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

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SC Court of Appeals

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.

FINAL BRIEF OF RESPONDENT THE PERSIMMON HILL HOMEOWNERS ASSOCIATION, INC.

John T. Chakeris
S.C. Bar No.: 7060
Alicia D. Petit
S.C. Bar No.: 102801
The Chakeris Law Firm
231 Calhoun Street
Charleston, SC 29401
(843) 853-5678

Phillip W. Segui, Jr.
S.C. Bar No.: 7029
Segui Law Firm, PC
720 S. Shelmore Blvd., Suite 100
Mt. Pleasant, SC 29464
(843) 884-1865

Attorneys for Respondent The Persimmon Hill Homeowners Association, Inc.

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STATEMENT OF ISSUES ON APPEAL

1. Was the Trial Court's factual finding that Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. did not knowingly waive or abandon his right to a defense under his Penn National policies wholly unsupported by the evidence?

2. Was the Trial Court's factual finding that Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. did not violate the cooperation clause of the policies through his actions wholly unsupported by the evidence?

3. Was the Trial Court's factual finding that Penn National suffered no prejudice from any alleged policy breach regarding Notice in the Conditions of Coverage or Duties in the Event of Occurrence, Offense, Claim or Suit provision wholly unsupported by the evidence?

4. Should the Trial Judge be reversed as a matter of law based on the alleged violation of the Notice and Coverage Conditions?

5. Was the Trial Court's factual finding that Penn National acted in bad faith as to Jose Castillo d/b/a JJA Framing and JJA Construction, Inc. wholly unsupported by the evidence?

6. Was the Trial Court's factual finding that Penn National acted in bad faith as to Portrait Homes wholly unsupported by the evidence?

7. Should the Trial Judge be reversed as a matter of law because the Trial Court's fact findings did not meet the "Legal Standards" for a Bad Faith Claim?

8. Was the Trial Court's factual finding that, due to Penn National's reckless, willful and wanton conduct, punitive damages were warranted wholly unsupported by the evidence?

9. Should the Trial Court's application of the Time-on-Risk doctrine be reversed?

STATEMENT OF THE CASE

This action arises out of two underlying construction defect cases in the Berkeley County Court of Common Pleas, which involved allegations of construction defects in the Persimmon Hill townhome community brought by The Persimmon Hill Homeowners Association, Inc., Civil Action No. 2012-CP-08-3065, (hereinafter referred to as "Persimmon Hill HOA") and Cheryl L. Waker, on behalf of herself and others similarly situated, Civil Action No. 2012-CP-08-3066, (hereinafter referred to as "Class Claims") against Portrait Homes - South Carolina, LLC and

Portrait Homes - Persimmon Hill, LLC (hereinafter collectively referred to as "Portrait") as well as against their subcontractors, including JJA Construction, Inc. d/b/a JJA Framing and Jose Castillo d/b/a JJA Framing (hereinafter collectively referred to as "JJA"). The Persimmon Hill HOA action specifically involved construction defect claims related to the building exteriors and common elements for which the Association was responsible pursuant to the applicable governing documents, while the Class Claims involved claims related to townhome unit owners' individual damages including loss of use claims.[1]

Following the filing of the underlying construction defect cases, Portrait filed this insurance coverage action in the Berkeley County Court of Common Pleas, on December 29, 2014, against Pennsylvania National Mutual Casualty Insurance Company (hereinafter referred to as "Penn"), and other insurance companies, for Portrait's claims that it was an additional insured under various insurance policies, that it was owed a defense in the underlying cases, and that it was owed the defense costs up to the date the insurers began defending Portrait in the underlying cases. On February 26, 2015, the Persimmon Hill HOA filed its Answer and bad faith crossclaims as the assignee of Portrait's bad faith claims against each insurance company.[2] All claims were resolved with all insurance companies other than Penn, and thereafter, on November 28, 2017, Portrait amended its Complaint to assert a cause of action against Penn for breach of the duty to defend and indemnify. The Persimmon Hill HOA filed crossclaims against Penn for the bad faith assigned from Portrait, and further, because the Persimmon Hill HOA had obtained a judgment against JJA, it obtained an assignment from JJA as to its rights against Penn. As a result, the Persimmon Hill

[1] The *Waker* case was not an issue in the trial or in this appeal.

[2] There is no issue regarding assignments in the trial or in this appeal. The Persimmon Hill HOA obtained the bad faith claim assignment (along with any related punitive damages claims) from Portrait as part of a partial settlement. The Persimmon Hill HOA also obtained claims from JJA via assignment after it obtained a judgment against JJA.

HOA also asserted JJA's rights as an insured of Penn, including with respect to duties to defend and indemnify, and including claims for bad faith against Penn.

This matter was scheduled to be tried before a jury beginning on February 4, 2019. Prior to jury selection and due to the complexities of the issues being tried and the possible length of the trial, all of the parties consented that all of the issues would be tried non-jury before the Honorable Roger M. Young, Sr. After hearing all of the trial testimony, Judge Young entered orders on October 22, 2019, in favor of Portrait and the HOA with a hearing for punitive damages to be held at a later date. (RI pp. 6-50, 51-107). On October 31, 2019, Penn filed a Rule 59 Motion. On November 1, 2019, the HOA filed its election of remedies wherein it elected the Breach of Duty of Good Faith & Fair Dealing/Bad Faith instead of Breach of the Duty to Defend and Indemnify on JJA's assigned claims and elected also its Judgment Creditor Claim. On January 15, 2020, Judge Young held the Rule 59 hearing, along with a punitive damages hearing. Following these hearings, judgment for Portrait and the HOA was entered on March 23, 2020. Penn's Rule 59 motion was denied as to both Portrait and the HOA. Punitive damages were awarded to both Portrait and the HOA and judgment was entered.

STANDARD OF REVIEW

"When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Auto-Owners Ins. Co. v. Hamin*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). "[T]he trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law." *Butler Contracting, Inc. v. Court Street, LLC,* 369 S.C. 121, 127, 631 S.E.2d 252, 255-56 (2006). "The trial court's findings in such a case are equivalent to a jury's findings in a law action." *Id.* at 127-28, 631 S.E.2d at 256. "Questions

regarding credibility and the weight of the evidence are exclusively for the trial court." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009). Therefore, this Court's "jurisdiction is limited to correcting errors of law and factual findings will not be disturbed unless unsupported by any evidence." *State Farm Mut. Auto. Ins. Co. v. Echols*, 337 S.C. 86, 93, 522 S.E.2d 345, 348-49 (Ct. App. 1999). Finally, an order comes to the appellate court with a presumption of correctness and the burden is on appellant to demonstrate reversible error. *McCall v. IKON,* 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008).

STATEMENT OF THE FACTS

1. The Persimmon Hill Project

The Persimmon Hill project is a large development consisting of 388 townhomes in 74 buildings located in Berkeley County. Portrait oversaw the development and construction of the Persimmon Hill project. (RI p. 486, ¶2-p. 487, ¶3). JJA was the subcontractor responsible for installing the framing members, windows and doors, the flashing around windows and doors and the secondary weather barrier in roughly 85% of the Persimmon Hill project. (RI p. 269, lines 2-10). Construction began at Persimmon Hill in 2002 and was completed in 2006, (RI p. 371, line 24-p. 372, line 9), and JJA Framing became involved early on and worked through completion of the project. (RI p. 373, lines 9-16).

2. The Underlying Litigation

The Persimmon Hill HOA filed suit against Portrait for construction defects at the Persimmon Hill project in 2012. (RI pp. 484-497). In March of 2013, the HOA amended its pleading adding subcontractors, including JJA. (RII pp. 516-559).The amended pleading alleged that JJA installed framing, windows and doors, secondary weather barrier, and window and door flashings at the townhomes. (RII p. 519, ¶6-p. 520, ¶7). The amended pleading alleged that the

negligence of the defendants – including JJA – had caused damages to the Plaintiff by continuous exposure to moisture and water intrusion "resulting in damage to walls, deterioration, and other damages to the finishes and structural elements of the townhomes." (RII pp. 550-551, ¶49).

Robert Sisnroy is a licensed professional engineer that investigated the construction at the Persimmon Hill project on behalf of the HOA. The construction of the Persimmon Hill project began in 2002. The last certificate of occupancy was issued in 2006. (RIV p. 1429). His inspection of the exterior building envelope of the townhome buildings was extensive. Mr. Sisnroy testified that he found the improper installation of the window flashings and weather barrier caused damage to the wall sheathing as well as the structural framing with this damage being a pervasive condition. (RI p. 396, line 1-p. 399, line 23). Water intrusion also caused damage to the interior drywall, trim and even curtains and plantation blinds. (RI p. 394, line 5-p. 395, line 25). JJA was the framer, and its work involved the installation of the windows, window flashings and weather barrier on approximately 85% of the units. (RI p. 269, line 2-p. 271, line 4). Mr. Sisnroy estimated the damage to the buildings would have started two months after the certificate of occupancy. (RI p. 399, lines 14-18).

The HOA litigated its claims against Portrait and its subcontractors for several years. (RI p. 276, line 18-p. 278, line 8). Ultimately, the HOA settled its claims against Portrait and its subcontractors with the exception of the claim against JJA. *Id*. No appearance was made on behalf of JJA, and as such Plaintiff's counsel wrote Penn on April 24, 2014, transmitting Penn the pleading and advising Penn that if no Answer were filed within fifteen (15) days an Order of Default and Judgment would be sought against its insured. (RIII p. 1230). This claim notification was in addition to two (2) letters sent to Penn by Portrait's counsel dated June 5, 2013, and May 23, 2014, respectively demanding additional insured coverage under JJA's policies. (RII pp. 611-

613, 616-617). Penn acknowledged receipt of Plaintiff's counsel's correspondence by emailing Plaintiff's counsel on May 8, 2014 and defended/protected JJA by requesting a 30-day extension of time to respond to the Complaint to which the HOA's counsel agreed to the extension. (RIII p. 1231). Penn abandoned the defense/protection, and no Answer was ever filed. (RI p. 329, line 24-p. 330, line 1). As a result of Penn's abandonment and failure to provide JJA a defense, an Order of Default was entered against JJA on December 22, 2014, nearly nineteen (19) months after being on notice of the lawsuit. (RIII p. 1234-1236). Penn was also put-on notice of the entry of default by correspondence dated July 1, 2015, from HOA's Counsel, but did nothing. (RIII pp. 1195, 1234-1236). On July 13, 2015, their claims file noted: "Our office has received a court order of default. Copy in file. Coverage disclaimer in place due to no cooperation from the insured. Our file remains closed." (RIII p. 1195). Over a year later, on July 13, 2016, a Default Judgment was entered against JJA in the amount of $4,156,976.89 by the Honorable Dale Van Slambrook. (RIII pp. 1240-1245). At no point did Penn file a declaratory judgment action to determine whether Penn was obligated to provide a defense and indemnity for its insured or file a motion to lift the default. (RI p. 402, lines 11-20).

After the entry of judgment, JJA assigned all of its rights under Penn's policies to the HOA.

