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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefler Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

Appellate Case No. 2022-000761

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.; Sam J. Crain & Co., Inc.; and South
Carolina Property and Casualty Insurance Guaranty Association, Defendants,

Of whom Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

**REPLY TO RETURN TO MOTION TO DISMISS
APPEAL OF INTERLOCUTORY DISCOVERY ORDERS**

Peter D. Protopapas, in his capacity as the Receiver for Covil Corporation (“the Receiver”), hereby submits this Reply to Pennsylvania National Mutual Casualty Insurance Company’s (“Penn National”) Return.

In one breath, Penn National argues “the orders here do not compel the production of anything” and, in another breath, it argues “the documents to be turned over include hundreds of thousands of pages of private, confidential information.” (Ret. pp. 6, 9 n. 7.) To borrow a word from Penn National, this is “illogical.” (Ret. p. 10.) Penn National claims both that these orders are not interlocutory discovery orders because they do not compel production and that the Court should prevent the production of the documents the orders compel. Despite Penn National’s

tortured interpretation and unsound mental gymnastics, the May 5 Order grants the Receiver's motion to compel and compels Penn National to produce the following documents to the Receiver: (1) certain historic insurance policies and policy-related information issued prior to 1992, (2) information concerning code keys for Penn National's policy prefixes, (3) "all information that was disclosed to Ellis & Winters and used as a basis for identifying policy numbers for the three newly discovered Covil insurance policies located by Ellis & Winters on March 17, 2022, and (4) "all underwriting documentation in its possession, custody, or control for all the Receiverships for which Mr. Protopapas is the court-appointed Receiver." (May 5 Or. pp. 8–11.) The May 26 Order denies reconsideration of the May 5 Order. These orders are quintessential interlocutory discovery orders that are not appealable.

In fact, what Penn National fails to tell this Court is that it is actively and concomitantly seeking review of the very same interlocutory discovery orders with the Supreme Court. On June 6, 2022, Penn National filed a Petition for Writ of Certiorari requesting the Supreme Court review the May 5 and May 26 orders.¹ See Exhibit A, Penn National's Petition for Writ of Certiorari, Appellate Case No. 2022-000785. Penn National filed the Petition in the original jurisdiction of the Supreme Court seeking extraordinary relief by requesting immediate review of the unappealable interlocutory discovery orders. *Rowe v. City of W. Columbia*, 334 S.C. 400, 407–08, 513 S.E.2d 379, 383 (Ct. App. 1999) ("A writ of certiorari is an extraordinary form of relief that generally is used only in the absence of other effective relief."); *Oncology and Hematology Assocs. of S.C. v. S.C. Dep't of Health and Env'tl.*, 387 S.C. 380, 387–88, 692 S.E.2d 920, 924

¹ The Receiver filed a Return to the Petition for Writ of Certiorari arguing that the Petition lacked merit, was improper, and that no emergent circumstances existed to justify the Supreme Court granting such extraordinary relief to bypass this Court and review the unappealable interlocutory discovery orders. See Exhibit B, Return to the Petition for Writ of Certiorari, Appellate Case No. 2022-000785. The Petition is currently pending before the Supreme Court.

(2010) (explaining the Supreme Court can grant a writ of certiorari “to review a discovery order where exceptional circumstances exist” but its willingness to do so “will be as rare as the proverbial ‘hen’s tooth’”).

This appeal is an improper attempt by Penn National to forum shop in our appellate courts. It not only is a waste of our appellate courts’ limited judicial resources but also interferes with the fair administration of justice and creates the danger of inconsistent rulings among this Court and the Supreme Court. A party cannot cast a wide net by seeking the same review in multiple appellate courts in hope of receiving a favorable ruling from one of them. Penn National’s pursuit of the extraordinary remedy of a writ of certiorari in the Supreme Court’s original jurisdiction to review unappealable interlocutory discovery orders is entirely contradictory to the arguments it raises to this Court and borders on a violation of its duty of candor to our courts. Penn National cannot claim that the discovery orders are immediately appealable because they act as contempt orders while also maintaining that the Supreme Court should step in to grant the extraordinary relief of immediately reviewing the orders because they are unappealable interlocutory discovery orders. The insurers of Covil, including Penn National, have consistently shown that they will assert any argument, no matter how frivolous, and bend our rules of procedure to subvert justice and delay rulings on important matters of South Carolina law.²

² See October 16, 2019 Order, Appellate Case No. 2019-001651 (dismissing Zurich American Insurance Company, United States Fidelity and Guaranty Company, and Sentry Insurance a Mutual Company’s notices of appeal because the appealed order was an interlocutory discovery order); October 16, 2019 Order, Appellate Case No. 2019-001654 (denying petition for writ of certiorari to review an interlocutory discovery order); February 13, 2020 Order, Appellate Case No. 2020-000206 (dismissing Zurich American Insurance Company and United States Fidelity and Guaranty Company’s notices of appeal as improper due to timely pending post-trial motions); May 22, 2020 Order, Appellate Case No. 2020-000749 (denying petition for writ of mandamus and finding it “not appropriate” because recusal decision was not ministerial); June 17, 2020 Order, Appellate Case No. 2020-000791 (dismissing United States Fidelity and Guaranty Company’s petition for a writ of supersedeas as improper due to no pending appeal); July 30, 2020 Order,

Penn National’s disingenuous conduct does not end there. It asserts to this Court that the circuit court’s order compelling the production of documents “order[ed] the payment of punitive monetary sanctions.” (Ret. p. 6.). This is untrue. Nowhere in the order does the Court order Penn National to pay monetary sanctions. What Penn National is really arguing is that the cost of complying with the order compelling the production of documents is too burdensome.³ This illustrates the true nature of the order as an interlocutory discovery order.

The fact that Penn National believes that it should not be required to incur costs to comply with the order compelling production does not transform the order into a contempt order. Requiring a party to expend resources to comply with its discovery obligations in litigation is commonplace and is not a monetary sanction ordered by the court. Our courts have decided that the fact that a party will have to expend resources to continue litigating a case is not a good enough reason to deviate from established precedent and allow for an immediate appeal from an interlocutory order. *See, e.g., Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (“Avoidance of trial is not a ‘substantial right’ entitling a party to immediate appeal of an interlocutory order.”). Throughout the Return, Penn National misrepresents the nature of the orders to this Court

Appellate Case No. 2020-000845 (dismissing United States Fidelity and Guaranty Company’s appeal due to its status as a non-party to the action).

³ Although the Receiver does not believe the Court needs to delve into the specific facts of the discovery dispute, the Receiver notes Penn National misrepresents to the Court that the cost of compliance for producing the documents “has been estimated to cost up to \$1 million.” (Ret. p. 4.) As discussed in the Receiver’s Return to Penn National’s Petition for Writ of Certiorari, Ellis & Winters estimated that the cost of digitizing Penn National’s entire microfiche repository could cost between \$240,000 to \$960,000. (Ret. to Pet. p. 5–6.) Specifically, Ellis & Winters received two estimates, one for 85 cents per microfiche card and another for \$4 per microfiche card. (*Id.*) However, the circuit court did not order Penn National to digitize and produce its entire microfiche repository. Instead, it ordered Penn National to digitize and produce a subset of its microfiche repository that contained relevant documents, which Ellis & Winters estimated would be as little as half of the entire repository. (*Id.*) Penn National grossly exaggerates the cost of compliance and misrepresents that the circuit court ordered Penn National to produce all records in its entire microfiche repository.

as contempt orders in hope that the Court will review the unappealable discovery orders. This Court should deny Penn National's tortured attempts to characterize a routine interlocutory discovery order as a contempt order.

Essentially, Penn National's argument is that it should not be required to produce these documents. It construes the order as a contempt order for purposes of seeking review in this Court and an interlocutory discovery order for purposes of seeking extraordinary review in the Supreme Court. In doing so, it plays fast and loose with the facts of this case and propounds contradictory sky-is-falling arguments to our appellate courts in hopes that one of our appellate courts will prevent it from having to produce the documents. This is clearly improper, and this Court should deny Penn National's attempts at gamesmanship and dismiss this appeal from interlocutory discovery orders.

Respectfully submitted,

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June 21, 2022.

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jean H. Toal, Circuit Court Judge

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South Carolina Property and
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Guaranty Association,

Defendants.

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CERTIFICATION OF COUNSEL

Counsel for Petitioner Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) requests that the Supreme Court of South Carolina accept for review an order entered by the circuit court on May 5, 2022 and an order denying Penn National’s motion for reconsideration entered on May 26, 2022. In these orders, the circuit court took the unprecedented step of commanding Penn National to image and digitize its entire repository of historic commercial lines insurance policy related documents stored on microfiche and to allow opposing counsel to have unrestricted and unfettered access to the same. Penn National’s microfiche records include more than 200,000 historic policies, with the commercial line policies alone being stored on approximately 300,000 microfiche cards, each of which is comprised of up to 60 images, meaning that there are roughly 18 million pages of commercial lines policies stored on microfiche. These documents including private information for thousands of individuals and entities that have no relationship whatsoever to this litigation.

This matter presents exceptional circumstances, specifically (1) it involves a novel issue of law in the context of asbestos coverage litigation; and (2) if not immediately reviewed by this Court, the rights of Penn National and the numerous insureds to whom it issued historic policies of insurance will forever be lost. Penn National respectfully requests that this Court accept its Petition for Writ of Certiorari to review the orders issued in this case. Penn National has also filed a Notice of Appeal of the orders; however, this matter has not been reviewed by the Court of Appeals. Penn National has also contemporaneously filed a Petition for Writ of Supersedeas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the circuit court appropriately ordered Penn National to image and digitize its microfiche repository of historic commercial lines policies.
2. Whether the circuit court appropriately ordered that opposing counsel have

unrestricted and unfettered access to Penn National's microfiche repository of historic commercial lines policies after the same is imaged and digitized at Penn National's expense.

STATEMENT OF THE CASE

Covil Corporation ("Covil"), a South Carolina corporation formed in 1954, was in the business of selling, distributing, and installing insulation products, some of which allegedly contained asbestos. (Appx., pp. 25-26, ¶ 7) In 1991, Covil effectively ceased operations and its charter was thereafter administratively revoked. (*Id.*) Covil has been sued in numerous lawsuits brought by individuals allegedly injured through their exposure to asbestos, or their estates, claiming that such injuries were caused by Covil's alleged distribution and/or installation of asbestos-containing products. (*Id.*) See, e.g., *Covil Corp. v. Zurich Am. Ins. Co.*, 2020 U.S. Dist. LEXIS 33140, *4-5 (D.S.C. 2020); *Zurich Am. Ins. Co. v. Covil Corp.*, 2020 U.S. Dist. LEXIS 138062, *15 (M.D.N.C. 2020).

