IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

Superior Walls of America, Ltd.	:	**July Term, 2013**
Plaintiff	:	
	:	**No. 01545**
v.	:	
	:	**Commerce Program**
Pennsylvania Nat'l Mut. Cas. Ins. Co., et al.	:	
Defendants	:	**57 EDA 2019**
	:	

J. DJERASSI **DECEMBER 30, 2020**

OPINION

INTRODUCTION

This is a declaratory judgment action instituted by manufacturer plaintiff/appellee Superior Walls of America ("Superior Walls") against insurance company defendant/appellant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"). The case comes after Penn National denied insurance coverage to Superior Walls during an underlying wrongful death and survival case, *Debra Doan et. al., v. Electrolift, Inc., et al.,* CP Phila, February Term, 2010, No. 1265 ("Underlying Action"). Superior Walls was one of many named defendants in that lawsuit.

Superior Walls makes proprietary precast molding systems used as foundations for the installation of residential swimming pools. Superior Walls has a network of franchised independent companies who assemble Superior Walls' parts, mix concrete into the molds and then install the foundations on site. One of these franchises is Advanced Concrete Systems ("ACS") whose employee, Raymond Doan, was in the process of smoothing liquid concrete in one of Superior Walls' precast molds when a hook broke on an overhead crane. A metal rod fell and crushed Doan in the head and killing him. The accident occurred on ACS's factory premises in Middleburg, Pa.

As part of its franchise arrangement, Superior Walls had supplied ACS with manuals instructing ACS employees how to assemble the Superior Walls system. A Franchise Agreement between Superior Walls and ACS required ACS to purchase a commercial general liability insurance policy that covered not only ACS but Superior Walls as well. Penn National issued the policy to ACS and Superior Walls was named as an additional insured. Superior Walls had its own primary commercial insurance policy with Erie Insurance Company ("Erie").

After the Raymond Doan accident and Superior Walls' inclusion in the Underlying Action on a negligence franchisor claim, Superior Walls submitted a coverage demand to Penn National. The insurance company responded affirmatively at first with a reservation of rights. Discovery and motions practice ensued but less than two months before trial in the Underlying Action, Penn National sent notice to Superior Walls that coverage was being denied. Superior Walls was left undefended and uncovered against liability in the underlying wrongful death case. Superior Walls eventually retained the same lawyer Penn National had assigned who settled with the Doan plaintiffs. Superior Walls also filed this declaratory action.

Early in the litigation of this case, retired President Judge Pamela Dembe, sitting in Commerce Court in 2014, issued an Order declaring that Penn National owed both a duty to defend and indemnification to Superior Walls. Judge Dembe also found that Penn National had already breached the aforementioned duties and left open the question whether Superior Walls' settlement was reasonable.

Following a bench trial, this Court applied Judge Dembe's findings, concluded Superior Walls' settlement in the Underlying Action was reasonable and awarded damages to Superior Wall.

PROCEDURAL HISTORY

Superior Walls filed a complaint for declaratory judgment in this case on July 10, 2013 and an amended complaint on October 30, 2013. Penn National filed an Answer and New Matter on June 9, 2018. Superior Walls filed a motion for summary judgment on July 18, 2014 and Penn National filed its summary judgment motion on July 21, 2014.

On October 2, 2014, former President Judge Dembe entered an Order addressing the summary judgment motions and found in pertinent part:

> "1) Defendant owed a duty to defend and breached that duty in Part.
>
> 2) Defendant owed a duty to indemnify and breached that duty. (The issue of reasonableness of Plaintiff's settlement with the Doan Family is not addressed in the Order)."

On October 14, 2014, Penn National filed a motion to certify for an interlocutory appeal. This was denied by Judge Dembe on October 21, 2014.

Upon Judge Dembe's retirement in June, 2015, this Court was assigned. We presided over discovery litigation and addressed a new summary judgment motion from Penn National that was filed on March 21, 2016 and denied on August 1, 2016.

Litigation continued and we signed an Order on December 20, 2016 as follows:

> "…upon consideration of the motion of defendant Pennsylvania Mutual Casualty Insurance Company, for an Order limiting maximum indemnity coverage to $1 million, Plaintiff's response in opposition, and the respective briefs filed by the parties, the motion is

denied. It is further ordered that Penn National may challenge only the reasonableness of the settlement of the Doan Action at the time of trial and that the full limit of the umbrella policy is available for indemnity."

A four day bench trial took place between January 12, 2017 and January 17, 2017. After receipt of proposed findings, this Court issued Findings of Fact and Conclusions of Law in favor of Superior Walls in the aggregate amount of $2, 239,000. This includes statutory 6 percent interest awarded pre-judgment going back to October 8, 2013, the day Superior Walls' settled the Underlying Action for $1,500,000.

Defendant's post-trial motions were denied on November 26, 2018 and Judgment was entered on November 29, 2018. Defendant filed a supersedeas bond and notice of appeal on December 14, 2018. On July 30, 2019, Superior Walls filed an Application to Quash Appeal relating to timeliness of Penn National's preservation of Judge Dembe's October 2, 2014 Order for appellate review. On September 6, 2019, the quash application was denied with leave for Penn National renew the waiver issue in its appellate brief.

We submit this Opinion on the merits.

STATEMENT OF FACTS

A Franchise Agreement between franchisee ACS and franchisor Superior Walls required ACS to name Superior Walls as an additional insured. The Franchise Agreement stated that any insurance coverage provided to Superior Walls under the Policy was primary and noncontributory with respect to any other insurance available to Superior Walls.[1] The Agreement also required that

[1] The Franchise Agreement p. 21 at 10.3 – 10.3.1 through 10.3.3.

the insurance procured by ACS would defend, indemnify and hold harmless Superior Walls should injury, death, or property damage occur in connection with the "Franchised Business."[2]

Penn National issued a commercial general liability insurance policy to ACS effective March 1, 2008 through March 1, 2009. The policy limit was $1 million per occurrence and $2 million aggregate. The policy includes an "Additional Insured – Grantor of Franchise" endorsement which provides that the Additional Insured---Superior Walls ---is covered for its own liability, but only in its capacity as grantor of the franchise. The policy also contains a provision defining the meaning of "bodily injury" to include "bodily injury, sickness or disease sustained by a person including mental anguish or death resulting from any of these." [3]

The Underlying Action concerned an accident that took place on May 2, 2008, when a ten-foot metal rod struck ACS employee Ray Doan on his head and neck while he was working on ACS premises. The victim was smoothing liquid concrete in a molded pool that was part of the Superior Walls precast system used by ACS to manufacture building foundations. An ACS machinist was operating a crane which was lifting a large metal bucket to pour liquid concrete into the molded pool. Mr. Doan's job was to remove air particles from the poured concrete. He was leaning over the pool with a leveler when a hook on the crane snapped and a connecting rod fell on his head. Compounding the tragedy, Ray Doan's son, Brandon, witnessed his father's death. Brandon Doan was also an ACS employee assigned to the concrete job and was standing a few feet away from his father when he was killed. Expert witness opinions agreed that Ray Doan was conscious for a time after the accident and experienced pain and suffering before dying. Evidence presented at the bench

[2] The Franchise Agreement p. 20 at 10.1.
[3] The Policy Appendix 140 at II. Bodily Injury Redefined.

trial was persuasive that Brandon Doan had a preexisting mental disorder that was aggravated by the trauma of witnessing his father's death.

Debra Doan, the Estate of Ray Doan, and Brandon Doan initiated the Underlying Action on February 9, 2010 as wrongful death and survival actions. They sued multiple defendants along with Superior Walls. Among them was Bitterman Scales, LLC ("Bitterman"), a company that ACS had hired two years before the Doan accident to inspect its crane. Bitterman's job included examining the particular metal hook which connected the crane to the bucket. Discovery in the Underlying Action had identified this hook as having snapped, causing the bucket to disconnect and releasing the connecting rod that fell on Ray Doan's head.

Following extensive litigation and settlements involving other defendants, only Superior Walls and Bitterman remained as defendants when trial approached in the Underlying Action.

Superior Walls' path to eventual settlement in the Underlying Action was complicated by Penn National's decision to refuse its Additional Insured coverage after its initial acceptance. Penn National's refusal occurred after two evaluation reports were prepared for the company by Donald Grimes, Esquire, Penn National's original assigned attorney for Superior Wall.

In Mr. Grimes' first evaluation report for Penn National dated August 30, 2012, he estimated the chance of a defense verdict in favor of Superior Walls to be between o 60%.

In his second evaluation report to Penn National dated January 3, 2013, Mr. Grimes lowered his estimated chance for a defense verdict to between 30% and 40%. Mr. Grimes also reported that Superior Walls was exposed to damages in a range from $3,000,000 to $6,000,000. He attributed his reduced confidence in a favorable defense outcome for Superior Walls on two factors. The first was the trial court's denial of Superior Walls summary judgment motion in the Underlying

Action; the second was expert reports, including one from his own expert, agreeing that Ray Doan had survived for a few minutes and died painfully.

Mr. Grimes also told Penn National that he was concerned by a video deposition given by Craig Bitterman, the owner of Bitterman Scales, LLC. Bitterman had been hired by ACS to inspect ACS's crane including the safety and durability of the hook, but Mr. Bitterman denied this at his deposition. He falsely claimed that he had only been hired to measure the crane's lift capacity.

In his trial testimony before this Court, Mr. Grimes said he believed Craig Bitterman's denial would not play well in front of a Philadelphia jury. As stated in our Findings of Fact and Conclusions of Law at paragraph 43, "Mr. Grimes feared that Bitterman's callousness, if so perceived, could taint the jury's consideration of the entire Doan case, including SWA's (Superior Walls) role. Mr. Grimes was concerned that this had the potential to 'jack up' a plaintiff verdict and harm SWA in a joint and several damages verdict."

Ten days after submitting his second interim report to Penn National, Mr. Grimes represented Superior Walls at a Settlement Conference on January 13, 2013 in the Underlying Action. Counsel for the Doan plaintiffs demanded $10,000,000 to settle. We heard from Mr. Grimes that he had not been given authority by Penn National to negotiate and that Penn National. We also found that Penn National had misled the Court by claiming the reason for declining authority to Mr. Grimes was due to its own unfamiliarity with Mr. Grimes' interim reports. The dates on the reports and the ten days between the second report and the Settlement Conference belie this explanation. Indeed, two days after the Settlement Conference, Penn National suddenly withdrew its defense for Superior Walls entirely. Penn National stopped paying for Mr. Grimes and Superior Walls' defense in the Underlying Action was thrown into limbo.

After Penn National denied coverage, Superior Walls retained its business franchise attorneys, DLA Piper, to try to reverse Penn National's refusal. DLA Piper also evaluated Superior Walls' legal options, reviewed the Underlying Action's litigation and counseled Superior Walls on potential remedies. Superior Walls paid $96,000 to DLA Piper.

Penn National, however, refused to change its position and Erie Insurance Company, Superior Walls primary corporate insurance carrier, picked up coverage with subrogation rights. Erie retained Mr. Grimes to resume his Superior Walls representation, and on October 8, 2013, Mr. Grimes and Superior Walls settled the Underlying Action for $1.5 million. Erie paid the $1.5 million settlement and Mr. Grimes' legal fees and costs totaling $53,000.

LEGAL ANALYSIS

This Opinion does not analyze the quash issue whether Penn National adequately preserved its appellate objections to Judge Dembe's October 2, 2014 Order declaring that Penn National owed a duty to defend and indemnification to Superior Walls as an Additional Insured. We note, however, that Penn National had moved to certify the question for immediate interlocutory appeal.

1. Superior Walls Is Owed Penn National's Duty to Defend and Indemnification.

Penn National's additional insurance coverage for Superior Walls is required under Superior Walls' Franchise Agreement with ACS. The Franchise Agreement and Superior Walls's inclusion as a named additional defendant in ACS's Penn National policy qualify Superior Walls as an insured.

The Supreme Court states "[a] court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage. General Accident Ins. Co. of Am. v. Allen, 692 A.2d 1089, 1095 (Pa. 1997). In doing so, general rules of contract interpretation apply. O'Donnel v. Independence Life & Accident. Ins. Co., 323 A.2d 387, 388 (Pa. Super. 1974).

Where the language of a contract is clear and unambiguous, a court is required to give effect to the text. Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). Courts examine insurance contracts in their entirety including endorsements. Burton v. Republic Ins. Co., 845 A.2d 889, 893 (Pa. Super. 2004). Where a provision of a policy is ambiguous, it is construed in favor of the insured and against the insurer, the party who drafted the policy. Standard Venetian Blind Co. v. American Empire Ins. Co. supra. An ambiguous contract is one that is subject to two or more constructions. Burton, supra. at 893.

The Commercial General Liability Insurance Policy ("CGL") in this case states that Penn National will cover those sums for which its insured becomes legally obligated to pay. This includes "bodily injury" and "property damages" as defined by the policy. Superior Walls is an insured specifically named by endorsement in the CGL: "Additional Insured---Grantor of Franchise." The actual coverage is defined in the endorsement as provided "only with respect to their liability as grantor of a franchise" to ACS.[4]

An additional insured generally enjoys the same rights as a named insured and is entitled to have its coverage provided in the form of a direct recovery from the insurer. See West Am. Ins. Co. v. Lindepuu, 128 F. Supp. 2d 220, 232 (E.D. Pa. 2000). In this case, Superior Walls has a reasonable expectation that its rights as an additional insured are at least as great as those of the named insured in terms of Penn National honoring its promises.

The question then becomes whether Superior Walls' potential exposure in the Underlying Action triggers its additional insured coverage? The answer depends on the averred facts in the Underlying Action. If the Underlying Action exposed Superior Walls to risk, then Penn National has a duty to defend Superior Walls "until such time that the claim is confined to a recovery that the

[4] CGL 20 29 1185.

policy does not cover." General Accident Ins. Co. of Am. v. Allen, 692 A.2d 1089, 1095 (Pa. 1997). If the question is close and averments in an underlying complaint "might or might not" fall within the coverage, then the insurer is nonetheless required to defend. See Casper v. American Guarantee & Liability Ins. Co., 184 A 2d 247, 248 (Pa. 1962).

Multiple averments in the Underlying Action's complaint potentially implicated Superior Walls. In particular, Count VIII accuses Superior Walls of failing to monitor, supervise and otherwise control ACS, its licensee (franchisor). The relationship between Superior Walls as franchisor and ACS as franchisee is repeatedly referenced in Count VIII's subparagraphs. [5]

Ultimately, insurance coverage is determined by comparing the four corners of the insurance contract to the four corners of the underlying complaint. Kiely on behalf of Feinstein v. Philadelphia Contributorship Ins. Co., 206 A.3d 1140, 1145-46 (Pa. Super. 2019); Everest Indemnity Insurance Company v. Valley Forge, Inc., 140 F. Supp. 3d 421 (E.D. Pa. 2015. Doing so in this case, we find Superior Walls is entitled to defense coverage from Penn National. The Underlying Action's complaint seeks recovery from Superior Walls for its role and conduct as ACS's licensor, its franchisor. This falls squarely within Penn National's promise to cover its Additional Insured "with respect to their liability as grantor of a franchise."

We also find Penn National's coverage includes indemnity. See. Penn-America Ins. Co. v. Peccadillos, Inc., 27 A.3d 259, 269 (Pa. Super. 2011). This is because evidence was persuasive at trial that Superior Walls' settlement in the Underlying Action was reasonable and indemnification is accordingly required. See TIG Inc. v. Nobel Learning Cmtys, Inc. 2002 WL 1340332 at *12 (U.S. Dist. Ct. E.D. Pa. 2002.).

[5] See Count VIII, Paragraph 97, subparagraphs (f), (g), (h), (i), (j), (k), (n), (p), ®, (s), (u), (v), (bb), (cc), (ff), (gg), (ll), (uu), (vv), (ddd), (fff), (ggg) and Paragraph 88.

Whenever an insured's claim is potentially within the scope of an insurance policy, an insurer who refuses to defend "does so at its own peril." This peril includes being required to pay the insured's separately negotiated reasonable settlement. Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 953 (Pa. Super. 1992); Alfiero v. Berks Mut. Leasing Co., 500 A.2d 169, 171 (Pa. Super. 1985). In addition, when an insurer breaches its duty to defend and the insured subsequently settles, "the insured need not establish actual liability" for indemnification as long as potential liability is shown to exist. TIG Inc. *supra.* And the reasonableness of the actual settlement itself is determined by keeping in view "the size of possible recovery and degree of probability of claimant's success against the insured. American Int'l Underwriters Corp v Zurn Industries, 71 F. Supp. 690, 701-702 (W.D. Pa. 1991).

Here, there was an initial settlement demand of $10,000,000 and more importantly the insurance company's own assigned attorney projected potential risk in a $3,000,000 to $6,000,000 range with only a 30% to 40% chance of a defense verdict. Superior Walls' settlement was clearly reasonable.

2. Brandon Doan's Underlying Action Claims are covered by Penn National's duty to Defend and Indemnify.

Penn National asserts that its CGL policy does not cover mental injury because the bodily injury suffered by Brandon Doan was not physical. Brandon Doan sought damages for negligent infliction of emotional distress in the Underlying Action.

The CGL policy defines bodily injury as "bodily injury, sickness or disease sustained by a person including mental anguish or death resulting from any of these." This policy language does not explicitly require that the mental anguish be precipitated by one's own physical injury. We are satisfied that expert testimony was credible that Brandon Doan suffered significant emotional

trauma when he saw his father die suddenly in front of , and we find his distress falls within the policy's definition of bodily injury as bodily injury, sickness or disease, *including mental anguish*…" (*Italics added*).[6] Expert testimony established that Brandon Doan suffered from a previously existing mental disorder that was worsened by the trauma of seeing his father's death. Experts were prepared to testify that at Brandon Doan was suffering mental anguish afflicting his stability and work capacity.[7]

3. <u>Reasonableness of the settlement:</u>

Penn National claims we erred in finding the underlying settlement is reasonable because the finding is against weight of the evidence. Counsel for Penn National appears to argue that Superior Walls' settlement was unreasonable because Mr. Grimes had at one point estimated Superior Walls's chance of a defense verdict to be as high as 50% to 60%. Penn National also argues that Mr. Grimes had reported strengths in Superior Walls's case: that Superior Walls did not control safety at the ACS's plant and Superior Walls was not actually involved in the negligent inspection of the crane's hook. Penn National also cites evidence that Ray Doan had received safety training recommended by Superior Walls in its franchise safety manual.

While these factual points were shown except for the question whether Superior Walls could be said to control safety at its ACS franchise, substantially more persuasive was Mr. Grimes' testimony.[8] H concern that a fact- finder could be inflamed by co-defendant Craig Bitterman's video testimony

[6] Findings of Fact Conclusions of Law paragraphs 28-32

[7] In its Rule 1925 Statement of Matters Complained Of, Penn National cites *Philadelphia Contributorship Insurance Company v. William Shapiro*, 798 A.2d 781 (Pa. 2002) for the proposition that Brandon Doan's distress and trauma are not covered under the Policy. *Shapiro* is distinguishable for two reasons: 1) the *Shapiro* Court was decided on the grounds of humiliation suffered from being fired from a job, which did not rise to the level of 2) "mental anguish" which was an injury that was included in the *Shapiro* policy's definition of "bodily injury." In contrast, the phrase "mental anguish" appears in Penn National's CGL.

[8] See findings of Fact conclusions of Law, paragraphs, 17-18.

was justified. So was Mr. Grimes' worry that a Philadelphia jury could find Superior Walls directly responsible because ACS followed Superior Walls' safety manual procedures regarding use of cranes and the procedures to use when franchise employees pour liquid concrete into Superior Walls' pre-molded pools.[9]

Finally, when an insurance company breaches its duty to defend and the insured settles on its own, "the insured need not establish actual liability" to recover for a reasonable settlement---"as long as potential liability on the facts shown is shown to exist", TIG Ins. Co. v. Nobel Learning Cmtys, Inc. supra. quoting *American Int'l Underwriters Corp v. Zurn Industries*, 771 F. Supp. 710-792 (W.D. Pa. 1991). Here, Superior Walls' potential liability was proven and its settlement with the Doan plaintiffs was reasonable.

4. Award of Damages

Penn National asserts that our award of $1.5 million for the settlement and attorneys' fees ($53,000 for Mr. Grimes' services and $96,000 for DLA Piper') was erroneous in the context of this declaratory judgment. Penn National claims an award is not required because Erie Insurance Company, has already paid the Doan family on Superior Walls' behalf. Penn National appears to extend its argument to attorney fees and costs incurred by Superior Walls in this declaratory action. These arguments fail because of Penn National's bad faith in the Underlying Action.

Generally, the rule is that parties pay their own attorney fees and costs in a declaratory action, but exceptions apply in insurance coverage cases if an insurer has, in bad faith, refused to defend an action brought by a third party. Regis Ins. Co. v. Wood, 852 A.2d 347, 351 (Pa. Super. 2004); Kelmo Enterprises, Inc. v. Commercial Union Ins, Co., 426 A.2d 680, 685 (Pa. Super. 1981).

[9] See Findings of Fact, Conclusions of Law, paragraph 56-60

"Bad faith will be shown where an insurer has for a frivolous or unfounded reason refused to pay the proceeds of a policy to its insured." Hollock v Erie Ins. Exch., 842 A.2d 409, 416 (Pa. Super. 2004).

The test to determine bad faith is whether an insurance company has a reasonable basis to deny, and if not, whether the company knew or recklessly disregarded this lack of reasonability. Terletsky v. Prudential Property & CA's. Ins. Co., 437 Pa. Super. 108, 649 A. 2d 680, 688 (1994). Here we found Superior Walls was exposed to major liability and damages potentially in excess of a $2,000,000 aggregate coverage. And, less than two months before trial, Penn National stopped defending its additional insured.

Penn National argues there is no prejudice to Superior Walls since Erie, possibly in a capacity as an excess carrier, has already picked up its attorney bills. Whether this is true in the context of this declaratory judgment case, we do not know, and we have made no finding on the issue. Nonetheless, Penn National's bad faith makes Erie's precise role irrelevant.

Reviewing a bad faith refusal to defend, the Court held in F.B. Washburn Candy Corp, 541 A.2d 771, 774 (Pa. Super. 1988), that 1) an insurer that had refused to defend an insured under a policy was obligated to reimburse an excess carrier for costs incurred by the excess carrier in rendering a defense; and 2) the original carrier that had refused a duty to defend was not responsible for costs incurred in declaratory judgment action *unless the refusing insurance company had acted in bad faith.*

Where, as here, there is a finding of bad faith, remand appears to be necessary under *Washburn* to determine Superior Walls' attorney fees and costs in this declaratory action case.