3. The Penn Policies

Penn issued eight (8) commercial general liability insurance policies at issue in this case; six to Jose Castillo d/b/a JJA Framing Company, JJA Construction, Inc., and JJA Framing Company[3] bearing number GL9 0601617 from December 5, 2002, to January 31, 2008. (RII pp. 629-678, 679-750, 764-816, 821-887, 894-947, RIII pp. 949-1008, 1010) and two to JJA Framing

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

Company and JJA Construction, Inc.[4] bearing number GL9 0649575 from July 9, 2008 to July 9, 2010. (RIII pp. 1011-1070, 1071-1128). The policies at issue are "occurrence-based" policies. (RII pp. 631, 680, 765, 822, 895, RIII pp. 950, 1012, 1072). The relevant Limits of Insurance stated on the declarations page for each of the eight policies were as follows:

- General Aggregate Limit (Other than Products-Completed Operations): $1,000,000.00;
- Products-Completed Operations Aggregate Limit: $1,000,000.00;
- Each Occurrence Limit: $500,000.00;

Id.

4. Penn's Adjusting of the JJA and Portrait AI Claims

Penn opened a claim file on June 25, 2013, after receiving correspondence from Portrait's counsel tendering for additional insured coverage under JJA's policies. (RII pp. 611-613). This correspondence also contained an extensive HOA's forensic engineer's report of the investigation of the Persimmon Hill project which contained approximately 450 pages, along with the most recent amended complaint. *Id.* Penn assigned the claim to Greg Gross, an experienced claims adjuster with approximately 25 years claims experience, having previously adjusted claims for Hartford, Royal Sun Alliance, Liberty Mutual and Montgomery insurance companies. (RI p. 310, line 15-p. 312, line 1). Adjuster Greg Gross was supervised by Gary Gibson, the regional claim's office team leader of the Greensboro, NC office. (RI p. 313, lines 3-10). Also participating in the adjustment of the claims was Adam Parsons, Home Office–In House Claims Counsel. (RI p. 314, lines 13-20, p. 320, line 22-p. 321, line 5). At the inception of the claim, Penn knew the claim related to the work of JJA was a multi-million-dollar claim. (RI p. 318, lines 10-23, p. 359, lines 4-7).

[4] From January 9, 2008, to August 15, 2008, the named insured was JJA Framing Company; from August 15, 2008, to July 9, 2010, the named insured was JJA Construction, Inc.

Penn's claims log contains the chronology of the claims from inception to conclusion. (RIII pp. 1179-1195, 1209-1225). There are two versions of the claims log that were exhibits at trial; HOA Exhibit 4 is the redacted version of the claims log, and Plaintiff's Exhibit 58 is the unredacted version of the claims log. The redactions in large part relate to Adam Parsons', Home Office–In House Claims Counsel, participation and instruction as to the manner in which the claims were to be adjusted. *Id.* On July 10, 2013, being 15 days after the claims file was opened, the claims log memorializes a meeting between the primary adjuster, Greg Gross, Gary Gibson and Adam Parsons and notes Parsons' instructions on how the HOA claim against JJA and the Portrait tender for additional insured coverage should be handled. (RIII p. 1180). Gross as the frontline adjuster was charged with carrying out Parsons' claims handling instructions. (RI p. 322, lines 2-13). Parsons instructed that if the named insured had not been served and/or had not requested a defense then Penn cannot retain counsel on their behalf. (RIII p. 1180). Additionally, Gross was to complete and submit a CQR (Coverage Question Report) to Parsons regarding Portrait's additional insured tender before any effort to investigate the claim or analyze coverage was undertaken. *Id.* CQRs are only submitted when there are coverage questions, and it is more likely than not that the claim will be denied. (RI p. 322, lines 19-23).

Penn's created requirement it imposed on insureds wherein an insured had to affirmatively request a defense prior to Penn hiring defense counsel is not contained anywhere in the policies. Gross testified that "when a lawsuit is filed against a Penn insured, they've got to do two things: Number one is the pleadings have to trigger coverage . . . . Then there is a second hurdle they've got to jump through which is, they got to request a defense from Penn . . . [.]" (RI p. 315, lines 14-23). Gross testified that this second hurdle was not a term or condition contained in any of the insuring agreements that he had ever seen at Penn, and that he told management he believed

imposing this requirement of specifically having to request a defense was improper. (RI p. 315, line 24-p. 316, line 23). Gross further testified that this second hurdle was not a requirement at any of the four (4) other insurance companies he had previously been employed at adjusting claims. (RI p. 317, lines 18-23).

Gross made an effort to locate JJA by doing an internet search, but was unsuccessful because Gross determined that the insured was out of business. (RI p. 319, lines 16-24). The claims file reflects that Gross did not utilize any of the insured's contact information contained in Penn's underwriting file available to him to include two (2) phone numbers for Mr. Castillo, the phone numbers for the office manager and Glenda Castillo, and an email address. (RI p. 324, line 1-p. 325, line 23, RIII pp. 1209-1225). Instead, Penn hired an Independent Adjuster ("IA"), Gayle McLeod, to travel to the Berkeley County Courthouse to review the Clerk of Court's file to determine if JJA had been served. (RIII pp.1180, 1293-1294). The September 21, 2013 claims log entry reflects that as of that time the IA reported back to Penn that there was still no service on the insured. (RIII p. 1181).

On September 21, 2013, Gross sent by certified mail the first of three (3) Reservation of Rights ("ROR") letters to JJA Construction, Inc., to an incorrect address of 9496 Highway 78, Lot 2, Ladson, SC 29458, despite noting the correct updated address of 11227 Eastfield Rd, Huntersville, NC, as part of his coverage analysis in the claims log entry that same day of September 21, 2013. (RIII pp. 1185, 1247-1252). On the same day, the following plan was noted in Penn's claims log:

> PLAN: ROR has been sent to the insured today via certified mail. If the insured receives and requests a defense on these complaints, there is a probable defense obligation due to the negligence count in the complaint and the trigger of coverage in South Carolina. Diaried two weeks for

> acceptance of ROR. If letter comes back unclaimed will issue CQR[5] to HOC[6] for review of coverage (i.e., insured has not demanded a defense to date).

(RIII p. 1186).[7] The first sentence of the ROR states, "Penn National Insurance acknowledges receipt of the above referenced claim." (RIII p. 1247). The ROR stated that "construction defects appear to be resultant in water intrusion and deterioration as a result" and "[i]t appears from the contracts/purchase orders in the file that construction commenced in 2002." (RIII p. 1248). Penn noted the date of loss as December 5, 2003. (RIII p. 1247). The ROR was "cut and paste" correspondence that misapplied policy language for the Duty in the Event of an Occurrence Section that was amended by an Extended Coverage Endorsement. (RI p. 327, line 8-328, line 17). The ROR stated it was "not a denial of coverage, but rather to inform JJA of potential coverage issues. Any actions taken by Penn in the investigation of this matter, or in negotiating for a compromise settlement, or in making any settlement, or in defending this claim, or in any way acting or failing to act, shall not constitute an admission of liability or an admission of coverage." (RIII p. 1251). There was no claimed green card for this certified mail in the claims file. (RIII pp. 1179-1195).

The second set of ROR letters dated August 11, 2014, were sent by certified mail addressed to Jose Castillo d/b/a JJA Construction, Inc. and JJA Construction, Inc. (RIII pp. 1281-1286, 1287-1292). Both again contained the incorrect address of 9496 Highway 78, Lot 2, Ladson, SC 29458. (RIII pp. 1281, 1287). The second set of RORs also included language regarding Duties in the Event of an Occurrence that was different than the Duties in the Event of an Occurrence language contained in the policies. (RIII pp. 1281-1286, 1287-1292). There was no claimed green card for

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[5] CQR refers to Coverage Question Report. (RI p. 322, line 14-p. 323, line 7).

[6] HOC refers to Home Office Counsel, Adam Parsons. (RI p. 321, line 3).

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

the August 11, 2014, RORs in the claims file. (RIII pp. 1179-1195). The third set of ROR letters dated October 2, 2014, were sent by certified mail to Jose Castillo d/b/a JJA Construction, Inc. One of the letters was sent to the outdated Ladson, SC, address, while the other was sent to the Huntersville, NC, address. (RIII pp. 1129, 1135). These RORs included language regarding Duties in the Event of an Occurrence that was also different than the Duties in the Event of an Occurrence language contained in the policies. (RIII pp. 1129-1134, 1135-1140). There was no claimed green card for this October 2, 2014, certified mail in the claims file. (RIII p. 1194). Penn's adjuster acknowledged that JJA never received this correspondence either. (RI p. 336, lines 5-9). JJA was never informed by Penn that it was denying coverage. (RI p. 468, lines 14-23).

The March 13, 2014, claims log note reflects the IA informed Penn that JJA had been served at the 11227 Eastfield Rd. Huntersville, NC 28078 address. (RIII p. 1187). After the independent adjuster informed Penn that JJA had been served, Penn's adjuster noted the following plan in the claim log on March 13, 2014:

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

Id. The same day that Penn learned its insured had been served, Penn was discussing denying coverage. *Id.* Capstone ISG, the same company hired to go to the courthouse to determine if an affidavit of service as to JJA had been filed, was hired to complete this additional, but limited, task. The instructions given by Penn to Gayle McLeod at Capstone ISG were:

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

(RIII p. 1228). During this time while Penn had hired an IA to make a cold call on JJA to ask if JJA wanted these policy benefits to which it was already entitled, counsel for the HOA submitted notice of the claim to Penn by letter dated April 24, 2014, stating that no one had filed an Answer on behalf of their insured and that if no one filed an Answer with fifteen (15) days an Order of Default and Judgement would be sought. (RIII p. 1230).

On the Saturday morning of May 10, 2014, Gayle McLeod made a cold call on JJA by showing up unannounced and walking into the open garage of Mr. Castillo's home in Huntersville, NC, knocking on his back door. (RI p. 427, lines 14-19). According to McLeod, she spoke with him for ten (10) minutes. (RI p. 431, lines 18-20). Mr. Castillo had not physically mailed the Complaint to Penn although Penn already knew the details of the Complaint and had a copy of it. At the time of the cold call in Mr. Castillo's garage, he informed Penn that he had received the Complaint, and McLeod had informed Mr. Castillo that Penn already knew about the case. (RI p. 442, lines 8-17). McLeod asked Mr. Castillo if he wanted Penn to defend him in the lawsuit to which he responded no. (RI p. 432, lines 13-15, p. 472, lines 2-6). McLeod further testified that Mr. Castillo answered every question she asked him before he started walking back inside. (RI p. 440, lines 13-16). It would have been important to Mr. Castillo to have been told that he had already paid for a defense by paying policy premiums, but he was never told this by McLeod. (RI p. 466, lines 4-14). McLeod did not provide any other relevant information to Castillo such as the details of the HOA's forensic engineer's report, his personal liability exposure being in the multi-millions of dollars, the cost of defense of the claims had already been paid for as part of the premiums, and that declining a defense would be rejecting a policy benefit that he was entitled to at no cost. (RI p. 332, lines 10-25, p. 428, lines 9-13, p. 445, lines 11-14, p. 445 line 25-p. 446, line 3, p. 474, line 12-p. 475, line 2). McLeod did not provide this information to Mr. Castillo

during the cold call because she was not asked to do so by Penn. (RI p. 333, lines 13-17, p. 433, lines 8-14, p. 437, lines 4-7). McLeod did not undertake any effort to investigate the claim while face-to-face with Mr. Castillo because she was also not asked to do so. *Id*. She had the opportunity to ask him about the Persimmon Hill project file, his scope of work, where he kept his project file material, or anything else that would have helped with the investigation or defense of the claim but did not. (RI p. 443, lines 2-19). McLeod did not seek to take a recorded statement nor written statement from Mr. Castillo during this ten (10) minute discussion in his garage. (RI p. 440, line 23-p. 441, line 5).

