

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Nov 30 2022

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Jean Hoefer Toal, Circuit Court Judge

Opinion No. 5888 (S.C. Ct. App. Filed Jan. 5, 2022)

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Petitioner.

APPENDIX VOLUME II

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INDEX

Record on Appeal

Order Granting Covil Corporation’s Motion for Partial
Summary Judgment of August 13, 2020.....2

Order Denying Penn National’s Motion for Reconsideration of September 21, 2020.....13

Summons and Complaint filed February 28, 202018

Defendant’s Notice of Motion and Motion to Transfer Venue and
Answer to Complaint filed March 30, 202023

Covil Corporation’s Motion for Partial Summary Judgment filed April 22, 2020.....34

Defendant Penn National’s Memorandum of Law in Opposition
To Covil’s Motion for Partial Summary Judgment filed May 8, 2020.....162

Reply Memorandum of Covil Corporation in Support of Its
Motion for Partial Summary Judgment filed June 18, 2020.....520

Defendant Penn National’s Motion for Reconsideration filed August 24, 2020.....553

Receiver’s Response to Penn National’s Motion for
Reconsideration filed August 27, 2020.....558

Notice of Appeal filed September 14, 2020.....563

Certificate of Counsel565

Court of Appeals Documents

Final Brief of Appellant filed March 1, 2021567

Respondent’s Final Brief filed February 24, 2021.....616

Final Reply Brief of Appellant filed March 1, 2021.....652

COA Decision entered January 5, 2022682

Appellant’s Petition for Rehearing and Suggestion
For Rehearing *EN BANC* filed January 27, 2022695

Order denying Appellant’s Petition for Rehearing entered February 23, 2022.....725

EXHIBIT 13-2

SPECIAL MULTI-PERIL
POLICY
NON-ASSESSABLE

Pennsylvania National

Insurance Companies
Pennsylvania National Mutual Casualty Insurance Company
100 East 29th Street, Philadelphia, PA 19106



POLICY NO.

SRRO 025

THE LAST DAY OF EXPIRATION YEAR
5 1 5 5 0 2 8 5 3 - 8

ITEM 1. INSURED'S NAME AND MAILING ADDRESS (LAST NAME FIRST)
Covil Corporation, Inc. (See 70-53)
P O Box 1804
Greenville, Greenville, SC 29602

IN LIEU OF
DATING PLAN PREMIUM PAYING PLAN EMPLOYER NUMBER
515 50 28 53-7
99
2 3 2093 6967

ITEM 2. POLICY PERIOD FROM 3/31/87 TO 3/31/88

12:01 AM STANDARD TIME AT LOCATION OF DESIGNATED PREMISES
Sam J Crain & Co., Inc.

AGENCY NUMBER 22 6729
ISSUING DATE 4/8/87

1. Consideration of the premium insurance is provided the named insured with respect to the designated premises shown in Item 4 below and with respect to those coverages and kinds of property for which a specific limit of liability is shown, subject to all of the terms of this policy including forms and endorsements made a part hereof.

3. Audit Period: Annual, unless otherwise stated. The Named Insured is: Individual Corporation Partnership Joint Venture

4. Designated Premises (ENTER "SAME" IF SAME LOCATION AS ITEM 1 ABOVE):
131 Pensley Cir. Greenville, Greenville, SC
Warehouse
Warehouse

5. Insurance is provided with respect to the designated premises and with respect to those coverages and kinds of property for which a specific limit of liability is shown, subject to all of the terms of this policy including forms and endorsements made a part hereof.

SECTION	COVERAGES	COPI- CLASSIFICATION	APPLI- CABLE	LIMITS OF LIABILITY			
				Loc. No.	Loc. No.	Loc. No.	Loc. No.
PROPERTY COVERAGE	Building(s)			1	1	2	
	Personal Property of the Insured	80	\$	893,000	\$	5000	\$
	Personal Property of Others	80	\$	1,200,000	\$	2000	\$
	Addl. Cov. (Specify)		\$		\$		\$

Deductible: \$ See 70-627 each occurrence.
If no deductible stated above, the deductible shall be \$100 each occurrence, \$1,000 aggregate each occurrence.

SECTION	LIABILITY COVERAGE	LIMITS OF LIABILITY	
		each occurrence	aggregate
LIABILITY COVERAGE	Bodily Injury and Property Damage Liability Combined Single Limit	\$ 1,000,000	\$ 1,000,000
	Bodily Injury Liability	\$	\$
	Property Damage Liability	\$	\$
	Premises Medical Payments	\$ 1,000	\$ 10,000
	Addl. Cov. (Specify)		

SECT. III CRIME COVERAGE
SECT. IV BOILER AND MACHINERY COVERAGE As stated in the endorsement, made part of this Policy, if indicated by [X].

- 6. Forms and Endorsements made part of this policy at time of issue (insert No. and Ex. Date):
 - a. Section I - Forms and Endorsements only: MPO315 4/80 MPO090 7/77 MPO127 4/86 ILO018 10/84 MPO013 10/83 70-53 MPO014 10/83 MPO420 1/83 70-627 70-640 70-16 RO.520 9/85 70-1911 9/86 ILO928 5/86
 - b. Section II - Forms and Endorsements only: GLO104 7/66 GL9918 3/83 GLO032 4/84 70-1656 7/85
 - c. Section III - Forms and Endorsements only: CGL-1 MP-1 PI-1 GLO300 7/81 70-260 73-3010
 - d. Section IV - Forms and Endorsements only: MPO450 12/79 MP5231 7/77 MPO307 7/77 ILO249 9/86 GL2104 7/66 MP2405 7/77

7. Mortgagee: (Name and Address) Bldg. 1) Community Bank, P O Box 6807 Loc. 1) Greenville, SC 29611
Bldg. 1) First Federal of SC 2304 W. Parker Rd. Greenville

8. The Total Advance Premium is \$ 38193 and is payable \$ 38193 at inception, and \$ at each anniversary. Unless indicated by an X in the box below as "NOT APPLICABLE", the premium for installments subsequent to the initial installment shall be subject to adjustment on the basis of the rates in effect at each anniversary date. NOT APPLICABLE

THIS POLICY PROVIDES LIMITED COVERAGE FOR POLLUTION LIABILITY. READ YOUR POLICY CAREFULLY.

HOME OFFICE COPY

Authorized Agent

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SCHEDULE

Policy No. 468 -

GENERAL LIABILITY HAZARDS

DESCRIPTION OF HAZARDS	CODE NO.	PREMIUM BASES	RATES		ADVANCE PREMIUM	
			BODILY INJURY	PROPERTY DAMAGE	BODILY INJURY	PROPERTY DAMAGE
Premises—Operations	Indicate Subline	(a) Area (sq. ft.) (b) Frontage (c) Remuneration (d) Receipts (e) No. Units	(a) Per 100 sq. ft. of Area (b) Per linear ft. (c) Per \$100 of Remuneration (d) Per \$100 of Receipts (e) Per Unit			
Escalators (Number at Premises)	Subline 314	Number Insured	Per Landing			
Independent Contractors	Subline 315	Cost	Per \$100 of Cost			
Products/Completed Operations	Subline 316	(a) Receipts	(a) Per \$1,000 of Receipts			
Total Advance B.I. and P.D. Premiums						
Total Advance Premium					\$	
Location of all premises owned by, rented to or controlled (ENTER "SAME" IF SAME AS ITEM 1. OF DECLARATIONS) by the named insured						
Interest of named insured in such premises					"OWNER", "GENERAL LESSEE" OR "TENANT"	
Part occupied by named insured						

The foregoing discloses all hazards insured hereunder known to exist at the effective date of this policy, unless otherwise stated herein.

When used as a premium basis:

"admissions" means the total number of persons, other than employees of the named insured, admitted to the event insured or to events conducted on the premises whether on paid admission tickets, complimentary tickets or passes;

"cost" means the total cost to the named insured with respect to operations performed for the named insured during the policy period by independent contractors of all work let or sub-let in connection with each specific project, including the cost of all labor, materials and equipment furnished, used or delivered for use in the execution of such work, whether furnished by the owner, contractor or subcontractor, including all fees, allowances, bonuses or commissions made, paid or due;

"receipts" means the gross amount of money charged by the named insured for such operations by the named insured or by others during the policy period as are a separate item and remits directly to a governmental division;

"remuneration" means the entire remuneration earned during the policy period by proprietors and by all employees of the named insured, other than chauffeurs (except operators of mobile equipment) and aircraft pilots and co-pilots, subject to any overtime earnings or limitation of remuneration rule applicable in accordance with the manuals in use by the company;

"sales" means the gross amount of money charged by the named insured or by others trading under his name for all goods and products sold or distributed during the policy period and charged during the policy period for installation, servicing or repair, and includes taxes, other than taxes which the named insured and such others collect as a separate item and remit directly to a governmental division.

Form CGL-1 Rev. 11-85

INSURING AGREEMENT

I. COVERAGE A—BODILY INJURY LIABILITY

COVERAGE B—PROPERTY DAMAGE LIABILITY

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

Coverage A. bodily injury or

Coverage B. property damage

which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Exclusions

This insurance does not apply:

(a) to liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;

(b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any automobile or aircraft owned or operated by or rented or loaned to any insured, or

(2) any other automobile or aircraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobile is not owned by or rented or loaned to any insured;

(c) to bodily injury or property damage arising out of (1) the ownership, maintenance, operation, use, loading or unloading of any mobile equipment while being used in any prearranged or organized racing, speed or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity or (2) the operation or use of any snowmobile or trailer designed for use therewith;

(d) to bodily injury or property damage arising out of and in the course of the transportation of mobile equipment by an automobile owned or operated by or rented or loaned to any insured;

(e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any watercraft owned or operated by or rented or loaned to any insured, or

(2) any other watercraft operated by any person in the course of his employment by any insured;



Pennsylvania National Mutual Casualty Insurance Company
P.O. Box 2361 - Harrisburg, PA 17105

COMPREHENSIVE GENERAL LIABILITY
INSURANCE COVERAGE PART

SCHEDULE		Policy No				
GENERAL LIABILITY HAZARDS						
DESCRIPTION OF HAZARDS	CODE NO. Indicate Subline	PREMIUM BASES (a) Area (sq. ft.) (b) Frontage (c) Remuneration (d) Receipts (e) No. Units	RATES		ADVANCE PREMIUM	
			BODILY INJURY (a) