purchase order contract by and between [Portrait Homes-South Carolina, LLC and Jose Castillo d/b/a JJA Framing] as if this Agreement had been set forth in said purchase order contract, in its entirety." [Plaintiffs' Exhibit No. 37, at p. 1 (Paragraph 1)]. The Master Agreement does not have any effect

on previously-executed purchase order agreements. [*Id.*] Portrait Homes' general business practice was to use the Master Agreement as a foundational document in its relationships with subcontractors that governed all purchase order contracts entered afterward. [Trial Transcript, Vol. 1, 449:1-450:7].

5. Portrait Homes and Castillo agreed to modify the Scope of Work and Pricing Sheet addenda to the Housing and Purchase Order Contract on August 15, 2003. [Plaintiffs' Exhibit Nos. 38, at p. 6; 41; and 42]. There is no evidence that the Housing and Purchase Order Agreement was re-executed as a whole on August 15, 2003, when the Scope of Work and pricing sheet addendums to the Housing and Purchase Order Contract were modified. [Plaintiffs' Exhibit Nos. 41 & 42]. Portrait Homes presented no evidence that it executed a new Housing and Purchase Order Contract with Castillo for the Persimmon Hill Project after the Master Agreement was executed. Portrait Homes understood the importance of doing so, however, as it required Castillo to execute a new Housing and Purchase Order Contract for the Summerwood Project. [Plaintiffs' Exhibit No. 46].

6. Portrait Homes also never entered into to a new Master Agreement or Housing and Purchase Order contract with JJA Construction, Inc. following the incorporation of JJA Construction, Inc. [Trial Transcript, Vol. 1, at 488:18-23].

7. The Portrait Homes plaintiffs are part of a greater corporate structure involving other companies. First, Portrait Homes – South Carolina, LLC is a state-specific entity within the greater Portrait Pasquinelli corporate hierarchy and a direct subsidiary of Pasquinelli Construction. [Trial Transcript, Vol. 1, at 73:15-74:14]. Second, Portrait Homes – Persimmon Hill, LLC is an entity created specifically to oversee the Persimmon Hill Project and a direct subsidiary of Portrait Homes – South Carolina LLC. [*Id.*].

C. Litigation of the Underlying Lawsuit and the Coverage Action

1. The Persimmon Hill Litigation was initiated on October 23, 2012 when two different lawsuits were filed against Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC, and Pasquinelli Homebuilding, LLC. [Plaintiffs' Exhibit Nos. 1 & 2]. The Persimmon Hill HOA Lawsuit was brought by the HOA against the Portrait Homes entities alleging defective construction on the Persimmon Hill Project that resulted in water intrusion into the homes and subsequent rot and deterioration. [Plaintiffs' Exhibit No. 1]. The Persimmon Hill Class Action Lawsuit made materially similar allegations against the Portrait Homes entities on behalf of the individual homeowners in the development. [Plaintiffs' Exhibit No. 2]. Portrait Homes' insurance carrier, Admiral Insurance Company, agreed to defend it in the Persimmon Hill Litigation and retained the Hood Law Firm to lead the defense. [*Id.* at 186:13-20]

2. The Complaints in the Persimmon Hill Litigation were amended on March 20, 2013 to add as parties the subcontractors who were involved in the project. [Plaintiffs' Exhibit Nos. 3 (HOA Amended Complaint) & 4 (Homeowners' Class Action Amended Complaint); Trial Transcript, Vol. 1, at 76:5-15]. No further Portrait Homes or Pasquinelli entities were added to the Litigation as defendants. *See* [Plaintiffs' Exhibit Nos. 3 & 4] (listing additional defendants, but including only the originally-named Portrait Homes & Pasquinelli entities). Among the subcontractors added to the Persimmon Hill Litigation at this stage were two Castillo Entities: "JJA Construction, Inc. d/b/a JJA Framing"; and "Jose Castillo d/b/a JJA Framing." [Plaintiffs' Exhibit Nos. 3 & 4]. Castillo was served with process in the Persimmon Hill Litigation individually and on behalf of JJA Construction, Inc. on September 8, 2013. [Penn National Exhibit Nos. 80 & 81; Trial Transcript, Vol. 1, at 713:4-8]. Neither Castillo entity responded to the suit and, on July 13, 2016, the court entered a default judgment in favor the Persimmon Hill HOA in the amount of

\$4,156,976.98. [HOA Exhibit No. 12; Trial Transcript, Vol. 1, at 377:16-20].

3. The Persimmon Hill project sustained damage as a result of the defective construction. Specific to the framing work on the project, which JJA Framing – among other contractors – was retained to perform, there was poor window framing construction, improper flashing, improper placement of the weather barrier, improper use of an air filtration barrier instead of a water barrier, and improperly installed “sticky-back” flashing. [Trial Transcript, Vol. 1, at 520:2-8, 20-521:4]. This defective work and use of improper materials resulted in water intrusion into the homes, causing rot, damage to interior wood framing, drywall, and curtains and blinds. [*Id.* at 521:5-522:25]. The defects and resulting damages were at least partially attributable to the improper materials selected and supplied by Portrait Homes, including the use of an improper air filtration barrier that Portrait provided to its framing subcontractors to be installed on the Project. [Plaintiff’s Exhibit 39, at p. 1 (paragraph 2C); Trial Transcript, Vol. 1, at 549:5-550:13]. Portrait Homes also employed superintendents to observe the work conducted by the various subcontractors, such as Castillo/JJA Framing, and failed to note the “open and obvious” defective framing work, which could have been corrected before the buildings incurred any water damage. [Trial Transcript, Vol. 1, at 550:2-551:10; *see also* Plaintiffs’ Exhibit No. 53, at pp. 7-10 (expert report noting absence of proper flashing installed at various buildings in the Persimmon Hill Project)]. While Portrait Homes considered JJA Framing to have been the primary framer on the project, Portrait Homes acknowledged that other framers also worked on the Project. [Transcript, Vol. 1, at 458:1-16]. Portrait Homes was not able to provide any evidence to identify the exact buildings or proportion of the buildings for which Jose Castillo served as the framer. [Trial Transcript, Vol. 1, at 558:3-7]. Portrait Homes’ and the HOA’s expert, Robert Sisnroy, could not discern between the work performed at the project by different framing subcontractors, but noted

that all framing work he observed had been performed incorrectly. [*Id.* at 558:3-7]. The vast majority of the damages to the interior and exterior of the homes in the Persimmon Hill Project were attributable to defective construction other than the framing work. [*Id.* at 554:24-555:9].

4. The Portrait Homes entities ultimately settled the claims against them with the HOA and the Homeowners Class for \$3,850,000 in March 2016. [Trial Transcript, Vol. 1, at 109:24-110:17]. The HOA and Homeowners supported their demand with a repair estimate for the damaged homes totaling approximately \$12,700,000. [HOA Exhibit No. 12] The Portrait Homes settlement amount was paid by its insurance carriers, including Admiral. [*Id.* at 183:23-184:8].

5. In addition to the costs and legal fees paid by Admiral, Portrait Homes paid some costs related to its defense. First, it paid the first \$25,000 of the defense costs billed by The Hood Law Firm to satisfy the self-insured retention of its insurance policy with Admiral. [Trial Transcript, Vol. 1, at 123:11-18]. Portrait Homes also paid \$17,791.24 to DeVore Acton & Stafford, a North Carolina law firm that operated as Portrait Homes' national counsel, for the services of Fred DeVore. [*Id.* at 122:22-123:8]. Mr. DeVore communicated with members of The Hood Law Firm to assist in locating witnesses and providing documents, discussing defense strategies, and understanding Portrait Homes' corporate structure. [*Id.* at 121:17-122:16].

6. As a result of settlements with other subcontractors and their insurers in this litigation regarding additional insured coverage, Portrait Homes recovered a total of \$532,283.36 from these other insurers and parties. Despite Portrait recovering this amount from these other parties as a result of Portrait's additional insured claims against these parties, all of this recovery was returned to Admiral and none went to reimburse Portrait Homes for any of the \$42,791.24 that Portrait Homes claims it incurred in defense costs and fees. [Defendant's Exhibit No. 77 (chart detailing Portrait Homes' recovery from various carriers in this action); Trial Transcript, Vol. 1,

at 182:3-183:8].

D. Portrait Homes' Additional Insured Tender to Penn National

1. Portrait Homes first requested a defense for the Persimmon Hill Litigation from Penn National by letter dated June 5, 2013. [Plaintiff's Exhibit No. 6; Trial Transcript, Vol. 1, at 87:16-19]. Portrait Homes' defense counsel, Tyson Nettles of the Hood Law Firm, submitted the letter to Penn National on Portrait Homes' behalf. [Plaintiffs' Exhibit No. 6]. The letter requested a defense under the 2005-06 Policy. [*Id.*]. Portrait Homes contends that it did not receive a response to this first tender letter. [Trial Transcript, Vol. 1, at 90:22-91:7; 94:13-17].

2. Penn National's claim notes indicate that Greg Gross, the Penn National adjuster assigned to this claim, called Mr. Nettles on June 18, 2013 and left a voicemail message seeking information about the claim and the Persimmon Hill Project. [HOA Exhibit No. 4, at p. 2; Trial Transcript, Vol. 1, at 381:3-382:1]. The purpose of Mr. Gross' request to Mr. Nettles was to gather additional information necessary to determine Portrait Homes' additional insured status, such as the dates upon which certificates of occupancy on the Persimmon Hill Project were issued and a copy of JJA's contract with Portrait Homes. [Trial Transcript, Vol. 1, at 392:17-394:4]. Having received no response to his June 18 call, Mr. Gross again called Mr. Nettles and left him a voicemail message on June 25, 2013. [HOA Exhibit No. 4, at p. 2; Trial Transcript, Vol. 1, at 394:19-22]. Mr. Gross called Mr. Nettles a third time on July 10, 2013 and again left a voicemail message. [HOA Exhibit No. 4, at p. 2; Trial Transcript, Vol. 1, at 399:6-9]. Mr. Gross never received a return call from Mr. Nettles. [Trial Transcript, Vol. 1, at 399:10-21].

3. Portrait Homes' counsel sent a second tender letter to Penn National dated May 23, 2014. [Plaintiffs' Exhibit No. 8]. This letter requested a defense under the 2004-05 Policy. [*Id.*].

4. Gross prepared a Coverage Question Report on May 29, 2014 that recommended

denial of Portrait Homes' claim. [Trial Transcript, Vol. 1, at 412:24-413:3; Penn National Exhibit No. 78, at pp. 31-35]. Penn National adjusters prepare Coverage Question Reports to address coverage concerns related to a claim based upon their review of the facts and circumstances for review and consultation with their supervisor and counsel in order to help provide consistency of claims coverage decisions made across different jurisdictions. [Trial Transcript, Vol. 1, at 414:12-22; Vol. 2, at 13:17-14:1]. Gross sent the report to his supervisor, Gary Gibson, on May 30, 2014, who forwarded it to Penn National's in-house claims counsel, Adam Parsons, on June 3, 2014. [Trial Transcript, Vol. 1, at 415:13-23; Vol. 2, at 23:17-24:3]. Parsons reviewed Gross' recommendation to deny additional insured coverage for Portrait Homes, found no analysis to support that recommendation, and, by email on June 16, 2014, requested that Gross provide additional analysis concerning the claim for additional insured coverage. [Penn National Exhibit No. 78, at p. 28; Trial Transcript, Vol. 1, at 416:21-417:13; Vol. 2, at 45:25-46:18].

5. On August 11, 2014, Gross emailed Gibson with an updated coverage analysis concerning Portrait Homes' claim. [Penn National Exhibit No. 78, at p. 22]. Gibson forwarded Gross' updated recommendation to Parsons on August 15, 2014. [Penn National Exhibit No. 78, at p. 18]. Parsons requested that Gross include the updated recommendation in a complete request that included a complete factual background and analysis. [*Id.* at p. 16]. Gross provided a complete analysis with the recommendation by responsive email on August 26, 2014. [*Id.* at pp. 10-14].

6. Parsons responded to Gross on September 11, 2014. [Penn National Exhibit No. 78, at p. 1-2]. Parsons noted that after Castillo incorporated JJA Construction, Inc. and changed the named insured under the policy to the company effective March 2, 2015, Portrait Homes no longer had a contract with the named insured requiring the insured to name Portrait Homes as an additional insured. [*Id.*]. As a result, Parsons reasoned that no defense would have been available

to Portrait Homes under any policy issued after the named insured on the Penn National Policies was changed on March 2, 2005. [*Id.*] Parsons further found that the entities that were specifically named as additional insureds under the 2003-04 and 2004-05 Policies' CG 2037 additional insured endorsement were not named as Defendants in the Persimmon Hill Litigation and that no defense was owed to the Portrait Homes entities that had been sued in that action. [Trial Transcript, Vol. 2, at 54:6-56:18]. As a result of this analysis, Parsons recommended that Portrait Homes' claim for coverage be denied. [*Id.*].

7. Penn National denied Portrait Homes' tender by letter dated September 30, 2014. [Plaintiffs' Exhibit No. 9]. Penn National cited as grounds for its denial that the policies under which Portrait Homes sought additional insured coverage did not contain completed operations coverage. [*Id.*] Penn National admits that the ground for its denial of Portrait Homes' claim as stated in the September 30, 2014 denial letter is an incomplete explanation of the policies' contents, because, while the policies at issue each contain completed operations coverage in one of the two forms discussed *infra* at paragraphs A2, 6, Penn National concluded that such coverage was not available to the tendering Portrait Homes parties under the circumstances of this case. [Trial Transcript, Vol. 1, at 424:1-425:6; Vol. 2, at 80:8-81:2; 163:9-165:2; 171:9-172:25]. Despite having evidence that the policies did in fact contain the additional insured endorsements discussed above, the record contains no evidence that Portrait Homes ever responded to this denial letter challenging its conclusion.

E. Castillo's Actions Regarding Underlying Litigation

1. Castillo was served with the complaints in the Persimmon Hill Litigation, on behalf of himself and JJA Construction, Inc., on September 8, 2013. [Penn National Exhibit Nos. 80 & 81; Trial Transcript, Vol. 1, at 713:4-8]. Neither Castillo nor JJA Construction, Inc. responded to

the Complaint, and the court entered a default judgment in the amount of \$4,156,976.98. [HOA Exhibit No. 17; Trial Transcript, Vol. 1, at 377:16-20].

2. Upon being made aware of the lawsuit via Portrait Homes' tender letter, Penn National retained an independent adjuster, Gayle McLeod with Capstone ISG, to determine whether its insureds had been served with process and to discuss the facts and circumstances of the loss with Castillo. [Trial Transcript, Vol. 1, at 400:8-23]. Penn National had not received any correspondence or communication of any type from Castillo of JJA Construction, Inc. about the loss or suit. [Trial Transcript, Vol. 2, at 374:6-24].

3. On September 21, 2013, Penn National sent its first Reservation of Rights letter to Castillo. [HOA Exhibit No. 14 at pp. 2-7 (Bates Stamped 957-962)]. The letter was addressed to Castillo at an address in Ladson, South Carolina. [*Id.*]. Castillo had informed Penn National that his address changed to a location in Huntersville, North Carolina by submission of a policy change request dated July 21, 2009. [Plaintiffs' Exhibit No. 34 at p. 52]. The letter was also copied to Castillo's agent, the Taylor Agency in Charleston, South Carolina. [*Id.* at p. 7 (962)]. Penn National received no correspondence in response to its September 21, 2013 letter from either The Taylor Agency nor Castillo. *See* [HOA Exhibit No. 4 at p. 9 (Bates Stamped 1084) (indicating that Penn National had received no response and was retaining an Independent Adjuster to ascertain Castillo's intentions with regard to the Persimmon Hill Litigation)].

4. Penn National received notice that its insureds, Castillo and JJA Construction, Inc., had been served with process in the Persimmon Hill Litigation in a February 19, 2014 report from McLeod. [Defendant's Exhibit No. 82]. Penn National, having received no tender or other communication from Castillo regarding the litigation, requested that McLeod attempt to contact Castillo at his residence in order to inquire about suit representation, inquire whether Castillo

wanted Penn National to handle the suit on his behalf, and to obtain direct contact information for Castillo. [Defendant's Exhibit No. 83; Trial Transcript, Vol. 2, at 88:2-11]. McLeod was unsuccessful in meeting Castillo in person. [HOA Exhibit Nos. 6, 7; Trial Transcript, Vol. 1, at 406:15-21; Vol. 2, at 88:21-25]. On that occasion, McLeod traveled to Castillo's residence, rang his doorbell several times, left contact information and instructions to contact her on the two vehicles parked in Castillo's driveway, and left contact information with a woman residing next door who identified herself to McLeod as Castillo's tenant. [Trial Transcript, Vol. 2, at 89:1-20]. Penn National did not receive any communication from Castillo following McLeod's first visit to Castillo's property. [*Id.* at 26:19-27:9]. Penn National then requested that McLeod attempt to contact Castillo about the suit a second time. [HOA Exhibit No. 4 at p. 10 (1085)].

5. By report dated May 15, 2014, Penn National learned that McLeod had successfully contacted Castillo. [HOA Exhibit No. 10; Trial Transcript, Vol. 1, at 407:6-11]. The meeting described in the report is the first instance in which a Penn National representative successfully established contact with Castillo about the suit, despite his having been served with process more than eight months before. [Trial Transcript, Vol. 2, at 26:19-27:9; Penn National Exhibit Nos. 80 & 81 (certificates of service); *see* HOA Exhibit No. 4 at pp. 3-10 (1078-1085) (claim file notes indicating no contact from Castillo)]. McLeod confirmed that she was speaking with Castillo. [Trial Transcript, Vol. 2, at 91:18-19]. McLeod explained that the Persimmon Hill Litigation papers named Castillo individually, that the plaintiffs in the Persimmon Hill Litigation could seek to recover Castillo's personal assets, and noted that he paid premiums to his insurer to receive the benefit of a defense in such a lawsuit. [HOA Exhibit No. 10; Trial Transcript, Vol. 2, at 92:21-93:22]. McLeod explained that Castillo needed to contact Penn National immediately about the Persimmon Hill Litigation and strongly encouraged him to do so. [*Id.* at 93:14-18, 94:22-95:1].

Castillo confirmed to McLeod that he had been served with the suit papers. [Trial Transcript, Vol. 2, at 91:23-92:1]. Castillo told McLeod that he did not own anything personally, that he no longer operated JJA Construction, Inc., and that he was not interested in defending the lawsuit. [*Id.* at 93:23-94:21]. Castillo stated that he did not want Penn National to defend him in the Persimmon Hill Litigation. [*Id.* at 94:22-95:1, 386:2-6]. Castillo accepted contact information for the Penn National adjuster handling the claim from McLeod, and told her that he would reach out to Penn National directly to discuss the claim further. [HOA Exhibit No. 10; Trial Transcript, Vol. 1, at 407:17-408:8; Vol. 2, at 95:2-7]. McLeod then asked Castillo whether he would provide Penn National his contact information, but Castillo simply shook his head to indicate “no” and began walking toward the door to his home. [*Id.* at 95:8:22-96:8]. After refusing to provide his contact information to McLeod or Penn National, Castillo walked inside his house and closed the door, ending the conversation. [Trial Transcript, Vol. 2, at 95:18-96:8, 386:7-9]. During McLeod’s conversation with Castillo, he never indicated that he did not understand her questions or the proceedings about which she asked him. [*Id.* at 92:9-14; 94:4-21; 97:10-20]. Castillo never called Penn National to discuss the claim or suit following this May 2014 conversation with Ms. McLeod. [Trial Transcript, Vol. 1, at 408:2-4, 23-24].

