No. COA 24-169 FIFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

LUIS ORTEZ and THERESA BEDDARD ESTES, Individually and As Administratrix of the ESTATE OF DARREN DRAKE ESTES,	)	
Plaintiffs,	)	From Onslow County 19-CvS-2391
v.	)	
PENN NATIONAL SECURITY INSURANCE COMPANY,	)	
Defendant.	)	

****

DEFENDANT-APPELLANT'S BRIEF

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NORTH CAROLINA COURT OF APPEALS

****

LUIS ORTEZ and THERESA BEDDARD ESTES, Individually and as Administratrix of the ESTATE OF DARREN DRAKE ESTES,

Plaintiffs-Appellees,

v.

PENN NATIONAL SECURITY INSURANCE COMPANY,

Defendant-Appellant.

From Onslow County
No. 19 CVS 2391

****

I. STATEMENT OF ISSUES

1. Whether the trial court erred in granting judgment on the pleadings to Ortez on his claim for breach of the duty to defend when a straightforward application of the comparison test showed that the sole claim asserted against Ortez in the underlying lawsuit was unambiguously excluded from coverage by the fellow employee exclusion contained in the policy.

2. Whether the trial court erred in granting judgment on the pleadings to Ortez on his claim for breach of the duty to defend when undisputed

extrinsic evidence that did not contract any allegation in the Complaint established that the underlying lawsuit was unambiguously excluded from coverage by the fellow employee exclusion contained in the policy.

3. Whether the trial court erred in granting judgment on the pleadings to Ortez on his claim for breach of the duty to settle when there is no duty to settle contained in the Penn National Policy, and even if there were, the facts pled by Penn National, taken as true on a 12(c) motion, show that Penn National attempted to effectuate a settlement but was unable to do so by the Estes Estate's unreasonable one-business-day time-limit demand.

4. Whether the trial court erred in granting judgment on the pleadings to Ortez on his claim for unfair or deceptive trade practices where the facts pled by Penn National, taken as true, do not constitute an unfair or deceptive trade practice, and Ortez did not plead facts showing any substantial aggravating factors attendant to any breach of contract by Penn National.

5. Whether the trial court erred in entering judgment against Penn National for the amount of the judgment entered against Ortez in the underlying lawsuit plus interest, trebled, where no court has found that

an unjustified denial of a duty to defend results in the waiver of policy limits.

6. Whether the trial court erred in entering judgment against Penn National for the amount of the judgment entered against Ortez in the underlying lawsuit plus interest, trebled, where the pleadings contained disputed facts regarding any actual damages suffered by Ortez that were proximately caused by any unfair or deceptive practice by Penn National.

7. Whether the trial court erred in failing to grant Penn National's Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Rules of Civil Procedure.

II. STATEMENT OF CASE

This case arises out of a truck accident which occurred on August 8, 2017. On that day, Plaintiff-Appellee Luis Ortez and Darren Drake Estes were making deliveries for their employer, Kitchen and Lighting Designs ("Kitchen & Lighting"). Ortez was driving a box truck owned by Kitchen & Lighting, in which Estes was a passenger, when Ortez came upon a slow moving tractor trailer truck owned by Passport Transportation, Inc. and operated by Zemo Fissaha. Due to his distracted driving, Ortez did not take timely evasive measures and the box truck collided with the tractor trailer, resulting in Estes' death.

Plaintiff Theresa Beddard Estes, as Administratrix of the Estate of Estes ("Estes Estate") filed a wrongful death lawsuit against Passport Transportation, Fissaha, and Ortez. Defendant-Appellant Penn National Security Insurance Company ("Penn National") issued a business auto policy to Named Insured, Kitchen & Lighting, which provided $1 million in liability coverage limits. Ortez did not tender the wrongful death lawsuit to Penn National or otherwise request a defense of the lawsuit from Penn National. Penn National, however, was notified of the lawsuit by counsel for the Estes Estate. Penn National thereafter denied coverage, including any duty to defend or indemnify Ortez for the wrongful death lawsuit. Ultimately, on April 11, 2019, a judgment was entered against Ortez in the wrongful death lawsuit for $9.5 million.

On April 12, 2019, the day after the judgment was entered against Ortez in the wrongful death lawsuit, Ortez and the Estes Estate filed the present action against Penn National, Pennsylvania National Mutual Casualty Insurance Company ("PNMCIC") and Pamela Tokarz. In the Complaint, Ortez asserted claims for: (1) breach of the duty to defend; (2) breach of the duty to settle; (3) unfair or deceptive trade practices; and (4) bad faith refusal to pay insurance claims. (R pp 17-26) The Estes Estate also asserted its own claims for: (1) breach of contract (for UM/UIM coverage); (2) breach of the implied covenant of good faith and fair dealing; (3) unfair or deceptive trade practices; and (4) bad faith

refusal to pay insurance claims. (R pp 26-39) Attached to the Complaint were copies of the Penn National policy (R pp 41-84), the Complaint filed in the wrongful death lawsuit (R pp 85-105), and the Order entering judgment against Ortez in the wrongful death lawsuit (R pp 106-09).

Defendants filed their Motion to Dismiss, Answer and Motion to Bifurcate on June 20, 2019. (R pp 111-31) In their pleading, Defendants admitted that Ortez and Estes were employees, the provisions of the Penn National policy, and the allegations of the underlying wrongful death lawsuit, but denied coverage or any duty to defend Ortez in the wrongful death lawsuit. (R pp 113-14, ¶¶ 11-22) Defendants also denied that they had a reasonable opportunity to settle the Estes Estate's claims against Ortez. (R pp 115-16, ¶¶ 31-32) Finally, Defendants denied all other material allegations and raised affirmative defenses, including policy exclusions. (R pp 126-29)

Twenty (20) days after Defendants filed their Answer, on July 10, 2019, Ortez filed a Motion for Partial Judgment on the Pleadings against Defendant Penn National only. (R pp 134-51) In his motion, Ortez requested that the court enter judgment on his claims for breach of duty to defend, breach of duty to settle, and unfair or deceptive trade practices. On July 15, 2019, Penn National filed a written objection. (R pp 152-56) A hearing was held on Plaintiff Ortez's motion on July 15, 2019 before Judge John E. Nobles. (Transcript [7/15/2019 hearing], pp.3-53)

Judge Nobles entered an order granting Ortez's motion for partial judgment on the pleadings. In his order, Judge Nobles found that Penn National breached its duty to defend, breached its duty to settle, and violated the Unfair or Deceptive Trade Practices Act, N.C. Gen. Stat. §75-1.1, *et seq.* ("UDTPA"). (R pp 157-58, ¶¶ 1-3) The court then found that the damages to be assessed against Penn National were the totality of the judgment entered against Ortez in the wrongful death lawsuit (despite Penn National's coverage limits of $1 million) with prejudgment interest incurred, and that the total amount (including interest) should then be trebled. (R p 158) Judgment was entered against Penn National for $28,949,424.80. (*Id.*)