As to Portrait's claim[8] and request for additional insured coverage from Penn, Portrait tendered for additional insured coverage by letter from its counsel dated June 5, 2013. (RII pp. 611-613). Portrait's counsel submitted a second tender dated May 23, 2014, since there was no response by Penn to the first tender letter. (RII pp. 616-617). Penn denied Portrait's request for additional insured coverage by denial letter dated September 30, 2014. (RII pp. 618-620). This denial letter was sent seventeen (17) months following the initial tender and is the only written correspondence from Penn to Portrait. The basis for the denial of Portrait's claim was ". . . the sole avenue to additional insured status would be through an endorsement providing additional insured status for completed operations. The above policies do not contain such an endorsement." (RII p. 619). The basis for denial was untrue, and this untruth was referred to by Greg Gross as "doesn't jibe"[9] and "not right"[10], by Adam Parsons as "inaccurate"[11] and by Penn's expert, Bernd Heinze, as "the opposite of what was true"[12]. Denial of additional insured requests were routine by Gross

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[8] The HOA incorporates herein the facts contained within Portrait Homes' Initial Brief.
[9] RI p. 304, lines 9-10.
[10] RI p. 358, lines 23-24.
[11] RI p. 453, line 11-p. 454, line 8.
[12] RI p. 476, lines 8-22.

while adjusting claims at Penn. Gross believes that out of the twenty-five (25) to thirty (30) additional insured claims that he adjusted, he denied all of them, although Penn noted a single additional insured claim that Gross adjusted that was accepted. (RI p. 308, line 16-p. 309, line 10).

5. JJA Construction, Inc. d/b/a JJA Framing and Jose Castillo d/b/a/ JJA Framing

Jose Castillo is sixty-one (61) years old with a 6th grade education. (RI p. 458, lines 7-8, p. 461, lines 9-10). He is able to only speak conversational English. (RI p. 461, lines 2-8). Mr. Castillo attended the trial of this case voluntarily and without being under subpoena. (RI p. 467, lines 19-23). Mr. Castillo had been a framer for over twenty-five years. (RI p. 459, lines 5-6). In the early years, he operated his business as Jose Castillo d/b/a JJA Framing and later formed JJA Construction, Inc. d/b/a JJA Framing. (RI p. 459, lines 7-16). He always operated these businesses as being one in the same and viewed them as a singular entity. (RI p. 459, line 17-p. 460, line 11). They had the same location, same trucks, same telephone number and same federal ID number. (RI p. 459, line 5-p. 460, line 8). Mr. Castillo resides in Huntersville, NC and currently owns and operates a crane company. (RI p. 458, lines 9-24). He starts his workday by leaving his home around 7:00 am and returns around 7:00 or 8:00 pm. (RI p. 464, lines 21-25). Through his long hours of hard work, Mr. Castillo has accumulated assets to include the ownership of real property and cranes for his crane business. (RI p. 473, lines 1-22).

The first contact Mr. Castillo received from Penn regarding this claim was the McLeod cold call showing up in his garage and knocking on his back door one Saturday morning in May of 2014. (RI p. 465, lines 5-15). No one from Penn had previously called him to discuss this claim, although Penn would call him regularly during year end premium audits when additional premiums may be owed. (RI p. 463, lines 5-13). Mr. Castillo never received any of the three certified ROR letters, the first two of which were to a four-year-stale Ladson, SC, address. (RI p. 463, line 5-p.

464, line 18). During Penn's first and only contact with its insured via cold call, Mr. Castillo and McLeod had the aforementioned discussion about the Persimmon Hill lawsuit and discussed that Penn was in possession of the lawsuit. (RI p. 442, line 9-p. 443, line 1). McLeod was there to ask him if he wanted Penn to provide him a defense. (RIII p. 1232). It would have been important to Mr. Castillo to have been told that he had already paid for a defense by paying policy premiums, but he was never told this by McLeod. (RI p. 466, lines 4-14). Mr. Castillo was never asked for the Persimmon Hill project file or pay records, or he would have looked for them. (RI p. 466, line 15-p. 467, line 2). He was never asked about the relationship between JJA the sole proprietorship and JJA Construction, Inc. or he would have explained the relationship. (RI p. 467, lines 3-18). He would have cooperated with Penn. (RI p. 466, line 4-p. 467, line 18). McLeod noted that Mr. Castillo answered every question that she asked him during their conversation until he turned and walked back into his home. (RI p. 440, lines 13-16).

There was no evidence Penn told Mr. Castillo that Penn had already undertaken to defend/protect him for free by obtaining an extension for him to avoid a default Order, but if he declined the defense, Penn would abandon the defense/protection and let the extension expire leaving Mr. Castillo to be in default. Instead of revealing that Penn had already undertaken this duty of defense and procured an extension to protect Mr. Castillo from a default Order, McLeod asked Mr. Castillo "if he wanted a defense." (RI p. 432, lines 13-15, p. 439, lines 14-17, p. 466, lines 10-12). There was no evidence that McLeod informed him that a failure to say "yes" would be treated by Penn as a full waiver and abandonment by Mr. Castillo of his rights to a defense and to indemnity under the policies, for which he had paid premiums for years. There was also no evidence that McLeod told Mr. Castillo that under the policy language itself, Penn had a "duty" to

defend him in the litigation. (RII pp. 653, 717, 784, 860, 924, RIII pp. 981, 1043, 1096)(". . . We will have *the right and duty to defend* the insured . . .")(emphasis added).

Had McLeod told Mr. Castillo that an attorney would be provided for his defense at no cost to him because he had already paid for this policy benefit through his premium payments, he would have told her that he wanted Penn to provide a defense. (RI p. 466, lines 4-14).

ARGUMENTS[13]

This appeal is from a nonjury trial decision by Judge Roger M. Young, Sr., who issued his decisions within three (3) separate Orders and judgment in this matter after considering over one hundred (100) exhibits and listening to testimony from twelve (12) witnesses. In the end, Judge Young concluded as a factual matter that Penn should not be excused from its policy duties based on various claims of supposed waiver, abandonment, and failure to inform Penn of things it admittedly already knew. Penn claims this judgment should be reversed, and that instead, judgment must be granted to Penn. The judgment of the trial judge is based on his factual findings, and as this Court will see, Penn is unable to show they are wholly without evidentiary support. The Judge's fact findings are indeed well supported. Penn also makes various legal arguments that it is entitled to judgment that should be rejected. Lastly, Penn argues that, even if it isn't entitled to judgment, the actual damages portion of the judgments should be remanded to Judge Young for further proceedings regarding "time on risk" issues. This remand argument should also be rejected.

It should be noted that the punitive damages awarded in Judge Young's Post-Trial Motions and Punitive Damages Order, dated March 23, 2020, were not contested by Penn via a Rule 59(e) motion (no such motion was filed), nor has the ***amount*** of punitive damages awarded been

[13] To the extent not inconsistent herein, Persimmon Hill HOA also adopts and incorporates the arguments made by Portrait Homes on appeal with respect to Judge Young's decisions.

contested by Penn on appeal. Judge Young provided a detailed, reasoned analysis with respect to the bad faith claims as to Portrait and as to JJA (both of which have been assigned to the HOA). (RI pp. 150-177). Because there were actual damages without question with respect to both bad faith claims,[14] unless Penn is determined on appeal to be entitled to judgment *in its entirety*, the punitive damages awards are unappealed and stand as the law of the case with respect to both bad faith claims. *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010)(unappealed ruling, whether right or wrong, stands as law of the case).

Regardless, Judge Young's orders should be affirmed in all respects, as outlined below.

I. The Trial Court's factual finding that Castillo did not knowingly waive or abandon his right to a defense under his Penn policies is not wholly unsupported by the evidence

Penn asserts there is no evidence to support Penn owing JJA a defense based solely on Mr. Castillo's conversation during a cold call from the IA in his garage on a Saturday morning in May 2014. Penn states, "Here, Castillo's refusal likewise operated as a *knowing and voluntary* relinquishment of his rights under the policy that was fully viable under the law." (Initial Brief of Appellant at 20). However, this conclusion reached by Penn is a factual conclusion with which Judge Young, the fact finder here, disagreed. The determination of the factual issue of *knowing and voluntary* relinquishment or waiver was made by Judge Young contrary to Penn. This issue was the subject of much argument made by counsel for both the HOA and Penn to Judge Young throughout most every facet of the case. This determination of whether Mr. Castillo understood

[14] As to the bad faith against Portrait claim, Penn has not appealed the ruling by Judge Young that it had a duty to defend Portrait, and Judge Young specifically found actual damages for breach of that duty to defend suffered by Portrait. *See* RI pp. 124, 156. As to the bad faith against JJA claim, Penn does not dispute that actual damages in the form of covered damages exist, and Judge Young specifically found there were covered damages here for which the policies would be answerable. *See* RI p. 30.

what the IA was asking him on this cold call visit in his garage, and whether Mr. Castillo *knowingly and voluntarily* waived his policy rights and a defense, as Penn contends, is a factual inquiry. Penn must show the Court, consistent with the applicable standard of review, that Judge Young's factual determination is wholly unsupported by the evidence in order to prevail on this point. Penn cannot sustain this burden. The record contains overwhelming evidence and reasonable inferences from evidence that fully support Judge Young's factual finding in this regard.

Jose Castillo purchased eight (8) policies of insurance which were all applicable to the lawsuit by the HOA against JJA for the property damages at the Persimmon Hill townhome buildings. (RII pp. 629-678, 679-750, 764-816, 821-887, 894-947, RIII pp. 949-1008, 1011-1070, 1071-1128). The policies provided that Penn had the "right <u>and the duty</u>" to defend Castillo, and that duty extended to the lawsuit here. (RII pp. 653, 717, 784, 860, 924, RIII pp. 981, 1043, 1096)(emphasis added). Penn became aware of and had a copy of the lawsuit by the HOA against JJA through Portrait, an additional insured, and knew of these claims even before JJA had been served. (RII pp. 611-613). Penn was also sent a copy of the pleading by Plaintiff's counsel and JJA discussed it with McLeod during the cold call in the open garage. McLeod asked if "JJA wanted the insurance company to defend him." (RI p. 429, line 25-p. 430, line 1)("I said, do you want them to defend you for these suits?"). JJA said "no." *Id.* The IA asked for "contact information" for JJA (which Penn already had in its underwriting file) to which JJA "shook his head" (allegedly in the negative). McLeod did not take a recorded or written statement. Penn contends through that sole interaction, JJA *voluntarily* and *knowingly* orally relinquished policy benefits for all eight (8) policies regarding a multi-million-dollar lawsuit against him and his business and that such eradicated Penn's already-existing, policy-based ***duty*** to defend. Waiver, like estoppel, is an affirmative defense and the burden of proof is upon the party who asserts it. *Frady v. Smith,* 247

S.C. 353, 360, 147 S.E.2d 412, 415 (1966) *overruled on other grounds by Tolemac, Inc. v. United Trading, Inc.*, 326 S.C. 103, 484 S.E.2d 593 (1997). Waiver is a question of fact for the finder of fact. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992). "[W]aiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id*.