6. After learning of Castillo’s declination of a defense and refusal to provide contact information, Mr. Gross prepared the May 29, 2014 Coverage Question Report recommending that the claim be denied on the grounds that Castillo had failed to cooperate with Penn National’s investigation. [Trial Transcript, Vol. 1, at 412:24-413:3; Penn National Exhibit No. 78, at pp. 31-35]. Castillo never tendered the lawsuit to Penn National for a defense after being served on behalf of himself or JJA Construction, Inc. [Trial Transcript, Vol. 2, at 37:11-23].

7. Penn National’s in-house coverage counsel, Parsons, reviewed the Coverage

Question Report on June 16, 2014 and agreed with its conclusion that coverage should be denied to the Castillo entities for failure to cooperate with Penn National's investigation. [Penn National Exhibit No. 78, at p. 28; Trial Transcript, Vol. 2, at 34:25-36:7]. In an effort to give Castillo every benefit of the doubt, however, Parsons recommended writing Castillo a final letter outlining Penn National's efforts to secure his cooperation with its investigation, noting the ramifications of his failure to cooperate and declination of the defense Penn National offered him and his companies, and offering him a final opportunity to participate in the investigation and receive the defense offered by his policy. [Penn National Exhibit No. 78, at p. 28; Trial Transcript, Vol. 2, at 34:25-36:7].

8. Penn National sent updated reservation of rights letters to Castillo and JJA Construction, Inc. on August 11, 2014. [HOA Exhibit No. 14, at pp. 9-14, 16-21 (Bates Stamped 942-948, 950-955)]. The letters gave Castillo through the end of August 2014 to respond to Penn National's attempts to contact him and warning that his failure to do so would result in the denial of his claim. [*Id.*, at pp. 14, 21]. As of August 11, 2014, Penn National had not received any additional communication from Castillo. [Trial Transcript, Vol. 1, at 419:2-4]. These letters were again addressed to Mr. Castillo's address in Ladson, South Carolina and copies were again sent to the Taylor Agency. [*Id.*; Trial Transcript, Vol. 1, at 418:14-20]. The record contains no evidence that Penn National ever received a response to these letters from Castillo.

9. By letters dated October 2, 2014, Penn National advised that no coverage would be afforded due to Castillo's failure to cooperate with Penn National's investigation of the claim and attempts to defend it against the Persimmon Hill Litigation. [HOA Exhibit No. 14, at pp. 23-28, 30-35]. These letters were addressed to Castillo's address in Huntersville, North Carolina and copied to the Taylor Agency. [*Id.*]. Penn National never received a response to these letters from

the Castillo Entities. [Trial Transcript, Vol. 2, at 374:6-24].

CONCLUSIONS OF LAW

Claims Asserted Against Penn National by the Plaintiff-HOA

A. The Castillo Entities Are Afforded No Coverage Under The Penn National Policies

Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. affirmatively declined Penn National's offer of a defense in the Persimmon Hill Litigation. The Castillo Entities also breached the policy's conditions precedent to coverage by failing to promptly tender the suit to Penn National upon receipt and failing to cooperate with Penn National's attempts to investigate and defend them in the Persimmon Hill Litigation such that they are not entitled to coverage. The Castillo entities never tendered the complaints in the Persimmon Hill Litigation, did not respond to attempts to communicate with them, and did not participate in or cooperate with Penn National's efforts to defend them in these suits. As a result of these behaviors, Penn National's investigation and ability to defend the Castillo Entities in the Persimmon Hill Litigation was substantially prejudiced.

1. Castillo Affirmatively Refused Coverage Under the Penn National Policies

As an initial matter, the Castillo Entities are not entitled to coverage because they refused it when Penn National contacted Castillo about his intentions for the Penn National Litigation. After months of silence following his service with process in the action, Penn National retained an adjuster to contact Castillo directly. *Infra* at Findings of Fact, ¶¶ E2, 4-5. Once she successfully met with Castillo and asked him directly whether he wanted Penn National to defend him in the Litigation, he answered "no." *Id.* at ¶ E5. Castillo told the adjuster, McLeod, that he did not personally own property or continue to operate JJA Construction, Inc., indicating he understood the ramifications of refusing a defense. *Id.*

Just as an insured has a right to the benefits of its insurance contract when triggered, it also has the right to refuse those benefits. *See, e.g., Twin City Fire Ins. Co. v. Ben-Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 374 (4th Cir. 2005) (applying South Carolina law) (finding that the insured may refuse the defense conducted by the carrier and fund its own defense); *see also State National Ins. Co. v. Eastwood Construction LLC*, C/A No. 6:16-cv-02607-AMQ, 2018 WL 8787543, at *16 (D.S.C. Sept. 5, 2018) (indicating that the insured may “relieve the insurer of all obligations under the terms of the policy”). Here, Castillo, like the insured in *Twin City*, refused to be defended when Penn National asked him whether he wanted to be. Castillo’s refusal, while perhaps unwise, was perfectly within his rights under the Penn National Policies. However, the result of that refusal is that Castillo forfeited his rights under the Policies with regard to the claims arising out of the Persimmon Hill Litigation. *Twin City*, 433 F.3d at 374.

Accordingly, Castillo’s refusal of the defense Penn National offered him relieved Penn National of its further duties to the Castillo Entities arising out of the claims at issue.

2. The Castillo Entities Breached Conditions Precedent to Coverage

The Castillo Entities neither tendered the Persimmon Hill Litigation process to Penn National promptly upon receipt nor cooperated with Penn National’s attempts to investigate and defend them, both in violation of the Penn National Policies’ duties in the event of a suit. The Policies all contain the following language giving the insured certain duties in the event that it is sued or is involved in an incident that could lead to a claim or suit (excerpted in relevant part):

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

* * * *

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

* * *

b. If a claim is made or “suit” is brought against any insured, you must:

...

(2) Notify us as soon as practicable.

- You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
- c. You and any other involved insured must:
- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
 - ...
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; ...

Infra at Findings of Fact, ¶ A13. The above conditions are modified by an endorsement attached to all policies at issue. That endorsement provides that there is no breach of the insured's duty to notify Penn National of any claim or lawsuit against it unless the insured fails to do so after learning about the claim or suit. *Id.* at ¶ A13.

Insurers in South Carolina are permitted to impose conditions upon the policyholder that, if violated, relieve the insurer of its coverage obligations. *South Carolina Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 104 (2006) (recognizing that insurers have the right to impose conditions on the coverage afforded by liability policies). Two such conditions that have been recognized and affirmed by South Carolina's courts are the insured's duties to (1) promptly provide his insurance company with notice of a lawsuit and to forward the suit papers to the carrier and (2) to cooperate with the insurer's investigation of the claim and defense of the suit. *Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 616, 103 S.E.2d 272, 273 (1958) (finding that an insurer properly denied coverage to its policyholder where he violated the notice and cooperation conditions of the policy); *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 249-50, 407 S.E.2d 655, 657 (Ct. App. 1991) (holding that the insured was not entitled to coverage where he failed to provide timely notice of the claim and also failed to forward suit papers until approximately four months after he had received them). South Carolina courts have interpreted the insured's duty to notify its insurer of a claim or suit "as soon as

practicable” as meaning “within a reasonable time frame.” *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 422 (1994) (citing *Squires v. National Grange Mut. Ins. Co.*, 247 S.C. 58, 68, 145 S.E.2d 673, 678 (1965) (interpreting the phrase in the context of an insured’s duty to report a claim under uninsured motorist coverage)).

Here, the evidence establishes that the Castillo Entities failed to comply with the notice and cooperation clauses contained in the Penn National Policies. Castillo was served with process in the Persimmon Hill Litigation individually and on behalf of JJA Construction, Inc. on September 8, 2013. *Infra* at Findings of Fact, ¶ C2. The court finds that the affidavits of service admitted into evidence are sufficient to show that Castillo knew of the Persimmon Hill Litigation as of September 8, 2013. The affidavits indicate that the process server delivered the suit papers to Castillo’s address in Huntersville, NC and that Castillo himself accepted the papers on behalf of himself and JJA Construction. The court assigns little credibility to Castillo’s testimony to the contrary.² Service of the suit papers on Castillo thereby triggered his duties to notify Penn National of the litigation and to cooperate with Penn National’s investigation and settlement of the claim. Penn National never received any correspondence related to the Persimmon Hill Litigation from Castillo after that date – indeed, it was Castillo’s lack of communication that prompted Penn National to seek out his cooperation and ascertain his intentions as to the litigation. *Infra* at Findings of Fact, ¶¶ E2, 4-5. The court finds, therefore, that Penn National has carried its burden to prove that the Castillo entities failed to comply with the policy’s notice provision.

Even after Penn National sought out Castillo to obtain his cooperation in its investigation and defense of the suit, Castillo refused to participate, violating his duty to cooperate. When Penn

² Castillo admitted that he became aware of the Persimmon Hill Litigation, but does not recall exactly when. Trial Transcript, Vol. 2, at 379:6-11. Castillo’s inability to recall when he became aware of the suit is insufficient to overcome Penn National’s evidence of service.

National received no tender of the suit from Castillo and no response to the letters it later found were erroneously addressed, it retained an Independent Adjuster, McLeod, to meet with Castillo in person and ascertain his intentions with respect to the Persimmon Hill Litigation. *Infra* at Findings of Fact, ¶ E4. McLeod met with Castillo at his home in May 2014 – more than eight months after he had been served. *Id.* at ¶ E5. During this meeting, Castillo declined to provide contact information that would allow Penn National representatives to contact him directly, indicated he did not want Penn National to retain defense counsel and defend him in the Persimmon Hill Litigation, and stated that he would reach out to Penn National himself to discuss the matter further. *Id.* Castillo never contacted Penn National after this meeting, and, after sending Castillo an additional letter in August 2014 advising him of his right to a defense under the policies and obligation to cooperate with the investigation, Penn National ultimately advised that Penn National was unable to afford coverage without his cooperation and participation. *Id.* at ¶¶ E8-9.

Castillo's behavior here is analogous to the insured's behavior in *Tucker* such that Penn National's denial of coverage was proper as a matter of South Carolina law. Like the insured in *Tucker*, Castillo indicated that he would not participate in the defense of the action. 232 S.C. at 619, 103 S.E.2d at 274 (insured indicated that "he did not want to have anything more to do with" the action). Castillo went even further and refused to provide direct contact information that would have allowed Penn National – or any counsel that Penn National retained on his behalf – to have contacted him directly. Castillo also told McLeod that he would contact Penn National himself to discuss the case, but never did so. On these facts, *Tucker* is clearly applicable and Castillo's acts here constitute a violation of the policy's cooperation clause.

The HOA established that Penn National's letters were erroneously mailed to an address where Castillo no longer resided. *Infra* at Findings of Fact, ¶¶ E3, 8. The HOA ignores, however,

that these letters were sent after Castillo had been served with process, thus triggering his duty to contact Penn National directly and provide notice of the suit, which he failed to do. *Prior*, 305 S.C. at 249-50, 407 S.E.2d at 657; *infra* at Findings of Fact, ¶¶ A12-13, E1. Moreover, Penn National did not base its coverage decision based upon Castillo's lack of response to these letters. Rather, it made additional efforts to contact Castillo that included twice sending an Independent Adjuster to speak with Castillo in person. During that face-to-face meeting Castillo refused to provide contact information so that Penn National could reach him directly, failed to call or contact Penn National using the contact information he was given during the May 2014 meeting (after also failing to contact Penn National using information McLeod left him during her first visit to his property), failed to provide Penn National with any information relevant to the lawsuit, and had otherwise failed to contact Penn National about the litigation in any manner for months after having received service. *See Tucker*, 232 S.C. at 620-21, 103 S.E.2d at 275 (insurer denied coverage after insured refused to participate in defense and failed to respond to multiple letters following his refusal). The HOA's evidence on this point is therefore irrelevant to the issue of whether or not Castillo violated the Penn National Policies' cooperation clause.

Persimmon Hill and the HOA's expert testified that Penn National's asking Castillo whether he wanted a defense on behalf of himself and JJA Construction, Inc. was unreasonable conduct that precipitated Castillo's breach of the cooperation clause. *See, e.g.*, [Trial Transcript, Vol. 1, at 675:8-677:18]. Given the circumstances known to Penn National at the time it asked Castillo this question, however – that nearly nine months had passed since Castillo was served and he had not contacted Penn National about the lawsuits at all – the Court finds that Penn National's conduct of asking Castillo whether he wanted Penn National to defend him in the Persimmon Hill Litigation was reasonable. [Trial Transcript, Vol. 2, at 596:21-598:8].

Finally, the HOA suggests that Castillo's inability to understand English excused him from performing the conditions precedent to coverage under the policy. A party's inability to read or understand English does not render a contract or its terms unenforceable. *J.B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E. 845, 848 (1924) (holding that one entering into a written contract should read and avail himself of every reasonable opportunity to understand its contents and meaning, and a person who is unable to read is bound to have the paper read to him before signing); *Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 233 S.E.2d 111 (1977) (dismissing claims for misrepresentation of insurance coverage when plaintiff made no effort to inform himself as to the terms, conditions, and exclusions in the written contract to which he was a party); see *Shirazi v. Greyhound Corp.*, 145 Mont. 421, 426 (1965) ("It was incumbent upon [the plaintiff], who knew of his own inability to read the English language, to acquaint himself with the contents of the ticket. It was not incumbent upon the defendant to discover the plaintiff's inability and then inform him of the limitation contained in the matter printed on the baggage receipt and on the notice posted at the baggage counter."); *Holcomb v. TWR Express, Inc.*, 11 A.D.3d 513, 514, 782 N.Y.S.2d 840 (2004) ("An inability to understand the English language, without more, is insufficient to avoid [the] general rule [that a party who executes a contract is presumed to know its contents and to assent to them].") (citations omitted); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) (finding a forum selection clause printed in German to be enforceable); see also S.C. Code § 38-61-60(B) (stating that insurers are not required to provide insurance related services in South Carolina in any language besides English). Further, the policyholder's inability to understand English does not excuse his obligation to timely notify an insurer of an occurrence or suit. *Virtuoso v. Aetna Cas. & Sur. Co.*, 134 A.D. 252, 254, 250 N.Y.S.2d 439 (1987) ("Neither the inability to understand the English language nor an

unfamiliarity with the United States legal system permitting intra-familial suits is a legally cognizable reason for a 22-month delay in notifying the insurance company of the accident.”). Therefore, the policy and all of its conditions, including the duty to notify Penn National in the event of a suit, were binding and enforceable despite Castillo’s inability to understand English.

Thus, the evidence presented in this case establishes that Castillo violated the Penn National Policies’ notice and cooperation conditions precedent to coverage.

3. The Castillo Entities’ Breaches of Conditions Precedent to Coverage Substantially Prejudiced Penn National’s Investigation and Defense

The Castillo Entities’ failure to notify Penn National of the lawsuits promptly or to cooperate in their defense substantially prejudiced Penn National’s investigation and defense. “Where the rights of an innocent third party are jeopardized by the failure of the insured to comply with the notice requirements of an insurance policy, the insurer must show substantial prejudice to the insurer’s rights.” South Carolina courts have consistently held that the insured’s failure to comply with the conditions for coverage under a liability policy will relieve an insurer of its obligation to provide coverage to the insured if prejudice results from such failure. *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 421 (1994); *Prior*, 305 S.C. at 249-50, 407 S.E.2d at 657 (noting that the rule requiring an insurer to have sustained substantial prejudice in order to deny coverage for violating a condition precedent to coverage applies only where the rights of innocent third parties are affected by the insured’s failure); *see also Twin City*, 433 F.3d at 374 (holding that the insurer was relieved of its obligation to provide coverage to its insured who failed to cooperate in the defense of the underlying litigation).

Here, as a result of the Castillo Entities’ failure to notify Penn National of their receipt of the suit papers or to cooperate with Penn National’s efforts to investigate and defend the

Persimmon Hill Litigation, a default judgment was entered against them. A default judgment in this situation results in substantial prejudice to the insurer as a matter of South Carolina law. *Merit Ins. Co. v. Koza*, 274 S.C. 362, 364–65, 264 S.E.2d 146, 147–48 (1980) (“[P]rejudice is clearly established by the fact that a default judgment was entered against the insured.”); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 432–35, 137 S.E.2d 608, 612–13 (1964) (holding that the insurer was prejudiced by the default judgment entered against its insured because “[i]t was in large measure deprived of the opportunity...to investigate promptly, to negotiate a settlement without the handicap of a default position”). The evidence presented at trial shows that Castillo failed to forward the suit papers to Penn National, refused Penn National’s offer to retain defense counsel on his behalf, refused to provide Penn National’s Independent Adjuster contact information, and declined to contact Penn National to discuss the case. *Infra* at Findings of Fact, ¶¶ E2, 5. This conduct prevented Penn National from taking steps to defend Castillo, which resulted in entry of default judgment against him.

The HOA solicited expert testimony to the effect that Penn National should have retained counsel to act on Castillo’s behalf. Regardless of whether they did so, absent Castillo’s cooperation – which he refused to give and declined to participate in the defense effort – any counsel retained by Penn National could not have ethically or legally entered an appearance on behalf of Jose Castillo or JJA Construction, Inc. to respond to the Persimmon Hill Litigation. Absent communication and proper authorization from the client, an attorney cannot represent the client. *A Fast Photo Express, Inc. v. First Nat’l Bank of Chicago*, 369 S.C. 80, 630 S.E.2d 285, 290 (Ct. App. 2006) (citing *Dunkley v. Shoemate*, 515 S.E.2d 442, 445 (N.C. 1999)) (finding that the trial court erred in allowing a law firm to represent a client in a matter where the firm had not been authorized by the client to act on his behalf); *Twin City*, 433 F.3d at 374 (citing Rule

1.8(f)(1), Rule 407 SCACR) (“Of course, an insured must consent to the counsel assigned by the insurance company.”); *Eastwood Construction*, 2018 WL 8787543, at *11 (noting that Rule 1.8(f) of the South Carolina Rules of Professional Responsibility requires that an insured consent to its representation by counsel employed by an insurer to act on its behalf); *see also Johnson v. Amethyst Corp.*, 463 S.E.2d 397 (N.C. Ct. App. 1995) (holding that where an insurer retained counsel made an appearance without knowledge of the insured, such counsel had no authority to set aside the default on behalf of the insured because two factors essential in establishing an attorney-client relationship were not satisfied – (1) the agent’s authorization by the principal, and (2) the principal’s control over the agent); *Reynolds v. Maramorosch*, 144 N.Y.S.2d 900 (1955) (holding that the party to an action has ultimate control of the action and counsel may not take any step in action, no matter how appropriate it may be, against the express wish of the client). Thus, without any authority from Castillo to act on his behalf or on behalf of his corporation, any attorney retained by Penn National could not have responded to the Persimmon Hill Litigation and significantly, prevent entry of the default judgment.

Further, Penn National’s ability to investigate and defend the claims against the Castillo Entities were prejudiced by Castillo’s violation of the policy conditions even absent entry of a default judgment because Penn National was deprived of the opportunity to meaningfully investigate the claims against the Castillo Entities in the Persimmon Hill Litigation. *See Founders Ins. Co. v. Richard Ruth’s Bar & Grill, LLC*, No. 2:13-cv-03035-DCN, 2016 WL 3219538, at *6 (D.S.C. June 8, 2016) (finding that the insured’s failure to timely notify its insurer of the suit was prejudicial in part because the insurer did not receive any notice of the claim until more than eight months after the incident and four months after the insureds were served). For example, it was impossible for Penn National to determine which subcontractors performed different scopes of

work on the different parts of the project. The Persimmon Hill Project was a large multi-family residential construction project with many different subcontractors performing often-overlapping scopes of work on the project. While the testimony from Portrait Homes was that JJA Framing was the “primary” framer and that he performed framing work on a majority of the buildings in the Persimmon Hill Project, Portrait Homes also admits that it possesses no records and has no knowledge as to the specific buildings that JJA Framing framed. *Infra*, at Findings of Fact, ¶ B2. Accordingly, given the various subcontractors involved on the Persimmon Hill project (including multiple framing subcontractors and other subcontractors engaged in overlapping scopes of work), serious questions existed in the Persimmon Hill Litigation with regard to JJA Framing’s scope of work on the project and which buildings were “framed” by JJA. These questions were impossible to answer based upon the total lack of cooperation on the part of JJA.

Penn National was prejudiced by the Castillo Entities’ failure to timely tender the Persimmon Hill Litigation to Penn National and to cooperate with Penn National’s defense. Castillo’s failures led directly to entry of default judgment against the Castillo Entities in the Persimmon Hill Litigation. Additionally, these failures did not permit Penn National the opportunity to meaningfully investigate the claims asserted against the Castillo Entities in the Persimmon Hill Litigation or to defend against them and limit the Castillo Entities’ – and, by extension, Penn National’s – exposure in those lawsuits. Even if Castillo had not expressly instructed Penn National that he did not want a defense provided for the Persimmon Hill Litigation, Castillo’s conduct entitled Penn National to advise Castillo that no coverage would be afforded under the Penn National Policies without further cooperation from Castillo.

B. The HOA's Claim To Be Indemnified For Its Judgment Against The Castillo Entities Fails Because The Named Insureds Are Not Entitled to Coverage

The HOA cannot satisfy its default judgment against the Castillo Entities through Penn National's insurance proceeds because Penn National properly denied coverage to them. As either a judgment creditor or as a purported assignee of the Castillo Entities' rights under the Penn National Policies, the HOA stands in the shoes of the Castillo Entities in seeking coverage under the Penn National Policies and is only entitled to satisfy its award or judgment to the extent that the Castillo Entities would be entitled to coverage under the policies. *S.C. Farm Bureau Cas. Ins. Co. v. Ausborn*, 249 S.C. 627, 648, 155 S.E.2d 902, 913 (1967) (holding that judgment creditors of the insured were not entitled to coverage under a policy because the judgment creditors had no greater rights under an insurance policy than the insured who had made material misrepresentations in the application for the policy); *Crook v. State Farm Mut. Auto. Ins. Co.*, 235 S.C. 452, 460, 112 S.E.2d 241, 245 (1960) (holding that the claimant had no greater right under a liability policy than the insured who the insurer claimed had failed to cooperate with the insurer in the defense of the suit); *Richard Ruth's Bar & Grill*, 2017 WL 430858, at *4 (holding that the assignee under a liability insurance policy stands in their shoes and has no greater rights to its claims than the insured itself).

As such, the HOA – whether as the judgment creditor of the Castillo Entities or as assignee of their rights under the Penn National Policies – is not entitled to coverage under the Penn National Policies because Penn National appropriately denied coverage. As detailed above, the Castillo Entities are not entitled to coverage under the Penn National Policies because they breached the Conditions for coverage under the policies by failing to tender the Persimmon Hill Litigation to Penn National or to cooperate with Penn National in its investigation and defense of

such litigation.

C. The HOA Failed to Prove Its Claim for Bad Faith Against Penn National

The HOA's claim for bad faith against Penn National fails because Penn National's conduct under the circumstances was reasonable. An insured may raise a bad faith claim against an insurer, even in the absence of a breach of the insurance contract, where the insurer engages in unreasonable conduct in performing its other duties under the policy. *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 501-03, 473 S.E.2d 52, 54-55 (1996); *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 494 (4th Cir. 2005) (finding that an insurer's investigation of a claim was reasonable under the circumstances and that therefore, the insured's bad faith claim failed as a matter of law). Where a bad faith claim is premised upon a denial of benefits under the policy, the insured must show that the insurer had no reasonable basis to support its decision to deny the claim. *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) (quoting *Dowling v. Home Buyers Warranty Corp.*, 303 S.C. 295, 297, 400 S.E.2d 143, 144 (1991)).

The HOA principally argues that Penn National failed to conduct its investigation of the claim in good faith. The HOA's expert testified to various acts by Penn National personnel that he considered unreasonable under the circumstances: asking Castillo whether he wanted Penn National to defend the Castillo Entities in the Persimmon Hill Litigation [Trial Transcript, Vol. 1, at 675:8-677:18]; failing to retain defense counsel to represent the Castillo Entities and ascertain his wishes as to the Persimmon Hill Litigation [*id.* at 682:9-683:4]; and mailing claims correspondence to an address for Castillo that Penn National had been informed was no longer current [*id.* at 697:9-698:13].

Kraut's testimony and the HOA's argument ignore, however, that an insurer's conduct is

evaluated under the circumstances presented by a claim. *See Myrick*, 395 F.3d at 494 (finding that the insurer's investigation was "adequate...*under the circumstances.*") (emphasis added); *see also Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994) ("Whether an insurance company is liable for bad faith must be judged by the evidence before at the time it denied the claim..."). Penn National received notice of the suit and commenced an investigation to ascertain the whereabouts of its insureds and to determine whether or not they had been served. *Infra* at Findings of Fact ¶ E2. Upon learning in April 2014 that Castillo had been served on behalf of both Castillo Entities more than seven months before, Penn National asked its Independent Adjuster to locate Castillo and determine his intentions with regard to the suit. *Id.* at ¶ E4. At this stage, Castillo had not tendered the claim or otherwise contacted Penn National about the lawsuits despite having received process. Under these circumstances, Penn National's conduct of asking Castillo whether he wanted Penn National to provide him a defense was reasonable: Castillo's actions to that point all suggested otherwise (and were also material violations of the conditions precedent for coverage that the policy assigned him). [*E.g.*, Trial Transcript, Vol. 2, at 596:21-598:8].

The HOA also argued that Penn National's failure to record the fateful conversation in which Castillo declined a defense amounted to bad faith. Under the circumstances, however, the court finds that McLeod's failure to conduct a recorded statement was reasonable. According to McLeod's testimony and written report summarizing this encounter, the conversation was brief and consisted primarily of Castillo refusing to cooperate with McLeod's attempts to have Castillo contact Penn National. *Infra* at Findings of Fact, ¶ E5. The encounter terminated when Castillo went into his home and closed the door, which McLeod reasonably understood as a conclusion to the conversation.

The HOA's argument that Penn National should have retained defense counsel to discuss the ramifications of the situation with Castillo amounts to a distinction without a difference. Penn National retained a representative to ascertain his intentions and, when told that he was not interested in defending the suit because he was no longer in business as either JJA Framing or JJA Construction, Inc., encouraged Castillo to call Penn National at a phone number she provided him to discuss his options. *Infra* at Findings of Fact ¶ E5. He declined to do so. *Id.* Castillo affirmatively refused to provide direct contact information to Penn National's independent adjuster, which would have allowed Penn National's claims handler to speak with Castillo directly. *Id.*

Penn National's mailing its reservation of rights letters to erroneous addresses is insufficient to sustain this claim because this conduct did not result in the denial of the claim. *See Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983) (holding that "if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover *consequential damages* in a tort action.") (emphasis added). First, Castillo never complied with his own duty to notify Penn National of the lawsuit or provide it with copies of the suit papers. Second, Penn National absolved any previous error by hiring a representative to meet with Castillo in person before taking any adverse action with respect to the claim. That representative, McLeod, twice traveled to Castillo's property and left contact information, urging him to contact Penn National about the claim. Finally, Castillo directly advised Penn National that he did not want a defense provided, refused to participate in the defense of his entities, and failed to contact Penn National after meeting with its representative. Only after additional months of silence from Castillo did Penn National ultimately advise Castillo that Penn National would not afford any coverage absent Castillo's required cooperation and participation in the defense of the action. Thus, even to the extent that this conduct

was unreasonable, Penn National provided alternative means, both in the policy and in its investigation, to allow Castillo to participate and he simply failed to do so.

Finally, Penn National's coverage decision was not made in bad faith because Castillo's refusal of the defense Penn National offered him, his failure to notify Penn National of the Persimmon Hill Litigation, and his refusal to cooperate in Penn National's investigation and defense were each reasonable grounds for denial. "An insured may recover damages for a bad faith denial of coverage if he or she proves there was no reasonable basis to support the insurer's decision to deny benefits under a mutually binding insurance contract." *Cock-N-Bull*, 321 S.C. at 6, 466 S.E.2d at 730 (quoting *Dowling*, 303 S.C. at 297, 400 S.E.2d at 144). As discussed at length above, Castillo explicitly refused the defense Penn National offered him under the Policies, failed to timely notify Penn National of the Persimmon Hill Litigation, and failed to forward the suit papers and refused to cooperate with its investigation and defense of the action, in violation of the conditions precedent to coverage established in the Penn National Policies. Penn National's decision to not afford coverage absent cooperation from Castillo was therefore reasonably based upon the terms and conditions in their policies such that the HOA's claim is not tenable.

D. Persimmon Hill HOA Is Only Entitled To Be Indemnified By Penn National for Penn National's Time-on-risk Portion Of The Covered Damages

Where progressive damage is at issue, triggering multiple liability policies, the insurers each contribute to indemnify the insured for a covered loss in proportion to their time on the risk. *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.* ("*Crossmann II*"), 395 S.C. 40, 59-64, 717 S.E.2d 589, 599-601 (2011). In such cases, all policies are triggered from the time that the damage to the property first occurred to the time that property damage ceased. *Id.* at 48-49, 593-94. Damage is deemed to have ceased once the party responsible for the damage

compensates the injured plaintiff for the damage. *See, e.g., Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.* (“*Crossmann Communities*”), No. No. 4:09-CV-1379-RBH, 2013 WL 5437712, at *19-20 (D.S.C. Sept. 27, 2013) (using the date that the insured settled an underlying claim as the date upon which progressive damage terminated). The allegedly defective construction does not constitute the “property damage” for the purposes of determining the trigger date and instead, the date upon which the damage to previously undamaged property does. *Crossmann II*, 395 S.C. at 48-49, 593-94. Where there is no proof available to show the exact amount of damage sustained during each triggered policy’s period, the court should hold each insurer responsible for the proportion of the total loss as that carrier’s policy bears to the total time during which the risk occurred. *Id.* at 64-65, 602.

Penn National issued Castillo and JJA Construction eight total policies that would potentially be triggered by the damage at issue in the Persimmon Hill Litigation, dating from the 2002-03 Policy through the 2009-10 Policy. *Infra*, at Findings of Fact ¶¶ A1-3, 6, 8-11. The damage commenced, for the earliest buildings, beginning two months after the 2003 certificates of occupancy were issued by the City of Goose Creek and commenced until the entry of the default judgment against the Castillo Entities on July 13, 2016. In order to calculate this exposure, the Court will need to consider the number of units, the date each unit was completed, the date of the entry of the judgment, the dates of coverage provided by the Penn National policies which covered some but not all of the time to be addressed as part of the time on the risk calculation outlined in *Crossmann II*, 395 S.C. at 59-64, 599-601. Based upon a review of the available evidence presented at trial, the first unit was issued a certificate of occupancy on February 28, 2002, the last certificate of occupancy was issued on September 13, 2006, and the default judgment and damage award was entered on July 13, 2016. The time between the first certificate of occupancy and the

default judgment award is 5,249 days. Of this total amount, Penn National provided coverage for Castillo or JJA Construction, Inc. for 2,457 days. Therefore, for the earliest finished units, the maximum time on risk exposure that would be provided by a Penn National policy would be 46.8% (0.468), and this exposure would decrease as units were completed later in time.

The inquiry, however, does not end with the time on the risk calculation. In addition to the time-on-risk calculation, the HOA must present evidence that the damages claimed were in fact covered by the policy. *See, e.g., Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 303, 128 S.E.2d 171, 173 (1962) (“In other words, the insured had the burden of showing that his injury was covered by the terms of the policy.”); *Auto-Owners Ins. Co. v. Madison at Park West Property Owners Ass’n, Inc.*, 834 F.Supp.2d 437, 443 (D.S.C. 2011) (“The insured bears the burden of proving that a claim is covered by a policy, while the insurer bears the burden of establishing exclusions to coverage.”). In the present action, the HOA presented no evidence that the damages recovered against Castillo Entities were actually covered by the policy. The only evidence presented by the HOA was the default judgment that states that the damages award is necessitated by original improper construction for which Jose Castillo and JJA Construction, Inc. were responsible. [Exhibit 18]. South Carolina law clearly provides that the costs to repair or replace defective construction are not damages covered by a commercial general liability policy such as the Penn National Policies issued to Castillo and JJA Construction, Inc. *Crossmann II*, 395 S.C. at 48-49, 593-94. Having failed to establish through admissible evidence what amounts, if any, of the damages award entered against Castillo or JJA Construction, Inc. would be covered by the Penn National policies, the court concludes that the HOA has failed to establish that it is entitled to recover any amounts from Penn National a judgment creditor under the Penn National policies. *Garrett*, 241 S.C. at 303, 128 S.E.2d at 173.

Claims Asserted against Penn National by the Portrait Homes Plaintiffs

E. Portrait Homes Failed to Prove that it was an Additional Insured Under the Policies

Under South Carolina law, the insured bears the burden of proving that the claims asserted against it trigger the policy's coverage language. *Garrett v. Pilot Life Ins. Co.*, 241 S.C. at 303, 128 S.E.2d at 173. Insurance policies are subject to the "general rules of contract construction" and as such, the court must give policy language its "plain, ordinary, and popular meaning" and must construe the policy according to the terms used where they are "unambiguous, clear, and explicit." *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (citations omitted). Ambiguities in policy language and terms capable of more than one reasonable interpretation will be strictly construed against the insurer such that the interpretation most favorable to the insured will be adopted. *Goldston v. State Farm Mut. Ins. Co.*, 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct.App. 2004).

Portrait Homes' claim centers on whether or not it is entitled to additional insured status under the Penn National Policies since the claims raised in the Persimmon Hill Litigation are otherwise sufficient to trigger Penn National's duty to defend. *See Crossmann II*, 395 S.C. at 49, 717 S.E.2d at 593-94 (holding that damage to otherwise non-defective components of a structure may, subject to a policy's remaining terms, conditions, limitations, and exclusions, constitute "property damage" within the definition used in the standard CGL policy form). Of the Penn National Policies, only the 2003-04 Policy through the 2007-08 Policy are at issue. The 2002-03 Policy does not contain an endorsement conferring automatic additional insured status for completed operations, and the only additional insured endorsement contained within that policy does not name Portrait Homes as an additional insured. *See infra*, Findings of Fact ¶ A1. Further, the 2008-09 and 2009-10 Policies contain neither an automatic additional insured nor a specific

endorsement conferring additional insured status on Portrait Homes for completed operations. *See infra*, Findings of Fact ¶¶ A10-11.

The potentially-triggered Penn National Policies fall into two different categories based upon the additional insured coverage offered for completed operations. Below, the court discusses coverage under each of the two different types of policies.

1. Portrait Homes Is Not Entitled to Coverage Under the 2003-04 and 2004-05 Policies Because It Was Not Named as an Additional Insured

Portrait Homes fails to show that it is entitled to coverage under the 2003-04 Policy and 2004-05 Policy because neither Portrait Homes entity was listed as an additional insured under the endorsements attached to those policies. Both the 2003-04 Policy and 2004-05 Policy contain the same endorsement for conferring additional insured status with respect to completed operations coverage: form CG 20 37 1001. *Infra* at Findings of Fact, ¶¶ A2-3. This endorsement extends additional insured status under these policies to “the person or organization shown in the [endorsement’s] Schedule [of specifically-named entities], but only with respect to liability arising out of ‘[the named insured’s] work’ at the location designated and described in the schedule of this endorsement performed for [the additional insured] and included in the ‘products-completed operations hazard.’” *Id.* The additional insured endorsements attached to the 2003-04 Policy name the following entities as additional insureds: Pasquinelli Construction Co.; Pasquinelli Management, LLC; and Portrait Homes Construction Company. *Infra* at Findings of Fact, ¶ A2. The 2004-05 Policy contains a single endorsement that is identical in all relevant respects to the endorsements contained in the 2003-04 Policy. *Infra* at Findings of Fact, ¶ A3.

Here, the two Portrait Homes plaintiffs, who were the defendants in the Persimmon Hill Litigation, are not additional insureds under either policy. By their express terms, such status is conferred only to “the person or organization shown in the Schedule.” *Id.* at ¶¶ A2-3. Neither

Portrait Homes-South Carolina, LLC nor Portrait Homes-Persimmon Hill, LLC is shown in the schedules contained in the additional insured endorsement attached to either the 2003-04 Policy or the 2004-05 Policy. None of the three entities listed in those schedules – Pasquinelli Construction Co., Pasquinelli Management, LLC, and Portrait Homes Construction Company – were named as defendants in either of the lawsuits comprising the Persimmon Hill Litigation. *Infra* at Findings of Fact, ¶¶ C1-2. No other additional insured endorsement attached to either policy names either entity. Thus, under the clear and unambiguous terms of these two policies, Penn National owes Portrait Homes no obligation to defend or indemnify against the Persimmon Hill Litigation because none of the entities identified in the additional insured endorsement schedule was sued.

2. Portrait Homes Is Not Afforded Additional Insured Coverage Under the 2005-06 to 2007-08 Policies Because it had No Contract with the Named Insured

Portrait Homes fails to show that it had a contract with JJA Construction, Inc. requiring that Portrait Homes be added as an additional insured sufficient to confer additional insured status under the 2005-06 Policy, 2006-07 Policy, and 2007-08 Policy. These three policies contain an additional insured endorsement conferring automatic additional insured status for completed operations: form 71 1145.³ *Infra* at Findings of Fact, ¶¶ A6, 8-9. This endorsement adds as an insured under these policies “[a]ny person(s) or organization(s)...with whom you are required in a written contract or agreement to name as an additional insured for the ‘products-completed operations hazard’,” but only with respect to damages arising out of the named insured’s work performed for the additional insured at the premises described in the contract or agreement that satisfies the policy’s definition of “products-completed operations hazard.” *Id.* The word “you” is

³ The 2007-08 Policy contains an updated form, version 71 1145 0906, as opposed to version 71 1145 0105 used in the 2005-06 Policy and 2006-07 Policy. *Infra* at Findings of Fact, ¶¶ A6, 8-9. The updated form used in the 2007-08 Policy is, for all purposes relevant to the instant litigation, identical in the grant of additional insured status. *Id.*

defined in all three policies as “the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.” *Infra* at Findings of Fact, ¶ A12. The declarations pages for all three policies display the named insured as JJA Construction, Inc. *Id.* at ¶¶ A6, 8-9.