Defendant moved to alter or amend judgment pursuant to Rule 59(e) of the Rules of Civil Procedure. (R pp 160-64) A hearing on Defendant's motion was held on October 9, 2019. (Transcript [10/09/2019 hearing], pp.3-47) Judge Nobles denied Defendant's motion, but certified the matter for immediate appeal under Rule 54 of the Rules of Civil Procedure. (R pp 165-68)

Penn National filed a notice of appeal of both the initial order granting Ortez's motion for partial judgment on the pleadings and the order denying Defendant's motion to alter or amend judgment. (R pp 169-71; 177-80) After fully briefing the issues, and on the eve of this Court's consideration of this matter, Ortez filed a motion to dismiss appeal for lack of jurisdiction. On September 28,

2020, this Court entered an Order dismissing Defendant-Appellant's appeal without prejudice as interlocutory. (R pp 186-87)

This case was then returned to the Superior Court for further litigation of Ortez's remaining claim (for bad faith refusal to pay insurance claims) and the Estes Estate's claims. On September 18, 2023, Ortez filed a Notice of Dismissal without Prejudice of his claim for bad faith refusal to pay insurance claims. (R pp 213-14) On October 2, 2023, Ortez and Defendants entered into a Stipulation of Dismissal of Ortez's claims against PNMCIC without prejudice and against Tokarz with prejudice. (R pp 215-17) On November 20, 2023, Plaintiff Estes Estate filed a Notice of Voluntary Dismissal of all claims with prejudice. (R pp 218-19)

After all claims of both Plaintiffs were adjudicated, Defendant Penn National again filed its Notice of Appeal of the orders previously entered granting Plaintiff Ortez's motion for partial judgment on the pleadings and denying Defendant Penn National's motion to alter or amend judgment. (R pp 220-23) The Record on Appeal was filed on February 22, 2024.

III. STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Appeal lies of right with this Court pursuant to N.C. Gen. Stat. §7A-27(b)(1) because all claims by all parties have now been adjudicated or dismissed.

IV. STATEMENT OF FACTS

1. *Truck Accident*

Kitchen & Lighting is a company that provides cabinets, lighting and home décor selections for installation into residences. On August 8, 2017, Ortez and Estes were tasked with making deliveries for Kitchen & Lighting. At approximately 11:39 a.m., Ortez was driving an Isuzu box truck owned by Kitchen & Lighting on U.S. 17 in Craven County, North Carolina. Estes was in the passenger seat. At that same time, Fissaha was driving a tractor-trailer for his employer, Passport Transportation. The truck driven by Fissaha was traveling at an extremely slow rate of speed. When Ortez came upon the tractor-trailer, he was unable to take evasive measures to avoid hitting the truck. Estes died as a result of the accident. (Hereinafter referred to as "Truck Accident") (R pp 13-14, 86-87, 113-14)

2. *Wrongful Death Lawsuit*

On March 5, 2018, the Estes Estate filed a lawsuit entitled, "*Theresa Beddard Estes, as Administratrix of the Estate of Darren Drake Estes versus Passport Transportations, Inc., Zemo Fissaha, and Luis Ortez*," Civil Case No. 18 CvS 295, in Craven County Superior Court ("Wrongful Death Lawsuit"). In the Wrongful Death Lawsuit, the Estes Estate asserted five claims: (1) negligent, grossly negligent, willful, wanton and reckless conduct of Fissaha; (2) punitive

damages against Fissaha; (3) vicarious liability of Passport Transportation; (4) independent negligent and wanton conduct of Passport Transportation; and (5) reckless, willful, and wanton conduct of Ortez. (R pp 85-103)

The Complaint did not specifically allege that Ortez and Estes were co-employees. However, with regard to the single claim asserted against Ortez, the Estes Estate expressly pled that its one claim against Ortez was based solely on *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), which held that one employee may assert a claim against a fellow employee outside of the Workers Compensation Act for reckless, willful, and wanton conduct. Specifically, the Complaint alleged:

> 53. Defendant Luis J. Ortez is liable to the Plaintiff based on the legal precedent of *Pleasant v. Johnson*, and subsequent legal authority in North Carolina recognizing that legal duty and that legal right of recovery.

(R p 100) Notably, the Complaint did not allege a negligence claim against Ortez. Indeed, in contrast to the allegations supporting its claims against Fissaha and Passport Transportation, the Estes Estate was careful to avoid any use of the term, "negligent," when describing Ortez's conduct in support of its claim for reckless, willful and wanton conduct against Ortez. (Compare, R pp 88-91 and 96-99 to R pp 100-03)

On February 22, 2019, the Estes Estate settled its claims against Passport Transportation and Fissaha for $863,000. (R p 158, ¶4) The Estes Estate then

moved for partial summary judgment against Ortez regarding his liability. On March 4, 2019, the court granted partial summary judgment against Ortez:

> Plaintiff is entitled to judgment as a matter of law that Defendant Luis J. Ortez was reckless, willful, and wanton in causing the death of Plaintiff's Decedent, Darren Drake Estes.

(R p 137) A hearing was then scheduled regarding the entry of judgment against Ortez for damages. (*Id*.)

Immediately prior to the hearing on damages, Penn National filed a motion to stay the Wrongful Death Lawsuit to allow a previously filed declaratory judgment action[1] to proceed which sought a declaratory judgment regarding whether there was coverage for the Wrongful Death Lawsuit under a business auto policy issued by Penn National. (R pp 141-44) That motion was denied. (R pp 145-47) The court thereafter entered judgment against Ortez in the amount of $9.5 million. (R pp 148-51)

3. *Penn National Policy*

Penn National issued a business auto policy to Kitchen & Lighting, Policy No. AX9 0615893, for the policy period of August 1, 2017 through August 1, 2018

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[1] On March 20, 2019, Penn National filed a declaratory judgment action in the United States District Court for the Eastern District of North Carolina, Case No. 7:19-cv-0059, entitled, "*Pennsylvania National Security Insurance Company versus Luis Ortez, Kitchen and Lighting Designs Unlimited, Inc., and Theresa Beddard Estes, as Administratrix of the Estate of Darren Drake Estes*." The federal lawsuit was dismissed on June 3, 2019, after the present case was filed.

("Penn National Policy"). (R pp 41-84) The Isuzu box truck involved in the Truck Accident was listed on the Penn National Policy as a covered vehicle. (R p 46) The Penn National Policy provided $1 million per accident in liability coverage. (R p 45)

The Business Auto Coverage Form contained in the Penn National Policy outlined the coverage provided for an insured's liability for "bodily injury" caused by an "accident."[2] (R pp 57-69) At issue in this action, the Penn National Policy contained the following exclusion:

> **SECTION II – LIABILITY COVERAGE**
>
> **B. Exclusions**
>
> This insurance does not apply to any of the following:
>
> **5. Fellow Employee**
>
> "Bodily injury" to:
>
> a. Any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business; or
> b. The spouse, child, parent, brother or sister of that fellow "employee" as a consequence of Paragraph a. above.

(R pp 59, 60)

[2] The words in quotations are specifically defined by the Policy.

Penn National was notified of the Truck Accident by Kitchen & Lighting after the accident occurred. At that time, Kitchen & Lighting informed Penn National that it employed both Ortez and Estes. It also notified Penn National that it had submitted Estes' claim to its workers compensation carrier.