In 2017, this Court appointed Retired Justice Jean Hofer Toal to serve as Chief Judge for Administrative Purposes over all asbestos litigation filed in the South Carolina state court system. In this role, Ret. Justice Toal has exercised jurisdiction over both liability lawsuits as well as related insurance coverage litigation. On her own motion, on November 2, 2018, Ret. Justice Toal appointed Peter D. Protopappas to serve as a Receiver for Covil to manage its affairs under South Carolina law.¹ (Appx., pp. 37-39)

On or about April 27, 2020, Covil, by and through its Receiver, filed the present action against Penn National and others. In the Complaint, Covil acknowledged that Penn National

¹ Ret. Justice Toal found that certain of Covil's primary insurers, specifically United States Fidelity and Guaranty Company, Zurich American Insurance Company, and Sentry Insurance, were inappropriately responding to civil litigation filed against Covil without any involvement from Covil, which was, at that time, no longer in existence. Therefore, Ret. Justice Toal held that these three carriers were "alter egos" of Covil. Penn National was not one of these carriers.

issued two policies of general liability insurance to Covil: (1) Policy No. 515 50 28 53-7, for the policy period of March 31, 1986 to March 31, 1987 (“1986-87 Policy”); and (2) Policy No. 515 50 28 53-8, for the next policy period of March 31, 1987 to March 31, 1988 (“1987-88 Policy”) (collectively, the “Policies”). The Complaint also noted that the liability limits contained in both Policies are \$1 million per occurrence and in the aggregate. (Appx. p. 26, ¶ 8) The Complaint seeks a declaration regarding the interpretation of the Policies. (Appx. pp. 28-31, ¶¶ 14-26)

1. *The Extensive Investigation of Penn National’s Insurance Repository.*

Penn National is a regional insurance company that has been in existence since 1919. It issues policies of insurance to both individuals and companies in eleven states. The policies of insurance that Penn National issues to businesses include workers compensation, inland marine, property, commercial general liability, automobile liability, and excess policies. (Appx., pp. 264-65, ¶ 18)

When it began to store its historic policies of insurance, decades before it was involved in any asbestos coverage litigation, Penn National stored its policies by policy number. (Appx. p. 420) Penn National has a Document Retention Policy. Under this Policy, all non-workers compensation policy documents must be retained for twenty-five (25) years from cancellation or non-renewal date. (Appx., p. 265, ¶ 19)

Initially, Penn National stored its historic insurance policies on microfiche cards. In 1992, Penn National implemented an electronic storage system, ImageRight, but Penn National stopped using this version of the electronic storage system in 1995. Between 1995 and 2003, Penn National stored paper copies of its insurance policies. These documents are contained in 5,800 boxes located in an Iron Mountain facility in Pennsylvania. Between 2003 and 2005, Penn National

stored its insurance policies in a hybrid of electronic and paper copies. After 2005, all policies of insurance issued by Penn National have been stored electronically. (Appx., pp. 264-65, ¶¶ 17-19)

Given that its repository of non-electronic historic insurance policies are stored by policy number, Penn National can readily search for and obtain a copy of a policy of insurance once it is provided with a policy number. If no policy number is provided, Penn National can conduct a search of its electronic underwriting records (for the time periods from 1992 to 1995 and 2003 to present) by entering an entity's name to determine if Penn National has any electronic record of an insurance policy that was issued to that entity. (Appx. p. 256, ¶ 8) Electronically stored policy information is retained in the system by the first, or primary, named insured shown on declarations pages of insurance policies. (*Id.*) Therefore, Penn National can utilize this database to search for names of entities. The electronic search will produce matches to the name searched, along with the insured's city and state, policy number, and type of coverage issued. Once the policy number is obtained through the search, Penn National can search its repository of historic insurance policy documents and obtain a copy of the policy. (Appx., pp. 256-57, ¶¶ 8-10)

The Policies at issue in this case were initially located by Penn National approximately four years ago in response to a subpoena issued to Penn National in May 2018 by counsel for plaintiffs in an underlying asbestos case in which Covil was a defendant.² (Appx. p. 255, ¶ 4) The subpoena requested copies of insurance policies issued to Covil, and it attached a list of all the policies of insurance with policy numbers issued to Covil from March 31, 1969 through March 31, 1992 by various insurers, including the Policies issued by Penn National which are at issue in this case. (Appx. pp. 363-67) Pursuant to that subpoena, Penn National located and produced copies

² The subpoena was issued in the following underlying asbestos case: *Finch v. BASF Catalysts, LLC, et al.*, Civil Action No. 1:16-cv-1077, United States District Court for the Middle District of North Carolina.

of its Policies for Covil using the policy numbers provided. Penn National also conducted an electronic search to see if there were any commercial general liability policies that were issued either before its 1986-87 Policy or after its 1987-88 Policy, there were none. (Appx. p. 290) Covil has had complete copies of these two policies since 2018.

The Receiver for Covil began tendering Covil related asbestos cases to Penn National in February 2020. Penn National has since contributed to the defense of all asbestos lawsuits filed against Covil that have been tendered to Penn National. Penn National has further attended the mediations conducted in these lawsuits, and it has also participated and collaborated in countless pre-mediation and pre-trial conferences with Covil's Receiver, Covil's asbestos defense counsel, and other participating insurers with respect to strategy, valuation, and contribution to settlements based upon the applicable insurance coverage and the known evidence in each underlying Covil asbestos case.

After the Complaint in this action was filed in April 2020, Penn National has been engaged in extensive discovery concerning its insurance repository and searches for Covil related policy documents. Specifically, Covil has served the following written discovery on Penn National:

- Covil Corporation's First Interrogatories and First Requests for Production to Defendant Penn National (served on April 9, 2021): The twenty-six (26) interrogatories and thirty-three (33) requests for production of documents sought information regarding all insurance policies issued to Covil or on which Covil was insured, all underwriting files, total amounts of premium paid by Covil, all claims submitted by Covil for insurance coverage under any insurance policy, all reserves on any such claims, loss runs on each policy of insurance, detailed description of what Penn National did to search for policies issued to Covil, all locations where such searches were conducted, all steps taken by Penn National to

determine the terms and conditions of any policies issued to Covil, communications with reinsurers, reinsurance documents, retention policies, storage policies, all electronic systems used by Penn National to store its policies, process is how policy numbers are assigned, how liability payments are saved and stored, any documents in which the word, “Covil,” is used, communications with defense counsel for Covil, membership in Insurance Services Office, participation in an April 1977 meeting held by the American Insurance Association, claims handling policies, all policies of insurance issued to 240 listed contractors, and certificates of insurance or other coverage issued to 650 listed facilities. (Appx. pp. 51-91)

- Penn National served its responses to Covil’s first set of discovery requests on May 10, 2021 (Appx. pp. 92-137), and supplement responses on June 11, 2021 (Appx. 138-77). In conjunction with its responses, Penn National produced a voluminous set of Covil related policy documents, and offered to produce additional documents upon agreement on a Confidentiality Agreement and Protective Order.
- Covil’s Second Set of Requests for Production of Documents (served on November 19, 2021): Covil sought documents regarding litigation holds placed by Penn National. (Appx. 178-82)
 - Penn National served its responses to Covil’s second requests for documents on December 20, 2021. (Appx. pp. 183-89)
- Covil’s Second Set of Interrogatories, Third Requests for Production of Documents, and First Requests for Admissions (served on January 18, 2022): The twenty-two (22) additional interrogatories, twenty-four (24) additional requests for production of

documents, and twenty-six (26) requests for admission requested information regarding why certain historic insurance policies were not destroyed pursuant to Penn National's retention policy, additional information regarding Penn National's retention policy, information regarding all historic insurance policies that were destroyed pursuant to Penn National's retention policies after June 2018, including identification of named insureds and additional insureds on those policies, notices provided to insureds regarding the destruction of historic insurance policies, all historic insurance policies that were not destroyed pursuant to Penn National's retention policy, Penn National's destruction/purge practices, how historic insurance policies are identified to be destroyed, all communications between Penn National and any other insurer for Covil, all communications with Iron Mountain, all training relating to Penn National's retention policy, Penn National's litigation hold policy, all litigation holds placed after June 2018, all sanctions issued to Penn National and its counsel, all spoliation orders received by Penn National policyholders, policies written to Louisiana and Wisconsin insureds prior to 1990, and all litigation where Penn National was sued in a direct action in Louisiana and Wisconsin. (Appx. pp. 190-210)

- Penn National responded to Covil's second set of interrogatories, third requests for production of documents and requests for admission on February 17, 2022. (Appx. pp. 211-246) On March 9, 2022, Penn National served its supplemental response to Covil's third set of requests for production of documents, and upon execution of a Confidentiality Agreement and Protective Order, Penn National also produced over 2,500 pages of additional documents.
- Covil's Fourth Set of Requests for Production of Documents (served on May 13, 2022):

Covil served nineteen (19) additional requests for production of documents, including requesting documents regarding reviews by Penn National of documents it destroyed after 2010 pursuant to its retention policy, all self-audits generated in connection with Penn National's record retention policy, additional documents regarding Penn National's litigation hold regarding Covil cases, copies of Penn National's Standards of Conduct policy, copies of Penn National's legal review guidelines, a spreadsheet of all historic insurance policies stored at Iron Mountain, all documents contained in the boxes from Iron Mountain reviewed by Ellis & Winters, Penn National's organization of historic insurance policies contained on microfiche, inventory data sheets for historic insurance policies stored by Penn National, all communications regarding orders entered by Ret. Justice Toal, and all communications with Covil's asbestos defense attorneys. (Appx. pp. 247-53)

In addition to the forty-eight (48) interrogatories, seventy-eight (78) requests for production of documents, and twenty-six (26) requests for admission, Covil has taken the deposition of Brent Reifsnnyder, Penn National Director of Administrative Services, (Appx. pp. 408-507) and has also conducted two separate Rule 30(b)(6) depositions of Penn National, for which Boyd Wright, Penn National's Senior Home Office Claims Examiner, served as Penn National's corporate designee. (Appx. pp. 273-407, 508-606) Covil is also currently seeking a third Rule 30(b)(6) deposition of Penn National. (Appx. pp. 16-17)

While Covil has never produced a policy number or even any secondary evidence of any additional commercial general liability policies issued by Penn National to Covil other than the 1986-87 Policy and the 1987-88 Policy, both of which were produced to Covil, Covil demanded that Penn National manually search its entire repository of historic policies to determine

if any additional policies of insurance issued to Covil exist and if there are any policies of insurance on which Covil is covered as an additional insured. (Appx. pp. 607-10) Penn National objected to performing a manual search on the grounds that it would be unduly burdensome without being provided with a policy number to perform the search. (Appx. pp. 611-24) Specifically, Penn National stores its historic policies on microfiche contained in 148 boxes—which include approximately 300,000 microfiche cards containing commercial lines policies, each of which is comprised of up to 60 images, meaning that there are roughly 18 million pages of commercial lines policies stored on microfiche—and in paper documents contained in 5,800 boxes stored at an Iron Mountain facility. (Appx. p. 268, ¶¶ 8-9; 653) A manual search of these millions of documents is not reasonable and would be all-consuming and take an inordinate amount of time.