Judge Young found that Castillo did not, *in fact*, waive his rights, or understandably decide he did not want a defense because he did not have all of the material facts upon which such a decision depended; therefore, even if Castillo *could* do this, the Judge *as a factual matter* found he did not. Only if there is *no evidence* that supports the Judge's findings can this fact finding be reversed. Judge Young further found that Penn misled Castillo and failed to provide him important information that Penn had in its possession which was material. Judge Young also found that if this important information had been disclosed by Penn's IA to Castillo, Castillo would have responded to her that he *wanted* a defense – as testified to by Castillo. (RI p. 466, lines 4-14). Judge Young personally witnessed the demeanor of Mr. Castillo, and his factual finding of no waiver has evidentiary support. McLeod did not disclose to JJA that the claim was a multi-million dollar liability exposure, Castillo had a multi-million dollar personal liability exposure, the property damage at Persimmon Hill as contained in the HOA's engineer's report was extensive, or any other matter contained in the engineers report, or that JJA had already paid for and was entitled to a defense as a policy benefit without further cost. (RI pp. 131-133, 138-140, 172-173). Further, there was no evidence presented that Penn, having already voluntarily undertaken its policy duty to defend JJA, informed JJA that it had obtained an extension from default liability for

him, but if his answer was "no" to the question being asked by the IA, Penn would abandon the defense/protection and allow the extension period to expire and do nothing further for JJA. Penn defending/protecting JJA by asking for a 30-day extension to keep their insured out of default, and nearly simultaneously having the IA ask JJA if a defense was wanted are irreconcilable. Put simply, Judge Young heard the witnesses, judged their demeanors, considered the evidence, and found that Mr. Castillo made no decision to knowingly and voluntarily relinquish his rights to a defense under the policies for which he had paid, and that Penn was not excused from its policy duty to defend via this oral discussion between Mr. Castillo and the IA in his home garage on the cold call.

A review of Penn's actions and the testimony from trial shows it is exceedingly reasonable that the trial court found that Mr. Castillo was misled by Penn not providing pertinent and material information it had in its possession regarding the claim and coverages and rights available to him for which he had already paid premiums, along with not disclosing this claim was a multi-million dollar liability exposure. Even if Penn did not affirmatively mislead Mr. Castillo, it certainly omitted material information when it interacted with him and Judge Young found as a matter of fact that had Mr. Castillo understood that material information, he would not have answered the question from the IA by saying "no." Rather, Judge Young credited the testimony of Mr. Castillo that, had he been told of the material information and had he truly understood what he was being asked, he would have answered the question from the IA by saying "yes." Penn already had an existing duty under its policies to defend JJA. It had in fact already undertaken that duty by requesting an extension from default in favor of JJA. The question of whether, in the subsequent oral conversation, Penn's duty was knowingly released and abandoned for free by Mr. Castillo in the cold call meeting was a fact question for Judge Young. He determined it adversely to Penn.

There is evidence and reasonable inferences from the evidence supporting that determination. Judge Young thus cannot be reversed on this basis.

Knowing the suit had been brought against JJA, had been served on JJA, and on notice of default forthcoming if an Answer is not filed for JJA (but at that time extended for JJA per the request of the Penn adjuster) and having reason to believe none of its ROR letters had been received by JJA, Penn retained McLeod to cold call him. The purpose of this cold call was supposedly, according to Penn, to ask JJA if he wanted Penn to defend him. The specific instructions given by Penn to Gayle McLeod for her additional task were limited to the following:

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.

(RIII p. 1228). There, however, is nowhere in the eight (8) insuring agreements any provision requiring Castillo to make a second, affirmative request that Penn do what it is already obligated to do in the policy – defend JJA in the suit. Further, each policy also contains a Common Policy Conditions form which contains Penn's policy regarding any changes being made to their policies:

> **B. Changes**
> This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

(RII pp. 644, 705, 774, 835, 901, RIII pp. 958, 1022, 1077). There are no endorsements contained within any of the policies regarding Castillo having to make such an affirmative request for a defense. There are five (5) different claims log entries from the time the claim was opened until the time Penn was notified that JJA had been served noting that JJA was required to request a defense before Penn's duty to defend was triggered, even though this requirement does not exist in the policy. (RIII pp. 1180, 1181, 1186, 1187). There is also an entry in the claim log reflecting

Penn's intent to deny the JJA claim prior to Penn knowing that its insured had been served, which is telling. The claim log states: "I emailed IA today to check again to see if service has been perfected against the insured. If not, will send CQR to GG for review to send to HOC to recommend that no coverage be afforded any entity as the insured has not come forward requesting a defense and/or in violation of the conditions portion of the policy." (RIII p. 1187).

Further, Penn contends that JJA waived the policy right of a defense, but Penn's own insuring agreement requires that waiver of any policy term can only be done by endorsement issued by Penn and made part of the policy. (RII pp. 644, 705, 774, 835, 901, RIII pp. 958, 1022, 1077). The policy term that Penn claims was waived is

> **SECTION I – COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
> **1. Insuring Agreement**
> a. . . . We will have *the right and duty to defend* the insured against any "suit" seeking those damages. . . .

(RII pp. 653, 717, 784, 860, 924, RIII pp. 981, 1043, 1096)(emphasis added). There was no such endorsement made waiving or amending this policy term. Penn seems to suggest that it would be unreasonable for the court to enforce this policy provision contained in the policies Penn wrote because JJA was not waiving the "terms" of the policy by citing *S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001), and therefore, no endorsement is required. The cited case, however, dealt with the rules for interpreting restrictive covenants in South Carolina. Penn fails to see the unquestionable fact that it unilaterally altered the terms of its own policy by imposing as an additional term an insured having to affirmatively request a defense even if a defense obligation is triggered by the terms of the policies. This is not what the insured bargained for when buying the policy. Rather, the insured entered into a contract wherein Penn had the *right and the duty to defend* a claim which triggered the policy. Mr. Castillo testified that

had he been provided with important information regarding his coverages to include that a defense would be provided as part of the policy benefits for which he has already paid premiums, he would have responded that he *wanted* Penn to provide a defense:

> Q. If she had told you, Mr. Castillo, you have paid for a defense each year of these eight-year policy premiums and we, Penn National, will provide you this defense because you paid for it if you want it, you would tell her, of course, would you not?
> A. Yes.
> Q. Do you recall her ever telling you that you had already paid for a defense?
> A. No.
> Q. That would be important to you, wouldn't it?
> A. Yes.

(RI p. 466, lines 4-14). Furthermore, Gross testified that there was “no downside” to an insured saying “yes” to wanting the defense provided, in light of the fact that they have already paid for it with their premium. (RI p. 330, line 25-p. 330A, line 6).

There were inconsistencies in McLeod’s testimony. She agreed that “if it’s not in the claims file, it either was not important or it didn’t happen[.]” (RI p. 438, lines 13-17). McLeod’s reports to Penn, and affidavit filed with the trial court do not mention nor document that McLeod informed Mr. Castillo of any policy coverages or facts of the claim. At trial, McLeod testified:

> Q. So you had a discussion with Mr. Castillo about the possibility that if he ignored the lawsuit, he could have a judgment entered against him and they could take everything he owned, correct?
> A. Well, I didn’t put it that way.

(RI p. 428, lines 9-13).

> 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. Did you tell him he had a free lawyer, all he had to do was let the lawyer do his job?
> A. To me, I was to instruct him to call Penn National and that’s what I did.

(RI p. 445, line 11-14, p. 445, line 25-p. 446, line 3).

> 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: . . . If they had handed you a contract and said how about ask Mr. Castillo . . . about this contract. You would have done that if they had asked you to do it, wouldn't you?
> A: Yes.
> Q: Any information they asked you to gather from Mr. Castillo when you finally got face-to-face with him, you would have done your best to ask those questions and gather that information?
> A: Correct.
> 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.

(RI p. 435, line 23-p. 437, line 7). Further, McLeod did not get this cold call encounter in writing or otherwise record it, did not give Castillo any ROR letters, did not tell Castillo he already had a right under the policy to a defense, did not tell Castillo that Penn had already undertaken to act for him and had an extension for him to Answer and get defended in the lawsuit, did not explain that failing to defend himself/his business would subject him/his business to a possible multi-million dollar judgment, did not explain that Penn would consider there to be no coverage or rights from any of his policies if he said "no" to a particular question from the person visiting him at his home and did not otherwise warn Castillo of the ramifications Penn would ascribe to his "no" answer, nor provide any explanation of his rights. For example, the contents of the ROR letters were not provided to him or content discussed with him. McLeod didn't do any of these things, because she was not asked to do so by Penn. Therefore, the trial court held in its Order following the Rule 59 hearing that his findings that Penn misled JJA regarding the information and non-disclosures that

Penn provided or didn't provide about the facts of the claim, policy provisions and coverages would not be altered or amended. (RI pp. 131-133, 138-140, 172-173).

Furthermore, Penn's reliance on *Twin City Fire Ins. Co. v. Ben-Arnold-Sunbelt Beverage Co. of S.C.,* 433 F.3d 365, 374 (4th Cir. 2005) and *Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 103 S.E.2d. 272 (1958) to justify its actions in this case is misplaced, and the cases cited are supportive of affirming the order of the trial court. In *Twin City*, the District Court was seeking to determine how the South Carolina Supreme Court would rule on the issue of whether an insured is entitled to select its own counsel at the insurance company's expense when the insurance company issues a ROR letter regarding coverage. This was a novel issue at the time before the Court and previously undecided in South Carolina jurisprudence. The insured filed a declaratory judgment action seeking reimbursement of attorney's fees because the insured believed that counsel hired by the insurer to defend had a conflict of interest given the question of coverage in the ROR letter. While the Court ruled on this novel issue that the insurer was not required to reimburse the insured for attorney's fees, this was an issue of who was paying for the defense that was being litigated in a declaratory judgment action – not a knowing and voluntary relinquishment of one's policy rights as Penn contends.

Further in *Tucker,* the insured actually did knowingly and voluntary relinquish his policy rights to a defense, but the facts in *Tucker* are in stark contrast to those here. The facts in *Tucker* are demonstrative of the way Penn should have handled the claim and what constitutes a knowing and voluntary waiver. In *Tucker*, State Farm hired counsel to provide its insured a defense. When it was apparent that the insured was refusing policy benefits of a defense, counsel that had been hired by the carrier for Tucker provided a full explanation so as to ensure that any relinquishment

of policy benefits was knowing and voluntary. The Court notes the comprehensive nature and extent of information that counsel hired by the carrier provided the insured:

> The attorney repeated his former explanation of the necessity of defense of the action and of insured's verification of the answer; he explained the requirements of the policy that the insured cooperate in the defense, file answer, go to court, give evidence, etc.; but the insured was adamant in his refusal to sign the verification.