When the Wrongful Death Lawsuit was filed nine months later, Ortez did not tender the Wrongful Death Lawsuit to Penn National, nor request a defense. However, Penn National was notified of the Wrongful Death Lawsuit by the Estes Estate. Penn National sent a letter denying coverage to Ortez for the Wrongful Death Lawsuit based on the fellow employee exclusion.

4. ***Estes Estate's Offer To Settle Wrongful Death Lawsuit***

After partial summary judgment was entered against Ortez in the Wrongful Death Lawsuit regarding his liability for the Truck Accident, the Estes Estate's counsel sent a settlement demand to Penn National's counsel on Friday, April 5, 2019. The demand was for $30,000, the amount of minimum limits required by the North Carolina Motor Vehicle Safety and Financial Responsibility Act, N.C. Gen. Stat. §20-279.21(b)(2) ("FRA"). The Estes Estate demanded that the check be delivered to the Estate's attorney by 3:00 p.m. on Monday, April 8, 2019. Specifically, the settlement demand stated:

> … should [Penn National] make payment of $30,000.00, the minimum insurance limits required by the [FRA], by check, **delivered to Abrams & Abrams, P.A. on or before 3:00 P.M. EDT on Monday, April 8, 2019**, and agree in writing that the

> liability coverage under the policy provided to Mr. Ortez via his employer, Kitchen and Lighting Designs, was exhausted by such payment, Mrs. Estes will execute a Covenant Not to Execute Judgment in favor of Mr. Ortez, while retaining all rights to recover under any underinsured motorist coverage under which Mr. Estes would qualify as an insured, including but not limited to the [Penn National Policy].

(R p 139)(emphasis in original) This letter was emailed to Penn National's counsel on Friday afternoon. (R p 115, ¶31)

Penn National's counsel communicated with the Estes Estate's counsel on the morning of Monday, April 8. Specifically, counsel indicated that Penn National agreed to pay $30,000 and agreed to all other conditions imposed by the Estate. However, Penn National would not be able to get the $30,000 check to the Estate's counsel until the next day, Tuesday, April 9. Because the check could not be delivered on Monday, April 8, but on Tuesday, April 9, the Estate rejected the settlement and withdrew its offer. (R pp 115, ¶31; 119 ¶¶57-58)

V. ARGUMENT AND ANALYSIS

A. This Court's Review Of The Order Granting Partial Judgment On The Pleadings Under Rule 12(c) Is *De Novo*.

The $28.9 million judgment entered against Penn National was based solely on the pleadings, pursuant to Rule 12(c) of the Rules of Civil Procedure. In ruling on such a motion, the court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All facts pled by the nonmoving party are to be taken as true and all contravening facts pled by the

moving party are to be considered false. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). The Supreme Court has describe standard to be met by the moving party as a high one:

> Judgment on the pleadings is a summary procedure and the judgment is final. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment.

Newman v. Stepp, 376 N.C. 300, 852 S.E.2d 104 (2020) (quoting *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499).

The trial court applied the wrong standard when ruling on Plaintiff Ortez's motion for judgment on the pleadings. It is clear that the court did not accept as true all facts pled by Penn National as the non-moving party. Instead, the court accepted as true all allegations made by Ortez. Because material issues of fact plainly exist regarding Ortez's claims for breach of the duty to defend, breach of the duty to settle and unfair or deceptive trade practices, Ortez was not entitled to judgment as a matter of law on these claims. Further, material issues of fact remain regarding the damages proximately caused by any offending conduct by Penn National. Therefore, the trial court erred in entering an award against Penn National. This Court's review of a judgment entered on the pleadings is *de novo*. *Tully v. City of Wilmington*, 370 N.C. 527, 532, 810 S.E.2d 208, 213 (2018).

B. The Trial Court Erred In Finding That Penn National Had A Duty To Defend Ortez In The Wrongful Death Lawsuit.

Whether an insurer has a duty to defend an insured in a lawsuit is determined through the "comparison test." Specifically, the allegations in the complaint are read side-by-side with the provisions of the policy to determine whether the events alleged in the complaint are covered or excluded. *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC*, 364 N.C. 1, 6, 692 S.E.2d 605, 610 (2010).

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by the events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by facts ultimately determined at trial. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Waste Mgmt of the Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986)(internal citations omitted).

The Supreme Court has held that the comparison test can be augmented by facts learned by the insurer through its reasonable investigation:

> Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a

> policy exception to coverage. … In addition, many jurisdictions have recognized that the modern acceptance of notice pleading and of the plasticity of pleadings in general imposes upon the insurer a duty to investigate and evaluate facts expressed or implied in the third-party complaint as well as facts learned from the insured and from other sources. Even though the insurer is bound by the policy to defend "groundless, false or fraudulent" lawsuits filed against the insured, if the facts are not even arguably covered by the policy, then the insurer has no duty to defend.

Id. at 691-92, 340 S.E.2d at 377-78.

Consistent with this Supreme Court mandate, this Court has often referred to information outside of the complaint in determining whether an insurer has a duty to defend. For example, in *Duke University v. St. Paul Fire & Marine Ins. Co.*, 96 N.C.App. 635, 386 S.E.2d 762 (1990), this Court referred to affidavits filed by the plaintiff to find that the professional services exclusion did not apply to preclude coverage and therefore the insurer had a duty to defend the underlying lawsuit. In *Nationwide Mut. Fire Ins. Co. v. Grady*, 130 N.C.App. 292, 502 S.E.2d 648 (1998), this Court reviewed discovery to determine that the business pursuits exclusion applied to obviate the insurer's duty to defend the underlying lawsuit. See also, *Waste Mgmt*, 315 N.C. at 700, 340 S.E.2d at 383 (finding no duty to defend because "the events alleged in the pleadings and supported by the deposition fit squarely within the language of the exclusion clause").

In determining whether Penn National had a duty to defend Ortez in the Wrongful Death Lawsuit, the Court is tasked with reviewing the policy provisions

contained in the Penn National Policy and the allegations in the Complaint to determine whether the event alleged in the Wrongful Death Lawsuit is covered under the Penn National Policy. The Court is then to consider facts learned from the insured and facts discoverable by reasonable investigation in assessing whether a defense obligations actually exists. In the present case, the trial court failed to undertake this analysis and therefore erroneously found that Penn National had a duty to defend Ortez in the Wrongful Death Lawsuit.

1. *Application Of The "Comparison Test" Shows That Penn National Did Not Have A Duty To Defend Ortez In The Wrongful Death Lawsuit.*

The first step in determining whether an insurer has a duty to defend is to analyze the insurance policy provisions. It is well-settled that an insurance policy is a contract and its provisions govern the rights and obligations of the insurer and insured. *Radiator Specialty Co. v. Arrowood Indem. Co.*, 383 N.C. 387, 412, 881 S.E.2d 597, 614 (2022). When construing the provisions of the policy, the object "is to arrive at the insurance coverage intended by the parties when the policy was issued." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). The intent of the parties can be gleaned from the language in the policy itself. The language in the policy is to be construed as written with any undefined terms being given a meaning "consistent with the sense in which they are used in ordinary speech, unless the context clearly requires

otherwise." *Id.* An insurer's obligation to its insured is defined by the language in the policy itself and cannot be enlarged by judicial construction. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). This is to prevent the imposition of "liability upon the company which it did not assume and for which the policyholder did not pay." *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522.