Reading these provisions together, to receive additional insured rights under these policies pursuant to form 71, 1145, the third party must have a written contract or agreement with JJA Construction, Inc. under which JJA Construction, Inc. is required to name the third party as an additional insured under completed operations coverage. The only contracts in evidence are a March 6, 2002 “Housing and Purchase Order Contract” and an October 25, 2002 “Master Agreement.” *Infra* at Findings of Fact, ¶¶ B3, 4.

a. The Housing and Purchase Order Contract Fails to Trigger Additional Insured Coverage

The Housing and Purchase Order Contract fails to satisfy the requirements in the policy endorsement 71 1145 to confer additional insured status to Portrait Homes. This contract was between Portrait Homes Construction Co. and “JJA Framing.” *Id.* at ¶ B3. This contract required Castillo to obtain insurance coverage and, before commencing work on the Persimmon Hill Project, to present to Portrait Homes-South Carolina, LLC a certificate or memorandum showing that it had purchased the required coverage, that it had paid for the coverage, and that Portrait Homes-South Carolina, LLC had been named as an additional insured. *Id.* The Housing and Purchase Order Contract did not require Castillo provide completed operations coverage or name Portrait Homes-South Carolina, LLC as an additional insured for completed operations coverage. *Id.*

The provisions of the Housing and Purchase Order Contract do not confer additional insured status upon Portrait Homes because it is (1) not a contract between JJA Construction, Inc.,

the named insured, and Portrait Homes, and (2) its terms do not satisfy the endorsement's requirements. The 71 1145 endorsement in each of the 2005-06 to 2007-08 Policies requires both (1) that the named insured be compelled by written contract or agreement to name the entity seeking additional insured status as an additional insured and (2) that the additional insured status specifically include completed operations coverage. *Infra* at Findings of Fact, ¶¶ A6, 8-9. First, the Housing and Purchase Order Contract is not a written agreement with the named insured under these policies, JJA Construction, Inc., and the parties seeking additional insured status, Portrait Homes. Rather, this agreement was made with Castillo the sole proprietor doing business as JJA Framing, which was not a named insured under any of the three policies.

Beginning during the effective period 2004-05 Policy, when Castillo submitted a policy change request asking that the named insured be amended to JJA Construction, Inc., Penn National's policies displayed "JJA Construction, Inc." as the named insured. *Infra* at Findings of Fact, ¶¶ A6, 8-9. This change took effect on March 2, 2005 upon Penn National's issuance of Endorsement Number 1 on April 6, 2005. *Id.* at ¶ A5. All subsequent policies relevant to Portrait Homes' claim were issued to JJA Construction, Inc. *Id.* at ¶¶ A6, 8-9. Castillo's submission of the policy change request followed his incorporation of JJA Construction, Inc. on December 15, 2004 and filing of executed articles of incorporation with the North Carolina Department of the Secretary of State on December 17, 2004. *Id.* at ¶ A5. For all Penn National Policies containing the "Automatic Additional Insureds – Owners, Contractors and Subcontractors (Completed Operations)" endorsement, therefore, the endorsement required a contract between JJA Construction, Inc. and a third party by which JJA Construction, Inc. was required to name that party as an additional insured under completed operations coverage. The Housing and Purchase

Order Contract is not such a contract because it is between Portrait Homes-South Carolina, LLC⁴ and Castillo the individual.

Second, the Housing and Purchase Order Contract does not require the named insured to purchase completed operations coverage or to name Portrait Homes-South Carolina, LLC as an additional insured under such coverage. Rather, the contract merely requires Castillo to purchase and name Portrait Homes-South Carolina, LLC as an additional insured under various coverages, including general liability coverage. *Infra* at Findings of Fact, ¶ B3. The contract does not even require Castillo to purchase completed operations coverage, much less to name Portrait Homes as an additional insured under that coverage. *Id.* Since neither requirement is met for additional insured status to apply under the Housing and Purchase Order Contract, it cannot form the basis for additional insured status under these Policies.

b. The Master Agreement Is Not A Contract with the Named Insured

Similarly, the Master Agreement is not a contract with the named insured under the 2005-06 through 2007-08 Policies sufficient to confer additional insured status under form 71 1145. The Master Agreement was between Portrait Homes-South Carolina, LLC and Castillo's sole proprietorship, JJA Framing. *Infra* at Findings of Fact, ¶ B4. Paragraph 8.3 of the Master Agreement required Castillo to "carry general liability insurance and ... provide Portrait [Homes-South Carolina, LLC] with a Certificate of Insurance naming Portrait as an additional insured hereunder." *Id.* Castillo was required to procure such coverage in amounts of at least \$1 million per occurrence and \$1 million general aggregate. *Id.* The Master Agreement also required that such coverage include completed operations. *Id.*

⁴ It is also unclear whether the Housing and Purchase Order Agreement was even executed by Portrait Homes-South Carolina, LLC. While that entity is identified as the "Contractor" in the preamble, the signature block indicates that the contract was executed by "Portrait Homes Construction Co." [Plaintiff's Exhibit No. 38, at p. 6]. The title of the contract also indicates Portrait Homes Construction Co. [*Id.* at p. 1].

While the Master Agreement satisfies the second requirement of the automatic additional insured endorsement, it is a contract between Castillo and Portrait Homes-South Carolina, LLC. As described above, following the submission of the policy change request on March 2, 2015, the named insured on all Penn National Policies was changed to JJA Construction, Inc. To confer additional insured status under these Policies, therefore, Portrait Homes needed a contract with JJA Construction, Inc., not Castillo. Since it was not a contract with JJA Construction, Inc., the Master Agreement does not confer additional insured status to Portrait Homes under the 2005-06 through 2007-08 Policies.

c. Castillo, JJA Framing, & JJA Construction, Inc. Are Not the Same Entity

Portrait Homes attempted to establish at trial that Castillo, Jose Castillo d/b/a JJA Framing, and JJA Construction, Inc. were all functionally the same entity and were treated as such by both Portrait Homes and Penn National at all times relevant to this dispute. Portrait Homes submitted evidence that Castillo's name change request specifically stated that he had not incorporated, that Penn National continued to refer to the "Form of Business" for its named insured on the 2005-06 Policy and forward as "Individual," that a certificate of insurance issued for the 2005-06 Policy referred to Castillo as an insured in addition to JJA Construction, Inc., that the underwriting information used to issue the policies both before and after JJA Construction, Inc.'s incorporation was the same, and that Portrait Homes continued paying Castillo individually throughout the duration of the Persimmon Hill Project.

However, where a contract's language is "clear and unambiguous, the language alone determines the contract's force and effect." *Goldston*, 358 S.C. at 170 (quoting *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). "The primary purpose of all rules of contract construction is to determine the intent of the parties." *Id.* (citing *Hansen ex rel.*

Hansen v. United Services Auto. Ass'n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct.App. 2002)). “[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.” *MGC Mgmt. or Charleston, Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 548 520 S.E.2d 820, 823 (Ct.App. 1999). To create a contract ambiguity, the challenging party’s interpretation must reasonable. *Universal Underwriters Ins. Co. v. Metropolitan Property and Life Ins. Co.*, 298 S.C. 404, 407, 380 S.E.2d 858, 860 (Ct.App. 1989), superseded by statute on other grounds as noted by *Williams v. Government Employees Ins. Co.*, 409 S.C. 586, 602, 762 S.E.2d 705, 714 (2014) (quoting *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160, 363 S.E.2d 235, 236 (Ct.App. 1987)) (“A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one.”); *Poston v. National Fid. Life Ins. Co.*, 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990) (“Where language used in an insurance contract is ambiguous, or where it is capable of two reasonable interpretations, that construction which is most favorable to the insured will be adopted.”).

Here, the only reasonable interpretation of the 2005-06, 2006-07, and 2007-08 Penn National Policies is that the named insured was JJA Construction, Inc. and not Castillo dba JJA Framing. The language on the declaration pages in these policies is unambiguous: “Named Insured and Address[:] JJA Construction, Inc. ...” The two parties’ clear intention was that going forward from the March 2, 2005 change request, coverage would be available to “JJA Construction, Inc.” and no longer offered to Jose Castillo the individual doing business under the fictitious name JJA Framing. JJA Framing does not appear on any document attached to these policies. Even assuming, as Portrait Homes suggests, that JJA Construction, Inc. was functionally the same entity as Jose Castillo d/b/a JJA Framing, the evidence clearly shows that Castillo completed the corporate

formalities necessary to create a legally distinct entity by executing articles of incorporation and filing them with the North Carolina Department of Secretary of State. *Infra* at Findings of Fact, ¶ B5. South Carolina has long recognized the general legal principle that “[a] corporation is not a natural person and maintains a separate and distinct identity apart from its shareholders.” *Mangum v. Maryland Cas. Co.*, 330 S.C. 573, 576, 500 S.E.2d 125, 127 (1998) (citing *Costas v. First Fed. Sav. & Loan Ass’n*, 283 S.C. 94, 321 S.E.2d 51 (1984)).

Penn National’s description of the business form as “Individual” and continued use of the same underwriting information even after this change is insufficient to override the clear intention of the parties as expressed by the completion of the “Named Insured and Address” space on the declarations page with “JJA Construction, Inc.” No reference is made to Castillo the individual or even to his fictitious business name either in the declarations page or at any other point in these policies. Absent inserting facts from outside the four corners of the policy – that Castillo was the owner and incorporator of JJA Construction, Inc. – there is no way to construe the terms of the policy, by themselves, as conferring any of its protections to Castillo himself. *See Taylor v. Taylor*, 291 S.C. 261, 264, 353 S.E.2d 156, 158 (Ct.App. 1987) (“The parol evidence rule excludes evidence giving a perfectly clear agreement a different meaning or effect from that indicated by the plain language.”); *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) (“[O]nly if the document itself creates an ambiguity should a court look to outside evidence to aid in interpretation.”).

Similarly, the reference to Castillo as an insured on the certificate of insurance does not create an ambiguity in the policy itself because it is evidence outside of the contract. *Id.* The terms of the certificate are clear that the “certificate does not amend, extend or alter the coverage afforded by [the 2005-06 Policy]” and is provided for informational purposes only. *Infra* at Findings of

Fact, ¶ B8. As a matter of law, certificates of insurance do not affect coverage afforded under a policy and instead merely serve as evidence that a policy is in place. *See Campbell, Inc. v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764 (D.S.C. 2004) (holding that statement by insurance adjuster effectively expanding coverage under a policy could not operate as waiver or estoppel to deny coverage); *see also Mulvey Const. Inc. v. Bituminous Cas. Corp.*, 571 Fed. Appx 150 (4th Cir. 2014) (unpublished) (holding certificates of insurance could not be relied on to extend coverage where certificate expressly stated that it conferred no rights upon certificate holder and did not amend, extend or alter coverage); *G.E. Tignall & Co., Inc. v. Reliance Nat. Ins. Co.*, 102 F.Supp.2d 300 (D.Md. 2000) (certificate identifying general contractor as “additional insured” did not bind insurer); *Erie Ins. Exchange v. Gosnell*, 246 Md. 724, 230 A.2d 467 (1967) (where terms of certificate of coverage conflict with terms of the policy, the policy terms control); *Tidewater Equipment Co., Inc. v. Reliance Ins. Co.*, 650 F.2d 503 (4th Cir. 1981); *American Hardware Mut. Ins. Co. v. BIM, Inc.*, 885 F.2d 132 (4th Cir. 1989) (citing 13 A Appleman, Insurance Law & Practice § 7530, at 19 (1985 & sup. 1987) (“A certificate of insurance is not a contract of insurance but is merely the evidence that a contract has been issued)). Thus, the certificate of insurance does not affect coverage available under the Penn National Policies.⁵

Finally, Portrait Homes’ continued treatment of Castillo as a sole proprietor and payment of his bills in that capacity is irrelevant to the interpretation of the policies. Portrait Homes was a complete stranger to the insurance contract and its dealings with Castillo are insufficient to warrant altering the clear terms of the policy. Indeed, Portrait Homes’ additional bid documents and the certificate of insurance to which it refers, both of which it received from JJA Construction, Inc. following its incorporation, should have placed it on notice of the change in corporate structure

⁵ Portrait Homes’ suggestion that the certificate’s statement that “Portrait Homes-South Carolina LLC and all wholly owned subsidiaries...are named as additional insureds” confers policy rights upon it fails for similar reasons.

and to investigate whether its contract should have been renegotiated with the newly formed entity.

Portrait Homes also attempted to establish that JJA Construction, Inc. may have done business under the fictitious business name JJA Framing. Even if that were the case, Portrait Homes would be unable to avail itself of the benefits of the policy. The Master Agreement was not executed by JJA Framing; rather, it refers to Castillo specifically, identifying him as a sole proprietorship. *Infra* at Findings of Fact, ¶ B4. The Master Agreement was also executed more than two years before JJA Construction, Inc. was incorporated. The only reasonable way to interpret the Master Agreement, therefore, is that it was between Castillo in his individual capacity and Portrait Homes. Thus, Portrait Homes has not and cannot show that Castillo, JJA Framing, and JJA Construction, Inc. were all functionally the same entity.

d. The Master Agreement Does Not Govern Castillo's Work at Persimmon Hill

Even assuming for the sake of argument that Portrait Homes is correct that Castillo, Jose Castillo d/b/a JJA Framing, and JJA Construction, Inc. are the same entity, no coverage is available to Portrait Homes. Were JJA Construction, Inc. to be regarded as Castillo himself, argues Portrait Homes, it would be entitled to additional insured coverage under the Penn National Policies through the Master Agreement, which requires JJA Construction, Inc. to name it as an additional insured for completed operations under its insurance policies. However, the evidence shows that the Housing and Purchase Order Contract, and not the Master Agreement, governs the Castillo Entities' relationship with Portrait Homes and, thus, the Castillo entities' insurance obligations. As noted above, the Housing and Purchase Order Contract does not require Castillo to name Portrait Homes-South Carolina, LLC as an additional insured for completed operations and, as such, is insufficient to confer coverage under the 71 1145 endorsement attached to the 2005-06, 2006-07, and 2007-08 Penn National Policies.

It is clear that Castillo's obligations at the Persimmon Hill Project were governed by the Housing and Purchase Order Contract and not the Master Agreement. The Master Agreement is replete with terms indicating that it applied only prospectively and not retroactively. For example, the Master Agreement indicates in multiple places that it was executed in anticipation that the parties would execute further, project-specific purchase orders in the future. [See, e.g., Plaintiff's Exhibit 37, at p. 1 ¶ 1 ("Based on the nature of the services and/or materials to be provided by Contractor, it is anticipated that specific purchase order contracts will be executed..."), ¶ 5 ("The intent is that if any services and/or materials are procured and agreed to by both parties during the term of this Agreement, the terms and conditions of this Agreement shall apply.")] Further, the Master Agreement indicates that its terms apply and supersede only housing and purchase order contracts executed after it took effect. [*Id.* at ¶¶ 1 ("...however the terms of this Agreement shall prevail in the event of any conflict between the terms of this Agreement and any future purchase order contract and it being further agreed that the terms and conditions shall be incorporated into any future purchase order contract by and between the parties hereto as if this Agreement had been set forth in said purchase order contract, in its entirety."), 3 ("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.")] Finally, the Master Agreement indicates that it would take "full force and effect from the date of signing." [*Id.* at ¶ 4]. Thus, the term of the Master Agreement commenced when it was signed on November 5, 2002. *Infra* at Findings of Fact, ¶ B4.

These contractual terms indicate that the Housing and Purchase Order Contract continued to govern Castillo's responsibilities to Portrait Homes at Persimmon Hill. The Master Agreement was executed in November 2002 – seven months after the March 2002 execution of the Housing

and Purchase Order Contract -- and contains multiple clauses indicating its forward-reaching effect and application only to purchase order contracts executed during its term. The Master Agreement does not indicate that its terms apply retroactively to previously-executed purchase order agreements, such as the Housing and Purchase Order Contract at issue here. Portrait Homes clearly understood the importance of re-executing Housing and Purchase Order Contracts entered before the Master Agreement so that all Master Agreement terms would apply to pre-existing projects: it required Castillo to do so for the Summerwood project, which had been governed by the exact same Housing and Purchase Order Contract applicable to the Persimmon Hill Project. [Plaintiffs' Exhibit Nos. 38 & 46]. Portrait Homes submitted no evidence that it did the same for the Persimmon Hill Project.

While Portrait Homes solicited evidence at trial that two addendums to the Housing and Purchase Order Contract were executed after the Master Agreement, changes to these ancillary documents did not result in re-execution of the contract. The terms of the Housing and Purchase Order Contract indicated that it incorporated outside documents, including Castillo's scope of work at the project, and that those documents became "written instruments of [the] Contract." *Infra*, at Findings of Fact, ¶ B3; [Plaintiffs' Exhibit No. 38, at p. 5]. The court finds that very conduct of the parties -- executing addenda to a previously-executed contract without exchanging any additional consideration -- suggests that they were modifying the obligations under Housing and Purchase Order Contract, not executing it anew.

Portrait Homes also submitted testimony to the effect that the Master Agreement was meant to govern the relationship between it and its subcontractors irrespective of the date that a job-specific purchase order contract was executed. First, that testimony contradicts other testimony Portrait Homes offered, which clearly indicates that Portrait Homes personnel understood the

Master Agreement as a foundational document executed at the beginning of a business relationship and only looked forward. *Infra*, at Findings of Fact ¶ C4 (“Once the master agreement was in place, then we would execute individual housing and purchase order contract[s] for each individual community...” (emphasis added)). Second, even in the absence of this conflicting testimony, the court disregards evidence contradicting the clear terms of the Master Agreement as violating the parol evidence rule. *See Taylor*, 291 S.C. at 264, 353 S.E.2d at 158 (“The parol evidence rule excludes evidence giving a perfectly clear agreement a different meaning or effect from that indicated by the plain language.”); *Watson v. Underwood*, 407 S.C. 443, 455, 756 S.E.2d 155, 162 (Ct.App. 2014) (“If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms.”). Since the parties clearly and unambiguously specified that future purchase order contracts would be subject to the Master Agreement’s terms without any reference to those previously-executed, the court interprets the language as excluding those previous purchase orders. *Little v. Town of Conway*, 171 S.C. 27, 171 S.E. 447, 448 (1933) (“[T]he maxim ‘Expressio unius est exclusio alterius’ is thus defined: ‘When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.’”); *Chapman v. Metropolitan Life Ins. Co.*, 172 S.C. 250, 173 S.E. 801, 804 (1934) (applying “Expressio unius est exclusio alterius” to interpret a contract).

Portrait Homes fails to prove that it is entitled to additional insured status under the Penn National Policies. On the first two policies, the defendants named in the Persimmon Hill Litigation (the Portrait Homes plaintiffs here) are not named as additional insureds. For the last three policies, Portrait Homes had no contract with the named insured that would satisfy the additional insured endorsements attached to those policies. Therefore, Portrait Homes is not entitled to reimbursement of its collectible defense costs from Penn National.