232 S.C. 615, 619, 103 S.E.2d. 272, 274. Had Penn either hired counsel for JJA or provided information as counsel did in *Tucker*, Castillo would have responded differently to McLeod as supported by the trial testimony. (RI p. 462, line 11-p. 463, line 8, p. 466, lines 4-14). And Judge Young so found.

Further, Penn in its notice of appeal states that it is appealing the denial of its "directed verdict" motions by the Judge on February 7, 2019 and May 9, 2019, ruled upon "in open court." (*See* RV pp. 1830-1831). Such a directed verdict motion is not proper in a nonjury trial. A motion for nonsuit and a motion for judgment are available vehicles in a nonjury trial to make legal arguments that a party should prevail, as a matter of law, on a particular point. *See Waterpointe I Prop. Owner's Ass'n v. Paragon, Inc.*, 342 S.C. 454, 458-59, 536 S.E.2d 878, 880-81 (Ct. App. 2000). Thus, none of Penn's legal arguments in its brief are preserved, as Penn made no such motion.[15] It thus cannot, for the first time on appeal, make these legal arguments. Further, Penn cannot excuse this failure via the vehicle of a Rule 59(e) motion, since that motion is not to be used to raise points that could have been made prior to judgment but were not. *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). Preserved or not, as set forth herein, Penn's arguments are meritless and should be rejected.

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[15] Further, even treating such directed verdict motions as proper motions, the motion must raise (and get a ruling on) with particularity the ground asserted on appeal. *See Mains v. K-Mart Corp.*, 297 S.C. 142, 145, 375 S.E.2d 311, 313 (Ct. App. 1988).

II. The Trial Judge should not be reversed as a matter of law based on the alleged violation of the Notice and Coverage Conditions

The purpose of the Duties in the Event of Occurrence, Claim or Suit, including the duties redefined by the Extended Coverage Endorsement, is to ensure that an insurance carrier has notice of the claim so that it can properly perform an investigation and defend the lawsuit. *Neumayer v. Phila. Indem. Ins. Co.*, 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019). It would be inequitable to permit an insurer to avoid coverage for an innocent third party (here the HOA) just because the insured didn't notify the insurer of the lawsuit. The Supreme Court of South Carolina has adopted a notice-prejudice rule "whereby the insurer had the burden to show that it was substantially prejudiced by the failure of its insured to comply with the notice and cooperation provisions." *Id.* "The purpose of a notification requirement is to allow for investigation of the facts and to assist the insurer in preparing a defense." *Vt. Mut. Ins. Co. v. Singleton by & ex rel. Singleton,* 316 S.C. 5, 11, 446 S.E.2d 417, 421 (1994)(citing *Washington v. National Service Fire Ins. Co.*, 252 S.C. 635, 168 S.E.2d 90 (1969)). "[T]here is 'no sound reason . . . to permit a mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled.'" *Neumayer* at 272, 831 S.E.2d at 411 (quoting *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971)).

It is undisputed that JJA itself did not provide notice of the Complaint to Penn when served, and it was not until JJA discussed it with the IA at the time of the cold call in May of 2014, that such "notice" of the claim came directly from JJA. Penn, however, had notice of the claim against JJA even before JJA was served with the complaint via Portrait's additional insured tender. (RII, pp. 611-613). "A person who knows of a thing has notice thereof." *Hannah v. United Refrigerated Servs.*, 312 S.C. 42, 46, 430 S.E.2d 539, 542 (Ct. App. 1993)(citing *Walker v. Preacher*, 185 S.C. 462, 467, 194 S.E. 868, 870 (1938)). In other words, "no one needs notice of what he already

knows." *Id*. While Plaintiff's counsel could not find a South Carolina case on point, other jurisdictions have held that "[a]n additional named insured should be required to comply with the notice provisions of the policy in which he is named, *unless the insurer has been notified adequately by another party.*" Mark Pomerantz, *Recognizing the Unique States of Additional Name Insureds*, 53 Fordham L.Rev. 117, 141 (1984)("*It is immaterial who notifies the insurer as long as the standard is met.*")(citing *Western Freight Ass'n v. Aetna Casualty & Sur. Co.*, 255 F. Supp. 858, 862 (W.D. Pa. 1966), aff'd per curiam, 371 F.2d 541 (3d Cir. 1967); *Leventhal v. American Bankers Ins. Co.*, 159 Ga. App. 104, 105, 283 S.E.2d 3, 5 (1980); *Monguso v. Pietrucha*, 87 N.J. Super. 492, 496, 210 A.2d 81, 83-84 (1965); *Helvy v. Inland Mut. Ins. Co.*, 148 W. Va. 51, 61, 132 S.E.2d 912, 918 (1963)). In other words, "It is immaterial whether . . . the named insured *or* the additional insured *or* any other person involved notifies the insurer of the occurrence of an accident, if in fact notice is given." *Republic Mut. Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 413 F. Supp. 649, 653 (S.D.W.Va. 1976)(citing *American Southern Insurance Co. v. England*, 260 F. Supp. 55 (S.D.W.Va. 1960), aff'd in part, rev'd in part on other grounds, 380 F.2d 137 (4th Cir. 1967))(emphasis added).

Penn's argument that the holding in *Merit* is directly applicable to the facts in this case is misplaced as the facts here are significantly different. In *Merit*, it was undisputed that the suit papers were never forwarded to the insurance company. *Merit Ins. Co. v. Koza*, 274 S.C. 362, 364, 264 S.E.2d 146, 147 (1980). Here, it is undisputed that the insurance company *had* the suit papers. Moreover, the insured in *Merit* called his insurance company to let him know that his car was impounded. *Id*. The insurer was able to get his car back for him, then didn't hear from anyone any further until *after* the default judgment was entered. *Id.* The facts in this case are the exact opposite of the facts in *Merit*. In this case, Portrait, who is an insured under the policies, advised Penn of

the claims against JJA on June 5, 2013,[16] counsel for the HOA advised Penn of the claims against JJA and that JJA had been served on April 24, 2014,[17] and Penn's own IA had independently confirmed service and had a discussion about the lawsuit with JJA in May of 2014.[18] All of these notices of the lawsuit to Penn from these three (3) different sources took place *prior* to the Order of Default being entered on December 16, 2014. (RIII pp. 1234-1236). In fact, Penn was aware that a default would be sought as set forth in the HOA counsel's correspondence dated April 24, 2014, for which Penn ***provided a defense/protection to JJA by seeking and being granted a 30-day extension*** to file an Answer for JJA. (RIII pp. 1230, 1231). Thereafter, Penn abandoned the defense and received receipt of the entry of default on July 15, 2015, and the Judgment was entered on July 14, 2016, some twenty-six (26) months after Penn asked for the extension to Answer. (RIII pp. 1234-1236, 1240-1245). At no point in time after abandoning the defense did Penn ask or move for the default to be lifted or request relief from judgment. *See* Rules 55(c),60(b), SCRCP. Therefore, the facts between *Merit* and this case are diametrically opposite.

In any event, Penn cannot be successful on this point as well by virtue of the two issue rule. Judge Young also found that Penn had failed to include grounds for which it denied coverage, namely - it could not hire counsel for JJA without a specific request from JJA - in the ROR letters it prepared and sent to JJA (albeit all but one to a stale address). (RI pp. 37, 135). This is a separate basis upholding Judge Young's conclusion as to Penn's lack of coverage defenses here, and Penn failed to appeal regarding this basis. As a result, Judge Young's conclusions must be affirmed, pursuant to the two-issue rule. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds, because the

[16] RII pp. 611-613.
[17] RIII p. 1230.
[18] RIII pp. 1232-1233.

unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)(citing *Anderson v. Short,* 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996)).

The South Carolina Supreme Court was very clear in *Harleysville* as to the requirement and purpose of an insurer informing its insured of the coverage defenses it may assert through ROR letters. *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 339, 803 S.E.2d 288, 298 (2017). The Court in *Harleysville* defined an ROR as the following: "A 'unilateral reservation of rights' is a notice given by the insurer that *it will defend* [the insured in the lawsuit] but reserves all rights it has based on noncoverage under the policy . . . ." *Id*. at 338, 803 S.E.2d at 297(quoting 14 Couch on Ins. § 202:38)(emphasis added). Penn claims it had no duty to defend, yet it sent out three (3) ROR letters to JJA; letters that have a purpose of informing an insured that it will be defended. Penn further defended/protected JJA in obtaining a 30-day extension in order to file an Answer for JJA to preclude default. (RIII p. 1231). Yet, Penn now wants to claim that the insured didn't mail it the Complaint, and it, therefore, is excused of its duty to defend. This is a coverage defense, however, that is not discussed in any of the RORs sent to JJA. In the event that a carrier does not adequately reserve its rights sufficiently specifying its coverage defenses through a proper ROR, then the carrier will be precluded from disputing coverage at a later time. 420 S.C. at 339, 803 S.E.2d at 298. Penn never notified JJA in any of its RORs that it intended to rely on its failure to forward the complaint as a defense. Rather, the first sentence of the first ROR states, "Penn National Insurance acknowledges receipt of the above referenced claim." (RIII p. 1247). The ROR was "cut and paste" correspondence that also misapplied policy language for the Duty in the Event of an Occurrence Section that had been amended by an Extended Coverage Endorsement. (RIII pp. 1247-1252). The ROR went on to state it was "not a denial of coverage, but rather to inform JJA of potential coverage issues. Any actions taken by Penn in the investigation of this matter, or

in negotiating for a compromise settlement, or in making any settlement, or in defending this claim, or in any way acting or failing to act, shall not constitute an admission of liability or an admission of coverage." (RIII p. 1251). In fact, the second ROR sent in August 2014, which was after the cold call conversation with McLeod in the garage where McLeod had the opportunity to ask any and everything Penn could have ever wanted to investigate the claim but didn't, specifically advises again that it "is not a denial of coverage, but rather to inform JJA of potential coverage issues." (RIII pp. 1285, 1291). It then goes on to state:

> If Penn National Insurance does not hear from the above entity by August 31, 2014, Penn National Insurance will be faced with no alternative to deny coverage based upon a breach of the above noted conditions of the policy as, to date, we have had no cooperation from anyone from the above noted insured.

(RIII pp. 1286, 1292). The conditions, however, were again "cut and paste" that misapplied policy language for the Duty in the Event of an Occurrence Section that had been amended by an Extended Coverage Endorsement. (RIII pp. 1281-1286, 1287-1292). The final ROR sent to, but not received by, JJA in October of 2014 provided the sole reasoning for Penn's denial of the claim:

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

(RIII pp. 1133, 1139). Therefore, Penn should be precluded from asserting all other coverage defenses.