The insuring agreement of the Penn National Policy states:

> **SECTION II – LIABILITY COVERAGE**
>
> **A. Coverage**
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> * * *
>
> We will have the right and duty to defend any "insured" against a "suit" asking for such damages … However, we will have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" … to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. …

(R p 58)

Any coverage provided by the insuring agreement is limited by the exclusions contained in the Penn National Policy. Specifically, the Penn National Policy contained the following exclusion:

B. Exclusions

This insurance does not apply to any of the following:

5. Fellow Employee

"Bodily injury" to:

a. Any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business; or
b. The spouse, child, parent, brother or sister of that fellow "employee" as a consequence of Paragraph a. above.

(R pp 59, 60)

Based on the plain language contained in these provisions, Penn National has a duty to defend its insured in lawsuits which allege damages arising out of bodily injury caused by an accident. However, Penn National has no duty to defend the insured if the lawsuit is for bodily injury to the insured's fellow employee that occurs during the employment.

The second step in the comparison test is to review the allegations contained in the lawsuit filed against the insured. In the Wrongful Death Lawsuit, the Estes Estate sought damages resulting from the death of Estes caused by the Truck Accident. In its claims against Fissaha and Passport Transportation, the Estate repeatedly characterized their conduct as "negligent and wanton." (R pp 88-91, ¶24; R pp 96-99, ¶45)

By contrast, in the single claim asserted against Ortez, the Estate did not plead that Ortez was negligent at all. Instead, the Estate exclusively characterized Ortez's conduct as "reckless, willful and wanton." (R pp 101-102, ¶58) In the allegations supporting this claim, the Estes Estate made clear that it was not pleading a negligence claim but rather a *Pleasant* claim:

> 53. Defendant Luis J. Ortez is liable to the Plaintiff based on the legal precedent of *Pleasant v. Johnson*, and subsequent legal authority in North Carolina recognizing that legal duty and that legal right of recovery.

(R p 100)

In *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), the Supreme Court recognized, for the first time, that an employee could assert a claim in court against a co-employee for injuries sustained during employment that was not barred by the exclusivity provision contained in the Workers Compensation Act, N.C. Gen. Stat. §97-10.1.

> The pivotal issue in this case is whether the North Carolina Workers' Compensation Act provides the exclusive remedy when an employee is injured in the course of his employment by the willful, wanton and reckless conduct of a co-employee. We hold that it does not and that an employee may bring an action against the co-employee for injuries received as a result of such conduct.

Id. at 710, 325 S.E.2d at 246. These claims cannot be based on negligence, which would be barred by the Workers Compensation Act, but on willful, wanton and reckless conduct. See, *Estate of Baker v. Reinhardt*, 288 N.C.App. 529, 537, 887

S.E.2d 437, 444 (2023)("Mere negligence, even if conclusively established, does not suffice to establish a *Pleasant* claim as unquestionably negligent behavior rarely meets the high standard of willful, wanton or reckless negligence.")(internal quotations omitted). Subsequently, litigants and courts routinely describe claims asserted by one employee against another as "*Pleasant* claims." See, *Blue v. Mountaire Farms, Inc.*, 247 N.C.App. 489, 505, 786 S.E.2d 393, 403 (2016); *Greene v. Barrick*, 198 N.C.App. 647, 650, 680 S.E.2d 727, 730 (2009).

Finally, in applying the comparison test, the provisions of the policy and the allegations in the lawsuit are read "side-by-side" to determine whether the events as alleged are covered or excluded. The allegations contained in the Wrongful Death Lawsuit clearly show that the only claim asserted by the Estes Estate against Ortez was a *Pleasant* claim that could only be brought by one employee against another for injuries sustained during employment. The Estes Estate could not have pled a *Pleasant* claim against Ortez if Estes and Ortez had not been co-employees who were working at the time of the Truck Accident. Indeed, there is no other reason to have alleged that the claim against Ortez was "based on the legal precedent of *Pleasant v. Johnson* … recognizing that legal duty and that legal right of recovery." (R p 100, ¶53) The Penn National Policy does not provide coverage for claims of bodily injury by a fellow employee which arise out of the employment. A straightforward application of the comparison test between the

Penn National Policy and the Wrongful Death Lawsuit shows that Penn National did not have a duty to defend Ortez in the Wrongful Death Lawsuit.

2. *The Undisputed Facts Known By Penn National Through Its Investigation Confirmed That The Wrongful Death Lawsuit Was Definitively Not Within The Scope Of Coverage Of The Penn National Policy.*

The "caveat" to the comparison test in determining an insurer's defense obligation is information obtained by the insurer from the insured or from its reasonable investigation. *Kubit v. MAG Mut. Ins. Co.*, 210 N.C.App. 273, 279, 708 S.E.2d 138, 145 (2011). Here, Penn National's investigation and the information obtained from its named insured was that Ortez and Estes were, in fact, co-employees who were working at the time of the accident. (R pp 113-14)

Immediately after the Truck Accident (and months prior to the filing of the Wrongful Death Lawsuit), Penn National was put on notice of the Truck Accident and performed an investigation into the facts of the Accident. During this investigation, Kitchen & Lighting informed Penn National that it employed both Ortez and Estes and the Truck Accident occurred while the two were making deliveries. When the Wrongful Death Lawsuit was filed, the facts learned from the insured were that defendant Ortez was a fellow employee with the plaintiff's decedent at the time of the accident. The facts known by Penn National were not contradicted by any allegations in the Wrongful Death Lawsuit. The Wrongful Death Lawsuit did not specifically allege that Ortez and Estes were **not** co-

employees but had some other relationship. To the contrary, the Complaint was entirely silent on this issue. However, the single claim asserted against Ortez was a *Pleasant* claim, that could only be brought by one employee against another.

The information obtained by Penn National in its investigation did not show that the event alleged in the Complaint would be covered by the Penn National Policy. (R pp 113-14) Therefore, even under the caveat to the comparison test, Penn National did not have a duty to defend Ortez in the Wrongful Death Lawsuit. See, *Voyager Indem. Ins. Co. v. Gifford*, 633 F.Supp.3d 760, 767-68 (W.D.N.C. 2022)(finding no duty to defend where insurer's "investigation revealed that the underlying facts were definitively *not* within the scope of coverage")(emphasis in original).

3. *The Modern Trend Among Jurisdictions Supports The Use Of Extrinsic Evidence To Determine An Insurer's Defense Obligation When Such Evidence Is Undisputed And Does Not Contradict The Underlying Pleadings.*

Consistent with North Carolina law, courts in other jurisdictions have found that extrinsic evidence may be used by an insurer to make a coverage determination when (1) the complaint is silent regarding an otherwise undisputed fact, (2) the undisputed fact does not go to the merits of the underlying claims, and (3) the undisputed fact conclusively determines the coverage question. For example, in *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195 (Tex. 2022), the Texas Supreme Court held that when an underlying lawsuit is

silent about a potentially dispositive coverage fact, the insurer can refer to extrinsic evidence to fill the "informational gap" and determine whether a defense obligation exists. The Texas Court emphasized that the comparison test[3] remained the initial inquiry when determining whether a duty to defend exists. However, extrinsic evidence could be considered by the insurer in determining its defense obligation:

> But if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.