**F. Portrait Homes Is Not Entitled to Recover Any Amounts Paid on Its Behalf by
Admiral Insurance Company To Defend and Settle The Underlying Litigation**

Even if Portrait Homes were able to prove that it is an additional insured under either form of additional insured endorsement, its damages must be greatly reduced. Damages are an essential element of a breach of contract claim. *Hotel and Motel Holdings, LLC v. BJC Enterprises*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). An insured that incurs no out-of-pocket expenses in defending a lawsuit or paying a settlement or judgment arising from that lawsuit has no cognizable damages sufficient to maintain a breach of contract action against an insurer. *See Sloan Const. Co., Inc. v. Cent. Nat. Ins. Co. of Omaha*, 269 S.C. 183, 187 236 S.E.2d 818, 820 (1977) (finding that an insured whose defense costs had been paid by another carrier sustained no damages from the defendant-insurer's failure to defend it in the underlying litigation); *see also Hartford Accident and Indemnity Company v. South Carolina Ins. Co.*, 252 S.C. 428, 436, 166 S.E.2d 762, 765 (1969) (finding that an excess insurer subrogated to the insured's rights by virtue of the defense and indemnity it provided against the insured had no right to recover against the insured's primary carrier, which failed to participate in the defense, because the insured sustained no damages).

a. Portrait Homes' Defense and Settlement Were Funded By Its Carriers

The Portrait Homes entities were completely indemnified for their settlement payments in the Persimmon Hill Litigation by their insurance carriers. *Infra* at Findings of Fact, ¶ C4. The carriers, primarily Admiral, paid \$3.85 million to settle the claims against them by the HOA and the class of homeowners and approximately \$352,000 to the Hood Law Firm for its services in defending Portrait Homes against the two lawsuits. *Id.*

Thus, the settlement payment and defense costs paid by Admiral are not damages sufficient

to support Portrait Homes' breach of contract action against Penn National. Portrait Homes incurred no out-of-pocket cost in making the settlement payment to resolve the Persimmon Hill Litigation, which was completely funded by its insurance carriers; accordingly, it sustained no damage in the amount of \$3.85 million. *Sloan*, 414 S.C. at 652, 780 S.E.2d at 272; *Hartford*, 252 S.C. at 436, 166 S.E.2d at 765. Similarly, the \$352,000 cost to defend the Persimmon Hill Litigation was borne by Portrait Homes' insurance carriers and is not damages arising out of any breach of the insurance policy by Penn National.⁶ *Id.*

While South Carolina recognizes the collateral source rule, which allows the victim of a defendant's tortious behavior to recover damages arising out that behavior irrespective of the victim's indemnification for those damages by another independent source, it does not apply here to Portrait Homes' breach of contract claim. *New Foundation Baptist Church v. Davis*, 257 S.C. 443, 446-47, 186 S.E.2d 247, 249 (1972); see *Crossmann Communities*, 2013 WL 5437712, at *27 (D.S.C. Sept. 27, 2013) (...[T]he policies underlying the collateral source rule are less compelling in breach of contract cases than in tort actions. Tort law's focus on punishment and deterrence favors the risk of a plaintiff's double recovery over the risk of under-detering the defendant. Unlike in tort law, the purpose of damages in contract law is not deterrence and punishment[, but rather] to put the plaintiff in as good a position as he would have been in if the contract had been performed. ... Applying the collateral source rule to contract law would contravene this principle by awarding the non-breaching party more damages than necessary to compensate it for the breach.") (internal citations and quotations omitted). While South Carolina's courts have not addressed this issue, the *Crossmann Communities* court extensively cited decisions from other

⁶ Portrait Homes does not contend that the cost to defend the Persimmon Hill Litigation is a collectible damage. See [Plaintiffs' Exhibit No. 10] (Portrait Homes' Summary of defense, which includes only \$42,791.24 in defense costs).

jurisdictions refusing to apply the collateral source rule where another insurance policy indemnified the insured for defense and indemnity, calling that holding a “clear majority” rule and a “national consensus.” *Id.* at *26-27. Two United States District Courts both recently adopted the reasoning of *Crossmann Communities* on nearly identical facts to those presented in this matter and declined to apply the collateral source rule to allow a fully indemnified general contractor⁷ to recover the amount of a settlement paid by its insurer. *Summer Wood Property Owners Association, Inc. v. Pennsylvania National Mut. Cas. Ins. Co.*, Civ. No. 2:17-cv-3504-BHH, ECF No. 54, at pp. 11-12 (D.S.C. Sept. 16, 2019); *Pennsylvania National Mut. Cas. Ins. Co. v. Portrait Homes-South Carolina, LLC, et al. (“Oak Bluff”)*, Civ. No. 3:18-CV-00561-KDB-DCK, ECF No. 21, at pp. 7-14 (W.D.N.C. Sept. 18, 2019) (applying North Carolina law). As a result, this court is persuaded by the *Crossmann Communities* reasoning that allowing a breach of contract plaintiff to recover amounts indemnified by another of its insurers from a non-defending and contributing carrier constitutes an impermissible double recovery for that plaintiff.

Portrait Homes argues that *Otis Elevator, Inc. v. Hardin Const. Co. Grp.*, 316 S.C. 292, 295, 450 S.E.2d 41, 43 (1994) would allow it to collect the benefits paid on its behalf by its insurer. *Otis Elevator* is plainly inapplicable to the situation at bar. In *Otis Elevator*, the plaintiff sued the defendant to indemnify it for its settlement of a third party’s suit for injuries while using an elevator for which the defendant had agreed to provide a competent operator and to indemnify plaintiff for claims arising out of the use of the elevator. *Id.* at 294, 43. There, the court overturned a trial court’s reduction of a jury award in favor of the non-negligent plaintiff based upon its insurer’s indemnification of the plaintiff’s settlement in the underlying tort action. *Id.* at 300, 45. The *Otis Elevator* court justified this ruling on the ground that the negligent defendant should not benefit

⁷ The general contractor in this action was Portrait Homes-South Carolina, LLC and Portrait Homes Summer Wood, LLC.

from the plaintiff's insurance premiums. *Id.* Thus, *Otis Elevator* stands for the proposition that a wrongdoer-indemnitor may not reduce its own liability to a blameless indemnitee for underlying harm caused by the indemnitor's tortious conduct based on the indemnitee's insurance payments.

Here, by contrast, Penn National is not a tortfeasor or wrongdoer accused or proved to have caused damage to the Persimmon Hill Project, unlike the defendant in *Otis Elevator*. *Oak Bluff*, Civ. No. 3:18-CV-00561-KDB-DCK, ECF No. 21, at pp. 12-13. Nor was Portrait Homes adjudicated to be blameless in causing the damage at issue, unlike the *Otis Elevator* plaintiff. Indeed, the testimony here suggests that Portrait Homes contributed to the damage by supplying improper building materials and failing to properly supervise subcontractors, both of which helped cause the damage at the Persimmon Hill Project. *Infra* at Findings of Fact, ¶ C3. Rather, Portrait Homes effectively seeks coverage from Penn National as a co-insurer of a loss for which it has already been completely indemnified. *Id.* at ¶ C4; *Oak Bluff*, Civ. No. 3:18-CV-00561-KDB-DCK, ECF No. 21, at p. 13.

Portrait Homes failed to prove how its position was worsened by Penn National's refusal to pay the \$3.85 million settlement. *See Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct.App. 1996) ("The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in had the contract been performed."). Because Admiral made these payments on Portrait Homes' behalf, Portrait Homes is in the same position it would have been in had Penn National participated in its defense in the Persimmon Hill Litigation and contributed to the settlement payment. Portrait Homes asks this court to award it for costs that were wholly borne by another entity, an impermissible double recovery under the reasoning of *Crossmann Communities*.

b. Portrait Homes' Payments to the DeVore Acton & Stafford Law Firm Were Not Reasonable or Necessary Such That They Are Not Collectible Damages

Portrait Homes' \$17,791.24 in legal bills paid to the DeVore Acton law firm were not reasonable and necessary such that they are not collectible from Penn National here. Recovery of attorneys' fees expended in defending an underlying lawsuit is a permitted form of recovery in an insured's action against its insurer for breach of the duty to defend. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 550, 243 S.E.2d 443, 444 (1978). South Carolina recognizes six factors in determining the reasonableness and necessity of fees incurred in completed litigation: "(1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained." *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

Based on the testimony offered at trial, the services rendered by DeVore Acton were unreasonable when assessed under South Carolina's six-factor test. First, the services rendered by DeVore Acton with relation to the Persimmon Hill Litigation were primarily administrative in nature: Portrait Homes' defense counsel testified that the firm provided assistance in obtaining witnesses and documents and understanding key executives and Portrait Homes' corporate structure. *Infra*, at Findings of Fact, ¶ C5. Besides a single reference to Mr. DeVore's assistance with litigation strategy, the testimony of the firm's involvement solely concerns the above-referenced administrative tasks. *Id.* Portrait Homes submitted no evidence concerning whether Mr. DeVore is an attorney in good standing. The court, however, pursuant to S.C. R. Evid. 201(b)(2), takes judicial notice of (1) the DeVore Acton & Stafford P.A. website and Mr. DeVore's attorney

profile published there,⁸ (2) the North Carolina State Bar website's member directory,⁹ and (3) the South Carolina State Bar website's member directory.¹⁰ From these sources, which the court finds are sources whose accuracy cannot reasonably be questioned, the Court can readily determine that Mr. DeVore is an attorney in good professional standing in North Carolina, but is not admitted to practice law in South Carolina, the jurisdiction in which the Persimmon Hill Litigation was litigated. Mr. DeVore was thus necessarily limited in his ability to participate meaningfully in Portrait Homes' defense. Portrait Homes presented no evidence at trial regarding the effectiveness of Mr. DeVore's participation and did not tie the services rendered to the settlement agreed in resolution of the Persimmon Hill Litigation. Given DeVore's limited participation in the matter, the fee Mr. DeVore assessed in the matter appears customary for its involvement, though Portrait Homes did not present evidence concerning the firm's hourly fees (or the existence of any contingency arrangement), the customary fees assessed in the jurisdiction, the breakdown of how the provided services were allocated to different levels of legal professionals, or the hours the firm and its professionals devoted to Portrait Homes' defense. In short, besides vaguely describing the services DeVore provided with respect to the Persimmon Hill Litigation, Portrait Homes failed to carry its burden to show that the services rendered were reasonable and necessary under the six-factor South Carolina test. Accordingly, Portrait Homes' request for these fees is denied.

c. Portrait Homes' Self-Insured Retention Payments Are Collectible Damages That Must be Reduced by the Penn National Policies' Deductibles

Finally, Portrait Homes does identify one category of collectible damages, provided it proves the existence of coverage under the Penn National Policies: its self-insured retention payment to The Hood Law Firm of \$25,000. However, the amount must be reduced to the amount

⁸ Available at: <https://www.devact.com/firm-overview/attorneys/fred-w-devore-iii/>.

⁹ Available at: <https://www.ncbar.gov/for-the-public/finding-a-lawyer/member-directory/>.

¹⁰ Available at: <https://www.scbars.org/lawyers/directory/>.

that would place Portrait Homes in no better a position than it would have been had Penn National provided it a defense. *Minter*, 322 S.C. at 528, 473 S.E.2d at 70. The parties agree that coverage would only be available, to the extent it is triggered at all, under Penn National's 2003-04 Policy up to Penn National's 2007-08 Policy. South Carolina courts have found that where progressive damage triggering multiple policies is at issue, the insured is entitled to indemnity from the limits available under each triggered policy but must also pay the deductible applicable to each triggered policy. *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, 817 F.Supp.2d 784, 789-90 (D.S.C. 2011). Each of the five policies under which Portrait Homes seeks to collect includes a deductible of \$500. Thus, the maximum amount that Portrait Homes can collect as damages is \$22,500, the only out-of-pocket costs it paid as a result of any breach of the policies by Penn National less the applicable policy deductible.

G. Portrait Homes Failed To Establish that Penn National's Investigation and Denial Were In Bad Faith

The court finds that Penn National conducted a reasonable investigation for potential coverage owed to Portrait Homes¹¹ under the circumstances such that there was no bad faith. Even where there is no coverage available to the insured under the policy, the policyholder may nonetheless prove a bad faith claim where it proves that the insurer executed its other duties under the policy in bad faith. *Tadlock*, 322 S.C. at 501-03, 473 S.E.2d at 54-55.

The court found above that Penn National owed no coverage to Portrait Homes for its claim concerning the Persimmon Hill Litigation. Even had Portrait Homes been correct in its assertions that Penn National owed it a duty to defend and ultimately, to indemnify, the court finds that Penn National had an objectively reasonable basis upon which to contest coverage such that its denial

¹¹ Portrait Homes assigned its bad faith claim to the HOA as a part of these parties' settlement in the Persimmon Hill Litigation.

of benefits was not in bad faith. *Mixson, Inc. v. American Loyalty Ins. Co.*, 349 S.C. 394, 398, 562 S.E.2d 659, 661 (Ct. App. 2002). Portrait Homes may therefore only carry its burden on this claim by showing that Penn National's investigation was conducted in bad faith.

Penn National conducted its investigation of coverage as to Portrait Homes in a reasonable manner under the circumstances. Portrait Homes submitted evidence at trial to try to establish that Penn National failed to timely respond to its claims correspondence. The evidence shows that Penn National promptly responded Portrait Homes' June 2013 tender of coverage with multiple phone calls, but that Penn National and counsel for Portrait Homes were unable to reach one another. *Infra*, at Findings of Fact ¶ D2. Once Portrait Homes submitted its second tender letter, Penn National's claim notes show that it promptly investigated coverage, submitted a coverage question report for its counsel's consideration, and otherwise further investigated Portrait Homes' claims. *Id.* at ¶¶ D4-6. Finally, even to the extent that Penn National failed to timely respond, Portrait Homes admits that its other insurance carriers were defending it in the Persimmon Hill Litigation such that it is unable to prove any consequential damages resulting from these alleged failures. *Id.* at ¶ C1; see *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359-60, 415 S.E.2d 393, 396-97 (1992) (identifying damages to the insured as an element of an insurance bad faith claim in South Carolina). The court, therefore, finds the evidence of any delays in Penn National's response to claim communication insufficient to satisfy Portrait Homes' bad faith claim.

Next, Portrait Homes suggests that Penn National's failure to interpret contractual documents as broadly as it did constituted bad faith failure to investigate the existence of coverage. As discussed at length above, however, Penn National's policies unambiguously establish that no coverage was available to Portrait Homes. In the case of the 2003-04 and 2004-05 Policies, Portrait Homes claims that Penn National's conclusion that no coverage was available because the only

address of operations where additional insured coverage applied differed from that of the Persimmon Hill Project was unreasonable because the address on the relevant endorsements was that of the named insured, Castillo. Even if Penn National's interpretation of these policies was unreasonable, Portrait Homes again fails to connect that allegedly unreasonable conduct directly to any damages it sustained. *Crossley*, 307 S.C. at 359-60, 415 S.E.2d at 396-97. The endorsements on these policies unambiguously limit their application to specifically-listed entities, of which none were defendants in the Persimmon Hill Litigation such that Penn National had no duty to defend under these policies regardless of what address was included in the 2037 endorsements.

On the later policies, executed after Castillo incorporated JJA Construction, the clear language of the policies shows that the insured was JJA Construction, Inc. and that Portrait Homes had no contract with that entity. Portrait Homes argues that Penn National should have further investigated JJA Construction Inc.'s corporate formalities, which would have led it to the conclusion that it was functionally the same entity as Castillo's sole proprietorship, JJA Framing. Penn National was correct, however, that Castillo's incorporation of JJA Construction, Inc. created a legally distinct entity that changed Penn National's obligations under its policies. Regardless of whether its further investigation would have led it to discover the conflicting evidence presented at trial, Penn National owed a defense only where Portrait Homes had a contract with the named insured, and there has been no evidence to show that one existed at any time.

Finally, Portrait Homes argues that Penn National's denial letter, which contained the erroneous assertion that the policies at issue contained no completed operations additional insured coverage, was in bad faith. The uncontested evidence at trial is that the statement in the letter was a mistake and an incomplete statement as to the Policies' contents. *Infra*, at Findings of Fact ¶ C7. There is insufficient evidence to show that this statement was either unreasonable or made in bad

faith. To the contrary, all Penn National testimony and documentary evidence on the subject shows that Penn National's intention was to explain that the completed operations endorsements that were attached to the policies at issue did not operate to extend Portrait Homes coverage based on the facts and circumstances in the case. *Id.*

Portrait Homes again fails to show how it was damaged by this erroneous statement in Penn National's denial letter. *Crossley*, 307 S.C. at 359-60, 415 S.E.2d at 396-97. At the time it received the September 30, 2014 denial letter, another carrier was already defending Portrait Homes, and the same carrier ultimately funded Portrait Homes' settlement with the HOA. *Infra*, at Findings of Fact ¶ C4. Portrait Homes also possessed documents suggesting the statement was erroneous at the time it received the letter, including copies of additional insured endorsements concerning the relevant policies indicating that they did contain additional insured endorsements, yet failed to respond to the letter, even at Penn National's invitation to do so. *Id.* at ¶¶ A4, 7; D7. While such a failure would not excuse unreasonable or bad faith conduct by an insurer, Portrait Homes' silence while in possessing contradictory information certainly weighs against any argument that it was damaged by Penn National's erroneous statement in the denial letter.

Thus, while there is undisputed evidence that Penn National made some mistakes in its adjustment of Portrait Homes' claim, its conduct here does not rise to the level of unreasonableness or bad faith needed to support Portrait Homes' bad faith cause of action. Even if its conduct here satisfied that standard, Portrait Homes did not show that it was damaged by the conduct it argues supported its claim. Therefore, the court finds that Portrait Homes failed to satisfy its burden on this cause of action and finds in Penn National's favor.

H. Portrait Homes-South Carolina, LLC Is Only Entitled To Be Indemnified By Penn National for Penn National's Time-on-risk Portion Of The Covered Damages

Penn National is entitled to a “time on the risk” allocation of covered damages. *Crossmann II*, 395 S.C. at 59-64, 717 S.E.2d at 599-601; *see, Infra*, at Conclusions of Law ¶ D. Portrait Homes bears the burden of proving that its claim is covered by the policy. *Garrett*, 241 S.C. at 303, 128 S.E.2d at 173. Portrait Homes has failed to present sufficient evidence to establish what portion, if any, of the claimed damages is covered by the Penn National Policies. For example, the Penn National Policies only extended coverage to Portrait Homes to damages “arising out of” or “caused in whole or in part” by the named insured’s work at the Persimmon Hill Project. *Infra* at Findings of Fact, ¶¶ A2, 6. However, Portrait Homes presented no evidence to show on which of the buildings that Castillo or JJA Construction, Inc. performed framing work or what portion of its settlement represented damages attributable, at least partially, to the Castillo Entities’ work. *Id.* at ¶ C3. While Portrait Homes testified that it attributed that settlement wholly to Castillo’s errors, the testimony contradicts that of its expert, who testified that he was unable to discern which framing contractors had performed any particular work but that they had all performed the framing incorrectly, that the vast majority of the damages to the project were attributable to defects besides framing, and that Portrait Homes’ own errors, such as providing improper materials and failing to properly supervise subcontractors, materially contributed to the defects at the Project. *Id.* Having failed to present evidence allocating between covered and non-covered damages, Portrait Homes fails to carry its burden to prove that its claim is covered under the Penn National Policies.

Notwithstanding the Court’s finding that Portrait Homes has failed to present evidence bringing its claim for damage within the insuring language of the agreement for which it now seeks indemnity, Portrait Homes would not be entitled to recover this entire amount as it would need to

be analyzed by utilizing a time-on-risk calculation previously discussed herein. *See, Infra*, at Conclusions of Law ¶ D.

