STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Roy M. Stevens, Jr. and Renee Stevens, Plaintiffs, vs. Odom Scruggs & Associates, LLC and Auto Owners Insurance Company, Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No. 2019-CP-40-05116 **ORDER GRANTING IN PART AND DENYING IN PARTY DEFENDANT AUTO OWNERS' MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on motion of Defendant Auto-Owners Insurance Company (hereinafter "Defendant"), by and through its undersigned counsel, pursuant to the South Carolina Rules of Civil Procedure, Rule 56, for an Order rendering judgment in favor of the Defendant Auto-Owners on all claims and counterclaims. A hearing was held on the motion on May 14, 2020, with S. Jahue Moore appearing on behalf of Plaintiffs and Mary D. LaFave appearing on behalf of Defendant Auto-Owners[1]. The Court, for the reasons set out below, finds and concludes based on the evidence that Defendant Auto-Owners is entitled to summary judgment on the claims filed by Plaintiffs for bad faith claims practices, and specifically S.C. Code §38-59-10 *et seq*., on the grounds that there is no coverage under the insurance policy for the damages claimed by Plaintiffs. Accordingly, Defendant's motion for judgment as a matter of law is granted in part. However, the Court, for the reasons set out below, finds and concludes based on the evidence that Defendant is not entitled to summary judgment on its remaining counterclaims for negligence, fraud, breach of contract and breach of contract with

[1] As of the cate of the filing of this Order, Defendant Odom Scruggs & Associates has not appeared in the record.

fraudulent intent. Accordingly, Defendant's motion is denied in part as to its counterclaims against Plaintiffs.

FINDINGS OF FACT

This case arises out of the denial of an insurance claim filed by the Plaintiffs claiming that their personal property (a playset, rubber mulch and landscaping border) was stolen. The Stevens maintained Auto-Owners homeowner's insurance Policy #48-777-080-01 on the premises located at 95 Oakbrook Drive, Columbia, SC from July 8, 2017 to July 8, 2018, the terms of which are not in dispute (hereinafter "the Policy"). Plaintiffs allege that Defendant denied the claim in bad faith. In response, Defendant Auto-Owners counterclaims for fraud and breach of contract alleging that the claim is properly denied under the clear and unambiguous terms and conditions of the policy.

On or around December 2017, after living in the home located at 95 Oakbrook Drive, Columbia, South Carolina ("the premises") for ten (10) years, Roy "Mitch" Stevens and Renee Stevens decided to move with their 10 and 17-year-old children. *See* Roy Stevens EUO, pp. 10:23-25. The family completely moved into their new home and then, on May 19, 2018, they entered into a contract for sale on May 19, 2018, with Elmer and Tiffany Liebsch to sell the premises for $340,000. *See* Sales Contract. In Section 17 of the Contract, the terms explicitly provide that "[t]his sale includes all fixtures…. playsets…". *Id*. Roy Stevens acknowledges that this term was in the Contract and takes no exception. Importantly, he testified that Plaintiffs "absolutely" sold this playset with the premises. *See* Roy Stevens EUO, p. 12:17. He further testified that they had "zero" intention of taking this playset to their new home. *Id*. at 23:3. Shortly thereafter, Plaintiffs closed on the home on July 2, 2018 for the price agreed upon on May 19, 2018 of $340,000. *See* Deed.

Between entry of the Sales Contract and the closing date, though the exact date or week is unknown, the Stevens discover that the playset was missing. *See* Roy Stevens EUO, p. 16:4. On June 26, 2018, Renee Stevens contacts law enforcement to initiate an investigation. *See* Police Report. She represented to the police officer that she left the playset at 95 Oakbrook Drive until she could "come back and move it". *Id*. At that time, she also advised the police officer that the playset was worth about $7,000 and the officer records a date of loss of June 6, 2018. *Id*. The police report notes on the last page that, later that same day, Renee Stevens subsequently informed the Sheriff's Department that they discovered the playset had been donated to a friend and she wanted to "retract the prior report". *Id*.

On June 29, 2018, three days later, the Plaintiffs file a claim for "theft" with Auto-Owners claiming they have no idea what happened to the playset and it is worth $9,700 to $10,000. *See* Loss Report; Roy Stevens Recorded Statement. At that time, the Plaintiffs did not disclose that they knew agent Tommy Stallings donated it, that any lingering interest was sold and/or accepted a tax donation receipt. *See* Renee Stevens EUO, p. 16:13-17.

At some point prior to the closing, Renee Stevens and Tiffany Liebsch were discussing the move and it came up that the Stevens thought the playset was stolen. Liebsch recalls she explained to Renee Stevens that her agent contacted her and asked her if she intended on keeping the swing set after the closing and she stated that she did not. *See* Tiffany Liebsch Depo., p. 13:9. Liebsch testified that she asked Renee Stevens if she "had any desire to keep the swing set" and Renee Stevens responded with "no, we didn't want to keep it we just wanted to know what happened to it." *See* Tiffany Liebsch Depo., p. 13:4. She further testified that Renee Stevens was friendly about it and glad that it went to someone in need. *Id.* at 14:6.

Plaintiffs never asked the new owners for any compensation for the playset nor did they ask that the Sales Contract be modified. *Id.* at 14:20. Tiffany Liebsch testified that she was informed that

a tax donation receipt was accepted by the Plaintiffs and Roy Stevens advised that they had "no problem" with the playset being taken. *Id.* at 32:7, 33:3.

Renee Stevens testified as to the Stevens' agreement with Stallings:

> "I spoke with our real estate agent, Doug Bridges, and he presented the opportunity for Mr. Stallings to give us a tax donation receipt. And after discussing it with Mitch (Roy Stevens), he and **I decided that we would be willing to take a tax donation receipt**, because we actually had the paperwork for the cost of the playset, so we could submit it with the tax donation form, all of our original sales receipts."

See Renee Stevens EUO, p. 15 (emphasis added).

On December 5, 2018, a sworn proof of loss was submitted along with the police report and supporting documentation for a claim for $8,700 in stolen property. This sworn statement was submitted almost five (5) months after the playset was discovered missing and the house (along with the playset) sold to a new owner. *See* October 19, 2018 Email; Sworn Proof of Loss. In the sworn statement, Renee states that the playset was taken by "theft". *See* Sworn Proof of Loss. In addition, a black and white photograph of the purported thief is enclosed with the police report. The Stevens also enclosed internet research on the value of their claimed property.

On May 2, 2019, Plaintiffs provided examinations under oath with counsel present and their numbers continued to vary on the value of the property that they claim was stolen. Renee Stevens testified that the Plaintiffs reached an agreement with the person who made the donation that they would accept a tax donation receipt. *See* Renee Stevens EUO, p. 15:17-20. She admitted that she knew before the date of the closing that the playset had been removed and no changes were made to the Sales Contract. *Id.* at 19:10; 27:22.

Following the examinations, several letters were sent to counsel for the Stevens requesting copies of the Plaintiffs' 2018 tax returns, copies of correspondence between the Plaintiffs and their

agent, and correspondence between the Plaintiffs and the new homeowners, Tiffany and Elmer Liebsch.

Auto-Owners evaluated the information in its possession at the time and concluded that there is no coverage for this theft claim on the grounds that 1) Plaintiffs did not have an insurable interest in the useless and obsolete property; 2) Plaintiffs fail to meet conditions precedent to establish a theft claim; and/or 3) Plaintiffs suffered no loss of use.

Plaintiffs bring this bad faith action alleging that Auto-Owners mishandled the theft claim by not paying for the value of Plaintiffs' personal property and asking for additional information. In response, Auto-Owners filed counterclaims for 1) Declaratory Judgment that there is no insurance coverage under the Policy; 2) Breach of Contract; 3) Breach of Contract by Fraudulent Act; and 4) Fraud.

STANDARD OF REVIEW

Where, as here, the Court is presented with the question of whether an insurance policy covers a particular claim, summary judgment is the proper mechanism by which to determine whether coverage is available. *See OneBeacon Ins. Co. v. Metro Ready-Mix, Inc.*, 242 Fed.Appx. 936, 939 (4th Cir. 2007)(whereas the facts are undisputed and we are presented with a purely legal question of insurance coverage, the issue is ripe for summary judgment). To determine the standard of review for a claim brought under the Declaratory Judgment Act, the appellate court looks to the main purpose of the complaint, as reflected by the character of the claims, evidence and relief sought. *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (S.C. App. 2013). A declaratory judgment action to interpret an insurance contract is an action at law. *Loadhold v. State Budget & Control Bd.*, 339 S.C. 165, 168-169, 528 S.E.2d 670, 672-673 (Ct. App. 2000)(citing *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct.App. 1997).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment is appropriate if the court finds there is no genuine issue of material fact as to the Plaintiffs' bad faith claim and the Defendant's substantive counter claims. The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. Upon meeting this burden, the moving party shall be "entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All ambiguities, conclusions and inferences arising from the evidence "must be construed most strongly against the moving party." *Ellis v. Davidson*, 358 S.C. 509, 517-518, 595 S.E.2d 817, 821 (Ct.App. 2004). However, when the plain, palpable and disputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Id.*

CONCLUSIONS OF LAW

The question presented is whether coverage was properly denied under the Policy provisions. As a general rule, the terms of an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. *Gaskins v. Blue Cross Blue Shield of S.C.*, 271 S.C. 101, 245 S.E.2d 598 (1978). However, parties are entitled to enter into certain terms and the policy language should not be tortured to extend coverage expressly excluded. *Sphere Drake Insurance Company v. Rouse Litchfield et al.*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993) (policy exclusion for claims "arising out of assault and battery" reflects an unmistakable intent by the parties to exclude certain claims). The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. *S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 12 (Ct.App. 2008)(*citing Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App. 1990).

A bad faith cause of action should be dismissed by summary judgment if, in viewing the evidence in the light most favorable to the Plaintiffs, no reasonable fact finder could have found for

the Plaintiffs. *See Foster v. Tandy Corp.*, 828 F.2d 1052, 1055 (4th Cir. 1987). If there is an objectively reasonable ground for contesting an insurance claim, there is no bad faith denial of it. *Mixon, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 562 S.E.2d 659 (Ct.App. 2002). Whether an objectively reasonable basis for denial existed depends on the circumstances existing at the time of the denial. *State Farm Fire and Cas. Co. v. Barton*, 897 F.2d 729 (4th Cir. 1990). Auto-Owners asks that the court declare judgment that there is no coverage under the Policy based on the following grounds; summary judgment is appropriate as to Plaintiffs' claim for bad faith in light of the objectively reasonable basis for denial of the present claim; and grant any relief the Court deems appropriate under Auto-Owners' counterclaims.

Defendant contends Essentially, Plaintiffs are attempting to recover for a playset three times: 1) when the playset was donated; 2) when the playset's interest was sold to the new homeowners and 3) presently under an insurance claim for theft. Plaintiffs oppose Defendant's motion on the grounds that the claim was improperly denied because Plaintiffs suffered a "theft of the playset"; the Policy does not allow Defendant to request closing and tax documents; the Policy does not allow rejection of a Proof of Loss; and that the Plaintiffs complied with all duties under the Policy. *See Plaintiffs' Memo in Opposition*. Plaintiffs' arguments are unavailing and do not squarely address the arguments raised by the Defendant.

I. Declaratory Judgment in Favor of Auto-Owners is Appropriate on the Grounds that Coverage was Properly Denied On the Grounds Plaintiffs Lack an Insurable Interest in Property They Admit was Sold, Donated, Obsolete and/or Useless to Them

In South Carolina, Plaintiffs must have an insurable interest in the insured property in order to enforce his or her rights under a policy. *Nationwide Mut. Ins. Co. v. Smith*, 376 S.C. 60, 69, 654 S.E.2d 837, 842 (acknowledging the well settled rule of law in this country that an insured must possess an interest in the subject matter of the policy). The South Carolina Supreme Court has held, that to have

an insurable interest in property, the party must derive a benefit from the property's existence and suffer a loss from the property's destruction. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 579, 602 S.E.2d 389, 392 (2004); *Benton & Rhodes v. Boden*, 310 S.C. 400, 404, 426 S.E.2d 823, 826 (Ct.App. 1993). The Policy provisions on insurable interest are consistent with South Carolina Law:

> *6. Conditions*
>
> *a. Insurable Interest*
>
> *Subject to the applicable limit of insurance, we will not pay more than the insurable interest the insured has in the covered property at the time of the loss.*

The Policy, p. 12 of 22 (emphasis added).

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> *b. How Losses Are Settled*[2]
>
> *(1) Loss to covered property will be settled as follows:*
>
> *(a) is personal property insured under SECTION I – PROPERTY PROTECTION, Coverage C- Personal Property;*
>
> *(b) are structures that are not buildings which are located at the residence premises;*
>
> *(c) are… outdoor equipment…*
>
> *On the basis of the full cost to repair or the full cost to replace the damage property without a deduction for depreciation.*
>
> *…*
>
> *The provisions of this endorsement* ***do not apply to****:*
>
> *…*
>
> *i. Any item which is:*
>
> *2. No longer capable of or* ***will no longer be used to perform the function for which it was designed****.*
>
> *3.* ***Obsolete or useless to the insured****.*

The Policy, p. 12 of 22; as amended by Endorsement 17618 (emphasis added).

[2] This provision is modified by Personal Property Replacement Cost Endorsement #17618 (3-14). The modified terms are reflected here since they explicitly amend the original contract. *See* The Policy, Endorsement 17618, p. 1.

The law, as reflected in *Belton* and *Benton*, requires that a "benefit" be present, or the owner suffers a loss by the property's destruction for an insurable interest to exist. *See Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 579, 602 S.E.2d 389, 392 (2004); *Benton & Rhodes v. Boden*, 310 S.C. 400, 404, 426 S.E.2d 823, 826 (Ct.App. 1993). This provision clearly provides that property lacking any insurable interest, that is obsolete or useless property, is not covered.

Here, Plaintiffs cannot show an insurable interest in the playset at the time of loss. First, Plaintiffs testified that they had absolutely "zero" intention of taking the playset with them when they moved and that it was being sold with the residence. *See* Roy Stevens EUO, p. 23:3. The testimony by the Plaintiffs, the new owner Tiffany Liebsch and documents in the record are uncontroverted and clearly reflect that the Plaintiffs had not been using and never planned to ever use the playset again. *See* Sales Contract; Roy Stevens EUO, p. 12:3-17; Renee Stevens EUO, p. 9-18; Tiffany Liebsch Depo., p. 13:3.

To the extent that Plaintiffs argue that their insurable interest was the inherent value of the playset, they began a transaction to sell that interest beginning May 19, 2018. At the time of the loss, they were in the middle of a transaction to transfer all of the interest, in any, in their property and the playset at 95 Oakbrook Drive for $340,000. They completed the transfer of their interest in the playset on July 2, 2018 when the sale was finalized. The Sales Contract clearly reflects, and Plaintiffs do not contest, that the real estate transaction included the playset all still sold for $340,000. *See* Sales Contract; Roy Stevens EUO, p. 12:2. Plaintiffs never requested a change in the terms of the Sales Contract after the playset went missing, but before the sale was closed, and received duly negotiated consideration. *See* Tiffany Liebsch Depo., p. 14:20. In fact, Roy Stevens admits in his recorded statement that if he had possession of the playset, he *also would have donated it*. *See* Roy Stevens Recorded Statement.

Finally, the Plaintiffs accepted a benefit for the donation of the playset by way of a charitable tax donation receipt. To the extent that they had any insurable interest in the playset, which they did not, they subsequently adopted the donation. *See* Roy Stevens EUO, p. 32:1; Renee Stevens EUO, p. 16:13-17. There is no evidence that the Stevens sought related civil actions for conversion or criminal actions for larceny against those they know to be involved.