As noted above, Penn applied the wrong policy provision for the Duties in the Event of Occurrence, Claim or Suit section of the policy in denying JJA a defense and indemnity. This section of the policy was redefined by an Extended Coverage Endorsement – Duties in The Event of Occurrence, Claim or Suit Redefined. The first two ROR letters were sent by certified mail to a

four-years-stale address in Ladson, SC, and the third ROR letter that was sent certified mail to Huntersville, NC, none of which were received by JJA, did not contain the correct provision as redefined by the Extended Coverage Endorsement. The first time anyone from Penn became aware of this error was at the trial of this case. (RI p. 359, line 17-p. 360, line 13). The applicable Duties in the Event of Occurrence, Claim or Suit Redefined as in the Extended Coverage Endorsement contains the following:

> **VII. DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT REDEFINED**
>
> a. The requirement in Condition 2.a of CONDITIONS (Section IV) that you must see to it that we are notified of an "occurrence" only applies when the "occurrence" or offense is known to:
> 1) You, if you are an individual; . . .
> 3) An officer of the corporation or insurance manager, if you are a corporation.
>
> b. The requirement in Condition 2.b. of CONDITIONS (Section IV) that you must see to it that we received notice of a claim or "suit" will not be considered breached unless the breach occurs after such claim or "suit" is know (sic) to:
> 1) You, if you are an individual; . . .
> 3) An officer of the corporation or insurance manager, if you are a corporation.

(RII pp. 672, 738, 803, 843, 909, RIII pp. 967, 1029, 1084). In Section 2(a), the requirement for Penn to be notified of an "occurrence" doesn't trigger until the occurrence is known to the insured or officer if a corporation. Penn was aware of the occurrence before JJA was because of the notice correspondence from Portrait's counsel in June of 2013 and because Penn sought to undertake its own notice inquiry (not relying on JJA) by hiring an IA to go to the Berkeley County Courthouse to look at the Clerk's file. The same logic applies to Section 2(b) in that Penn is on notice of the claim or suit before JJA, and therefore, JJA wasn't in breach of this provision. Penn adjuster Gross testified:

> Q. And so B [referring to 2B in the redefined duties] which talks about the notice requirements for a lawsuit specifically says, you must see to it that

> we receive notice of a claim or suit. One might be a breach unless the breach occurs after such claim is known to you. So the fact that Penn knew about this before Jose Castillo, it would be impossible for him to be in breach. Would you agree with that?
> A. As you say.

(RI p. 361, lines 11-19). Penn seeks to assert that some of the provisions in the original Duties section not contained within the redefined Duties section are yet still applicable. While the redefined section does not state this, to the extent that there are ambiguities in the policy, South Carolina law holds that ambiguities are to be construed in favor of the insured. *See Spinx Oil Co. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 481, 427 S.E.2d 649, 651 (1993)("Ambiguous or conflicting terms in an insurance contract should be construed in favor of the insured and strictly construed against the insurer."). Therefore, this Court should affirm.

III. The trial court's factual finding that Castillo did not violate the cooperation clause of the policies through his actions is not wholly unsupported by the evidence

Judge Young found that Castillo did not, *in fact*, fail to cooperate. Only if there is *no evidence* that supports the Judge's findings can this fact finding be reversed. The trial court evaluated the testimony from the trial including that of Gross, McLeod, and Castillo, amongst others.

Based on the testimony of Gross, McLeod and Castillo, there is ample evidence that JJA was cooperative. Penn claims to have perceived JJA as being noncooperative. However, Penn didn't utilize any of the information that it had in its possession and available to Gross (which it used when conducting year end premium audits to possibly collect additional premium) including two phone numbers for Castillo, a phone number for his office manager and Glenda Castillo, and an email address, in its efforts to communicate with him. Or, it may have just been convenient to Penn to deem JJA noncooperative. Penn's supposed difficulty in making contact with JJA was not

JJA's fault. Penn also may have wrongly perceived JJA as being allegedly noncooperative when it sent ROR letters to a four-year-old stale address even though the correct address was noted in the claims log the same day the first ROR letter was sent.

This alleged and wrongly perceived noncooperation had no impact on Penn's claim investigation. Gross testified that Penn made the decision to not conduct any investigation:

> Q. And the reason that 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.

(RI p. 333, lines 1-17). Penn clearly had opportunities to investigate as set forth in the Order of the trial court but chose not to do so including when its IA made a cold call on Mr. Castillo in his garage. Gayle McLeod testified as to Mr. Castillo's cooperation when she made her unannounced cold call on him in his garage:

> 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 starting walking back inside, he answered every question you asked him?
> A. He did.

(RI p. 440, lines 13-16, p. 443, line 24-p. 444, line 3). Gross further testified as to Mr. Castillo's cooperation:

> Q. Is there anything that you've seen or recall that we've discussed or in the file up through May 15th, 2014, that Mr. Castillo has refused to do that Penn National has asked him to?
> A. Not that I recall.

(RI p. 331, lines 2-6, p. 334, lines 4-8, p. 334, line 25-p. 335, line 8). In fact, Mr. Castillo, who traveled from Huntersville, NC, and testified voluntarily at trial without being under subpoena, stated that Penn never asked him to do anything to help them investigate the Persimmon Hill claim.

(RI p. 466, lines 15-18). If they had, Mr. Castillo stated he would have helped them. (RI p. 466, lines 19-21).

Furthermore, Penn failed to preserve this issue for appeal since it made no motion for nonsuit or motion for judgment as a matter of law on this point. As a result, there is no legal argument preserved for appeal to review in this regard.

IV. The trial court's factual finding that Penn suffered no substantial prejudice is not wholly unsupported by the evidence

Even if there was a breach by JJA, it must be determined if Penn was substantially prejudiced thereby. "The driving force behind the notice-prejudice rule is that there is 'no sound reason . . . to permit a mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled.'" *Neumayer v. Phila. Indem. Ins. Co.*, 427 S.C. 261, 272, 831 S.E.2d 406, 411 (2019)(quoting *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971)). "Rather than provide a 'technical escape-hatch' for the insurer to deny coverage, the notice-prejudice rule balances both interests without a wholesale prohibition of these clauses." *Id.* In South Carolina, "[w]hether [the] insurer suffered prejudice from [the insured's] alleged failure to cooperate is an issue to be determined by the trier of fact on the merits of the action . . . ." *Puckett v. State Farm Gen. Ins. Co.*, 314 S.C. 371, 374, 444 S.E.2d 523, 524 (1994). Penn contends that it was substantially prejudiced because of the entry of default against JJA. Hence, Penn's argument is essentially that by definition if there is an entry of default against the insured, then the insurer is automatically substantially prejudiced.

In answering the question as to whether Penn was substantially prejudiced, one must look to see what Penn sought to do regarding this claim but was prevented from doing because of the alleged prejudice. Penn was not prevented from investigating this claim. According to the testimony of Gross, Penn never attempted to investigate the HOA's claim against JJA although

opportunity to do so existed. (RI p. 333, lines 1-17). The IA was face-to-face with Mr. Castillo (JJA) during her cold call and could have asked about facts and information that may have been helpful in investigating, evaluating and providing a defense but did not because she was not asked to. (RI p. 436, line 6-p. 437, line 7, p. 443, lines 2-19). Mr. Castillo testified that had this been done, he would have sought to provide any information requested. (RI p. 466, line 15-p. 467, line 18). Penn also argues it was substantially prejudiced because JJA never responded to the three (3) ROR letters that it sent as if somehow JJA should have responded to letters that were never received. Any information that Penn could have wanted from JJA they had the opportunity to ask for directly when the IA met with JJA. Moreover, to the extent Penn is arguing about Castillo's "shaking his head" when asked for [additional] contact information, this is misguided. Penn had his mailing address, two phone numbers for Castillo, the phone number for the office manager, Glenda Castillo's number and an email address all of which they chose not to utilize. Penn knew where he lived and could hand deliver documents to him if they chose to. There is a significant disparity between the level of effort to locate contact information for JJA that Penn had already had in its possession when Penn was seeking the opportunity to collect additional premium through a year-end premium audit versus when Penn was trying to locate him over a multi-million dollar liability exposure.

The trial court evaluated the testimony including that of Gross who testified that Penn made the decision to not conduct any investigation of this claim. (*See* RI p. 333, lines 1-17). The trial court further factually found that Penn had opportunities to investigate but chose not to do so, including when its IA made a cold call on Mr. Castillo in his garage. (RI pp. 15-16).

Penn cites the *Merit* and *Hatchett* cases to support its contention that a default judgment is per se substantial prejudice. This, however, is not anywhere close to the analysis and conclusions

reached by the Court in those cases as there is a significant distinction in the facts. Common sense and South Carolina law dictate that an insurer shouldn't be responsible for what they don't know or have the opportunity to investigate or defend because the insurer is substantially prejudiced in this situation. In *Merit*, it was undisputed that the suit papers were never forwarded to the insurance company. *Merit Ins. Co. v. Koza*, 274 S.C. 362, 363-64, 264 S.E.2d 146, 147 (1980). Moreover, the insured in *Merit* called his insurance company to let him know that his car was impounded. *Id*. The insurer was able to get his car back for him, then didn't hear from anyone any further until after the default judgment was entered. *Id.* In *Hatchett*, the insurer didn't receive notice of the summons and complaint until after default was entered, and the Plaintiff refused to agree to lift the default. *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 428, 137 S.E.2d 608, 610 (1964). This is not the facts and circumstances before this Court. Penn knew of the litigation nearly nineteen (19) months before the entry of default. (RIII pp. 1234-1236). Moreover, Penn received notice from three (3) different sources *prior* to the Order of Default being entered on December 16, 2014. (RIII pp. 1234-1236). In fact, Penn was aware that a default would be sought as set forth in the HOA counsel's correspondence dated April 24, 2014, for which Penn defended/protected its insured by obtaining a 30-day extension to file an answer for JJA. (RIII pp. 1230, 1231). Penn, thereafter, abandoned the defense/protection it undertook and never answered for JJA allowing default to be entered, nor did Penn make any effort to ask for or move to lift the default or move for request for relief from judgment. *See* Rules 55(c),60(b), SCRCP. Therefore, the facts between *Merit*, *Hatchett* and this case are diametrically opposite. Contrary to the cases cited by Penn, Penn knew of the lawsuit and made a conscious decision not to defend/protect its insured, and therefore, was the architect of the circumstances that led to the default about which they now complain. The trial court held that the default was a result of Penn's own actions and/or inactions, and therefore,

there was no substantial prejudice to Penn. There is ample factual evidence to support this finding. (RI pp. 134-135).