FINAL JUDGMENT

Therefore, for the reasons stated above, and based upon the entire record, the Court enters judgment pursuant to Rule 58 of the South Carolina Rules of Civil Procedure as follows:

- a. Third-Party Plaintiff The Persimmon Hill Homeowners Association, Inc. shall have and recover nothing from Defendant Pennsylvania National Mutual Casualty Insurance Company on the HOA's claim for breach of contract.
- b. Third-Party Plaintiff The Persimmon Hill Homeowners Association, Inc. shall have and recover nothing from Defendant Pennsylvania National Mutual Casualty Insurance Company on the HOA's claim for insurance bad faith.
- c. Plaintiffs Portrait Homes-South Carolina, LLC and Portrait Homes-Persimmon Hill, LLC's shall have and recover nothing from Defendant Pennsylvania National Mutual Casualty Insurance Company on Portraits' claim for breach of contract.
- d. Third-Party Plaintiff The Persimmon Hill Homeowners Association, Inc.'s, as assignee of Plaintiffs Portrait Homes-South Carolina, LLC and Portrait Homes-Persimmon Hill, LLC, shall have and recover nothing from Defendant Pennsylvania National Mutual Casualty Insurance Company on the HOA's claim for insurance bad faith.

AND IT IS SO ORDERED.

Dated:

Berkeley County, South Carolina

/s/The Honorable Roger M. Young, Sr.
Chief Administrative Judge, Ninth Circuit

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-08-02757

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.

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.

**DEFENDANT PENNSYLVANIA
NATIONAL MUTUAL
CASUALTY INSURANCE
COMPANY'S MOTION TO
ALTER OR, IN THE
ALTERNATIVE, TO AMEND
JUDGMENT PURSUANT TO
S.C. R. CIV. P. 59(e)**

**TO: STANLEY C. ROGERS, ESQ., ATTORNEY FOR THE PLAINTIFF,
PHILLIP WARD SEGUI JR., ESQUIRE, JOHN T. CHAKERIS, ESQUIRE
AND ALICIA D. PETIT, ESQUIRE, ATTORNEYS FOR PERSIMMON HILL:**

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant, Pennsylvania National Mutual Casualty Insurance Company, will move before the presiding judge of the Berkeley County Court of Common Pleas at the Berkeley County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may conveniently be heard, for an Order altering or, in the alternative, amending the

respective judgments entered in favor of Portrait Homes – South Carolina, LLC and Portrait Homes – Persimmon Hill, LLC (together, “Portrait Homes”) and The Persimmon Hill Homeowners Association, Inc. (the “HOA”) on October 22, 2019 based on the grounds stated below:

1. Portrait Homes filed suit against Penn National for breach of contract, claiming that it qualified as an additional insured under several insurance policies that it issued to a contractor named Jose Castillo (and later, to a corporate entity he formed called JJA Construction, Inc.). Portrait Homes asserted that it was owed a defense and indemnity under the policies for two underlying construction defect lawsuits asserted against it by the HOA and its individual members proceeding as a class, respectively. The HOA asserted cross-claims against Penn National that Castillo assigned it, essentially conferring its rights under the policies to the HOA. The HOA asserted claims for breach of contract for failure to defend Castillo in the underlying suit and insurance bad faith. The HOA also asserts Portrait Homes’ bad faith claim, which Portrait Homes assigned it in the underlying matter.

2. The matter proceeded with a bench trial from February 4-7, 2019 and May 7-9, 2019. Following completion of the trial and preparation of the transcript, the court ordered the parties to submit proposed orders including proposed findings of fact and conclusions of law pursuant to Rule 52 of the South Carolina Rules of Civil Procedure. The parties submitted these proposed orders on September 18, 2019. The parties submitted supplemental briefing on or about October 3, 2019.

3. On October 22, 2019, the court signed Portrait Homes’ and the HOA’s respective proposed orders. As for Portrait Homes, the court found that Portrait Homes qualified as an additional insured and that Penn National breached the obligations in the policies that it owed to

Portrait Homes. Further, the court found that Penn National engaged in insurance bad faith. As a result, the court awarded Portrait Homes \$2.5 million on the breach of contract claim, representing the Penn National policies' \$500,000 limit on each policy year in which the court found Portrait Homes to have qualified as an additional insured, and \$3.85 million in damages on the bad faith claim, the amount paid to the HOA to resolve the underlying claims against Portrait Homes. The court's order also awarded prejudgment interest to Portrait Homes.

4. As for the HOA, the court found that Penn National breached its policy duty to defend Castillo and that Castillo did not violate conditions precedent to coverage. The court also found that Penn National engaged in insurance bad faith in its investigation of Castillo's claim. As a result, the court awarded the HOA \$4,000,000 in damages on its breach of contract claim, representing the \$500,000 limit on each of the eight Penn National policies issued Castillo or JJA Construction, Inc., and prejudgment interest. The court also appeared to have entered a punitive damages award, but the amount of that award is unclear from the order as drafted.

5. Penn National moves, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to alter the judgments on the ground that the judgments entered are contrary to South Carolina law. Penn National contends that, as a whole, the judgments entered against it are unsupported by competent evidence in the trial record and contrary to published and binding authorities in South Carolina. Penn National contends that the court's conclusions of law entered in these judgments, including but not limited to the following, are in error:

a. **As to Portrait Homes:**

- i. The court's order improperly looks beyond the plain terms of the policies and Castillo's contract with entities in the Portrait Homes corporate structure to ascertain the parties' "intentions" where the contractual terms are unambiguous.

B.L.G. Enterprises, Inc. v. First Financial Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999); *S.C. Dep't of Transp. v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 656, 667 S.E.2d 7, 13 (Ct. App. 2008). Thus, the court's finding that Portrait Homes is an additional insured under either of the additional insured endorsements (CG 20 37 or 71 1145) attached to the various policies is improperly premised on evidence beyond the contracts.

- ii. The court improperly found that Penn National waived its right to contest coverage and that such waiver operated to extend coverage to uncovered risks, at odds with South Carolina law. *Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 336-44, 803 S.E.2d 288, 296-301 (2017); *Laidlaw Environmental Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 52, 524 S.E.2d 847, 852 (Ct. App. 1999).
- iii. The court's entry of damages on Portrait Homes' breach of contract claim is at odds with published South Carolina case law finding that a party completely indemnified for his loss sustains no damage for breach of an insurance contract. *See, e.g., Sloan Const. Co., Inc. v. Central Nat. Ins. Co. of Omaha*, 269 S.C. 183, 187, 236 S.E.2d 818, 820 (1977) (finding that the insured sustained no damage where one of its two insurers defended and the other refused to do so where the insured sought to collect its attorneys fees for defending the underlying action); *Hartford Accident and Indemnity Company v. South Carolina Ins. Co.*, 252 S.C. 428, 436, 166 S.E.2d 762, 765 (1969) (excess carrier standing in the shoes of the insured could not collect defense fees because insured did not sustain that damage where the defense was provided to it without cost).

- iv. The court improperly found that Penn National engaged in insurance bad faith based upon the behaviors it identified in its order. *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 501-03, 473 S.E.2d 52, 54-55 (1996); *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 494 (4th Cir. 2005).
- v. The court improperly found that Portrait Homes sustained damages in the amount of its underlying settlement as a result of the conduct it found supported its claim against Penn National for insurance bad faith. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359-60, 415 S.E.2d 393, 396-97 (1992).
- vi. The court failed to find by clear and convincing evidence that Penn National engaged in willful, reckless, or wanton conduct or that Penn National acted in willful and reckless disregard of Portrait Homes' policy rights and, as such, its award of punitive damages was improper. S.C. Code § 15-32-520.

b. **As to the HOA:**

- i. The court improperly failed to account for the legal ramifications of Castillo's declining a defense from Penn National, which relieved it of its duty to defend him. *See, e.g., Twin City Fire Ins. Co. v. Ben-Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 374 (4th Cir. 2005) (applying South Carolina law).
- ii. The court improperly failed to find that Castillo's behavior amounted to a breach of the policy requirement of notice. *Merit Ins. Co. v. Koza*, 274 S.C. 362, 364 S.E.2d 146 (1980); *Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC*, 761 Fed. App'x 178, 182-83 (4th Cir. 2019).
- iii. The court improperly failed to find that Castillo's behavior amounted to a breach of the policy requirement of cooperation with Penn National's investigation.

Tucker v. State Farm Mut. Auto. Ins. Co., 232 S.C. 615, 624-25, 103 S.E.2d 272, 277 (1958).

- iv. The court improperly failed to find that Castillo's violation of his duties to notify Penn National of the underlying lawsuit and to cooperate with Penn National's attempts to investigate and defend that lawsuit substantially prejudiced Penn National. Default judgment was entered against Castillo because of his violations of these duties, which is prejudicial as a matter of law in South Carolina. *Merit*, 274 S.C. at 364-66, 364 S.E.2d at 147-48; *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 432-35, 137 S.E.2d 608, 612-13 (1964).
- v. The court improperly found that Penn National engaged in insurance bad faith based upon the behaviors it identified in its order. *Tadlock*, 322 S.C. at 501-03, 473 S.E.2d at 54-55; *Myrick*, 395 F.3d at 494. Further, the court improperly found that Castillo sustained damages as a consequence of the bad faith behaviors identified in its order. *Crossley*, 307 S.C. at 359-60, 415 S.E.2d at 396-97; *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). Finally, the court's order fails to show how Penn National's behavior caused \$5,370,147.29 in damages to Castillo and JJA Construction, Inc. *Nichols*, 279 S.C. at 340, 306 S.E.2d at 619 (holding that "if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action.").
- vi. The court failed to find by clear and convincing evidence that Penn National engaged in willful, reckless, or wanton conduct or that Penn National acted in

willful and reckless disregard of Castillo's or JJA Construction, Inc.'s policy rights and, as such, its award of punitive damages was improper. S.C. Code § 15-32-520.

c. **As to Both Portrait Homes and the HOA:**

- i. The court improperly awarded damages to Portrait Homes and the HOA under South Carolina's time on the risk doctrine. *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.* ("Crossmann II"), 395 S.C. 40, 53, 717 S.E.2d 589, 595 (2011). The court's orders both imply that this analysis no longer applies, without any authority suggesting as such and in the face of South Carolina authorities continuing to apply it even after changes to the form CGL policy language, but does not specify how it should change or provide the methodology for how it was applied in this case. Moreover, the proper date upon which damage is deemed "complete" is the date that the responsible party compensates the injured plaintiff for the damage (or the date upon which damage is repaired, if repairs occur first). *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.* ("Crossmann Communities"), No. 4:09-cv-1379-RBH, 2013 WL 5437712, at *26 (D.S.C. Sept 27, 2013). Both orders use premature dates of completion, in violation of these precedents.

6. In the alternative, Penn National moves, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to amend certain findings of fact and conclusions of law contained within the judgments as respectively being unsupported by the record and by South Carolina law. Penn National contests that the court's findings of fact were improper and unsupported by the evidence offered at trial and that the judgments should be amended to remove

them, including but not limited to the following:

- a. Finding of Fact: “JJA would be waiving a policy benefit to which it was entitled at no cost if JJA declined a defense. Ms. McLeod did not provide this information to Mr. Castillo during the cold call because she was not asked to do so by Penn National. Mr. Castillo (JJA) responded that he did not want a defense. Trial Tr. vol. 2, 96-97. Without providing JJA the requisite information that Penn National had in its possession, Penn National misled JJA with respect to the claim, coverage and policy benefits to which it was entitled.” Order as to Persimmon Hill Homeowner’s Association, Inc.’s Claims of Bad Faith, Breach of Contract and Declaratory Judgment Against Pennsylvania National Mutual Casualty Insurance Company (the “HOA Order”), p. 9.
- b. Finding of Fact: “During this cold call, Ms. McLeod did not obtain a signed or recorded statement because Penn National did not ask her to do so in violation of its own claims handling manual which requires a recorded statement be taken from the named insured. Trial Tr. vol. 2, 120; HOA Ex. 21.” HOA Order, p. 9. “Even when Penn National had someone face-to-face with JJA no investigation effort was made. The Penn National claims handling manual requires such investigation and also requires the taking of recorded statements. (HOA Ex. 21).” HOA Order, p. 37.
- c. Finding of Fact: “Penn National acknowledges that as of the time of Ms. McLeod’s discussion with Mr. Castillo in his garage, JJA had met the Duties in the Event of an Occurrence, Claim or Suit section of the policy, albeit Penn National was not applying the correct Duties provision. Penn National further acknowledged at this point when Mr. Castillo and Ms. McLeod had the discussion in his garage, there

was not anything JJA had refused to do that Penn National had asked him to do. Trial Tr. vol. 1, 367.” HOA Order, p. 9. “Penn National concedes that the notice provision was complied with at this time. Trial Tr. vol. 2, 319-320.” HOA Order, p. 26.

- d. Finding of Fact: “*Lammey, et al. v. JJA Construction, Inc. et al.*, 2010-CP-10-607, was a lawsuit involving construction defects with a single-family home wherein Penn National provided JJA a defense. Penn National was put on notice by the Plaintiff’s counsel that JJA had been sued and served via publication, and Penn National hired counsel to defend JJA unlike in this case. There was no evidence at trial that JJA specifically contacted Penn National to request a defense or contacted Penn National otherwise. Yet, Penn National hired JJA a lawyer to provide JJA a defense. An Answer was filed on JJA’s behalf on February 18, 2011, being around two (2) years prior to Penn National being put on notice of the Persimmon Hill claim by Portrait. The allegations against JJA in *Lammey* were similar to that in this case; however, *Lammey* involved construction defect claims in a single-family residence whereas this claim involved 388 townhomes.” HOA Order, p. 30.
7. Penn National also requests that the judgments be amended to account for the following findings of fact, which are supported by undisputed evidence in the trial record:
 - a. Castillo was served with the complaints in the Persimmon Hill Litigation, on behalf of himself and JJA Construction, Inc., on September 8, 2013. [Penn National Exhibit Nos. 80 & 81; Trial Transcript, Vol. 1, at 713:4-8].
 - b. Penn National received notice that its insureds, Castillo and JJA Construction, Inc., had been served with process in the Persimmon Hill Litigation in a February 19,

2014 report from McLeod. [Defendant's Exhibit No. 82]. Penn National, having received no tender or other communication from Castillo regarding the litigation, requested that McLeod attempt to contact Castillo at his residence in order to inquire about suit representation, inquire whether Castillo wanted Penn National to handle the suit on his behalf, and to obtain direct contact information for Castillo. [Defendant's Exhibit No. 83; Trial Transcript, Vol. 2, at 88:2-11]. McLeod was unsuccessful in meeting Castillo in person. [HOA Exhibit Nos. 6, 7; Trial Transcript, Vol. 1, at 406:15-21; Vol. 2, at 88:21-25]. On that occasion, McLeod traveled to Castillo's residence, rang his doorbell several times, left contact information and instructions to contact her on the two vehicles parked in Castillo's driveway, and left contact information with a woman residing next door who identified herself to McLeod as Castillo's tenant. [Trial Transcript, Vol. 2, at 89:1-20]. Penn National did not receive any communication from Castillo following McLeod's first visit to Castillo's property. [*Id.* at 26:19-27:9]. Penn National then requested that McLeod attempt to contact Castillo about the suit a second time. [HOA Exhibit No. 4 at p. 10 (1085)].

- c. McLeod's May 10, 2014 meeting was the first instance in which a Penn National representative successfully established contact with Castillo about the suit, despite his having been served with process more than eight months before. [Trial Transcript, Vol. 2, at 26:19-27:9; Penn National Exhibit Nos. 80 & 81 (certificates of service); *see* HOA Exhibit No. 4 at pp. 3-10 (1078-1085) (claim file notes indicating no contact from Castillo)].
- d. McLeod then asked Castillo whether he would provide Penn National his contact

information, but Castillo simply shook his head to indicate “no” and began walking toward the door to his home. [Trial Transcript, Vol. 2, at 95:8:22-96:8]. After refusing to provide his contact information to McLeod or Penn National, Castillo walked inside his house and closed the door, ending the conversation. [Trial Transcript, Vol. 2, at 95:18-96:8, 386:7-9]. During McLeod’s conversation with Castillo, he never indicated that he did not understand her questions or the proceedings about which she asked him. [*Id.* at 92:9-14; 94:4-21; 97:10-20]. Castillo never called Penn National to discuss the claim or suit following this May 2014 conversation with Ms. McLeod. [Trial Transcript, Vol. 1, at 408:2-4, 23-24].

8. Penn National contests that the following conclusions of law be amended to account for errors of law made in finding them:
 - a. The Court’s two orders and judgments are irreconcilable. The court ordered that Penn National pay its limits to both Portrait Homes and the HOA on six of the eight policies at issue (the 2003-04 Policy to the 2007-08 Policy). The per-occurrence limits on each of these policies is \$500,000. Both parties’ damages are premised upon the same “occurrence” and, therefore, the maximum amount collectible under each of these policies is \$500,000 between Portrait Homes and the HOA collectively.
 - b. The HOA Order contains internal inconsistencies and is unclear about the damages it awards the HOA. The HOA Order first states that it awards the HOA \$4 million in damages on the breach of contract claim with added pre-judgment interest. HOA Order, at p. 43. Later, however, the court found that Castillo and JJA Construction, Inc. suffered \$5,370,147.29 in damages for both Penn National’s breach of the duty

to defend and indemnify and (apparently) \$5,370,147.29 in damages as a result of Penn National's breach of the duty of good faith and fair dealing. *Id.* at p. 44. Last, the court finds that the HOA is a judgment creditor as to \$5,213,170.40.

This Motion is made pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and will be supplemented and supported by such memoranda of law, evidence from the trial record, and such other documents as appropriate.

Respectfully submitted,

GOLDBERG SEGALLA LLP

/s/ John I. Malone, Jr.

John I. Malone, Jr.

SC State Bar Number 101962

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*Attorneys for Pennsylvania National Mutual Casualty
Insurance Company*

October 31, 2019
Greensboro, North Carolina

NOTICE OF APPEAL IN A CIVIL CASE

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

Portrait Homes – South
Carolina, LLC; Portrait
Homes – Persimmon Hill,
LLC; and The Persimmon Hill
Homeowners Association,
Inc.,

Respondents,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

NOTICE OF APPEAL

Pennsylvania National Mutual Casualty Insurance Company appeals the following orders and judgment of the Honorable Roger M. Young, Sr.:

- Post-Trial Order finding and entering judgment in favor of Respondents Portrait Homes – South Carolina, LLC and Portrait Homes – Persimmon Hill, LLC titled “Order Regarding Additional Insured Coverage” dated October 22, 2019
- Post-Trial Order finding and entering judgment in favor of Respondent The Persimmon Hill Homeowners Association, Inc. titled “Order as to Persimmon Hill Homeowners Association, Inc.’s Claims of Bad Faith, Breach of Contract and Declaratory Judgment Against Pennsylvania National Mutual Casualty Insurance Company” dated October 22, 2019
- Order denying its motion for a directed verdict at trial issued in open court on

February 7, 2019 and May 9, 2019

- Order denying Pennsylvania National Mutual Casualty Insurance Company's motion to alter or amend judgment pursuant to Rule 59 of the South Carolina Rules of Civil Procedure titled "Post-Trial Motions and Punitive Damages Order" dated March 23, 2020

Appellant received written notice of entry of the final orders and judgment on March 23, 2020.