Plaintiffs argue that the Policy does not allow for the Proof of Loss to be rejected by Auto-Owners asserting that the claim had to be paid within sixty (60) days of the Proof of Loss. Counsel for Plaintiffs relies on the following provision:

> ***f. OUR PAYMENT OF LOSS***
>
> *We will adjust any loss with you, and pay you unless another payee is named in the policy. We will pay within 60 days after we receive your proof of loss and all other requested documents and the amount of loss is finally determined by an agreement between you and us, a court judgment or an appraisal award.*

The Policy, p. 14 of 22.

Plaintiffs' argument is unavailing and does not address the lack of insurable interest in the property. A close examination of this provision reveals that it does not stand for the proposition that Defendant is required to pay any claim within 60 days as Plaintiffs contend. Instead, it further reflects the ability of Defendant to request supporting documentation in the investigation of a claim. Plaintiffs do not contest that they accepted donation receipt or that any interest, if any, in the property was sold with the home on Oakbrook Drive.

Based on the evidence, Plaintiffs' testimony and the Policy provisions, the Court finds that the Plaintiffs are not entitled to insurance coverage for the useless and obsolete playset because they, by their own admission, lacked an insurable interest in it. Even if they had an insurable interest at the time

of loss, which they did not, they donated or sold that interest. Coverage is properly denied on these grounds and declaratory judgment in favor of Auto-Owners, as to all Plaintiffs' claims, is appropriate.

II. Declaratory Judgment in Favor of Auto-Owners is Appropriate on the Grounds that Plaintiffs Fail to Meet Conditions Precedent for a Theft Claim

Plaintiffs have filed a claim for "theft" under their insurance policy. Even if they mistakenly thought that the property was stolen initially, they later learned it was donated, retracted the police report and accepted a donation receipt. Alternatively, Plaintiffs admit they sold the property along with their rights to the playset during the transaction for the sale of the home on Oakbrook drive. *See* Roy Stevens EUO, pp. 30:20, 32:1; Renee Stevens EUO, p. 16:13. Donation is not a covered peril under the Policy. Theft is covered under specific terms that require conditions precedent as follows:

> *1. Perils We Insure Against*
> *…*
> *b. Coverage C – Personal Property*
> *…*
> *(9) Theft or Attempted Theft, including loss of covered property from a known place if it is* ***likely that a theft has occurred****.*
>
> *ii. This peril does not include theft:*
> *a.* ***Committed by any insured*** *or by any other person regularly residing at the residence premises…*

The Policy, p. 7 of 22 (emphasis added).

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WHAT TO DO IN CASE OF LOSS

> *1. PROPERTY*
> *If a covered loss occurs, the insured must:*
>
> *a. Give us or our agency immediate notice. In* ***case of theft also notify the police and provide them with a complete inventory of stolen or damaged property****…*

p. 20 of 22 (emphasis added).

The Plaintiffs initially notified the police that the playset was stolen, but they admittedly retracted that police report. *See* Police Report. At the time of claim denial, Defendant argues, there was no police report for theft in possession of Auto-Owners as the Policy requires. Instead, there is only a report to law enforcement that their playset was donated to a friend. *See* Roy Stevens EUO, p. 31:19. The Court agrees that the report submitted by Plaintiffs to the Defendant was insufficient to meet the conditions precedent, as required, under the Policy to establish a theft claim.

Defendant he Plaintiffs' acceptance of the charitable tax donation receipt is evidence that the Plaintiffs elected to participate in the donation, which is excluded by the aforementioned provision if the loss is "committed by an insured". The retraction of the police report and the testimony in the record by Plaintiffs also confirms that, when considering the totality of the circumstances, the property was donated and not stolen. The Policy does not provide coverage for "donated" personal property, property loss committed by an insured, and/or the Stevens do not satisfy the conditions precedent to making a theft claim under their Policy. The Court agrees with the Defendant that coverage is properly denied.