Lastly, Penn argues that they could not provide a defense because a lawyer is ethically prohibited from representing a client without his consent for representation. This argument from Penn is not part of any ROR letter and not contained anywhere within its claims log, and there is no evidence that this defense was considered at any point in time by Penn until long after the declaratory judgment and bad faith claims were being litigated in this action. At trial Penn argued this as a basis for not providing JJA with a defense, and post-trial asserts it as a basis for which Penn was prejudiced. The consent for representation and the contractual agreement for Penn to provide representation for JJA is found in the insuring agreement: "We will have the <u>right and duty</u> to defend the insured against any "suit" seeking those damages. . . ." (RII pp. 653, 717, 784, 860, 924, RIII pp. 981, 1043, 1096)(emphasis added). Furthermore, the Supreme Court of South Carolina has provided the following in regard to the intricacies between the insurer, insured, and defense attorney:

> [A]n insurance company that hires an attorney to represent its insured is in a unique position in relation to the resulting attorney-client relationship. Pursuant to the insurance contract, the insurer has a duty to defend its insured, and must compensate the attorney for his time in defense of his client. If the insured settles or has judgment imposed against him, the insurance contract ordinarily requires the insurer to pay the settlement or judgment. Many insurance contracts provide the insurer has a right to investigate and settle claims as a representative of its insured. Finally, the insurer's right to settle must be exercised in good faith, and that duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits.

Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270, 272 (S.C. 2019)(citing *Tyger River Pine Co. v. Maryland Cas. Co.*, 163 S.C. 229, 234-35, 161 S.E. 491, 493-94 (1931)).

Further, Judge Young specifically ruled that this basis asserted by Penn for failing to defend JJA, namely – a supposed requirement that the insured affirmatively approve the attorney before the attorney could act – was not mentioned in any ROR letters by Penn and was therefore waived. (*See* RI p. 135)("This argument from Penn National is not part of any reservation of rights letter and not contained anywhere in its claim log."). Penn did not appeal this ruling, and under the two-issue rule, it is thus the law of the case. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds, because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)(citing *Anderson v. Short,* 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996)).

V. The Trial Court's factual finding that Penn acted in bad faith as to JJA and Portrait is not wholly unsupported by the evidence and meets the legal standards required

"The elements of a cause of action for bad faith refusal to pay . . . benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396-97 (1992)(citations omitted). "[A]n insured need not prove a breach of an express contractual provision as a prerequisite to bringing a bad faith cause of action." *BMW of N. Am., LLC v. Complete Auto Recon. Servs.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012)(citing *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996)). "An insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular

facts of the case." *Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002). "Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim or if the insurance company did not specifically deny the claim by the evidence it had before it at the time the suit was filed." *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994). The South Carolina Supreme Court has held "that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." *Nichols v. State Farm Mut. Auto Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). "Absent the threat of a tort action, the insurance company can, with complete impunity, deny any claim they wish, whether valid or not." *Id.* "It is well settled in South Carolina that when a defendant insured prevails in a declaratory judgment action, the insured is entitled to recover attorney's fees." *State Auto Prop. & Cas. Ins. Co. v. Raynolds*, 357 S.C. 219, 226, 592 S.E.2d 633, 637 (2004)(citing *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978)).

a. As to JJA's claims assigned to the HOA

Penn cannot meet its burden to show "no evidence" of Judge Young's findings of bad faith. While S.C. Code Ann. § 38-59-20 does not give rise to a private cause of action, it is instructive in evaluating the conduct of Penn. Penn did not undertake to perform an investigation of this claim as testified to by adjuster Gross. (RI p. 333, lines 1-17). Penn failed to contact witnesses, hire experts, ask Mr. Castillo for pertinent information when its IA was face-to-face with him, and failed to gather any information through its own investigative efforts of this claim which Penn

knew was a multi-million-dollar claim from the time it opened the claims file. (*See* RI p. 318, lines 11-23, p. 333, lines 1-17, p. 359, lines 4-7, p. 435, line 24-p. 436, line 15, p. 443, lines 16-19). Both S.C. Code Ann. § 38-59-20 and the case law of South Carolina require a good faith duty to perform a reasonable investigation of claims. *Flynn v. Nationwide Mut. Ins. Co.,* 281 S.C. 391, 395, 315 S.E.2d. 817, 820 (Ct. App. 1984). The reason Penn refused to conduct any investigation of the claim was because Penn required Mr. Castillo to specifically request a defense from Penn prior to Penn hiring counsel to provide a defense, irrespective of whether the Complaint triggered coverage. (RI p. 315, lines 8-13). This unilateral imposition by Penn of the requirement that an insured must request a defense prior to being provided one was something Gross believed was wrong and improper since it was not a term of the insuring agreement. Gross went to management with his concerns. (RI p. 316, line 16-p. 317, line 17). While home office in-house claims counsel, Adam Parsons, tried to distance himself and Penn from such a position in this claim by stating that Gross was mistaken and that Penn requiring the insured to request a defense prior to counsel being hired was not Penn's directive, the memorialization of the meeting Greg Gross, Gary Gibson and Adam Parsons had regarding this claim in the claims log note dated July 10, 2013 is contrary to Parsons' testimony at trial. (RI p. 447, line 23-p. 448, line 10, p. 455, lines 10-17). The July 10, 2013 claim note was just 15 days after the claim was opened and the second day of entry into the claims log. It states, "AP advises that if the NI has not been served and/or has not requested a defense we cannot retain counsel on their behalf." (RIII p. 1180). Additionally, the claims file is replete with claim notes that Mr. Castillo would not be provided a defense until he affirmatively requested one. (RIII pp. 1180, 1181, 1186, 1187). Judge Young, as fact finder, reviewed the evidence and witnessed the demeanor of the witnesses, including the Penn witnesses. The trial court's finding that Penn acted in bad faith, and recklessly so, is supported by the evidence and

reasonable inferences, therefore. The trial court was entitled to find that Penn was manufacturing reasons it knew were not in its policy to try to justify a denial of the defense and coverage here. The fact Penn undertook the defense/protecting in obtaining an extension for the time to respond to avoid default for JJA pursuant to its policy duty, before speaking directly with Mr. Castillo, completely undermines any supposed basis Penn had for first needing to have Mr. Castillo "request" a defense (to which he was already entitled under the policy), prior to taking action to defend him.

Further, Penn touts all of its efforts as exceedingly reasonable in its attempt to contact Mr. Castillo about this claim. Penn's underwriting file available to Gross contains contact information, to include phone numbers and e-mails, none of which were used by the claims department to communicate with him. Mr. Castillo testified that Penn was able to reach him when performing year end premium audits when Penn was seeking to collect additional premiums. (RI p. 463, lines 9-13). Penn also contends that sending three (3) ROR letters, the first two of which were mailed to an address that had been stale for four years and the other returned certified mail with no follow-up, was reasonable conduct. Penn contends this despite the fact that the day the first ROR letter was sent there was a simultaneous claims log entry that same day noting Mr. Castillo's correct address. Moreover, even after Penn's IA had a face-to-face conversation with Mr. Castillo at his correct address in NC, Penn proceeded to send another ROR to the four years stale address in Ladson, SC. (RIII pp. 1281, 1287). Penn asserts the lack of responsiveness from JJA due to Penn's own errors of sending these letters to the wrong address as supporting justification that JJA was non-cooperative. All of this conduct justifies the trial court's bad faith and reckless, willful and wanton findings.

An insurer should not knowingly misrepresent to its insureds pertinent facts or policy provisions relating to coverage at issue or provide deceptive or misleading information with respect to coverages. S.C. Code Ann. § 38-59-20. From the time Penn opened a claim in this matter, it knew this was a multi-million-dollar claim and the magnitude of the defects and damages at the Persimmon Hill project. (RI p. 318, lines 11-23, p. 359, lines 4-7). Penn never informed Mr. Castillo of these pertinent facts it possessed or asked McLeod to do so when face-to-face with Mr. Castillo. (RI p. 435, line 24-p. 436, line 15, p. 437, lines 4-7, p. 443, lines 16-19). Penn also failed to inform Mr. Castillo that a defense was a policy benefit for which JJA had paid and was covered within the policy. (RI p. 444, lines 14-20, p. 445, lines 10-19). Mr. Castillo testified that had he been told a lawyer would have been hired at no cost to him since this had been paid for as part of his premium payments he would have responded differently to McLeod and would have told her JJA wanted a defense. (RI p. 474, line 12-p. 475, line 2). Further, Penn abandoned the defense/protection it undertook without informing Castillo of the undertaking of the defense/protection or abandonment thereof. Misrepresentation of policy benefits and deceptive acts regarding coverages and benefits can occur by both providing misleading information and by failing to disclose pertinent facts. *See* S.C. Code Ann. § 38-59-20(1)(Rev. 2015).

Penn's insurance expert in this case, Bernd Heinze, testified Penn acted in bad faith in a 2007 matter in Delaware County, Pennsylvania in the case of *Pennsylvania National v. Johnson*. Mr. Heinze testified that in this 2007 case, Penn failed to conduct an investigation of the facts surrounding the claim which was in derogation of the standards and practices of the insurance industry constituting bad faith. (RI p. 480, lines 1-19). Mr. Heinze further testified that in the 2007 case, Penn willingly took no part in the arbitration letting a damage award be entered against their insured and made no efforts to protect its insureds' rights constituting bad faith. (RI p. 481, line

15-p. 483, line 9). Additionally, Mr. Heinze testified that the failure of Penn to file a declaratory judgment action was in derogation of the standards and practices of the insurance industry and in bad faith. (RI p. 483, lines 10-25). Mr. Heinze sought to differentiate what appears to be the same conduct by Penn in the instant case by relying on the insured tendering to Penn in the 2007 Pennsylvania case. (RI p. 482, lines 10-11). Hence, the Penn expert essentially supported that it acted in bad faith here, as the trial court found.

Throughout this claim there were numerous other instances both individually and collectively of Penn's unreasonable, and reckless, bad faith actions. As noted previously, these include sending RORs to a knowingly incorrect address and using the insured not responding to said letters as a basis to assert insured non-cooperation, quoting incorrect policy language in the RORs that had been amended, noting in the claims log five (5) different times that JJA was required to request a defense before Penn's duty to defend was triggered, when such was untrue, noting in the claims log that the claim should be denied for non-cooperation just one week after Penn knew the insured was served, violating its own policies and procedures, and requesting an extension to respond to the Complaint without any intention of filing an Answer. (RI pp. 45-46). Penn contends that the competent evidence does not support a finding that its conduct was willful or reckless. The trial court disagreed. The trial court found "that Penn National knowingly misrepresented to JJA the coverages and policy benefits for the policies at issue in this case by failing to disclose pertinent facts and information to JJA when asking whether JJA wanted a defense." (RI p. 45). Lastly, to the extent Penn is making legal arguments and not arguing the total lack of evidence supporting the trial court's findings, Penn's arguments are not preserved for appeal, as it made no motion for nonsuit and no motion for judgment. Hence, the trial court should be affirmed.

b. As to Portrait's claims assigned to the HOA

As to Portrait's claim of bad faith, Penn acknowledges that it did not handle Portrait's request for policy benefits in a timely manner but contends that the lack of timeliness in processing the claim is essentially irrelevant because there is no additional insured coverage for Portrait under the policies in the first place. (RI p. 128). The trial court, however, was not persuaded by this argument and found Portrait to be an additional insured under five (5) Penn policies. Further, as noted above, the trial court found that Penn owed Portrait a duty of defense based on the allegations in the underlying complaint which caused damages to Portrait, and that Penn acted in bad faith in its breach of such duty. Penn has failed to appeal this ruling. It is thus the law of the case. (*See* RI pp. 93-106, 127-129).