Id. at 201-02.

In *Blake v. Nationwide Ins. Co.*, 904 A.2d 1071 (Vt. 2006), a case very similar to the present action, the Vermont Supreme Court was tasked with determining whether an insurer had a duty to defend an insured in a lawsuit seeking damages from a single car accident. Although the complaint did not allege that the defendant and plaintiff were co-employees, the insurer argued that its employment-related exclusions barred coverage. *Id.* at 1075. The Vermont Supreme Court found that in such a situation, where the complaint is otherwise

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[3] Or, "eight-corners rule" as referred to by the Texas Court.

silent regarding an undisputed coverage fact, the insurer could look outside of the complaint to determine its defense obligation.

> Although in many cases the presence of a duty to defend can be determined by comparing the coverage provisions of the policy with the allegations in the complaint, this is not such a case because the relevant policy exclusions involve factual questions not covered in the complaint, namely, whether the accident occurred in the scope of employment. The insurer is entitled to independently examine whether the policy exclusions apply and deny coverage under an applicable exclusion.

Id. (internal citations omitted).

Similarly, in *Ooida Risk Retention Grp v. Williams*, 579 F.3d 469 (5th Cir. 2009), the Fifth Circuit found that an insurer could consider extrinsic evidence when determining whether the fellow employee exclusion precluded its defense obligation for an insured in a lawsuit arising from a single tractor-trailer accident. The complaint did not establish the defendant's role in the truck at the time of the accident. *Id.* at 475. The court held that the insurer could consider extrinsic evidence that was:

> readily ascertainable facts, relevant to coverage, that do not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case. The fact relevant to whether Moses is an "employee" … - whether he was tandem-driving with Williams, and thus "operating a commercial motor vehicle" – does not implicate Williams' negligence in the underlying suit, does not contradict any of the allegations in the pleadings, and controls the question of policy coverage. Because the pleadings do not contain the facts necessary to resolve the question, we hold that … extrinsic evidence can be considered.

Id. at 476 (internal citations and quotations omitted). Therefore, the court held that the fellow employee exclusion applied to negate the insurer's duty to defend the underlying lawsuit. *Id.*

Here, as reflected in Penn National's Answer, Penn National knew, even before the Wrongful Death Lawsuit was filed, that Ortez and Estes were fellow employees, and that the fellow employee exclusion precluded coverage for Ortez for any claim brought by the Estes Estate. (R pp 113-14) When the Complaint in the Wrongful Death Lawsuit was filed, there were no express allegations regarding the relationship between Ortez and Estes. The undisputed fact that Ortez and Estes were co-employees did not contradict allegations in the Complaint and did not overlap with the merits of the underlying claim asserted against Ortez. Indeed, this was consistent with the fact that the only claim pled by the Estes Estate against Ortez was "under the authority of *Pleasant v. Johnson*." The fact that Ortez and Estes were co-employees conclusively determined the coverage issue. Therefore, it was entirely proper for Penn National to deny any defense obligation to Ortez in the Wrongful Death Lawsuit.

4. *The Trial Court Erred In Granting Judgment On The Pleadings To Ortez On His Claim For Breach Of The Duty To Defend.*

When presented with Ortez's motion for judgment on the pleadings, the trial court was tasked with reviewing the undisputed facts (the provisions of the Penn

National Policy and the Complaint filed in the Wrongful Death Lawsuit) and performing a comparison test to determine if the event alleged in the Wrongful Death Lawsuit was covered or not under the Penn National Policy. A straightforward application of the comparison test shows that the only claim asserted against Ortez – a *Pleasant* claim – was excluded from coverage through operation of the fellow employee exclusion. Therefore, Penn National did not have a duty to defend Ortez in the Wrongful Death Lawsuit. The trial court should have denied Ortez's motion based on this clear-cut analysis.

Even if the trial court believed that a comparison of the pleadings to the policy was somehow inconclusive, the trial court was bound under Rule 12(c) to view all facts in the light most favorable to Penn National, the nonmovant. The following facts were pled by Penn National in its Answer:

> 13. … [I]t is admitted that Plaintiff Ortez was driving the Isuzu vehicle in question with the permission of Kitchen and Lighting Designs, Inc. as he was an employee of the same.
>
> 15. … [I]t is admitted that at the time of the accident, Darren Drake Estes was a passenger and co-employee in the Isuzu vehicle in question.
>
> 22. … [I]t is admitted that Defendant [Penn National] and Defendant [PNMCIC] were aware of the lawsuit, the allegations of the lawsuit, the fact than an insured vehicle (subject to exclusion) was involved in the accident, and the fact that Estes and Ortez were both employees of [Penn National's] named insured. …

(R pp 113, 114) In addition, in its affirmative defenses, Penn National pled that the exclusions in the Penn National Policy precluded coverage for Ortez and therefore Penn National did not have a duty to defend Ortez in the Wrongful Death Lawsuit. (R p 126-27)

Applying the proper standard under Rule 12(c), the trial court was to consider that these well-pled facts by Penn National were true. However, in granting Ortez's motion for judgment on the pleadings on Ortez's breach of the duty to defend, the trial court failed to do so. Its conclusion constituted error and should be reversed by this Court.

C. The Trial Court Erred In Finding That Penn National Breached A Duty To Settle Under The Penn National Policy.

1. *Penn National Does Not Have A Duty To Settle Claims Under Its Policy.*

The elements of a breach of contract claim are: (1) the existence of a valid contract and (2) breach of the terms of that contract. *Clute v. Gosney*, 290 N.C.App. 368, 371, 892 S.E.2d 233, 236 (2023). Here, it is undisputed that the Penn National Policy is a valid contract. However, the only affirmative duties that Penn National has under the Penn National Policy are (1) a duty to indemnify the insured for a covered claim, and (2) a duty to defend the insured for claims covered under the Policy. These obligations are contained in the insuring agreement, which states:

SECTION II – LIABILITY COVERAGE

A. Coverage

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> * * *
>
> We will have the right and duty to defend any "insured" against a "suit" asking for such damages … We may investigate and settle any claim or "suit" as we consider appropriate. …

(R p 58) The Penn National Policy indicates that as part of Penn National's duty to defend, Penn National has the right to settle any covered claim. However, this right to settle is not an independent term of the contract nor a "duty." See, *N.C. Farm Bureau Mut. Ins. Co. v. Lanier Law Grp.*, 277 N.C.App. 605, 610, 861 S.E.2d 565 569 (2021)("A policyholder claiming coverage under an enforceable insurance policy triggers two independent duties the carrier owes to the insured: the duty to defend and the duty to indemnify.").

The FRA is written into every motor vehicle policy issued in this State. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977). However, even the FRA does not impose upon an insurer the duty to settle claims. Instead, like the provisions in the Penn National Policy, the FRA only confers on the insurer the right to settle claims. See, N.C. Gen. Stat. §20-

279.21(f)(3)("The insurance carrier shall have the right to settle any claim covered by the policy …").