April 22, 2020

s/ John I. Malone, Jr.
John I. Malone Jr.
S.C. State Bar No. 101962
David L. Brown, *admitted pro hac vice*
GOLDBERG SEGALLA LLP
701 Green Valley Road, Suite 310
Greensboro, North Carolina 27408
(336) 419-4900
*Attorneys for Appellant Pennsylvania National
Mutual Casualty Insurance Company*

Other Counsel of Record:

Stanley C. Rodgers
LAW OFFICE OF STANLEY C. RODGERS
101 Queen Street, Suite 200
Charleston, South Carolina 29401
(843) 958-9881
*Attorney for Respondents Portrait Homes – South Carolina,
LLC and Portrait Homes – Persimmon Hill, LLC*

John T. Chakeris
Alicia D. Petit
THE CHAKERIS LAW FIRM
231 Calhoun Street
Charleston, South Carolina 29401
(843) 853-5678

- and -

Phillip W. Segui, Jr.
SEGUI LAW FIRM, P.C.
864 Lowcountry Boulevard, Suite A
Mt. Pleasant, South Carolina 29464
(843) 884-1865
*Attorneys for Respondent The Persimmon Hill Homeowners
Association, Inc.*

Portrait Homes – SC, LLC , et al.

v.

Pennsylvania National Mutual Casualty
Company, et al.

Case No.: 2014-CP-08-2757

Pre-Determined Plan to Deny

Wrongful Denial of Portrait's AI

Wrongful Denial of JJA's Policy Benefits

Punitive Damages Sought

HOOD
LAW FIRM
LLC

- 1834 -

C. TYSON NETTLES
Partner
(SC & MS)
DIRECT DIAL: (843) 577-1216
EMAIL: tyson.nettles@hoodlaw.com

June 5, 2013

Via Certified Mail, Return Receipt Requested

Pennsylvania National Insurance Co
P.O. Box 2361
Harrisburg, PA 17105

Re: ADDITIONAL INSURED TENDER
Primary Insured: Jose Castillo d/b/a JJA Framing
Additional Insured: Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC
Carrier: Pennsylvania National Insurance Co
Policy No(s): GL90601617
Policy Start Date: 12/5/2005
Policy End Date: 12/5/2006
Project/Claim:

Cheryl L. Waker, on behalf of herself and others similarly situated v. Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC

C/A No. and Jurisdiction: 2012-CP-08-3066, Berkeley CP

Persimmon Hill HOA v. Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC

C/A No. and Jurisdiction: 2012-CP-08-3065, Berkeley CP

Dear Sirs:

I represent Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC, and Pasquinelli Homebuilding, LLC who was involved in the construction of the above-referenced construction project. Portrait contracted with your Primary Insured, Jose Castillo d/b/a JJA Framing, for framing during original construction.

The Persimmon Hill HOA and Cheryl L. Waker have filed suit against Portrait alleging numerous construction defects mostly related to water intrusion. I am enclosing a copy of their forensic expert's report along with the latest Amended Complaint. According to the building records, some of the earliest units were completed as early as March of 2002 and work continued until at the later part of 2006. It is believed that Jose Castillo d/b/a JJA Framing's framing work contributed to these alleged damages.

Portrait's contract with your Primary Insured expressly required it to obtain insurance policies that name Portrait by separate endorsement as an additional insured. This contractual obligation on the part of your Primary Insured was apparently complied with, at least in part, as Portrait was named as a specific additional insured under the policy/policies issued by your company. I enclose copies of the insurance information which we have listing Portrait as an additional insured.

172 Meeting Street, Charleston, SC 29401
Phone: (843) 577-4435 . Fax: (843) 722-1630 . Email: Info@hoodlaw.com
www.hoodlaw.com



GREG GROSS TESTIMONY

-1835-

Q. [T]his is Plaintiff's Exhibit 53, which is the plaintiff's engineering report. . . . after reviewing that and knowing that Penn National insured the framer, do you believe that that is a large and significant claim at least potentially?

A. Yes. Yes.

Trial Tr. vol. 1, 336:11-23.

Q. Would it surprise you that their exposure in the Persimmon Hill case was multiple million dollars regarding JJA?

A. I agree with that statement.

Trial Tr. vol. 1, 436:4-7.

[User] 07/10/2013 10:02:44 AM By: Gary Gibson

GHG and I met with HOC AP here in the NCCSO on 7/9/13. AP advises that if the NI has not been served and/or has not requested a defense we can not retain counsel on their behalf. GHG to send monthly letters to the NI advising them we are aware of the suit and asking the NI to contact us. Re the tender by the GC, GHG will submit a CQR.

- 1837 -
Adam Parsons



Gary Gibson



Greg Gross

GREG GROSS TESTIMONY

Q. And this meeting between you, Gary Gibson, and Adams Parsons occurred and is the next entry after having received the Portrait tender; is that right?

A. Correct.

Q. And at that point in time, that claim was discussed and a plan to address that claim and how to adjust that claim was discussed between the three of you-all and was essentially left to you, the frontline adjuster, to implement that plan. Would you agree with that?

A. Correct.

ADAM PARSONS TESTIMONY

- 1839 -

Q. So within a couple of weeks of when this claim is opened up, you, Mr. Gibson, Mr. Gross have had a meeting and have talked about these claims?

A. Not true.

Q. Am I not reading that right? GHG and I met with HOCAP here. There wasn't a meeting?

A. There wasn't a meeting. I had a discussion with them.

Q. Well, my terminology, I may be getting hung up on what a meeting is or a discussion. I understood from the note y'all had some kind of face-to-face conversation in which you talked about these new claims.

A. No.

ADAM PARSONS TESTIMONY

- 1840 -

- Q. Says you met. Yesterday, you tried to downplay that and say it wasn't a meeting?
- A. Right, it wasn't a meeting.
- Q. Why did they think it was a meeting?
- A. I don't think they did.
- Q. They used the word meet?
- A. Met with. I meet plenty of people, it doesn't mean I have a meeting with them. I just met you, doesn't mean that I've had a meeting with you.

Trial Tr. vol. 2, 302:17-25.

Claim's File Documents Pre-Determined Plan

[User] 07/10/2013 10:02:44 AM By: Gary Gibson

GHG and I met with HOC AP here in the NCCSO on 7/9/13. AP advises that if the NI has not been served and/or has not requested a defense we can not retain counsel on their behalf. GHG to send monthly letters to the NI advising them we are aware of the suit and asking the NI to contact us. Re the tender by the GC, GHG will submit a CQR.

GREG GROSS TESTIMONY

Q. And CQRs are only submitted when there's coverage questions and it's more likely than not that a claim may be denied. Would you agree with that?

A. Correct

Trial Tr. vol. 1, 340:19-23

[User] 07/10/2013 10:02:44 AM By: Gary Gibson

GHG and I met with HOC AP here in the NCCSO on 7/9/13. AP advises that if the NI has not been served and/or has not requested a defense we can not retain counsel on their behalf. GHG to send monthly letters to the NI advising them we are aware of the suit and asking the NI to contact us. Re the tender by the GC, GHG will submit a CQR.

GREG GROSS TESTIMONY

Q. . . . And that is that an insured has to request a defense before Penn National will provide a defense, regardless of whether the pleadings trigger coverage or not. Do you agree with that?

A. Correct

Trial Tr. vol. 1, 331:8-13.

GREG GROSS TESTIMONY

- 1845 -

- Q. There [are] no words in the insurance policy that says the insured has to pick up the phone, call, write a letter and say, Penn National, provide me a defense. That is not contained within the policies of insurance at Penn National. Do you agree with that?
- A. That is not contained in the policies that I ever saw at Penn National.
- Q. So essentially by making that a requirement for a defense, it is the creation of an additional condition precedent to coverage and that's wrong.
- A. If you say so.
- Q. I'm asking your opinion. When you were a claims adjuster at Penn National.
- A. I was doing what I was told to do.

PARSONS CONTINUES TO ATTEMPT TO DISTANCE HIMSELF FROM KNOWN BAD CONDUCT

- Q. How do you explain Greg Gross' testimony at trial when asked about this same issue and he specifically said that he was instructed - - and I'm going to read it, that an insured has to request a defense before Penn National will provide a defense regardless of whether the pleadings trigger coverage or not.
- A. I explained that as an incorrect statement of Penn National.

[User] 07/10/2013 10:02:44 AM By: Gary Gibson

GHG and I met with HOC AP here in the NCCSO on 7/9/13. AP advises that if the NI has not been served and/or has not requested a defense we can not retain counsel on their behalf. GHG to send monthly letters to the NI advising them we are aware of the suit and asking the NI to contact us. Re the tender by the GC, GHG will submit a CQR.

ADAM PARSONS TESTIMONY

- 1848 -

Q. You've come in from Harrisburg to shine li[ght] on the facts of this case. You don't have any facts that contradict what I've said, right?

A. Right. I mean, contrary to Mr. Rodgers' assertion, I'm not remotely the most important person in this case. I had involvement in it in responding to two CQRs in 2014 where I set forth the correct coverage opinion.

Trial Tr. vol. 2, 296:25-297:7.

THE PLAN TO DENY PORTRAIT AI

HOOD LAW FIRM LLC

C. TYSON NETTLES
Partner
(SC & MS)
DIRECT DIAL: (843) 577-1216
EMAIL: tyson.nettles@hoodlaw.com

June 5, 2013

Via Certified Mail, Return Receipt Requested

Pennsylvania National Insurance Co
P.O. Box 2361
Harrisburg, PA 17105

Re: **ADDITIONAL INSURED TENDER**

Primary Insured: Jose Castillo d/b/a JJA Framing
Additional Insured: Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC
Carrier: Pennsylvania National Insurance Co
Policy No(s): GL90601617
Policy Start Date: 12/5/2005
Policy End Date: 12/5/2006
Project/Claim:

Cheryl L. Waker, on behalf of herself and others similarly situated v. Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC

C/A No. and Jurisdiction: 2012-CP-08-3066, Berkeley CP

Persimmon Hill HOA v. Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC
C/A No. and Jurisdiction: 2012-CP-08-3065, Berkeley CP

Dear Sirs:

I represent Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC, and Pasquinelli Homebuilding, LLC who was involved in the construction of the above-referenced construction project. Portrait contracted with your Primary Insured, Jose Castillo d/b/a JJA Framing, for framing during original construction.

The Persimmon Hill HOA and Cheryl L. Waker have filed suit against Portrait alleging numerous construction defects mostly related to water intrusion. I am enclosing a copy of their forensic expert's report along with the latest Amended Complaint. According to the building records, some of the earliest units were completed as early as March of 2002 and work continued until at the later part of 2006. It is believed that Jose Castillo d/b/a JJA Framing's framing work contributed to these alleged damages.

Portrait's contract with your Primary Insured expressly required it to obtain insurance policies that name Portrait by separate endorsement as an additional insured. This contractual obligation on the part of your Primary Insured was apparently complied with, at least in part, as Portrait was named as a specific additional insured under the policy/policies issued by your company. I enclose copies of the insurance information which we have listing Portrait as an additional insured.

172 Meeting Street, Charleston, SC 29401
Phone: (843) 577-4435 . Fax: (843) 722-1630 . Email: Info@hoodlaw.com
www.hoodlaw.com



- 1850 -

HOOD LAW FIRM LLC

C. TYSON NETTLES
Partner
(SC & MS)
DIRECT DIAL: (843) 577-1216
EMAIL: tyson.nettles@hoodlaw.com

May 23, 2014

Via Certified Mail, Return Receipt Requested

Pennsylvania National Insurance Co.
P.O. Box 2361
Harrisburg, PA 17105-2361

Re: **ADDITIONAL INSURED TENDER**

Primary Insured: Jose Castillo d/b/a JJA Framing
Additional Insured: Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC
Carrier: Pennsylvania National Insurance Co
Policy No(s): GL90601617
Policy Start Date: 12/5/2004
Policy End Date: 12/5/2005
Project/Claim:

Cheryl L. Waker, on behalf of herself and others similarly situated v. Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC

C/A No. and Jurisdiction: 2012-CP-08-3066, Berkeley CP

Persimmon Hill HOA v. Portrait Homes-South Carolina, LLC, Portrait Homes-Persimmon Hill, LLC and Pasquinelli Homebuilding, LLC
C/A No. and Jurisdiction: 2012-CP-08-3065, Berkeley CP

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The Persimmon Hill HOA and Cheryl L. Waker have filed suit against Portrait alleging numerous construction defects mostly related to water intrusion. I am enclosing a copy of their forensic expert's report along with the latest Amended Complaint. According to the building records, some of the earliest units were completed as early as March of 2002 and work continued until at the later part of 2006. It is believed that Jose Castillo d/b/a JJA Framing's framing work contributed to these alleged damages.

Portrait's contract with your Primary Insured expressly required it to obtain insurance policies that name Portrait by separate endorsement as an additional insured. This contractual obligation on the part of your Primary Insured was apparently complied with, at least in part, as Portrait was named as a specific additional insured under the policy/policies issued by your company. Copies of the insurance information which we have listing Portrait as an additional insured and the above-referenced documents may be obtained via the following link: <https://hoodlaw.sharefile.com/d/s7a1a610b6654e16b>.

Persimmon Hill HOA 0063

ELECTRONICALLY FILED - 2020 JAN 15 4:00 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

As to Portrait Homes, I don't see any analysis in the CQR pertaining to why we should decline coverage to that entity. To the extent that they seek insured status under the policy, due to the separation of insureds provision, the named insured's actions (or inactions) do not impact Portrait Homes' rights (if any) under the policy.

You can simply set forth the basis for declination of coverage and rejection of the tender from Portrait Homes in an email (without having to redo the CQR). I will address promptly upon receipt of same.

Thanks, Adam

From: Gibson, Gary
Sent: Tuesday, June 03, 2014 10:53 AM
To: Parsons, Adam
Cc: Heineck, Paul; Gross, Greg; CLMMAIL
Subject: Persimmon Hill HOA, et al v. Portrait Homes, et al (NI - JJA Construction); # 08861992; CQR

Adam:

Here is a Coverage Question Report (CQR) which has been completed by Greg Gross. As outlined, we recommend that coverage and a defense/indemnification be declined to both the named insured and Portrait Homes.

Following your review of this submission, our further direction is appreciated. Thank you.

Gary R. Gibson, CPCU, AIC, AIM, AIS, SCLA
Team Leader, Multi-line
Penn National Insurance - NC Claims Service Office
P.O. Box 1961
Harrisburg PA 17105-1961

ADAM PARSONS TESTIMONY

- 1852 -

ELECTRONICALLY FILED - 2020 Jan 15 4:00 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

- Q. Would you agree with me that in handling a claim on behalf of an insured as a claims adjuster or as an insurance company that an insured is supposed to receive the maximum benefits that exist under that policy to which they would legally be entitled?
- A. I would agree with that.
- Q. And the claims adjuster should look for ways to make sure that they are maximizing the amount of coverage and the things that coverage may apply to to further the insured's position in that regard, right?
- A. I would agree with that.
- Q. Shouldn't hide things from their insured, should they?
- A. No, sir.
- Q. In other words, an insurance company should be looking affirmatively for ways to find coverage that's supposed to exist, right?
- A. Yes.
- Q. And also, they should not focus only or solely on ways to deny coverage, right?
- A. I would agree.

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

September 30, 2014

Attorney Tyson Nettles
Hood Law Firm
172 Meeting Street
Charleston, SC 29401

RE: Claimant : Persimmon Hill HOA and other individuals
Date of Loss : December 5, 2003
Insured : JJA Construction, Inc./JJA Framing Company d/b/a Jose Castillo
Claim # : 08861992
Policy # : GL9 0601617 and GL90649575
Your Client : Portrait Homes- South Carolina, LLC

Dear Mr. Nettles:

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 tenders for defense and/or indemnity from Portrait Homes-South Carolina, LLC at this time.

Policy Period	Named Insured	AI Endorsement
12/05/03-04	JJA FRAMING COMPANY CASTILLO JOSE D/B/A	CG 20 37
12/05/04-05	JJA FRAMING COMPANY CASTILLO JOSE D/B/A	CG 20 37
12/05/05-06	JJA CONSTRUCTION INC	71 11 45
12/05/06-07	JJA CONSTRUCTION INC	71 11 45
12/05/07-08	JJA CONSTRUCTION INC	71 11 45

Characterization	Witness	Trial Transcript
"doesn't jibe"; "not right"	Greg Gross	Vol. 1, 299:9-10 Vol. 1, 434:23-24
"inaccurate"	Adam Parsons	Vol. 2, 172:11-173:8
"opposite of what was true"	Bernd Heinze	Vol. 2, 520:8-22

“[I]t is axiomatic that an insured must be provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage. . . . [A] reservation of rights letter must give fair notice to the insured that the insurer intends to assert defenses to coverage or to pursue a declaratory relief action at a later date.”

Harleysville Group, Inc. v. Heritage Cmty., Inc., 420 S.C. 321, 337–38, 803 S.E.2d 288, 297 (2017).

2005-2008 Policies Require Contract to Provide AI

Named Insured Under Policies:

JJA Construction, Inc.

Master Agreement & Housing
Purchase Order Contract:

Jose Castillo d/b/a JJA Framing

WHAT PENN SHOULD HAVE DONE:

- Look to the Pleading
 - Jose Castillo and JJA Construction, Inc. both alleged to be d/b/a JJA Framing
- Look to the Underwriting File
 - Name Change Form
- Look to the Certificates of Insurance
 - Show business as individual
- Had Gayle McLeod ask Mr. Castillo
 - Mr. Castillo testified businesses operated as one, had the same location, same employees, same trucks, same telephone number, and same federal ID number

- 1859 -

EXPERIENCE RATING PLAN MANUAL
APPENDIX

Issued July 1, 1991

Page A-3
2nd Reprint

Page 1 of 2

CONFIDENTIAL REQUEST FOR INFORMATION

The following confidential ownership statements may be used only in establishing premiums for your insurance coverage. It is extremely important that all questions be answered completely. Your workers compensation policy requires that you report ownership changes, and other changes as detailed below, to your insurance carrier in writing within 90 days of the change. If you have questions, contact your agent, insurance company, or the appropriate rating organization. Submit the completed form to the rating organization.