III. Plaintiffs Cannot Show "Loss of Use" to Trigger Coverage and Declaratory Judgment in Favor of Auto Owners is Warranted

In order to seek coverage under the Auto-Owners Insurance Policy for personal property, Plaintiffs must show that they sustained a loss of use of their property to trigger their policy. The Policy reads in pertinent part:

DEFINITIONS:

…

> *11. Property damage means **damage to** or destruction of tangible property including resulting **loss of use** of that property.*

The Policy, p. 2 of 22 (emphasis added).

SECTION I – PROPERTY PROTECTION

2. Coverages

...

c. Coverage C – Personal Property
(1) Covered Property
We cover:

*Personal property **owned or used** by an insured anywhere in the world including property not permanently attached to or otherwise forming a part of realty.*

The Policy, p. 3 of 22 (emphasis added).

The Policy terms clearly provide that to make a property claim under these facts, Plaintiffs must show that they suffered "property damage" by way of either physical damage or loss of use. Plaintiffs testified that they "absolutely" were not taking this playset with them as their children had outgrown it and they completed moved out on December 9, 2019 effectively abandoning the playset. *See* Roy Stevens EUO, pp. 6:25, 12:17, 23:13. They never had any intention of using it; thus, they suffered no loss of use. Prior to the playset being donated, Plaintiffs also entered a contract to transfer/sell the playset on May 19, 2018 along with the premises. This contract was performed at the original agreed upon price and consummation of the sale of the residence, along with the playset, occurred on July 2, 2018. Plaintiffs were paid for the playset as agreed prior to the donation and suffered no loss of use. The Court also agrees coverage is properly denied under this provision of the Policy.

IV. Questions of Fact Exist on Whether the Plaintiffs Forfeited Coverage by Concealing, Exaggerating, Misrepresenting Material Information Regarding the Loss, or Failing to Cooperate and Summary Judgment is Denied as to Defendant's Counterclaims for Fraud

Plaintiffs submit that they complied with requests for information and examinations made by Defendant and Summary Judgment as to Defendants' counterclaims should be denied. The Court agrees that a question of fact is presented as to the Defendant's counterclaims arising out of the Plaintiffs' conduct and cooperation throughout the investigation of the claim.

CONCLUSION

WHEREAS, the Court finds that Defendant is entitled to declaratory judgment pursuant to the South Carolina Uniform Declaratory Judgment Act §15-53-10 *et seq.* and South Carolina Rules of Civil Procedure, Rule 56 on all claims asserted by the Plaintiff on the grounds that there is no coverage and Plaintiffs' claim was properly denied as discussed hereinabove.

WHEREAS, the Court finds there is no coverage under the Policy for one or more of the aforementioned reasons, Plaintiffs cannot sustain their cause of action for bad faith under S.C. Code Ann. §38-59-10 *et seq.* or common law against Defendant Auto-Owners and judgment as a matter of law for Plaintiffs' claims against the Defendant is granted.

WHEREAS, the Court finds that Defendant's counterclaims are not ripe for judgment as a matter of law in light of the existence of a material question of fact as to whether the Plaintiffs failed to cooperate or whether they concealed, misrepresented or exaggerated their claim; therefore, Defendant's motion is denied as to Defendant's counterclaims for fraud and breach of contract.

NOW, THEREFORE, IT IS HEREBY ORDERED that pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant's Motion for Summary Judgment is granted as to all claims by the Plaintiff and denied as to Defendant's counterclaims for negligence, fraud and breach of contract.

IT IS SO ORDERED.

_____
The Honorable Jocelyn Newman
Presiding Judge, Fifth Judicial Circuit

_____, 2020

Richland Common Pleas

Case Caption: Roy M Stevens Jr , plaintiff, et al vs Odom Scruggs & Associates Llc , defendant, et al

Case Number: 2019CP4005116

Type: Order/Summary Judgment

So Ordered

Jocelyn Newman