The trial court found that Penn National breached its duty to settle the claims against Ortez. However, because the Penn National Policy does not include a term requiring Penn National to settle any claims,[4] the trial court erred in granting judgment in favor of Ortez on this claim. See, *Neshat v. Nationwide Mut. Fire Ins. Co.*, 2021 U.S. Dist. LEXIS 100154, *8 (E.D.N.C. 2021)(finding that an insurer does not have a duty to settle an insured's claim); *Blis Day Spa, LLC v. Hartford Ins. Grp.*, 427 F.Supp.2d 621, 635 (W.D.N.C. 2006)("An insured does not have a duty to settle an insured's claim.").

2. *There Were Disputed Facts Which Precluded The Entry Of Judgment On Any Claims Regarding Penn National's Attempt To Settle The Wrongful Death Lawsuit.*

Ortez based his claim for breach of duty to settle on the allegation that Penn National could have paid the Estes Estate $30,000 to settle the claim against Ortez, and failed to do so. Even if a breach of the duty to settle was a valid claim, which

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[4] Although insurers do not have a contractual obligation to settle covered claims, the courts have found that insurers are required to consider settlement in good faith. See, e.g., *Nationwide Mut. Ins. Co. v. Public Serv. Co.*, 112 N.C.App. 345, 350, 435 S.E.2d 561, 564 (1993). However, when an insurer fails to settle a claim in good faith, the claim is not a contractual claim but a tort for "bad faith refusal to settle a claim." See, *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C.App. 416, 420, 424 S.E.2d 181, 184, *aff'd per curiam*, 334 N.C. 682, 435 S.E.2d 71 (1993). Here, Ortez actually plead a claim for bad faith refusal to pay insurance claim. (R pp 24-26) However, Ortez did not move for judgment on the pleadings on this claim (R pp 134-35), and that claim has now been dismissed (R p 213).

Penn National disputes, the trial court still erred in granting Ortez judgment on the pleadings on this "claim."

A motion for judgment on the pleadings required the trial court to view all of the nonmovant's pled facts as true and all contravening assertions by the movant as false. *Newman*, 276 N.C. at 305, 852 S.E.2d at 108. Here, Ortez's allegations are based on a letter emailed by the Estes Estate to Penn National's counsel on the afternoon of Friday, April 5, 2019. In that letter, the Estes Estate's counsel demanded that Penn National pay $30,000 on or before 3:00 p.m. on Monday, April 8, 2019, and in exchange the Estes Estate would execute a covenant not to enforce judgment against Ortez. (R pp 139-40) According to Ortez, Penn National had the ability to pay the Estes Estate's demand but failed to do so. (R p 22, ¶61)

In Penn National's Answer, Penn National unequivocally disputed these "facts." Penn National pled that it had in fact agreed to pay the Estes Estate $30,000 as the Estate demanded but that the Estate rejected the settlement after it learned that Penn National needed two business days after the settlement demand was made in order to deliver the settlement check. Specifically, Penn National asserted in its Answer:

> 31. … [I]t is admitted that on a Friday afternoon, the Estes Estate made a settlement offer for the amount of $30,000.00 in exchange for a covenant not to enforce judgment. … In response to the offer, [Penn National] the very next business day agreed to pay $30,000.00 in exchange for a covenant not to enforce excess judgment,

> agreed to allow the Estate to proceed on their [sic] claimed underinsured motorist claim and agreed to have settlement processed from their Greensboro office location the very next day (Tuesday) and to have the check hand delivered to the Estate's counsel that same day. This offer to have a settlement check delivered within two business days was rejected by the Estate. …
>
> 32. … [I]t is admitted that a check could not be delivered and cut to the Estate in the specified time of the Friday afternoon demand letter. …
>
> 59. … [I]t is denied that [Penn National] had the ability to meet the Estate's settlement demand within the timeframe allowed. Counsel for [Penn National] and counsel for the Estate had multiple telephone and email communications relating to the fact that [Penn National] was ready, willing and able to deliver the $30,000.00 disputed funds on Tuesday, April 9th rather than Monday, April 8th. …

(R pp 115-16, 119) These facts raised by Penn National, as the nonmovant, should have been taken as true by the trial court. It is clear from the order that the trial court did not do so, and instead resolved all factual disputes in favor of the moving party, Ortez.

The facts pled by Penn National in its Answer showed that Penn National reasonably considered the Estes Estate's demand in good faith, agreed to pay the amount requested, and agreed to pay the amount by check hand-delivered to the Estate's counsel within two business days of the demand. These facts, taken as true and in the light most favorable to Penn National as the nonmovant, show that Penn National's actions in responding to the demand by the Estate of Estes were

reasonable. See, *Public Serv.*, 112 N.C.App. at 350, 435 S.E.2d at 564 (finding that insurer must exercise its rights in "a reasonable manner").

In almost identical circumstances, a court in South Carolina found that the insurer's failure to deliver a settlement check within one business day of the demand was not unreasonable and therefore could not support a claim for bad faith failure to settle. In *Urena v. Nationwide Ins. Co.*, 2016 U.S. Dist. LEXIS 198066 (D.S.C. 2016), the insured's attorney made a settlement demand on the afternoon of February 16, 2012, to be paid and actually received by counsel's office on February 17. *Id*. at *17-18. The insurer's check did not arrive to counsel's office until February 21. Counsel returned the check because the check was not delivered by the deadline. *Id.* at *20. The court found that the insurer did not act in bad faith in failing to meet the demand made by the plaintiff because "the one-day time-limit demand did not give Nationwide a reasonable opportunity to settle the case because that time-limit demand was, itself, unreasonable." *Id.* at *25. In so finding, the court recognized that any other conclusion would encourage illicit gamesmanship by plaintiff's counsel:

> Claimants would be allowed to impose any time limits or other conditions with their settlement offers, with the sole purpose of making it difficult for the insurer to comply. Even if those time limits or other conditions were arbitrary and unreasonable, claimants could use them to "set up" the insurer, in the hopes than an insurer's failure to strictly comply with all of those terms would create bad faith liability. This would transform the claims investigation, which the insurer is obligated to perform,

> from an exchange of information into a series of traps and pitfalls for the insurer, set with total impunity by the claimant's attorney. Litigation and claims handling would turn into "a mere game and not a search for the truth."

Id. at *26-27. See also, *Striegel v. American Family Mut. Ins. Co.*, 2015 U.S. Dist. LEXIS 88653, *12 (D. Nev. 2015)(finding two-week time limit demand was unreasonable); *Francois v. Illinois Nat'l Ins. Co.*, 2002 U.S. Dist. LEXIS 28017, *16 (S.D. Fla. 2002)(finding that time-limit demands of seven, four and three days were unreasonable).

Taking the facts pled by Penn National as true, as the trial court was required to do on a Rule 12(c) motion, it is clear that Penn National did not breach any duty to settle the Estes Estate's claim against Ortez. Instead, these facts showed that Penn National agreed to and reasonably tried to effectuate the settlement. The reason that Penn National could not obtain a covenant-not-to-execute against Ortez was due to the unreasonableness of the settlement demand. The trial court erred in granting judgment in favor of Ortez on this "claim."