Covil further demanded that Penn National search its millions of policy related documents to find any policies that Penn National may or may not have issued for 240 different “contractors” and 650 separate “facilities” on which Covil is not a named insured, but rather may theoretically qualify as additional insured. (Appx pp. 65-71) This request was made by Covil without any evidence indicating that Penn National issued policies to any of these 240 “contractors” or 650 “facilities” or that Covil indeed had any substantive relationship with any of the “contractors” or “facilities”.

Even without any evidence indicating that Penn National may have issued a policy for any of the 890 entities listed by Covil, or that Covil had any relationship with any of the entities, Penn National searched its electronic system for any information regarding the entities. After dedicating many hours to this project, Penn National’s search generated a result of four policies: an inland marine policy which did not provide general liability insurance coverage, a policy issued to an entity after Covil was no longer in existence and that had been purged pursuant to

Penn National's Document Retention Policy, and two additional general liability policies issued to other entities which did not provide coverage to Covil as an insured or additional insured. (Appx. pp. 255-59, ¶¶ 7-20) Internal Penn National communications concerning these policy related documents were produced with Penn National's responses to Covil's discovery request, and Penn National confirmed that it would produce the policy documents subject to a protective order as such documents were confidential in that they related to non-Covil entities. (Appx. p. 172)

Still not satisfied with the results of Penn National's search for policies, Covil moved to compel Penn National to perform a manual search of its historic files. After a hearing on such motion, the circuit court directed Covil's asbestos defense counsel, Ellis & Winters, LLP ("Ellis & Winters") to conduct a review of Penn National's repository of historic policy related documents to confirm whether there is a way to search Penn National's archived records for policy documents for a specific insured without a policy number. (Appx. p. 652) Three Ellis & Winters employees spent two days and 32 hours sampling approximately 100 boxes of paper documents. (Appx. pp. 690-706) Subsequently, two Ellis & Winters employees spent another two days and 21.7 hours reviewing microfiche cards. (*Id.*) After its search, Ellis & Winters submitted a report to the circuit court, which confirmed that Penn National actually stored its historic policy documents by policy numbers; as Penn National had repeatedly represented in this litigation. (Appx. pp. 652-56) Having access to Penn National's historic policy documents, Ellis & Winters was unable to find any additional commercial general liability policies that were issued to Covil or under which Covil was an additional insured.³ (*Id.*)

³ The Ellis & Winters employees, using a list of policy numbers apparently provided by Covil to them (but not to Penn National), were able to locate three additional policies of insurance. However, these policies were only located by Ellis & Winters because it had access to policy numbers for the policies. (Appx. p. 654) Furthermore, it is undisputed by the parties that these policies of insurance are not applicable to respond to Covil's asbestos liability because the policies

2. *The Orders at Issue.*

A hearing was conducted on April 11, 2022, addressing Ellis & Winters' report and other pending motions. (Appx. pp. 657-75) As a result of the hearing, the circuit court entered an Order on May 5, 2022⁴, which ordered that Penn National: (1) must now image and digitize its microfiche repository of historic commercial lines insurance policies, and (2) allow Covil and its attorneys to have unfettered access to this repository:

The Court also DIRECTS Ellis & Winters to use its professional judgment to solicit bids from two or more vendors with experience imaging microfiche, to select an appropriate vendor (the "selected vendor"), to award the bid, and to supervise the selected vendor's imaging of the microfiche cards into a format that is in a searchable database. ...

... The Receiver and his outside counsel therefore must have full and unfettered access to every page of every insurance policy and policy-related document that Ellis & Winters and its selected vendor make available in the database. This will necessarily include reviewing records of other insureds' policies.

The Receiver will be entitled to review the policy records uploaded to the database to identify potentially responsive documents. The Receiver will be entitled to examine each and every policy to understand whether it is a policy that in any way, shape, or form covers Covil's asbestos responsibilities and liabilities. Because of Penn National's intransigence, the Court will not limit the Receiver's access to any of the information in the microfiche database. ...

(Appx. pp. 12-13) (emphasis added)

The "intransigence" referred to in the above quote is Penn National's decision, made decades before its involvement in any asbestos coverage litigation, to store its historic insurance

were an inland marine policy, a boiler machine policy, and a commercial automobile policy, and therefore, provided no general liability coverage to Covil. (*Id.*)

⁴ The circuit court's order indicates that it applies in this case as well as any other matters in which Peter Protopapas is appointed the Receiver, and specifically identifies Case Numbers 2020-CP-40-04475, 2021-CP-40-03484, 2021-CP-40-01821, 2020-CP-40-05526, 2020-CP-40-01364, and 2020-CP-40-01952.

policies by policy number, Penn National's refusal to comply with Covil's unreasonable demand that Penn National manually search its historic insurance policies for any policies issued to Covil, and Penn National's failure to voluntarily incur the enormous expense to image and digitize its historic repository of insurance policy documents:

... This Court fully expects than an insurance company served with discovery requests from a receiver in this state, seeking the identification and production of insurance policies issued to the company as a named insured or which otherwise includes the company as a supplemental or additional insured, will search its entire repository of insurance policies and policy-related information for documents identifying the defunct company at issue. The Receiver need only provide the insurance company with the name of the defunct company for which it is seeking to marshal insurance assets. For the avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number.

* * *

Despite this Court's prior orders, as of November 5, 2021, Penn National had not performed a complete manual search of its historic insurance policies contained on microfiche cards. Nor had it processed the microfiche cards so that the information could be searched electronically. ...

* * *

... The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance policies (as well as non-Covil Receivership policies) amounts to a total and complete refusal to comply with its discovery obligations. It could well have done exactly what Ellis & Winters has proposed here. Penn National could have selected a vendor, processed the information on its microfiche cards, and conducted a review. It did not. Instead, Penn National took the defiant stance that it could not search for historic policies on its microfiche cards without being provided with a policy number. ...

(Appx. pp. 7-8, 9, 11)

As Ellis & Winters found during its investigation, Penn National's archived microfiche records contain more than 300,000 microfiche cards corresponding to commercial line policies

alone (with each card containing up to 60 images), meaning that there are roughly 18 million pages of commercial line policy related documents stored on Penn National’s microfiche cards. (Appx. pp. 653, 656) Ellis & Winters found that it could take up to 45 minutes to print the images on a single microfiche card, meaning that it could take roughly 5,625 workweeks to just print the images stored on microfiche for commercial line policies. (*Id.*) Furthermore, Ellis & Winters found that the cost to image and digitize Penn National’s microfiche repository of commercial lines policies would be between \$240,000 to \$960,000. (Appx. p. 656)

As such, the circuit court held that Penn National was “intransigent” and ordered Penn National to image and digitize its repository of history commercial lines policies and to provide the counsel for the Receiver unfettered access to the database created. The circuit court attempted to justify its order and characterization of Penn National as “intransigent” because Penn National did not voluntarily agree to either spend an unreasonable amount of time and resources manually searching its repository of historic policies or incur hundreds of thousands of dollars to image and digitize its repository in response to the Receiver’s requests (which came without any policy numbers or other secondary evidence to suggest that Penn National had issued any policies responsive to the Receiver’s requests that had not already been produced).⁵

On May 26, 2022, the circuit court denied Penn National’s Motion for Reconsideration of

⁵ The circuit court’s order also directs Penn National to produce yet further documents, including internal “policy prefix code keys”, information provided by Penn National to Ellis & Winters during its review of Penn National’s microfiche, and all underwriting documents for all Receivership entities. The order further mandates that Penn National must undergo a third Rule 30(b)(6) deposition on topics that certainly could have been addressed during the previous Rule 30(b)(6) depositions that Penn National has had to undergo. Finally, the order further penalizes Penn National by unnecessarily requiring that a copy of the order be sent to the South Carolina Department of Insurance. (Appx. pp. 13-14, 16-18) All of these orders were objected to and addressed by Penn National in its Motion for Reconsideration, and they are likewise included as issues that should be subject to review by this Court.

its May 5, 2022 Order. (Appx. pp. 20-23)

ARGUMENT IN SUPPORT OF PETITION

1. Whether A Circuit Court May Order An Insurance Company To Image And Digitize Its Entire Repository Of Historic Insurance Policies And Allow The Opposing Party To Have Unfettered Access To These Documents In This And Other Cases Is A Novel Question Of Law That Needs To Be Addressed By This Court.

In this case, the circuit court has taken the unprecedented step of mandating that Penn National image and digitize its entire historic microfiche repository of commercial lines insurance policies and that Penn National allow full and unrestricted access to this created database to opposing counsel. There is simply no justification for such an onerous, burdensome, and expensive fishing expedition – one that will violate the rights and privacy of thousands of insureds to whom Penn National issued insurance policies and who are not involved in the present litigation. Furthermore, the Receiver has issued similar requests for documents to many other insureds in relation to asbestos litigation, and is using the orders at issue in this case as authority to impose similarly onerous, burdensome, and expensive fishing expeditions on other insurers.⁶

The circuit court attempted to justify its extraordinary actions in this case by characterizing Penn National as “intransigen[t].” However, Penn National’s “intransigence” in this case consisted of: (1) the fact that it has always stored its historic insurance policies by policy number; (2) it did not manually search its millions of pages of documents or microfiche films for general liability coverage that may have been issued to Covil; and (3) it previously did not voluntarily

⁶ For example, in *Childers v. Davis Mechanical et al.*, Case No. 2021-CP-40-03484 (Richland County, SC), the Receiver has filed similar Motions to Compel seeking to require insurers to perform unreasonable searches of their historical policy documents. on May 16, 2022, the Receiver filed a Notice of Filing in the *Childers* action, placing the circuit court’s May 5, 2022 Order in the file and claiming that “this Order contains helpful guidance regarding this Court’s expectations regarding the administration of receiverships.” In that one case alone, the Receiver on behalf of various entities has filed seven (7) motions to compel since late 2021 to present, seeking to impose unreasonable obligations on various insurers to search for policy documents.

image and digitize its repository of historic policies. Ultimately, the circuit court is punishing Penn National for making a decision to store its policies of insurance by policy number.⁷ It should not be allowed to do so.

A. *There Is No Legal Requirement That Penn National Store Its Insurance Policies In A Certain Way.*

At its core, the circuit court in the orders at issue is punishing Penn National for the method by which it chose to store its historic insurance policies. However, there has never been any law or regulation promulgated by any federal or state agency that mandates how an insurance company should file and store its policies of insurance. In South Carolina, the legislature has enacted The Insurance Law, S.C. Code Ann. §38-1-10, *et seq.* which governs many aspects of the insurance industry. For example, this law addresses the capital and surplus required of insurance companies (S.C. Code Ann. §§38-9-10, *et seq.*), the investment and investment practices of property and casualty companies (S.C. Code. Ann. §§38-12-410, *et seq.*), the length of time – five years – that losses and claims are to be kept by insurers (S.C. Code Ann. §38-13-130), and what constitutes improper claims practices (S.C. Code Ann. §38-59-20). However, The Insurance Law does not mandate, or even address, a method by which insurance companies are to store their historic insurance policies.

Penn National chose to store its historic insurance policies by policy number. As explained by the Penn National employees, policy numbers are important to an insurance company because

⁷ Ret. Justice Toal erroneously speculated (without any evidence) during the hearing out of which the May 5, 2022 Order was issued that Penn National’s intent in storing policy documents by policy number was to make it difficult to find policies. (Appx. p. 666) However, the employee with Ellis & Winters charged with reviewing Penn National’s archived policy documents stated that he could not speak to Penn National’s intent, but that the terminal digit system used by Penn National to store its policies is commonly used by businesses to store or inventory its historical documents. (*Id.*)

they are a distinct identifier that is specifically associated with a particular insured. Insurance companies do not duplicate their policy numbers. An insured's name, address, or location may be similar to or identical to another insured's name, address, or location. However, the policy number assigned to a certain policy issued to a certain insured is unique. Because policy numbers are distinctive, they provide certainty regarding the issuance of insurance coverage. Mr. Wright testified in his deposition:

Insurance companies, and Penn National is no exception, issue policy numbers for a very specific reason. Name similarity, locations, and other things vary. Policy number is like a Social Security number. It's the identifier for that particular insured.

(Appx. p. 297) Because Penn National stores its historic policies by policy number, Penn National can only reasonably search its microfiche or paper documents by policy number.

It is clear that the circuit court disagrees with how Penn National stores its historic insurance policies. In its order, the circuit court stated: "For avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number."

(Appx. p. 8) Regardless of whether Penn National's decision to store its historic insurance policies by policy number is seen as inappropriate, unwieldy, or even ridiculous; absent a statute, rule or regulation requiring otherwise, a court cannot substitute its judgment on how such insurance policies should be stored and should not be allowed to punish an insurance company for failing to store its historic policies in a certain way. But, that is exactly what the circuit court has done in this case. See, *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 362-63 (1978) ("Finally, the suggestion that petitioners should have used 'different systems' to keep their records borders on the frivolous ... we do not think a defendant should be penalized for not maintaining his records in the form most convenient to some potential future litigants whose identity and perceived needs

could not have been anticipated.”).

B. *There Is No Evidence That Penn National Issued Any Additional Policies Of Insurance That Provided Coverage To Covil As An Insured Or Additional Insured.*

It is significant to note that there is **no evidence** that Penn National issued any general liability policy to Covil other than the 1986-87 Policy and the 1987-88 Policy. This is not a lost policy case. In fact, the undisputed information possessed by all parties to this case is that Covil was completely insured from March 31, 1969 through March 31, 1992, with consecutively issued policies of general liability insurance issued by insurance companies. There are no gaps in coverage. There are no periods where Covil was not insured or even self-insured. Coverage for each policy period was provided by a certain insurance carrier and the policy numbers for each such period are known and identified. (Appx. pp. 602-06)

Additionally, Covil has produced no information or secondary evidence that there may be other general liability insurance policies (not listed on the chart of insurance policy information attached to the subpoena) that may have been issued to it. See, *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968) (burden of proof on person seeking insurance benefits to prove coverage). For example, Covil has not produced any business records, statements for premiums, cashed checks showing payment of premiums, records from agents showing the issuance of policies, or testimony regarding the existence of policies. In fact, Covil has presented no evidence at all that Penn National may have issued other general liability policies to Covil at any time other than the 1986-87 Policy and the 1987-88 Policy. Further, there is no evidence that Covil used any reasonable means to search for any such secondary evidence. Indeed, the order does not reference any such evidence.

The orders at issue reference whether Covil was insured as an “additional insured” on

policies of insurance issued by Penn National. This is a red herring. Generally, a business can be insured on a policy of insurance issued to another entity if the policy contains an endorsement that broadens the definition of “Who Is An Insured” under that policy to include other businesses when that business has a contractual relationship with the named insured which requires such additional insurance and the liability arises out of the named insured’s work. For example, a typical additional insured endorsement states:

A. Section II – Who Is An Insured is amended to include as an additional insured any person or organization for whom [the named insured] is performing operations when [the named insured] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on [the named insured’s] policy. Such person or organization is an additional insured only with respect to liability for “bodily injury”, “property damage”, or “personal and advertising injury” caused, in whole or in part, by:

1. [The named insured’s] acts or omissions; or
2. The acts or omissions of those acting on [the named insured’s] behalf;

in performance of [the named insured’s] ongoing operations for the additional insured.

Dan Ryan Builders W.Va., LLC v. Main St. Am. Assur. Co., 452 F.Supp.3d 327, 332-33 (D.S.C. 2020).

It is extremely improbable that a manual search of historic insurance policies will produce policies under which Covil was insured as an additional insured. First, most additional insured coverage does not actually identify the entity who may qualify for coverage as an additional insured. As demonstrated by the language in the additional insured endorsement quoted above, such coverage is determined first by whether a contract or written agreement exists between the named insured and Covil. Covil has not produced any such contracts in the present case.

Furthermore, as demonstrated by the language above, additional insured coverage is

usually provided to companies for whom the named insured is performing or has performed operations. A common example is in the construction industry. Routinely, general contractors qualify for additional insured coverage under policies issued to a subcontractor. *See, e.g., Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London*, 788 F.3d 375, 377-78 (4th Cir. 2015); *Lendlease (US) Constr. Inc. v. National Fire Ins. Co.*, 2021 U.S. Dist. LEXIS 180377 (D.S.C. 2021). Here, it is undisputed that the asbestos liability asserted against Covil is the result of work or products that Covil brought to facilities in which it performed operations. *See, e.g., Finch v. Covil Corp.*, 388 F.Supp.3d 593, 600-01 (M.D.N.C. 2019). Because Covil was the vendor or subcontractor (and not the general contractor or facility owner), it is highly unlikely that Covil would be entitled to additional insured coverage under policies issued to the businesses where Covil brought its products or performed its operations. Indeed, Covil has never provided any evidence that would support any relationship between Covil and any of the hundreds of “contractors” or “facilities” for which it demands Penn National to search for coverage.

The simple truth is that it is highly unlikely and improbable that a manual search of Penn National’s repository of historic insurance policies would result in the discovery of any general liability policies that provided coverage to Covil as a named insured or as an additional insured. The facts in this case plainly do not justify the extraordinary remedy of requiring Penn National to image and digitalize its microfiche repository of commercial lines insurance policies at a cost of hundreds of thousands of dollars in order to allow the Receiver to engage in a fishing expedition for policies that it has no good faith basis to believe exist, and to then provide unrestricted access to such database to Covil, its Receiver, and their counsel.

C. *The Order Entered By The Circuit Court Is An Impermissible Fishing Expedition And Should Not Be Allowed To Stand.*

Generally, parties are allowed wide latitude in pursuing discovery in civil cases. However,

this Court has previously limited discovery that has been found to be abusive and impose an undue burden by expense. *Oncology & Heatology Assocs. of S.C., LLC v. South Carolina Dep't of Health & Envtl. Control*, 387 S.C. 380, 388-89, 692 S.E.2d 920, 924-25 (2010). The order of which Penn National seeks review is oppressive and beyond the pale. By its order, the circuit court is imposing a sanction on Penn National by requiring it to image and digitize its microfiche repository of historic commercial lines insurance policies at great expense and to allow Covil and its attorneys' unrestricted access to the created database. This sanction is based on nothing more than Covil's unfounded and wholly unsupported "hope" that Penn National may have issued more policies under which Covil may be insured for general liability purposes, and the circuit court's readily influenced irritation that Penn National used a storage method with which she disagreed. The circuit court's order in this case is a clear abuse of discretion.

In *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009), this Court established the framework by which a court should review discovery requests for abusiveness and undue burden by expense. Specifically, this Court held that if the party from whom discovery is being sought shows a particularized harm which will be caused by allowing the discovery, the person seeking the discovery has the burden of proving that the discovery sought is both relevant and necessary. *Id.* at 578, 683 S.E.2d at 498. In this case, Penn National has clearly shown that requiring it to perform a manual review of its historic policies of insurance would cause an undue burden by expense. (Appx. pp. 268-69, ¶¶11-12; 468-70) Ellis & Winters advised that Penn National's archived microfiche records contain more than 300,000 microfiche cards corresponding to commercial line policies, with each card containing up to 60 images, meaning that there are roughly 18 million pages of commercial lines policies stored on microfiche cards. (Appx. pp. 653, 656) Ellis & Winters further found that it could take up to 45 minutes to print the images on a

single microfiche card, meaning that it could take roughly 5,625 workweeks to just print the images stored on microfiche for commercial line policies if a manual review of the archived policy documents were to be undertaken. (*Id.*)

The cost to image and digitize Penn National's microfiche repository fares no better. Ellis & Winters has estimated that the cost to image and digitize Penn National's microfiche repository of historic commercial lines policies would be between \$240,000 to \$960,000; a cost ordered by the circuit court to be paid solely by Penn National.⁸ (Appx. pp. 15, 656)

Covil, however, has not shown that requiring the imaging and digitizing of these historic policies is both relevant and necessary to the present case. As indicated more fully above, Covil has not demonstrated by the production of policy numbers or by other secondary evidence that Penn National actually issued policies of general liability insurance to Covil other than the previously produced 1986-87 Policy and the 1987-88 Policy. There is no evidence that Covil even conducted a reasonable search to locate any such secondary evidence. Furthermore, Covil has not shown that there is any chance that a manual search of Penn National's historic insurance policies would actually uncover additional policies of insurance under which Covil would be an insured or additional insured. The circuit court failed to hold Covil to its burden of showing that a manual search of Penn National's historic microfiche repository is relevant and necessary. Instead, the circuit court has imposed on Penn National the extreme expense of digitizing its microfiche

⁸ The circuit court went so far as to prohibit Penn National from even participating in the choice of vendor to image and digitize Penn National's microfiche repository. Therefore, Penn National has no control over the vendor selected, the cost incurred to image and digitize its repository (a cost which the circuit court has imposed on Penn National), the electronic system used, or whether such system is compatible with and can be supported by Penn National's existing computer system. (Appx. p. 15: "The Court also DIRECTS Ellis & Winters to use its professional judgment to solicit bids from two or more vendors with experience imaging microfiche, to select an appropriate vendor (the "selected vendor"), to award the bid, and to supervise the selected vendor's imaging of the microfiche cards into a format that is in a searchable database.")

records and then ordered that Covil, the Receiver, and the Receiver's counsel be provided unfettered access to the entire database, including private information for Penn National's insureds with no connection to Covil whatsoever. Therefore, the circuit court abused its discretion when it ordered the imaging and digitizing of Penn National's historic repository, and providing unfettered access to such database to Covil, the Receiver, and the Receiver's counsel.

This Court's decision in *Hollman v. Woolfson* is instructive. In *Hollman*, this Court accepted a petition for writ of certiorari to review a discovery order that allowed one party to contact and interview the patients of the opposing party. In issuing the writ, this Court found that "allowing the interviews will moot any claim petitioners could raise on appeal that the discovery was erroneously allowed." *Id.* at 577, 683 S.E.2d at 498. Although this Court found that the interviews of non-party patients may be relevant to the claim of violation of the Unfair Trade Practices Act, this Court held that the plaintiff failed to show that such interviews were necessary. The burden of showing that the requested discovery is necessary is on the party propounding the discovery request:

In determining whether information is necessary, the party seeking information must demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat. The trial court must determine whether there are reasonable alternatives available to discover the information.

Id. at 580, 683 S.E.2d at 500 (quoting *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 476, 674 S.E.2d 154, 163 (2009)). By failing to make specific findings as to how the lack of information would impair the plaintiff's case, this Court held that the circuit court abused its discretion in ordering the discovery:

The circuit court committed an abuse of discretion in determining the interviews with the nonparty patients were necessary. Petitioners' treatment of other patients is not necessary to establish any element of

respondents' causes of action. In fact, no information obtained in the interviews could establish whether petitioners breached the standard of care when treating respondents or committed fraud on respondents. As to the UTPA cause of action, the circuit court did not make a specific finding as to exactly how the lack of information obtained from the interviews would impair respondents' presentation of the merits of that cause of action or that there were no reasonable alternatives available to discover the information.

Id. at 581, 683 S.E.2d at 500.

Similarly, in the present case, Covil failed to meet its burden of showing that a manual search of Penn National's historic insurance policies is relevant and necessary to prosecute its declaratory judgment claims in this case. In its order, the circuit court did not make specific findings as to how the failure to perform a manual search would impair Covil's case. In truth, Covil does not have and cannot show that Penn National issued any policies of insurance under which Covil was insured as a named insured or additional insured other than the two policies previously produced, the 1986-87 Policy and the 1987-88 Policy. Because the circuit court did not appropriately support its order, the circuit court abused its discretion in ordering the imaging and digitizing of Penn National's microfiche repository of historic commercial lines insurance policies.

The circuit court further abused its discretion in directing that Covil's Receiver and his attorneys be allowed unrestricted access to the created database of Penn National's repository of historic commercial lines policies. In so ordering, the circuit court never considered more limited alternatives. Instead, the circuit court is allowing the Receiver to access, review, and search Penn National's repository not only for insurance policies under which Covil may be insured but also for every other individual or entity to whom Penn National issued insurance policies. (Appx. pp. 12-13: "The Receiver and his outside counsel therefore must have full and unfettered access to every page of every insurance policy and policy-related document that Ellis & Winters and its

selected vendor make available in the database. This will necessarily include reviewing records or other insured's policies.”)

The order in this case is nothing more than a court-sanctioned fishing expedition. Such fishing expeditions have long been disapproved by this Court. This Court's holding in *Boykin v. Hermitage Cotton Mills*, 180 S.C. 364, 185 S.E. 863 (1936), where the circuit court ordered discovery of eleven years of corporate minutes, applies equally to the present case:

If discovery were allowed to this extent, the petitioner would obtain a great mass of confidential matter, wholly irrelevant to his cause of action. Private records of the Hermitage Cotton Mills, unrelated to the warehouse company, would be opened before him, with resultant damage to the appellant, and with no advantage to the petitioner in the preparation of his pleadings. We can see no reasonable justification for adopting a course which would inevitably result in a fishing expedition.

Id. at 379-80, 185 S.E. at 869.

This Court's decision in *Royster v. Unity Life Insurance Company*, 193 S.C. 468, 8 S.E.2d 875 (1940) is controlling. In *Royster*, the plaintiffs sought discovery of the insurance company's books and records, which the circuit court ordered. This Court noted initially that the discovery order “has all the earmarks of a fishing expedition, an enterprise which this Court has time and again stated it does not favor.” *Id.* at 472, 8 S.E.2d at 877. This Court then vacated the discovery order, holding:

The order appealed from requires the insurance company to produce before the Clerk of Court of Williamsburg County its books and records; - there to be examined and inspected by these five plaintiffs.

This Court is of the opinion that the order should be vacated. To subject the insurance company to such a far-reaching order on the record therein would be vexatious in the extreme. Matters of a confidential and private nature would almost certainly be disclosed to plaintiffs.

Id. at 473, 8 S.E.2d at 877.

The circuit court in the present case has ordered substantially the same relief as was ordered

in *Royster*, that Penn National be required to image and digitize its historic policies and allow Covil and its attorneys to have unrestricted access to these records. Like in *Royster*, matters of a private and confidential nature, specifically policy and policy-related documents issued to individuals, companies, or organizations who are not in any way involved in this case, would then be disclosed without any consent or knowledge by these policyholders. The order in this case, like the order in *Royster*, is “vexatious in the extreme.” Penn National respectfully requests that this Court accept its Petition for Writ of Certiorari to review and vacate the circuit court’s order mandating that Penn National image and digitize its microfiche repository of historic commercial lines insurance policies and that Covil, its Receiver and their attorneys have full and unfettered access to the same.

CONCLUSION

Penn National requests this Court to issue a writ of certiorari to review the circuit court’s unprecedented order mandating that Penn National image and digitize its entire microfiche repository of historic commercial lines insurance policies and, further, allowing the opposing party, Covil, its Receiver, and their attorneys unrestricted access to this database in this and many other current and future cases. The circuit court took this extraordinary action simply because it disagreed with the method by which Penn National stored its historic insurance policies, i.e. by policy number. The facts show that there is no other basis for this action – there is no evidence that Penn National actually issued any additional commercial general liability insurance policies (other than the two policies previously produced) under which Covil would be insured. The truth is that there is no reasonable justification for ordering such a remedy that will inevitably result in a fishing expedition. Penn National requests that this Court protect it from this abusive and unduly burdensome order and accept its Petition for Writ of Certiorari to review and vacate the same.

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Date: June 6, 2022

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefler Toal, Circuit Court Judge

Case No. 2020-CP-40-02098
Appellate Case No. 2022-000785

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty Insurance Guaranty Association, Defendants,

Of whom Pennsylvania National Mutual Casualty Insurance Company is the Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether these interlocutory discovery orders involve exceptional circumstances to warrant the issuance of a common law writ of certiorari?
2. Whether the circuit court acted within its discretion to compel Penn National to produce historic policy documents requested through discovery and to bear the cost of production after Penn National's continued refusal?

IMPORTANT BACKGROUND

This is another case in a long line of cases where Covil's insurers have attempted to bend our rules of procedure to subvert justice and delay rulings on important matters of South Carolina law. Covil's insurers have repeatedly filed interlocutory and improper appeals requiring the Receiver to file motions to dismiss and occupying the time of this Court and the Court of Appeals to review the improper appeals and issue orders of dismissal. See October 16, 2019 Order, Appellate Case No. 2019-001651 (dismissing Zurich American Insurance Company, United States Fidelity and Guaranty Company, and Sentry Insurance a Mutual Company's notices of appeal because the appealed order was an interlocutory discovery order); October 16, 2019 Order, Appellate Case No. 2019-001654 (denying petition for writ of certiorari to review an interlocutory discovery order); February 13, 2020 Order, Appellate Case No. 2020-000206 (dismissing Zurich American Insurance Company and United States Fidelity and Guaranty Company's notices of appeal as improper due to timely pending post-trial motions); May 22, 2020 Order, Appellate Case No. 2020-000749 (denying petition for writ of mandamus and finding it "not appropriate" because recusal decision was not ministerial); June 17, 2020 Order, Appellate Case No. 2020-000791 (dismissing United States Fidelity and Guaranty Company's petition for a writ of supersedeas as improper due to no pending appeal); July 30, 2020 Order, Appellate Case No. 2020-000845 (dismissing United States Fidelity and Guaranty Company's appeal due to its status as a non-party to the action). Penn National's Petition is another example of the insurers' modus operandi.

COUNTER-STATEMENT OF THE CASE

The circuit court appointed Peter D. Protopapas as the Receiver for Covil Corporation on November 2, 2018,¹ and it tasked the Receiver with “the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil’s insurance carriers.” (Appx. pp. 37–39.) Covil is a now-defunct entity that conducted business in South Carolina until it forfeited its corporate charter in the early 1990s. Because it was an insulation contractor, Covil has been named as a defendant in many personal injury and wrongful death cases that have been filed in state court in South Carolina alleging liability based on asbestos exposure. The Receiver has been required to spend considerable time and effort searching for Covil’s assets, which primarily consist of insurance policies. The Receiver must rely on the discovery process to locate these insurance policies.

The Receiver has filed declaratory judgment claims related to policies issued to Covil. In attempt to fulfill his obligations to the receivership court, the Receiver has attempted to obtain information and documents from Penn National via subpoena and deposition testimony regarding any insurance policies Penn National issued that provide coverage to Covil. The Receiver filed the instant declaratory judgment action against Penn National on April 27, 2020. (Appx. pp. 24–

¹ Penn National makes numerous factual inaccuracies in its Statement of the Case. Penn National states: “On her own motion, on November 2, 2018, Ret. Justice Toal appointed Peter D. Protopapas to serve as Receiver for Covil to manage its affairs under South Carolina law.” (Pet. p. 2.) This is untrue. Chief Justice Toal appointed a receiver for Covil upon motion by an asbestos plaintiff, not sua sponte. (Appx. p. 37.) Penn further states Chief Justice Toal held that “three [insurance] carriers were the ‘alter egos’ of Covil.” (Pet. p. 2 n.1.) This is also untrue. Whether certain insurers were the alter egos of Covil was the subject of some of the claims in the *Finch v. United States Fidelity & Guaranty, et al.* case. However, there was never a finding on the alter ego claims, and these claims were never adjudicated due to settlements. See *Finch v. United States Fidelity & Guaranty, et al.*, C/A No. 2019-CP-40-03003. Penn National also touts its alleged willingness to contribute to settlements in underlying asbestos cases involving Covil. (Pet. p. 5.) However, Penn National’s refusal to contribute to a settlement despite available insurance coverage is the subject of a petitioner for writ of certiorari currently pending before this Court. See Appellate Case No. 2022-000366.

40.) The instant action seeks declarations regarding the interpretation of certain known Penn National policies, but it also alleges other policies of insurance covering Covil are in the possession of Penn National and seeks a declaration that these policies of insurance are the property of Covil and must be returned to Covil. (Appx. p. 29.) As recognized by the circuit court in the May 5, 2022 Order, Covil has “diligently pursued discovery of all insurance policies issued by Penn National that cover Covil, in any way, through written requests for information as well as multiple depositions” and Penn National has continuously refused to produce the information under the guise that it is unable to locate historic policy documents without a policy number and the material is too voluminous to manually search. (Appx. pp. 7–9.)

It is important to note the Receiver has been attempting to obtain these materials from Penn National in this and other proceedings involving Covil since at least February of 2020.² The discovery dispute that is the subject of the instant Petition has been ongoing since that time. The Receiver and Penn National have been before the circuit court on these discovery issues numerous times, necessitating the Receiver filing at least eight motions to compel against Penn National.³ The requested discovery includes documents naming Covil not only as a primary insured, but also as an additional insured. The circuit court has ordered Penn National to meaningfully participate

² In fact, the Receiver’s attempts to obtain policy documents from Penn National goes as far back as 2018. (Appx. p. 353.)