5. Pre-judgment interest

Penn National argues that we have committed error by awarding pre-judgment .Penn Nationals' points are legal; they are not equitable in nature. These legal claims appear to be procedural and not substantive: (1) prejudgment interest is not recoverable in a declaratory judgment action with no other causes of action, (2) Superior Walls pled only declaratory judgment, (3) Superior Walls did not request prejudgment interest in its complaint, and (4) the record does not disclose evidence that Superior Walls paid the settlement and there is no basis to calculate the amount of interest due.

Our pre-judgment award, however, is based on equitable considerations rooted in fair dealing and the interest of justice. With respect to pre-judgment interest, "[T]he fairest way for a court to decide questions pertaining to interest is according to a plain and simple consideration of justice and fair dealing". Kaiser v. Old Republic Ins. Co. 761 A.2d 748, 755 (Pa, Super. 1999).

Going back to the Underlying Action, Penn National was on notice as far back as October 2, 2014, that it was in violation of a court ordered duty to defend with indemnification.

The determining factor driving this Court's exercise of discretion to award an equitable remedy is Penn National's bad faith. The company's conduct places equitable interests of fair dealing and the interest of justice squarely in play through a remedy of pre-judgment interest. Linde v. Linde, 220 A.3d 1122, 1150 (Pa. Super. 2019) (Our courts have generally regarded the award of pre-judgment interest as not only a legal right, but also an equitable remedy awarded to an injured party at the discretion of the trial court."). Here, we find acknowledgement of the importance of fair dealing in basic contractual responsibilities between an insurance company and an insured to be compelling under the circumstances of this case. Penn National left its insured defenseless less than two months before a major jury trial with millions of dollars at stake. Only a few days earlier the insurance company had refused to allow its assigned attorney to negotiate at a Settlement

Conference and did so under false pretenses. Then at this declaratory judgment trial, it was shown that the potential risk to Superior Walls was indeed substantial and the settlement agreed to was clearly reasonable. Establishing these relatively straightforward points in this declaratory action cost Superior Walls substantial sums and considerable exertion and patience.

An equitable remedy such as pre-judgment interest should be affirmed when it is based on facts and not ill will or prejudice. *Linde* at 1150 quoting Commonwealth v. Eichinger, 591 Pa. 1, 915 A.2d 1122, 1140 (2007)(Courts will not disturb a discretionary ruling unless there is an abuse which exists "where the court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable or the result of partiality, prejudice bias or ill will.").

Superior Walls has been substantially harmed by Penn Nationals' bad faith and delay, and not just by damages associated with its settlement and its attendant attorney fees and costs. Also present here are the frustrations, anxieties and time expenditures associated with Superior Walls' staff and management coping with bad faith in one case over many years. This is a remedy awarded in recognition of the unfair delay Penn National imposed on Superior Walls. As such, equitable pre-judgment interest is analogous to those available in law to account for delay. See. Helpin v. Trustees of University of Pennsylvania, 969 A.2d 601, 620 (Pa. Super. 2009) (Pre-judgment interest is not "interest as such" but rather "compensation for delay in the nature of interest.") In this sense, pre-judgment interest is akin to damages for breach of contract where pre-judgment interest becomes payable going back to the date of the breach. See Benefit Trust Life Ins. Co. v. Union Nat. Bank of Pittsburg, 776 F.2d 1174, 1179 (3rd Cir. 1985).

Penn National's bad faith compounded many errors in handling Superior Walls. A measure of relief for Superior Walls own corporate injury is pre-judgment interest.

CONCLUSION

For the reasons explained here, we respectfully request the Court to affirm. We also request remand, if appropriate, to determine attorney fees and costs spent by Superior Walls in this declaratory action.

BY THE COURT

RAMY I. DJERASSI, J.