D. The Trial Court Erred In Finding That Ortez Was Entitled To Judgment As A Matter Of Law On His Claim For Unfair Or Deceptive Trade Practices.

The trial court erroneously granted judgment in favor of Ortez on his claim for violation of the UDTPA. To support a UDTPA claim against Penn National, Ortez must have conclusively established that (1) Penn National engaged in an unfair or deceptive act or practice; (2) in or affecting commerce, and (3) which

proximately caused injury to Ortez. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). Generally, in an UDTPA case, it is within the province of a jury to decide: whether the insurer engaged in certain conduct; whether and what damages were proximately caused by that conduct; and the amount of such damages. The only question of law for the court is whether the conduct found by the jury constitutes an unfair or deceptive practice that violates UDTPA. *Id.* See also, *Jumas Food Mart v. Chubb Ins.*, 2023 U.S. Dist. LEXIS 112351, *17 (M.D.N.C. 2023)("Occurrences of the alleged conduct, damages, and proximate cause are fact questions for the jury, but whether the conduct was unfair or deceptive is a legal issue for the court.").

In the order at issue, the trial court merely found, based on nothing more than the allegations in the pleadings, that "[Penn National's] conduct constitutes a violation of [UDTPA]." (R p 158, ¶3) The court failed to detail what conduct engaged in by Penn National constituted a violation of UDTPA or whether Ortez conclusively showed that the alleged conduct proximately resulted in damages to Ortez. With regard to Penn National's conduct, in its prior conclusions, the court found that Penn National had breached its duty to defend, and its (alleged) duty to settle, conduct that amounts to nothing more than a breach of contract. This conduct by Penn National does not violate the UDTPA as a matter of law.

It is beyond cavil that conduct amounting to a breach of contract cannot

support a claim for UDTPA violation.

> It is well recognized, however, that actions for unfair and deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. §75-1.1.

Branch Banking & Trust Co. v. Thompson, 107 N.C.App. 53, 62, 418 S.E.2d 694, 700, *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992)(internal citations omitted). Courts are extremely hesitant to allow plaintiffs to manufacturer a claim for an UDTPA violation out of facts that only allege a breach of contract. *Birtha v. Stonemor*, 220 N.C.App. 286, 298, 727 S.E.2d 1, 10 (2012).

Therefore, in order to recover under the UDTPA, a plaintiff must show "substantial aggravating circumstances" attendant to the breach. *Griffith v. Glen Wood Co.*, 184 N.C.App. 206, 217, 646 S.E.2d 550, 558 (2007). See also, *Lovell*, 108 N.C.App. at 422, 424 S.E.2d at 185 (defining aggravated conduct as "fraud, malice, gross negligence, insult, rudeness, oppression, or wanton and reckless disregard of plaintiff's rights"); *Neshat*, 2021 U.S. Dist. LEXIS 100154 at *16 (finding that substantial aggravating circumstances require "some element of deception, like forged documents, lies, or fraudulent inducements").

Here, Ortez has not shown any substantial aggravating factors attendant to Penn National's alleged breach of contract. Indeed, the trial court did not identify any. Ortez's breach of the duty to defend is premised on a disagreement between

the parties of what the comparison test requires. And, it is undisputed that Ortez never even tendered the Wrongful Death Lawsuit to Penn National for a defense nor otherwise communicated with Penn National during the litigation. Even if Penn National breached a duty to defend, which it disputes, no North Carolina court has ever held that a breach of the duty to defend automatically constitutes an unfair or deceptive trade practice that violates UDTPA. See, *Martinez v. National Union Fire Ins. Co.*, 911 F.Supp.2d 331, 339 (E.D.N.C. 2012)("[A] fundamental disagreement about [coverage under a policy] is not a 'substantial aggravating circumstance'.").

Ortez's breach of the (alleged) duty to settle is based on Penn National's inability to meet a one-business-day time-limit demand. The legislature has identified Unfair Claim Settlement Practices which include "not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear." N.C. Gen. Stat. §58-63-15(11)(g). Conduct that violates the Unfair Claim Settlement Practices statute may constitute an unfair or deceptive practice under the UDTPA. See, *Gray*, 351 N.C. at 71, 529 S.E.2d at 683. However, Penn National disputed that it engaged in this conduct (as outlined above). On a Rule 12(c) motion, the court was required to take the facts in Penn National's Answer as true. Therefore, the trial court erred in finding that Penn National engaged in conduct that violated the UDTPA as a matter of law.

E. The Trial Court Erred In Entering A $28.9 Million Judgment Against Penn National.

1. *The Trial Court Improperly Ignored Penn National's Liability Limits When Determining The Amount Of Damages Caused By A Breach Of Its Defense Obligation.*

In this case, the trial court took the extraordinary step of entering judgment against Penn National, based solely on the pleadings, for the full amount of the underlying judgment against Ortez. In the Wrongful Death Lawsuit, judgment was entered against Ortez in the amount of $9.5 million. The Penn National Policy limit was $1 million. As an apparent "penalty" against Penn National for allegedly breaching its duty to defend under its Policy, the trial court found that Penn National waived its **policy limit** in addition to policy terms such as exclusions. This unprecedented finding is clearly contrary to North Carolina law.

In *Waste Management*, the Supreme Court made clear what consequences flow from an insurer's breach of its defense obligation:

> In this event, the insurer's refusal to defend is at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, ***the insurer will be responsible for the cost of the defense***. This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay.

Waste Mgmt, 315 N.C. at 691-92, 340 S.E.2d at 377-78 (citations and quotations omitted; emphasis added). The "penalty" for breaching a defense obligation is not, and has never been, the waiver of all policy provisions and limits. The

consequences of the failure to defend are (1) the payment of defense costs incurred; and (2) the waiver of the enforcement of the insured's obligations to secure the insurer's consent prior to any settlement. See also, *Nixon v. Liberty Mut. Ins. Co.*, 255 N.C. 106, 110, 120 S.E.2d 430, 433-34 (1961)("The courts generally hold that where a liability insurer denies liability for a claim asserted against the insured and unjustifiably refuses to defend an action therefor, the insured is released from a provision of the policy against settlement of claims without the insurer's consent, and from a provision making the liability of the insurer dependent on the obtaining of a judgment against the insured, and that under such circumstances, the insured may make a *reasonable* compromise or settlement in good faith without losing his right to recover on the policy.")(emphasis in original).

No North Carolina appellate court has held that an insurer waives all policy provisions and its policy limits when it breaches a defense obligation. To the contrary, what is waived is the insurer's right to require the insured to comply with its obligation to seek the insurer's consent for any settlement. An insurance policy imposes certain obligations on the insured including the requirement that the insured obtain the insurer's consent prior to paying any amount. Voluntary payments by an insured violate the conditions of an insurance policy and generally void coverage for such payments. *Branch v. Travelers Indem. Co.*, 90 N.C.App.