³ This does not include the numerous motions Penn National has filed for protection from discovery. Several of the motions, hearings, and orders governing the discovery dispute arose in the *Finch* matter, and Penn National did not include these filings and transcripts in the Appendix. The Receiver does not believe the Court needs to consider these voluminous materials to determine whether to grant or deny Penn National’s Petition as the Receiver contends the Court should decline to micromanage this discovery dispute. However, if this Court is inclined to grant certiorari, the Receiver would request leave to supplement the Appendix with these materials so that Court is able to understand the breadth of this discovery dispute, Penn National’s failures to comply with its discovery obligations, and the entire background that ultimately led to the circuit court’s May 5, 2022, and May 25, 2022 orders. Further, the Receiver is happy to supplement the Appendix if the Court wishes to review these materials as it considers Penn National’s Petition.

in discovery on multiple occasions and to search its records for policies which list Covil as an additional insured. However, Penn National has continuously and brazenly ignored the circuit court's orders by refusing to search its records. Penn National claimed that it could not search its documents unless the Receiver provided the policy numbers where Covil was designated as an additional insured. Penn National further refused to perform a manual search or to scan the documents so they could be searched electronically.

The circuit court issued orders compelling Penn National on July 1, 2021, and November 5, 2021.⁴ These orders were precursors to the circuit court's May 5, 2022 Order. In the July 1, 2021 Order, the circuit court found: "Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver." (Appx. pp. 8–9.) The circuit court specifically directed Penn National to "thoroughly search its paper records using the list of contractors and facilities provided by the Receiver in connection with [Covil's] February 8, 2021 subpoena to Penn National." (Appx. p. 9.) Penn National did not comply with this order, leading the circuit court to issue another order compelling Penn National on November 5, 2021. (Appx. p. 9.) Because of Penn National's continued refusal to search its records on its own accord, the circuit court "ordered Penn National to open its repository of insurance policies and to facilitate a review performed by Covil's insurer-appointed defense counsel, Ellis & Winters" and directed Ellis & Winters to "report back to the Court with suggestions for meeting Covil's needs to identify responsive coverage while not wasting Penn National's resources." (Appx. p. 10.)

This process occurred over a period of several months, and Ellis & Winters submitted their recommendations to the circuit court on March 22, 2022. (Appx. pp. 652–56.) After Ellis &

⁴ Penn National did not include these Orders in the Appendix, and they are not seeking review of these Orders in their Petition for Writ of Certiorari.

Winters reviewed and sampled Penn National’s document management systems, it recommended the Court order “additional collection of records focus[ing] on Penn National’s microfiche records.” (Appx. p. 654.) The report noted “commercial policies evidencing Covil coverage stored by Penn National are most likely stored in microfiche form.” (*Id.*) The Ellis & Winters report “provided an array of options for imaging and review of Penn National’s policies, even in the absence of a policy number.” (Appx. pp. 10, 652–56.) Specifically, the Ellis & Winters report provided four options for the Court: (1) image a sample of commercial line policy microfiche card boxes, (2) image only commercial line policy microfiche cards with cancel-non-renew date prior to 1993 and relevant policy prefixes, (3) image commercial line policy microfiche cards, eliminating cards solely by policy prefix, or (4) image all commercial line policy microfiche cards. (Appx. pp. 655–56.) Ellis & Winters indicated option 4—digitizing Penn National’s entire catalog of microfiche cards—could cost approximately \$240,000 to \$960,000. (Appx. p. 656).

On April 11, 2022, the circuit court held a hearing on the ongoing discovery issues related to the Ellis & Winters report and Covil’s motions to compel. At the hearing, Ellis & Winters explained that it received two estimates for the cost of digitizing microfiche cards, one was “approximately 85 cents to a dollar per card” and the other was “\$4 per card.” (Appx. p. 666.) Ellis & Winters explained its review determined an “intelligent way[] to reduce the universe” of Penn National documents that was both “reasonable and intentional.” (Appx. p. 664.) Ellis & Winters informed the Court that Penn National’s policy numbers have a prefix that indicates the type of policy, such as AU for automobile or WC for workers’ compensation. (Appx. p. 665.) Ellis & Winters suggested the Court order the digitization of only the microfiche cards that contained policies with policy prefixes for commercial general liability and general liability policies. (Appx. 665–67.) Ellis & Winters indicated this would reduce the amount of microfiche

cards that needed to be digitized by at least one-third, but likely one-half. (Appx. p. 666.) Thus, the cost of requiring Penn National to digitize the culled records could be as little as \$120,000. (*Id.*)

Importantly, and highlighted by the circuit court, “The Report also explained that, after one day of in-person searching within the microfiche cards at Penn National’s headquarters, Ellis & Winters located three newly discovered policies covering Covil that Penn National had not produced to Covil.” (Appx. p. 10.) Further, as noted by the circuit court, at no point in Penn National’s prior representations to the Court did it inform the Court that it was able to determine the type of policies by looking at the policy prefix and could automatically cull the universe of Penn National records to make them more manageable for searching or digitizing. (Appx. p. 669.) These new revelations disclosed by the Ellis & Winters report revealed Penn National’s abject failure to participate in the discovery process without the circuit court’s intervention and oversight. As aptly stated by the circuit court, the ongoing discovery disputes have caused the court to lose “all confidence in Penn National’s willingness and ability to independently participate in discovery” and Penn National’s conduct “amounts to a total and complete refusal to comply with its discovery obligations.” (Appx. p. 11.) Therefore, the circuit court found it had no choice but to intervene and direct Penn National on exactly how to comply with its duties to meaningfully participate in discovery.

Specifically, the circuit court ordered Penn National to (1) digitize certain microfiche records under option 3 of the Ellis & Winters report and produce the digitized records to the Receiver, (2) produce code keys for its policy prefixes to the Receiver, (3) produce all information disclosed to Ellis & Winters and used as a basis for identifying the policy numbers for the newly discovered Covil insurance policies, and (4) produce all underwriting documentation in its

possession, custody, or control for various receiverships. (Appx. pp. 12–13.) The circuit court also found Penn National was responsible for bearing the cost of complying with their own discovery obligations and put certain parameters in place to ensure the confidentiality of Penn National’s insureds’ information. (Appx. pp. 14–15.) The circuit court also found the Receiver was entitled to take a deposition of Penn National pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure. (Appx. p. 17.) Penn National filed a motion requesting the circuit court reconsider the May 5 order, and the circuit court declined. (Appx. pp. 20–23.)

Penn National filed a Notice of Appeal of the circuit court’s May 5, 2022, and May 25, 2022 orders with the South Carolina Court of Appeals on May 31, 2022. *See* Appellate Case No. 2022-000761. This appeal is still pending before the Court of Appeals.⁵ Penn National filed the instant Petition for Writ of Certiorari on June 6, 2022, seeking simultaneous review of the circuit court’s orders from this Court. The Receiver submits the instant Return to the Court and requests the Court deny certiorari.

ARGUMENT

I. This Petition is both inappropriate and unnecessary because Penn National is contemporaneously seeking appellate review of the same orders in the Court of Appeals

The Receiver requests the Court deny Penn National’s Petition for Writ of Certiorari because it is an improper attempt by Penn National to forum shop in our appellate courts. Prior to filing this Petition for Writ of Certiorari, Penn National filed a Notice of Appeal with the Court of Appeals. *See* Appellate Case No. 2022-000761. The Receiver filed a Motion to Dismiss Penn National’s appeal on June 6, 2022, arguing the appeal should be dismissed because South Carolina

⁵ The Receiver filed a Motion to Dismiss the appeal on June 6, 2022, and Penn National’s response to the Motion is due on June 16, 2022.

law prohibits immediate appeals from interlocutory discovery orders. After Penn National filed its Petition for Writ of Certiorari, counsel for the Receiver requested that Penn National withdraw its Notice of Appeal. Counsel for Penn National refused and indicated Penn National intended to file a Response to the Receiver's Motion to Dismiss. Penn National's Response to the Motion to Dismiss is due on June 16, 2021. Thus, it appears Penn National takes the position that it is entitled to an immediate appeal of these interlocutory discovery orders in the Court of Appeals, and this Court granting certiorari in its original jurisdiction is both unnecessary and inappropriate.

Penn National is actively pursuing appellate review of the May 5, 2022, and May 26, 2022 discovery orders in the Court of Appeals. Penn National is simultaneously pursuing review of the same orders in this Court by virtue of this Petition for Writ of Certiorari in this Court's original jurisdiction. As Penn National's pursuit of appellate review in the Court of Appeals shows that Penn National believes it has other forms of effective relief, the Petition for Writ of Certiorari is improper. *Rowe v. City of W. Columbia*, 334 S.C. 400, 407–08, 513 S.E.2d 379, 383 (Ct. App. 1999) (“A writ of certiorari is an extraordinary form of relief that generally is used only in the absence of other effective relief.”). Although the Receiver believes Penn National's appeal in the Court of Appeals is improper and should be dismissed, Penn National apparently believes that it has grounds under South Carolina law to pursue an immediate appeal in the Court of Appeals as it has not withdrawn its improper Notice of Appeal and has indicated it is submitting a response to the Receiver's Motion to Dismiss.⁶ Penn National did not give the Court of Appeals any opportunity to rule on the Motion to Dismiss or consider its appeal before seeking relief with this Court.

⁶ For the reasons contained herein, the Receiver also believes this Petition is improper and should be denied.

Penn National cannot have both appellate courts reviewing the same orders at the same time. *See id.* at 408, 513 S.E.2d at 383 (finding certiorari improper where judicial review is available). This is clearly improper. It not only is a waste of our appellate courts' limited judicial resources but also interferes with the fair administration of justice. Allowing Penn National to proceed on the same issue in both appellate courts creates the danger of inconsistent rulings. This Court and the Court of Appeals do not have concurrent jurisdiction. Penn National's attempt to receive rulings from *both* this Court and the Court of Appeals is inapposite to the purpose behind the creation of our Court of Appeals and forces an unnecessary burden on our unified judicial system.⁷ A party should not be able to cast a wide net by seeking the same review in multiple appellate courts in hope of receiving a favorable ruling from one of them. There is no emergent situation to support Penn National's request for such an extraordinary measure by this Court, especially when they are actively seeking review of the same orders at the Court of Appeals. This situation in no way rises to the level of extraordinary and exceptional necessary to warrant a Writ of Certiorari in the original jurisdiction of this Court. As such, the Court should deny Penn National's Petition for Writ of Certiorari.

II. There are no exceptional circumstances presented by this interlocutory discovery matter to warrant the issuance of a common law writ of certiorari

There is no extraordinary need for this Court to review these interlocutory discovery orders in this Court's original jurisdiction. *See* Rule 245(b), SCACR. Penn National does not cite to any law in its Petition justifying this Court to exercise of its limited original jurisdiction and issue a common law writ of certiorari.

⁷ In fact, this Court has cautioned other insurers of Covil in a similar situation where the insurer simultaneously filed an appeal in the Court of Appeals and sought an extraordinary writ from this Court on the same issue raised in the pending appeal. *See* March 9, 2021 Order, Appellate Case No. 2020-001670.

South Carolina law is clear—and has been clear for many years—that an order granting a motion to compel and directing a party to participate in discovery is an interlocutory order that is not immediately appealable. *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) (holding discovery orders are interlocutory and are not immediately appealable because they do not involve the merits of the action or affect a substantial right); *Ex Parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) (“An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14–3–330 (1976)”); *Ex Parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (“[A]n order denying or compelling pretrial discovery is not directly appealable since it is an intermediate or interlocutory decision.”).

This Court has the “power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs.” S.C. Const. art. V, § 5. Although discovery orders are generally not appealable, this Court can grant a writ of certiorari “to review a discovery order where exceptional circumstances exist.” *Oncology and Hematology Assocs. of S.C. v. S.C. Dep’t of Health and Envtl.*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010); *see also Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009). On certiorari, this Court’s review is confined to the correction of errors of law. *Berry v. Spigner*, 226 S.C. 183, 189, 84 S.E.2d 381, 384 (1954). However, extraordinary writs in the original jurisdiction of this Court are not common and must be reserved for only the most extraordinary and exceptional situations. *See* S.C. Const. art. V, § 5; S.C. Code Ann. 14-3-310; Rule 245(b), SCACR; *State v. Isaac*, 405 S.C. 177, 185, 747 S.E.2d 677, 681 (2013) (“[W]e caution the Bench and the Bar that such writs are aptly named, as they are intended only for the most *extraordinary* and exceptional situations.”); 72A C.J.S. *Prohibition* § 17 (“A writ of prohibition will issue only in cases of necessity, urgency, or in cases of a clear and obvious or special emergency.”). “[P]rerogative writs

should be used with forbearance and caution, and only in cases of necessity.” *Ex parte Jones*, 160 S.C. 63, 158 S.E. 134 (1931).

Despite the well-established case law holding interlocutory discovery orders are not reviewable by an appellate court until a final order or judgment has been entered in the case, Penn National alleges this Court should grant certiorari in its original jurisdiction to involve itself in the discovery process because (1) the orders “involve[] a novel issue of law in the context of asbestos coverage litigation” and (2) “the rights of Penn National and the numerous insureds to whom it issued historic policies of insurance will forever be lost.” (Pet. p. 1.) Neither of these fabricated reasons rise to the level of extraordinary to necessitate this Court’s review. First, the issues involved in the Petition are not novel. It is not novel that an insurance company must search its records to locate policies responsive to a discovery request or subpoena propounded by an insured. This is a routine discovery matter. In fact, several other insurers of Covil sought an emergency writ of certiorari from this Court for a similar discovery order requiring the insurers to produce historic policy information, and this Court denied the petitions. *See* October 16, 2019 Order, Appellate Case No. 2019-001651. Second, this matter does not implicate the rights of third parties. The circuit court put adequate confidentiality measures in place to protect any information of third parties that might be contained in the documents it ordered Penn National to produce.⁸ (Appx. pp. 12–13.)

⁸ Despite Penn National’s argument, this case is not similar to *Hollman v. Woolfson*. (Pet. p. 20). In *Hollman*, there were no confidentiality provisions in place to protection information of third parties and, in fact, the order allowed for the party receiving the information to contact and interview the third parties. *Hollman*, 384 S.C. 571, 577–78, 683 S.E.2d 495, 498–99 (2009) (noting no protective measure could limit “the invasion of the nonparty patients’ privacy once contact with them is permitted”). Further, *Hollman* involved concerns of the privacy of medical information which is mandated by numerous state and federal statutes. *Id.* at 578, 683 S.E.2d at 499.

Although Penn National’s Petition only lists two questions presented, a close review of the Petition shows that Penn National is requesting that this Court become involved to micromanage this discovery dispute that has been ongoing for years and overturn numerous well-reasoned orders issued by the circuit court compelling the production of documents. This Court has previously indicated it has “no desire to micromanage discovery orders.” *Oncology and Hematology Assocs. of S.C. v. S.C. Dep’t of Health and Env’tl.*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010). The circuit court has been intimately aware of and involved in these disputes for a number of years, and this Court has recognized that a circuit court is in the best position to oversee the discovery process in its discretion.⁹

For example, in footnote 5 of the Petition, Penn National states that the following issues are “included as issues that should be subject to review” by this Court: (1) the circuit court’s order for Penn National to produce its internal policy prefix code keys, (2) the circuit court’s order for Penn National to produce the information it provided to Ellis & Winters, (3) the circuit court’s order for Penn National to produce underwriting documents, (4) the circuit court’s order directing Penn National to undergo a Rule 30(b)(6) deposition, and (5) the circuit court’s statement that the order should be sent to the Department of Insurance. (Pet. p. 13.) Further, throughout the Petition, Penn National intimates that it should not have been required to search its documents for insurance policies that may list Covil as an additional insured. (Pet. pp. 9–10, 18–19). However, the circuit

⁹ Recently, this Court considered whether to extinguish well-established South Carolina case law to allow for immediate appeals of interlocutory discovery orders. See October 3, 2019 Order, Appellate Case No. 2019-001056. The Court declined to do so. *Mosley v. Alston*, Op. 2020-MO-010 (S.C. Sup. Ct. filed October 21, 2020) (dismissing writ of certiorari as improvidently granted). In fact, the *Mosley* claims were similar to Penn National’s claims in the instant Petition and the Court declined to grant a writ of certiorari. The Petitioner in *Mosley* claimed that this Court should grant a writ of certiorari because the circuit court’s discovery order involved privacy rights of third parties and would require the Petitioner to expend between \$5 million and \$22 million to comply with the ordered production. See Appellate Case No. 2019-001056.

court first ordered Penn National to search its documents for policies where Covil might be listed as an additional insured in the July 1, 2021 Order. That Order, though, is not the subject of this Petition for Writ of Certiorari and Penn National did not attempt to file a similar Petition from that Order. Penn National's goal is clear. It is using the guise of an emergency to have this Court review all rulings Chief Justice Toal has issued thus far in this multi-year discovery dispute. This is improper and illustrates the potential dangers of this Court granting a writ of certiorari.¹⁰

In granting the Petition, the Court would set a dangerous precedent that will undoubtedly lead down the slippery slope of parties constantly asking this Court to intervene in discovery disputes. Discovery disputes occur in nearly every case, and circuit courts are well-equipped to handle them during litigation. Allowing parties to obtain certiorari on interlocutory discovery orders burdens this Court and impedes the administration of justice throughout our state due to the resulting delays in the final adjudication of matters while this Court considers the discovery disputes.¹¹ These delays could last years. As explained by this Court,

The rule in restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were otherwise, endless delays would be encountered—delays which are unnecessary in cases similar to the one now before us, which can be decided upon an appeal from such final judgment as may later be entered by the trial Court.

¹⁰ The Receiver further objects to Penn National's attempt to have this Court consider any previous orders of Chief Justice Toal or any other issues outside of the narrow questions presented. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Rule 242(d), SCACR (requiring a Petition for Writ of Certiorari to clearly express the questions presented for review).

¹¹ For example, in the instant case, the Receiver has been attempting to locate all policy documents from Penn National for years. The circuit court's May 5, 2022 Order directed the process of digitizing certain Penn National records to begin immediately. However, Penn National has further delayed the Receiver's ability to obtain these documents by appealing to the Court of Appeals and requesting a writ of certiorari from this Court. Once the records are finally digitized and produced to the Receiver, the Receiver still must complete a review of the records to determine responsive documents. Not to mention, the actual merits of this action also need to be litigated.

Good v. Hartford Acc. & Indem. Co., 201 S.C. 32, 21 S.E.2d 209, 213 (1942). See also *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13–14 (2000) (“The current case reveals why such appeals are disfavored. . . . Already the progress of this case has been delayed several years over the issue of venue.”).

The entire purpose of reserving our appellate courts’ limited resources for review of only final orders and judgments except in the direst circumstances is to prevent overburdening our court system. See *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017) (explaining appellate rules related to interlocutory orders are “construed narrowly” with the goal of avoiding “circuitous litigation and needless appeals”); *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (“Piecemeal appeals should be avoided[.]”); *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019) (“The provisions of section 14-3-330 are narrowly construed and serve the underlying policy of favoring judicial economy by avoiding ‘piecemeal appeals.’” (quoting *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005))). This goal is accomplished not only by reducing the number of cases being reviewed by our appellate courts but also by ensuring our appellate courts are not reviewing unnecessary decisions—only those that play a decisional role in the merits of a case. See *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (“The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.” (quoting *Breland*, 339 S.C. at 94, 529 S.E.2d at 13)). Our appellate courts generally do not consider discovery matters until the end of a case when a court is able to determine whether any perceived error in a discovery order had any effect on an order or judgment.

For example, if the circuit court were to require a party to produce a document but that document played no role in the resulting litigation, this Court would not need to consider whether the circuit court properly ordered production because it would be unnecessary.

The fact that a party will have to expend resources to comply with an order is not a reason to justify this extraordinary review. In fact, it is well-established the avoidance of trial is not a substantial right. *See Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). Thus, denials of motions to dismiss are not immediately appealable. *See Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995). Our courts have decided that the fact that a party will have to expend resources to continue litigating a case is not a good enough reason to deviate from established precedent and allow for an immediate appeal from an interlocutory order. Similarly, the fact that Penn National will have to expend resources to comply with this discovery order is not a reason to make an exception for them here.¹²

This case simply does not present the exceptional circumstances necessary for this Court to grant a writ of certiorari. The Court should reject Penn National's attempts to create a "stop-and-start" enterprise." *State v. Ledford*, 422 S.C. 244, 249, 810 S.E.2d 868, 870 (2018). As the Court stated in *Oncology & Hematology Associates*, this Court's "willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial 'hen's tooth.'" 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010). The Court had "no desire to micromanage discovery orders" then, and it should not do so now. *See id.*

¹² Further, as discussed herein, Penn National misstates the amount of money it will cost them to comply with the circuit court's orders.

III. The Court should deny certiorari because the circuit court did not abuse its discretion in ordering Penn National to participate in discovery

This Court should further deny certiorari because the circuit court properly acted within its discretion in ordering Penn National to comply with its discovery obligations in this case. A circuit court’s “rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion.” *Hollman*, 384 S.C. at 577, 683 S.E.2d at 498.

This case is unique. The circuit court appointed the Receiver on behalf of Covil and directed him to marshal the assets of Covil, which mainly consist of insurance policies. Because Covil is a defunct entity that has not operated since the early 1990s, it does not have a robust system of corporate records. Thus, the Receiver has to rely on methods of discovery in order to determine what insurance policies exist that may provide coverage to Covil. This is not the typical case where a court can preclude a party from relying on a document at trial that it refused to produce during discovery. Instead, insurers, like Penn National, have an interest in obfuscating historical documents evidencing insurance coverage and blocking the Receiver from obtaining the information. If they are successful in blocking the Receiver’s attempts to obtain insurance policies by simply saying that it would be too difficult for them to search their own historic records, then the Receiver will be unable to marshal the assets of Covil.

Each day that Penn National delays is another day that Covil is unable to adequately participate in litigating asbestos cases that are pending against it. (Appx. p. 9.) Here, Penn National is in the best position to know what insurance policies it issued and to search its records, not the Receiver. Penn National urged the circuit court, and now urges this Court to place the burden on the Receiver to give Penn National proof of an insurance policy before it is required to search its own records. As Chief Justice Toal found, this is unworkable and causes “great concern”

not only as to the Covil receivership but “also in other Receivership litigation involving Penn National.” (Appx. p. 10.)

Penn National has continuously refused to search its own records under the guise that it is unable to search them without a policy number. It is not until the circuit court held the hearing on the Receiver’s most recent motions to compel that the circuit court learned—not from Penn National but from Ellis & Winters—that Penn National could easily cull its records to eliminate irrelevant documents and make its search more manageable. (Appx. p. 669.) The circuit court had to involve itself step-by-step in the process to learn this. Getting information from Penn National about its own records systems and ability to search them has been like pulling teeth. In fact, “after one day of in-person searching within the microfiche cards at Penn National’s headquarters, Ellis & Winters located three newly discovered policies covering Covil that Penn National had not produced to Covil.” (Appx. p. 10.) It is these types of deliberate and misleading actions and outright refusal to participate in the discovery process that caused the circuit court to lose “all confidence in Penn National’s willingness and ability to independently participate in discovery.” (Appx. p. 11.)

Multiple times in their Petition, Penn National asserts that the circuit court simply wanted to punish them for choosing to store their policies by policy number and it asserts the circuit court called them “intransigent” for this reason alone. (Pet. pp. 15–16.) This is inaccurate. Penn National’s actions in the discovery process, misleading representations to the circuit court, and abject refusal to participate in discovery lead to the circuit court noting Penn National’s intransigence. As explained by the circuit court, the reasoning behind its May 5, 2022 order is:

Because [Penn National] absolutely refused to put its foot down to doing anything, to doing this by itself. [It] could have well done exactly what Ellis & Winter[s] has done. [It] could have looked at all of these – instead of just taking the flat stance we can’t search except for the policy number, which itself turns out not to be so, and

then follow that up with [“]and we’re not going to do anything else and we’re not going to give anything to a corporate representative who can say anything about it,[”] you’ve now forced me to allow your opponent to examine your records. . . .

[Penn National] has failed so completely at doing anything on its own to search these policies and determine the coverage, that I am going to allow an independent group to digitize these records. And I do that because it’s the only way they can then really be looked at with the numbering system you have and all the rest of it to see whether there’s principal coverage by means of named insured, whether there’s excess coverage and all the rest of it. It’s a lot more they have to look at it than simply running the name Covil through it. They’re going to be able to look at each and every policy to understand whether that is a policy that in any way, shape, or form covers Covil’s responsibilities in this litigation because those are assets of Covil’s. And they tried to get their assets disclosed through normal means and that has not worked.

(Appx. p. 668.)

Penn National exaggerates the potential cost of compliance with the circuit court’s order. Penn National alleges it will cost between \$240,000 and \$960,000 for the digitization. (Pet. p. 21.) While it is true Ellis & Winters approximated that it would cost that much to digitize Penn National’s entire microfiche repository, the circuit court did not order Penn National to do that. Instead, the circuit court ordered Penn National to digitize only a necessary portion of its microfiche repository. Ellis & Winters estimated that the culling process would eliminate up to half of the microfiche cards, which would result in the estimated price being half of what Penn National alleges to this Court. (Appx. p. 669.) Further, this cost is not solely related to the instant action or the Covil receivership. As noted by the circuit court, the need for these policy documents and Penn National’s refusal to search for them has arisen in other asbestos receiverships in this state. Thus, the burden on Penn National is proportionate to the Receiver’s needs in this and other receiverships.

Penn National also alleges that it is bearing the sole burden of compliance. While it is true the circuit court ordered Penn National to pay for the digitization, the Receiver will also bear a

burden in searching through the database that is created. Traditionally, a party could be trusted to search its own database and produce only responsive documents. However, Penn National's conduct has shown that it cannot be trusted to adequately perform the necessary searches. The circuit court ordered Penn National to give the Receiver access to all documents in a database so that the Receiver can perform the searches himself because the court was "not confident of [Penn National's internal procedures]." (Appx. p. 669.) The circuit court stated:

[Penn National's] approach to handling this material has not been reliable in the face of reasonable, in my view, discovery requests. And the reason the discovery requests ballooned is because [Penn National] wouldn't answer the initial ones correctly and, therefore, [the Receiver] had to try to drive at it a whole bunch of different ways to try to figure out who would have had charge of enough information to put these policies down. [Penn National is] living with the consequences of the approach they decided to take with respect to maintaining the records that a covered insured ought to be able to obtain.

(Appx. p. 669.) Thus, the Receiver has had to go to an extreme burden to try to obtain the information from Penn National and will now be further burdened to search through the database to locate the records Penn National should have produced originally.

Throughout this discovery dispute, Penn National has complained that it was too burdensome for it to search its own records. Now, Penn National complains that it is too burdensome for someone else to search its records for it. It will always be more costly for a party who chooses to only keep paper records to search the records than someone who chooses to keep electronic records. However, that party should not be rewarded in litigation for its choice. The extra burden and expense of that party's choice is not an excuse for them to refuse to participate in discovery. This would lead to companies choosing to store their records in antiquated ways to avoid their discovery obligations.

The simple fact of the matter is that Penn National has refused to comply with its discovery obligations. This has caused the circuit court to become involved in every step of the process. The

circuit court did not order Penn National to undergo the expense of digitizing their records at first blush. Instead, the circuit court took small steps to compel Penn National to produce the documents. However, in the face of Penn National's continued refusal, the circuit court has had to issue further orders.

First, the circuit court ordered the Receiver to give Penn National a list of potential job sites and contractors that might have been involved in procuring coverage from Penn National. The circuit court did this to help facilitate Penn National's search. Penn National refused to search. The Receiver then took depositions of Penn National's corporate representatives to help better understand Penn National's document management system in order to determine a better way for Penn National to search for the information requested. Penn National refused to adequately prepare its corporate representatives. The circuit court then ordered Penn National to cooperate with Ellis & Winters to review Penn National's document management systems. Penn National still maintained it was unable to perform the searches. Therefore, the circuit court finally ordered Penn National to digitize certain microfiche cards as recommended by Ellis & Winters and give the Receiver access to the database to search the records since Penn National has been unwilling to do so.

The circuit court has taken small, measurable steps over the last few years to help facilitate discovery in this matter after Penn National has refused to participate. At all times, the circuit court has acted within its discretion in compelling Penn National to produce documents. The circuit court has considered the burdens that this order places on Penn National and the Receiver as well as the necessities of the discovery sought by the Receiver. Penn National has maintained that it is unable to complete a manual search of its records, so the circuit court ordered Penn National to digitize a subset of the relevant and necessary records. The circuit court has attempted to come up

with a solution that is only as restrictive as necessary to ensure that Penn National finally complies with its discovery obligations while allowing the Receiver access to the discovery to which he is entitled. At no point has Penn National attempted to proffer a solution to the problem it created, and it still does not. Penn National's only "solution" is to allow it—contrary to the discovery rules in South Carolina and the obligations on every other litigant in South Carolina—to not participate in discovery. The circuit court did not accept Penn National's recalcitrance, and this Court should not either.

CONCLUSION

Accordingly, because this Petition is improper and does not present an exceptional circumstance and because the circuit court did not abuse its discretion, the Receiver requests the Court deny Penn National's Petition for Writ of Certiorari.

Respectfully submitted,

SMITH | ROBINSON
Smith Robinson Holler DuBose and Morgan, LLC

s/Shanon N. Peake

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June 16, 2022

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-02098
Appellate Case No. 2022-000785

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty Insurance Guaranty Association, Defendants,

Of whom Pennsylvania National Mutual Casualty Insurance Company is the Petitioner.

PROOF OF SERVICE

I, the undersigned attorney of the law offices of Smith Robinson Holler DuBose and Morgan, LLC, do hereby certify that on June 16, 2022, I have served all counsel in this action with a copy of the pleading(s) hereinbelow using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules.

Documents Served: Return to Petition for Writ of Certiorari

Counsel Served: **E-Mail**

David G. Harris II – dharris@goldbergsegalla.com
David L. Brown – dbrown@goldbergsegalla.com
Brady A. Yntema – byntema@goldbergsegalla.com

(Signature page follows)

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June 16, 2022.

From: [Shanon Peake](#)
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Cc: [Jon Robinson](#); [Dot Faulkenberry](#); [Lindsay Valek](#); [Nes, W. Brad](#); [Austin Reed](#)
Subject: Appellate Case No. 2022-000785 - Covil v. Penn National
Date: Thursday, June 16, 2022 3:52:00 PM
Attachments: [Return to Pet for Writ of Cert. 4.pdf](#)
[POS Return to Pet for Writ of Cert. 2.pdf](#)

Good Afternoon,

Please find attached for service a copy of the Return to the Petition for Writ of Certiorari that we are filing with the Supreme Court today in the above-referenced matter.

Thank you,
Shanon

SMITH ROBINSON
Forward thinking. Results driven.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefler Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

Appellate Case No. 2022-000761

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.; Sam J. Crain & Co., Inc.; and South
Carolina Property and Casualty Insurance Guaranty Association, Defendants,

Of whom Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

PROOF OF SERVICE

I, the undersigned attorney of the law offices of Smith Robinson Holler DuBose and Morgan, LLC, do hereby certify that on June 21, 2022, I have served all counsel in this action with a copy of the pleading(s) hereinbelow using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules.

Documents Served: Reply to Return to Motion to Dismiss
Appeal of Interlocutory Discovery Orders

Counsel Served: **E-Mail**

David G. Harris II – dharris@goldbergsegalla.com
David L. Brown – dbrown@goldbergsegalla.com
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(Signature page follows)

Respectfully submitted,

s/Shanon N. Peake

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June 21, 2022.

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Cc: [Jon Robinson](#); [Murrell Smith](#); [Nes, W. Brad](#); [Dot Faulkenberry](#); [Lindsay Valek](#)
Subject: RE: Appellate Case No. 2022-000761 - Reply to Return to Motion to Dismiss
Date: Tuesday, June 21, 2022 6:12:00 PM
Attachments: [Reply to Return to Motion to Dismiss \(with exhibits\), 1.pdf](#)
[POS Reply to Mtn Dismiss, 2.pdf](#)

Good Afternoon,

Please find attached for service the Reply to Penn National's Return to the Motion to Dismiss Appeal of Interlocutory Discovery Orders that we are filing with the Court of Appeals today.

Thanks,
Shanon



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From: Shanon Peake
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Subject: Appellate Case No. 2022-000761 - Motion to Dismiss

Good Afternoon,

Please find attached for service the Motion to Dismiss Appeal of Interlocutory Discovery Orders that we are filing with the Court of Appeals today.

Thanks,
Shanon



Forward thinking. Results driven.

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