While S.C. Code Ann. § 38-59-20 does not give rise to a private cause of action, it is instructive in evaluating the conduct of Penn in this regard as well. It took nearly seventeen (17) months from the time of Portrait's first tender on June 5, 2013, until Penn denied Portrait's claim by denial letter dated September 30, 2014. This denial letter was the only written communication Portrait received from Penn since the initial tender. Seventeen (17) months is not a reasonably prompt response time to Portrait's tender. During this seventeen-month period, Penn failed to adequately investigate Portrait's request for additional insured status, including neglecting to review and evaluate its own underwriting file and other information that was reasonably available to Penn as noted in the trial court's Order. (RI pp. 103-104). Had Penn done so, it should have concluded that Portrait met the policy terms as an additional insured.

Furthermore, Penn acknowledges that it should communicate accurate information and not provide misleading information in the claims handling process, which is also a requirement of S.C. Code Ann. § 38-59-20. The basis for denial of Portrait's claim as set forth in Penn's letter dated September 30, 2014 was ". . . the sole avenue to additional insured status would be through an

endorsement providing additional insured status for completed operations. The above policies do not contain such an endorsement." (RII p. 619). This basis for denial was simply untrue, and this misrepresentation was conceded by Gross in his testimony to be "not right", by Adam Parsons to be "inaccurate" and by Penn's expert, Bernd Heinze, to be the "opposite of what was true". (RI p. 85). Under South Carolina law, "Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim . . . ." *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994). Therefore, at the time of Portrait's denial, Penn's basis for its denial was that the policies did not have endorsements for additional insured completed operations coverage, which is an admittedly false basis. Moreover, at trial, Penn sought to differentiate JJA Construction, Inc., JJA Framing, and Jose Castillo as different entities. However, in its last letter to Castillo, Penn stated: "Mr. Castillo explained to the representative of Capstone, ISG that he did not want Penn National *to defend him or JJA* for the aforementioned lawsuits. Therefore, Penn National Insurance will not provide a defense and/or indemnity for these lawsuits at this time." (RIII pp. 1133, 1139)(emphasis added). Penn treats them as two separate entities when it is a convenient basis for Penn to deny Portrait's additional insured tender as testified to at trial, but treats them differently and as a singular entity when Penn's asking the question that only it can derive benefit and, in this case, eradicate a multi-million dollar liability exposure – "Do you want Penn to provide you a defense?".

During Gross' time as an adjuster at Penn, he was accustomed to denying additional insured claims. He testified that out of the 25 or 30 additional insured claims that he adjusted while at Penn, he denied them all. Penn provided evidence of a single additional insured claim in South Carolina that it accepted on a single-family home.

As Portrait has been found to be an additional insured under JJA's policies, there is a mutually binding contract of insurance between Portrait and Penn. Second, Penn has refused to pay benefits due to Portrait as the additional insured under the contract. Third, this resulted from Penn's bad faith or unreasonable action in breach of the implied covenant of good faith and fair dealing of the contract as described above. Finally, Penn's bad faith caused damage to Portrait. (*See* RI pp. 93-106).

VI. The trial court's factual finding that, due to Penn's reckless, willful and wanton conduct, punitive damages were warranted is not wholly unsupported by the evidence

Penn's arguments regarding punitive damages in its brief are unpreserved. In its post-trial motion under Rule 59(e) made after Judge Young's initial orders, Penn did not make *this* argument (the one it advances on appeal, that the evidence is insufficient to support reckless, willful, or want conduct), instead arguing that the trial court *failed to find* by clear and convincing evidence that Penn engaged in willful, reckless, or wanton conduct or that Penn acted in willful or reckless disregard of Castillo's or JJA Construction, Inc.'s policy rights and, as such, its award of punitive damages was improper. Yet, the trial court *did* make such a finding, expressly, in its original Orders. (RI p. 49)("I find that the conduct of Penn National was in willful and reckless disregard of JJA's policy rights, and I find by clear and convincing evidence that punitive damages are appropriate in this case.");(RI p. 105)("Furthermore, I find that Penn National's actions were willful and in reckless disregard of Portrait's rights. I further find by clear and convincing evidence that punitive damages are appropriate in this case.").

Further, Penn made no Rule 59(e) motion with regard to the Judge's later comprehensive Order setting punitive damages, which extensively set forth the reasons therefore and facts supporting same. (*See* RI pp. 150-177). Penn's arguments on appeal are thus unpreserved. The

facts that give rise to punitive damages were exhaustively argued to Judge Young, and much of the trial transcript quotes supporting these arguments are contained in the PowerPoint presented at the Rule 59(e) hearing and filed with the trial court. (RV pp. 1832-1899). It is clear that the manner in which the Portrait and the JJA claims were to be handled was orchestrated by Penn's Home Office In-House Counsel, Adam Parsons. Judge Young found by clear and convincing evidence that punitive damages should be awarded, and Penn could not meet its burden of showing the record is wholly unsupportive of such a finding, even if Penn had preserved its argument the punitive damages awards were equal to the actual damages and within the statutory punitive damages allowable under S.C. Code Ann. § 15-32-530. (*See* RI pp. 150-177).

VII. The trial court's application of the Time-on-Risk doctrine should not be reversed

This argument in Penn's brief is also not preserved for appeal. After the trial court's initial Orders, Penn made a Rule 59(e) motion in which it complained that the trial court did not specify how and/or why the traditional time on risk methodology should change. In the trial court's second Order addressing the Rule 59(e) motion, however, the trial court expressly responded to this lack of specification. (*See* RI pp. 141-144). The Court went on to explain why, because different policy language was involved here, it had adopted that methodology. *Id*. Penn filed no motion or objection regarding this methodology with the trial court. It made no Rule 59(e) motion regarding the *Post-Trial Motions and Punitive Damages Order*. Penn cannot, therefore, for the first time on appeal complain about the trial court's explanation and reliance on same. "It is axiomatic that an issue cannot be raised for the first time on appeal but, must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing *Creech v. South Carolina Wildlife & Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)).

Penn further contends that a time-on-risk analysis using the default method should be applied to the HOA's award. The facts in *Crossman II* were stipulated whereas the facts in this case are not. Further, the policy language before the South Carolina Supreme Court in *Crossman II* is different from the policies in this case. The Court concluded the change in policy language meant the time on risk analysis changed as well, such that "the progressive property damage caused by continuous or repeated exposure to water intrusion occurring *after* the end of a policy period is deemed to be included in what is covered by the policy." (RI p. 100). Moreover, this case involves a unique set of facts whereby Penn refused to provide a defense or other policy benefits to JJA, and a judgment resulted. In addition to differing policy language, the facts and circumstances differ in this case from *Crossman II*. When the time-on-risk framework was developed in *Crossman II*, there was no need for the consideration of the insurer refusing to defend or indemnify because the carrier provided a defense for claims for damages that arose both during the insured and uninsured periods – the question was one of the amount of the indemnity obligation. Penn ignores that it made the decision to gamble not only for itself but also with Mr. Castillo's potential financial obligations by not providing Mr. Castillo a defense. Penn knew this gamble could result in a default judgment for a liability exposure in the multi-millions of dollars. Penn cannot now claim it should reap the benefits and protections of the default time-on risk even if the default time-on-risk applied in this case which it does not. This would allow Penn to benefit itself to the detriment of its insured by allocating the pro-rata uninsured period of time portion of the judgment to its insured when such allocated amount could have been significantly reduced or eliminated by defending the claim and/or by negotiated settlement should the Plaintiff have accepted a settlement offer made by Penn. This though would have required Penn to perform its defense and indemnity obligations. Penn chose poorly in its gamble to refuse to defend or indemnify its insured and should not reap the

benefits of its poor decision to the detriment of its insured. "An insurance company fails to defend at its own peril. . . ." *Stroup Sheet Metal Works, Inc. v. Aetna Cas. & Sur. Co.*, 268 S.C. 203, 212-13, 232 S.E.2d 885, 888 (1977). "Where an insurer refuses to undertake the defense of an action against the insured based upon a claim within the coverage of the insurance policy, it thereby breaches the contract of insurance and is liable to the insured for all damages resulting to such insured as a direct result of such refusal and breach." *Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)(citations omitted). Further, "[a]n insurer who unreasonably refuses or fails to settle a covered claim within the policy limits is liable to the insured for the entire amount of the judgment obtained against the insured regardless of the limits contained in the policy." *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001)(citing *Trotter v. State Farm Mut. Auto Ins. Co.*, 297 S.C. 465, 475, 377 S.E.2d 343, 349 (Ct. App. 1988)).

CONCLUSION[19]

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

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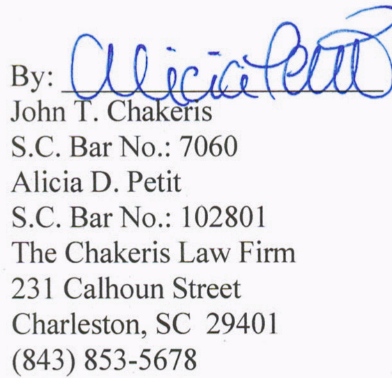
[19] Penn further argues against the award of attorney fees to HOA's counsel. Following the trial court's order on October 22, 2019, the HOA filed its election of remedies on November 1, 2019, wherein the HOA elected the Breach of Duty of Good Faith & Fair Dealing/Bad Faith rather than the Breach of Duty to Defend and Duty to Indemnify. Attorney's Fees were only awarded as to the Breach of the Duty to Defend and Indemnify. Moreover, this argument in Penn's brief is not preserved for appeal. After the trial court's initial Order, the trial court explained its reasoning in detail as to its award to attorney's fees as it pertained to Breach of Duty to Defend and Duty to Indemnify. *See* RI pp. 147-150. Penn made no Rule 59(e) motion regarding the *Post-Trial Motions and Punitive Damages Order*, including with regard to said award of attorney's fees. Again, Judge Young's Orders should be affirmed.

By: 
John T. Chakeris
S.C. Bar No.: 7060
Alicia D. Petit
S.C. Bar No.: 102801
The Chakeris Law Firm
231 Calhoun Street
Charleston, SC 29401
(843) 853-5678

Phillip W. Segui, Jr.
S.C. Bar No.: 7029
Segui Law Firm, PC
720 S. Shelmore Blvd., Suite 100
Mt. Pleasant, SC 29464
(843) 884-1865

Attorneys for Respondent The Persimmon Hill Homeowners Association, Inc.

December 14, 2020
Charleston, South Carolina

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

RECEIVED
Dec 14 2020
SC Court of Appeals

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.

CERTIFICATE OF COUNSEL

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

By: s/ *Alicia D. Petit*
John T. Chakeris
S.C. Bar No.: 7060
Alicia D. Petit
S.C. Bar No.: 102801
The Chakeris Law Firm
231 Calhoun Street
Charleston, SC 29401
(843) 853-5678

Phillip W. Segui, Jr.
S.C. Bar No.: 7029
Segui Law Firm, PC
720 S. Shelmore Blvd., Suite 100
Mt. Pleasant, SC 29464
(843) 884-1865

Attorneys for Respondent The Persimmon Hill Homeowners Association, Inc.

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