116, 119, 367 S.E.2d 369, 371 (1988). Therefore, an insurer who breaches a duty to defend cannot later insist that the insured secure the insurer's consent prior to settlement. See, *Ames v. Continental Casualty Co.*, 79 N.C.App. 530, 340 S.E.2d 479 (1986)("By denying liability and refusing to defend claims covered by the insurance policy, the insurance company commits a breach of the policy contract and thereby waives the provisions defining the duties and obligations of the insured.").

Penn National also did not waive its exclusions when it failed to defend Ortez in the Wrongful Death Lawsuit. In *Nationwide Prop. & Cas. Ins. Co. v. Brinley's Grading Serv.*, 2013 N.C.App. LEXIS 149 (2013), this Court separately considered whether the insurer breached its duty to defend and whether it had a duty to indemnify the insured. In *Brinley*, a wrongful death action was brought against the insured. The lawsuit affirmatively alleged that the plaintiff's decedent was not an employee of the defendants, but was an independent contractor. The court compared these stated allegations with the policy and found that the policy's employment-related exclusions did not apply to preclude coverage. Therefore, the *Brinley* Court held that the insurer had a duty to defend the insured in the underlying lawsuit. *Id*. at *9-16. With regard to the duty to indemnify, the court considered the true facts developed by the parties in litigation. Those facts showed that the decedent actually qualified as an "employee" under the policy. Therefore,

the employment-related exclusions contained in the policy precluded coverage for any judgment rendered in the underlying lawsuit. *Id*. at *20-24. Just because the insurer wrongfully denied a duty to defend, the insurer's exclusions were not waived but could be considered in determining whether any judgment was covered under the policy.

Similarly, *Squires v. Textile Ins. Co*., 250 N.C. 580, 108 S.E.2d 908 (1959) held that the duties of defense and indemnity are separate and based upon different sets of facts. There, the carrier attempted to avoid liability by re-litigating facts related to agency and damages that had been determined in the underlying action, which it did not defend. *Id*. at 585, 108 S.E.2d at 912. The court found that, while the carrier was bound by the facts established in that underlying action, it retained its coverage defenses at the indemnity stage. *Id*. (noting that the "only defense available to the [insurer] is that the policy does not cover the insured's liability").

Both *Squires* and *Brinley* thus recognize the principle that the insurer may be obligated to reimburse defense costs if it wrongfully denied a defense, but if the facts proved at trial do not implicate coverage, the insurer does not owe indemnity coverage.

No appellate court has found that an insurer waives its policy limit or exclusions when it breaches the duty to defend. There is no record here upon which the trial court could have properly made such a finding – certainly not under

Rule 12(c) based on disputed pleadings. This Court should therefore reverse the trial court's decision awarding judgment against Penn National for the total amount of the underlying judgment against Ortez.

2. *The Trial Court Erred In Concluding That The Total Amount Of The Judgment Rendered Against Ortez In The Wrongful Death Lawsuit, Plus Interest, Was Proximately Caused By Penn National's Conduct As A Matter Of Law.*

The Supreme Court has interpreted the UDTPA as requiring a plaintiff to prove that he suffered actual injury which was directly and proximately caused by the defendant's unfair or deceptive act. Any such damages are then to be trebled under the UDTPA. *Gray*, 352 N.C. at 74-75, 529 S.E.2d at 684-85. See also, *Sunbelt Rentals, Inc. v. Head & Engquist Eqip.*, 174 N.C.App. 49, 62, 620 S.E.2d 222, 232 (2005)("Under the UDTPA, proximate cause is a question of fact.").

Here, no evidence was presented by Ortez regarding what damages, if any, he suffered as a direct and proximate result of any alleged unfair or deceptive practices. Ortez merely argued that the total amount of the judgment against Ortez, plus interest on that amount, were damages proximately caused by Penn National's conduct. However, there was no evidence presented to the trial court where it could find this as a matter of law. See, *Id*. at 61, 620 S.E.2d at 231 ("Plaintiffs must prove damages [caused by UDTPA violations] to a reasonable certainty.").

In fact, Penn National denied that Ortez suffered any damages as a result of its conduct. (See, R p 24, ¶72: "As a proximate result of [Defendants'] violations

of [the UDTPA], Ortez has been damaged in the amount of at least the amount of the judgment in the Underlying Case."; R p 120, ¶72: "The allegations contained in paragraph 72 are denied.") Because Penn National denied that Ortez's damages from any unfair or deceptive practices were the amount of the judgment against him in the Wrongful Death Lawsuit, and the trial court was required to accept these facts as true on a Rule 12(c) motion, the trial court erred in entering this amount as damages from the UDTPA violation and trebling the same.[5]

VI. CONCLUSION

The trial court failed to carefully scrutinize the actual pleadings filed by the parties and rashly entered a $28.9 million judgment against Penn National under Rule 12(c) based on disputed pleadings, effectively precluding Penn National from receiving a full and fair hearing on the merits of the claims asserted against it. An actual analysis of the claims, and taking Penn National's averments of facts as true, should have resulted in a denial of Ortez's motion on the pleadings. First, a straightforward comparison of the pleadings and policy clearly shows that there was no duty to defend Ortez because a claim of bodily injury to a fellow employee (the only claim asserted against Ortez) is clearly excluded under the Policy.

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[5] Furthermore, the trial court added interest on the amount of the judgment before trebling the same. (R p 158, ¶4) This is clearly error. There was no evidence that the interest on the judgment was proximately caused by any conduct by Penn National. To the contrary, interest is a legal requirement unaffected by any conduct by Penn National. Therefore, trebling the interest constitutes a clear windfall for Ortez and was improper.

Second, Penn National did not have a duty to settle claims against Ortez. Even if it did, the facts as pled by Penn National show that it attempted to effectuate a settlement but was unable to do so because of an unreasonable one-business-day time-limit demand by the Estes Estate. Finally, the pleadings did not assert sufficient facts to show that these alleged breaches of contract were accompanied with substantial aggravating circumstances to justify a conclusion that such conduct violated the UDTPA as a matter of law.

Significantly, there is no support within the pleadings filed by the parties in this case to justify a $28.9 million judgment against Penn National. Penn National's policy limits are $1 million. In essence, the trial court commandeered Penn National's ability to litigate whether its conduct in this case (1) breached its Policy, (2) constituted an unfair or deceptive trade practice, or (3) what damages were proximately caused by any offending conduct. Instead, the trial court decided it believed Ortez over Penn National, found all facts in favor of the moving party (turning black letter law on its head), and entered a final judgment against Penn National, requiring it to pay 28.9 times the amount of its limits in a case that Ortez never tendered to Penn National for a defense and never communicated with Penn National during the litigation. Simply, this judgment cannot stand. Penn National respectfully requests that this Court reverse the trial court's grant of judgment in favor of Ortez, grant judgment in favor of Penn National on the duty to defend

claim, and vacate the remaining judgment on all other claims. In the alternative, Penn National requests that this Court reverse and vacate the trial court's judgment on the pleadings and remand this case for a full and fair hearing on the merits on all claims.

This the 25th day of March, 2024.

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule 28(j) of the Rules of Appellate Procedure and the Order entered March 21, 2024 on Appellant-Defendant's Consent Motion to Enlarge Word Limitations in Briefs, counsel for the Defendant-Appellant certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced fonts, is less than 11,000 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word processing software.

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

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