PURPOSE (Check One)

☒ 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

☐ Combination of separate entities

Complete a separate column for each entity related through common ownership (attach additional forms if necessary)

☐ Sale, transfer or conveyance of ownership interest

Complete column A for ownership before the change and column B for ownership after the change

☐ Merger or consolidation (attach copy of agreement)

Complete columns A and B for the former entities and column C for the surviving entity

☐ Formation of a new entity

Complete column A

☐ Sale, transfer or conveyance of an entity's physical assets to another entity which takes over its operations

Complete column A for the former entity and column B for the acquiring entity

☐ Voluntary or court-mandated establishment of a trustee or receiver, excluding a debtor in possession, a trustee under a revocable trust or a franchisor

Complete column A for ownership prior to the change, and column B for the trustee or receiver established

INFORMATION	A	B	C
Name and street address of Entity (P.O. Box Numbers are not acceptable)	JJA Framing Company 3000 COLVARD RD NW CLT, NC 282169	JJA Construction, Inc. 11227 EASTFIELD RD. HUNTERVILLE NC 28078	
Legal Status of Entity (Corporation, Partnership, Sole Proprietor, Trustee, Receiver, Individual, Other)	Sole Proprietor	Corporation	
Ownership Corporations—List names of owners of 5% or more of voting stock and number of shares owned.* (Submit shareholder proposal if transaction involved exchange of stock.) Partnerships—List each general partner and appropriate share in the profits. (If limited partnership, list name of general partner.) Other—if no voting stock, list members of board of directors or comparable governing body.	Jose A Castillo - owner	Jose A Castillo Emilio Castillo FEIN: 81-0660358	
* Total shares of voting stock issued.		200	
Date of Ownership Change, Acquisition, or Combination		01-01-2005	

WHAT PENN SHOULD HAVE DONE:

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 - Jose Castillo and JJA Construction, Inc. both alleged to be d/b/a JJA Framing
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- Had Gayle McLeod ask Mr. Castillo
 - Mr. Castillo testified businesses operated as one, had the same location, same employees, same trucks, same telephone number, and same federal ID number



**PENN NATIONAL
INSURANCE**

Pennsylvania National Mutual Casualty Insurance Company
Penn National Security Insurance Company
P.O. Box 2381 • Harrisburg, PA 17105

**COMMERCIAL GENERAL LIABILITY POLICY DECLARATIONS
OCCURRENCE POLICY
RENEWAL OF GL9 0601617**

NON-ASSESSABLE THIS POLICY IS SUBJECT TO A GENERAL AGGREGATE LIMIT

POLICY NUMBER	POLICY PERIOD FROM TO		COVERAGE IS PROVIDED IN	AGENCY	BR
GL9 0601617	12/05/07	12/05/08	PA NATIONAL MUTUAL CAS INS CO	0006751	25
NAMED INSURED AND ADDRESS			AGENCY		
JJA CONSTRUCTION INC 9496 HIGHWAY 78 LOT 2 LADSON SC 29458			W LEE TAYLOR AGY-C PO BOX 30609 CHARLESTON SC 29417		

POLICY PERIOD: POLICY COVERS FROM: 12:01 A.M. STANDARD TIME AT THE ADDRESS OF THE INSURED STATED ABOVE.

FORM OF BUSINESS: **INDIVIDUAL**

BUSINESS DESCRIPTION: **CARPENTRY**

IN RETURN FOR PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE

General Aggregate Limit	
(Other than products - completed operations)	\$ 1,000,000
Products - Completed Operations Aggregate Limit	\$ 1,000,000
Personal and Advertising Injury Limit - Any one person or organization	\$ 500,000
Each Occurrence Limit	\$ 500,000
Damage to Premises Rented to you Limit - Any one premises	\$ 100,000
Medical Expense Limit - Any one person	\$ 5,000

PREMIUM INFORMATION

CODE	PREMIUM BASIS	PER	RATES		ADVANCE PREMIUM	
			PREMS/OPS	PRODUCTS	PREMS/OPS	PRODUCTS

SEE SUPPLEMENTAL DECLARATIONS, FORM 71-0029S

WHAT PENN SHOULD HAVE DONE:

- Look to the Pleading
 - Jose Castillo and JJA Construction, Inc. both alleged to be d/b/a JJA Framing
- Look to the Underwriting File
 - Name Change Form
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 - Show business as individual
- Had Gayle McLeod ask Mr. Castillo
 - Mr. Castillo testified businesses operated as one, had the same location, same employees, same trucks, same telephone number, and same federal ID number

2003-2005 Policies Required Insured Location

Listed: 300 Colvard Parkway
Charlotte, North Carolina
(JJA's Office Location)

Certificate of Insurance from Taylor Agency:
Work Done for the Above Organization

Plaintiff's Exhibit 7

GREG GROSS TESTIMONY

- 1864 -

ELECTRONICALLY FILED - 2020 Jan 15 4:40 PM - BERKELEY - COMM. FILES - CASE#2014CP0802757

- Q. [H]ow many additional insured claims had you evaluated in the context of a construction defect case where the general contractor was making an additional insured claim under the subcontractor's policy?
- A. My answer is, probably about 25 to 30.
- Q. Okay. In every one of those claims as to the evaluation of the additional insured claim, did a coverage question report always go from you to Gary Gibson to Adam Parsons?
- A. At Penn National, yes.
- Q. Every time?
- A. Every time.
- Q. Do you remember Penn National ever picking up the defense for an additional insured in that context?
- A. No.
- Q. Never?
- A. Not that I can recall.

THE PLAN TO DENY JJA

There is no dispute that
the Complaint triggered
coverage

From the time Penn National opened a claims file until the time the independent adjuster told Penn National that Castillo had been served, there were 5 separate claim log entries noting that JJA was required to request a defense before Penn National's duty to defend was triggered.

One week after the independent adjuster informs Penn National that JJA has been served, the claims log reflects Penn was ready to deny the claim

CLAIMS LOG REFERENCES JJA VIOLATING POLICY CONDITIONS BEFORE JJA HAD EVEN BEEN SERVED

Q. How in the world can the insured be in violation of the conditions portion of the policy if they haven't even been served yet? It's impossible; you'd agree with that?

A. That is correct. That's fine.

Trial Tr. vol. 1, 356:11-15 (Testimony of Greg Gross).

GREG GROSS TESTIMONY

- Q. But Greg Gross' opinion at Penn National when he was told to not adjust a claim until an insured requested a defense, you went to management and you told them you didn't believe that was correct, that you didn't believe that was proper, you didn't believe that was right?
- A. That is correct.
- Q. And you were just following orders from above?
- A. Correct.

RESERVATION OF RIGHTS LETTERS

- September 21, 2013
- August 11, 2014
- October 2, 2014

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

September 21, 2013

JJA Construction, Inc.
9496 Highway 78
Lot 2
Ladson, SC 29458

The named insured is JJA Construction, Inc. The declarations list the risk as "carpentry." The policy has a \$500,000 per occurrence limit of liability coverage. It lists the insured's address 9496 Highway 78, Lot 2, Ladson, SC, 29456. Effective 07/29/2009 the insured address is changed to 11227 Eastfield Rd., Huntersville, NC 28078. Jose Castillo, dba JJA Framing Company is not named in the policy as an insured. This policy was not renewed at the end of the policy period.

RESERVATION OF RIGHTS LETTERS

- September 21, 2013
- August 11, 2014
- October 2, 2014

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

August 11, 2014

Jose Castillo d/b/a JJA Construction, Inc.
9496 Highway 78
Lot 2
Ladson, SC 29458

RE: Claimant : Persimmon Hill HOA and other individuals
 Date of Loss : December 5, 2003
 Insured : JJA Construction, Inc./JJA Framing Company d/b/a Jose Castillo
 Claim # : 08861992
 Policy # : GL9 0601617 and GL90649575

RESERVATION OF RIGHTS

Dear Policyholder:

This letter is a follow up to correspondence to JJA Construction, Inc. dated September 21, 2013.

Penn National understands this loss involves the following facts:

First, an underlying suit has been filed in Court of Common Pleas of Berkeley County, South Carolina on March 18, 2013 styled Cheryl Walker v. Portrait Homes-South Carolina, LLC, JJA Construction, Inc. d/b/a JJA Framing; Jose Castillo d/b/a JJA Framing, et. al. This is a class action amended lawsuit. The lawsuit alleges that Cheryl Walker is an owner of a townhome located at in the Persimmon Hill HOA, Inc. in Berkeley County, South Carolina. 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. The Class does not include any prior owner of a townhome at the site. The complaint is brought for various construction defects and resultant loss of use. The construction defects appear to be resultant in water intrusion and deterioration as a result. Counts against JJA are negligence; gross negligence; carelessness; recklessness;



CAPSTONE
ISG

Trae Allison, AIC
Branch Manager

March 13, 2014

Penn National Insurance
Attn: Gregg Gross

ggross@pnat.com

STATUS REPORT

Re: Claim Number: 08861992
Insured: JJA Construction, Inc.
Claimant: Persimmon Hill Condos
Date of Loss: 12/05/2003
Loss Location: Persimmon Hills Condos
Our File Number: 8-7037

Dear Mr. Gross:

This will serve as our current status report following ours of 02/20/2014 regarding the above captioned claim.

ASSIGNMENT:

As per your additional request of 03/13/2014, we were instructed to complete the following tasks:

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

INSURED:

As previously reported, the insured is identified as JJA Construction, Inc. The address provided by our office is 11227 Eastfield Road, Huntersville, NC 28078.

P O Box 3308 Irmo, SC 29063 Tel (803) 233-4277, Fax (803) 233-4192
www.capstoneisg.com

Persimmon Hill HOA 0045

ADAM PARSONS TESTIMONY

Q. Mr. Parsons, can we agree that everything important with regard to a claim should be documented in the claims file?

A. Yes.

Trial Tr. vol. 2, 281:17-20.

GAYLE MCLEOD TESTIMONY

1877

- Q. Before you interacted with Mr. Castillo, you got an assignment from Penn National to do certain things?
- A. Correct.
- Q. . . . You attempted to accomplish the task they asked you to accomplish?
- A. Yes.
- Q. Did they say word one to you about asking Mr. Castillo about any contracts he had entered with Portrait Homes?
- A. No.
- Q. Did they ask you to ask him about the substance of his work at the project, what he had done?
- A. No.
- Q. If they had asked you to do that, you would have asked him, wouldn't you?
- A. Yes. . . .
- Q. Did you ask him to do anything whatsoever that could have helped with the investigation of this claim or his defense?
- A. No.

GAYLE MCLEOD TESTIMONY

1878

- Q. Well, there's nothing in anything that I've seen in these documents, including Exhibit 10, that says you're to persuade him to do anything. Everything I've seen says that you were charged with asking him one question and one question only and that is whether or not he wanted a defense. Do you agree with that?
- A. Yes. . . .
- Q. When you were trying to persuade him, as you've testified today about all this stuff, did you tell him he had already paid his insurance premiums and the lawyer would be provided to him at no charge?
- A. No.
- Q. Why didn't you tell him that? If you're trying to persuade him, that would be pretty important? He's not going to get billed for a lawyer. It's already paid for. He's already paid it when he paid his premiums?
- A. I don't know what they have told him what went on.

- 1879 -
GAYLE MCLEOD TESTIMONY

Q. And the reason you didn't ask about those things is because Penn National did not include that in your assignment, correct?

A. That's true.

THE ONLY COMMUNICATION OF
ANY KIND BETWEEN JJA & PENN
DURING THIS ENTIRE CLAIM WAS
THE SINGLE SATURDAY MORNING
COLD CALL IN JJA's GARAGE BY
GAYLE MCLEOD

CLAIM IMPROPERLY DENIED

- Penn National misled Castillo by not informing him of information they possessed
 - Defense paid for via premiums
 - Multi-Million Dollar Exposure
 - Entitled to a defense and would be waiving it if declined it
 - Free Lawyer
 - Assets could be sold to satisfy judgment

CASTILLO/JJA
COOPERATED

Castillo Cooperated with Gayle McLeod

Q. Well, what had he not done prior to that moment in your mind that led you to the belief he was not cooperating? Is there anything other than Penn National telling you that he wasn't cooperating?

A. Correct. . . .

Q. So, at least, for the conversation before he started walking back inside, he answered every question you asked him?

A. He did.

Castillo Cooperated with Mike Sloop

- Q. And you said that you spoke, obviously, both with his wife and him on the telephone. How did you find their demeanor? Were they cooperative?
- A. Very cooperative. I actually spoke with his wife in person on the very first day. I spoke with him on the telephone. Again, very cooperative.

Castillo Cooperated with Nationwide Defense Counsel

ELIOTRONICALLY FILED - 2020 Jan 15 4:00 PM - BERKELEY - COMMON PLEAS - CASE#2014CP0802757

Q. So we've talked about the fact that you've had Nationwide Insurance, correct?

A. Yes.

Q. And Nationwide contacted you through Troy Thames to discuss the lawsuit that had been filed, correct?

A. Yes.

Q. And y'all had a discussion about Mr. Thames and Nationwide providing you a defense?

A. Yes.

Q. And, in fact, as part of providing you this defense, that's how this affidavit came about, correct?

A. Yes. . . .

Q. And when Mr. Thames was representing you in th[e] matter through Nationwide, you cooperated with Mr. Thames and you did everything he asked you to do; is that correct?

A. Yes.

Castillo Cooperated with HOA Counsel

Q. And, in fact, you are here today on your own free will. Nobody has sent you a subpoena. You came because you wanted to tell Judge Young what has happened; is that correct?

A. Yes.

Trial Tr. vol. 2, 370:19-23.

Castillo Cooperated with Penn National

- Q. You would agree with me as we talked about as of 5/29, there's nothing that Mr. Castillo has done that he's failed to cooperate with Penn National as of 5/29, right?
- A. By your wording, yes, sir, correct. . . .
- Q. Okay. And this is an entry from Gary Gibson, come down one, two, three - - four lines, talking about how Mr. Castillo will not cooperate in any defense.
- A. Correct.
- Q. And we've already talked about the fact that he has cooperated with everything he's been asked to do thus far?
- A. Correct.

- 1888 -
JOSE CASTILLO TESTIMONY

Q. Did Penn National ever ask you to do anything to help them investigate the Persimmon Hill claim as it pertained to JJA? Anything that you've ever seen?

A. No.

Q. And had they done that, Mr. Castillo, would you have helped them?

A. Yes.

PENN NATIONAL FAILED TO INVESTIGATE AND WRONGLY BLAMED IT ON NONCOOPERATION

- Q. And they had the opportunity to ask Mr. Castillo about any potential project file and didn't right?
- A. Correct.
- Q. They had the opportunity to ask Mr. Castillo about if he hired subcontractors, but they didn't, right?
- A. Correct.
- Q. They had the opportunity to ask Mr. Castillo about his means and methods, but they didn't, right?
- A. Correct.
- Q. And the reason they didn't is because Penn National does not assume an investigation effort of any claim as their policy until the insured requests a defense, correct?
- A. In this particular claim, yes.

PENN KNEW DEFAULT WOULD BE SOUGHT

04/28/2014 02:51 PM BA296_11009

THE CHAKERIS LAW FIRM
231 CALHOUN STREET
POST OFFICE BOX 397
CHARLESTON, SOUTH CAROLINA 29402

JOHN T. CHAKERIS
TASO H. CHAKERIS

TELEPHONE 843 853-5078
FACSIMILE 843 853-5077

April 24, 2014

Via Certified Mail
Return Receipt Requested
Penn National Insurance
P.O. Box 2361
Harrisburg, PA 17105-2361

08861992

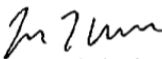
Re: The Persimmon Hill Homeowners Association, Inc. v. Portrait Homes-South Carolina, LLC, et al.
Case No.: 2012-CP-08-3065
Cheryl L. Waker, et al. v. Portrait Homes-South Carolina, LLC, et al.
Case No.: 2012-CP-08-3066
Your Insured: JJA Construction, Inc. d/b/a JJA Framing, Jose Castillo d/b/a JJA Framing

Dear Sir or Madam:

Enclosed please find a filed copy of the Civil Action Cover Sheet, Summons for Amended Complaint and Amended Complaint in the above matters that has been served on your insured JJA Construction, Inc. d/b/a JJA Framing, Jose Castillo d/b/a JJA Framing. Failure to hire counsel and participate in this matter within fifteen (15) days of your receipt of this letter will result in an Order of Default and Judgment sought against your insured. To avoid this, your prompt response to this letter is required.

With kind regards, I am

Sincerely,


John T. Chakeris

JTC/cmp
Enclosures
cc: Phillip W. Segui, Jr., Esquire

2014 APR 28 PM 10:34

- 1891 -
GREG GROSS TESTIMONY

Q. And in response, let's move to HOA 9, which is an e-mail exchanged between you and me. And your e-mail to me dated May 8, 2014, is requesting a 30-day extension to respond to the complaint . . . right?

A. That is correct.

Q. And my e-mail back to you confirms the 30-day extension?

A. That is correct. . . .

Q. And Penn never responded to the complaint that you're aware of?

A. That I'm aware of, yes.

GREG GROSS TESTIMONY ABOUT HOW A CLAIM SHOULD BE ADJUSTED

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

Unfair Claims Practices Act § 38-59-20 (1)-(8)

- Penn violated all 8 subparts

Court Found Bad Faith

1. The existence of a mutually binding contract of insurance between the plaintiff and the defendant;
2. Refusal by the insurer to pay benefits due under the contract;
3. Resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract;
4. Causing damage to the insured.

Howard v. State Farm Mut. Auto Ins. Co., 316 S.C. 445, 450 S.E.2d 582 (1994).

- 1895 -
BERND HEINZE TESTIMONY

- Q. [T]his is not the first time you've been involved in a case as an expert in a case involving Penn National, is it?
- A. Correct.
- Q. You were also an expert in this Pennsylvania National v. Johnson case, a 2007 Delaware County Pennsylvania case?
- A. Yes. . . .
- Q. In that case, Penn National conducted no investigation of the facts and circumstances surrounding the claims whatsoever before or even after its denial of coverage, right?
- A. Right. . . .
- Q. . . . the court awarded actual damages, but they also awarded punitive damages against Penn National in the amount of six million dollars, right?
- A. Yes
- Q. And they specifically said that it was for the purposes of punishing and deterring Penn National and other insurers in the same position from acting in a similar fashion in the future?
- A. Correct.

Case	Ratio of Punitive to Actual Damages
- 1896 - Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010)	8.2:1
James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006)	6.82:1
Collins Entertainment Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) aff'd, 368 S.C. 410, 629 S.E.2d 635 (2006)	9.97:1
Cody P. v. Bank of Am., N.A., 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011), reh'g denied (Dec. 12, 2011).	7.69:1
Jenkins v. Few, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010), reh'g denied (Feb. 28, 2011)	3.6:1
Lister v. Nationsbank, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997)	23.24:1
Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66 (Ct. App. 1994)	2.4:1

SC's Punitive Damage Statute

S.C. Code Ann. § 15-32-530

Punitive Damages for JJA's Assigned Claims

<u>\$5,370,147.29</u>	x	<u>3</u>	=	<u>\$16,110,441.87</u>
Bad Faith		Ratio/		Punitive Damages
Actual Damage Award		Multiplier		Award

Punitive Damages for Portrait's Claims

<u>\$3,892,791.20</u>	x	<u>3</u>	=	<u>\$11,678,373.60</u>
Bad Faith		Ratio/		Punitive Damages
Actual Damage Award		Multiplier		Award

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Dec 1 42020

SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2014-CP-08-02757

Portrait Homes – South
Carolina, LLC; Portrait
Homes – Persimmon Hill,
LLC; and The Persimmon Hill
Homeowners Association,
Inc.,

Respondents,

v.

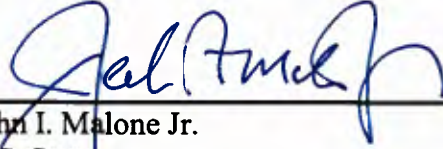
Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

Appellate Case No. 2020-000735

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.



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*Attorneys for Appellant Pennsylvania National
Mutual Casualty Insurance Company*

November 23, 2020.

Dec 1 42020

CERTIFICATE OF SERVICE

SC Court of Appeals

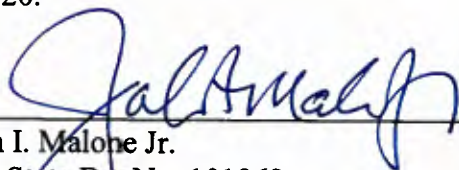
I hereby certify that a copy of the foregoing Record on Appeal was served on all counsel of record by electronic mail and/or by depositing a copy of the same in an official depository of the United States Mail in a postage-paid envelope addressed as follows:

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This the 23rd day of November, 2020.



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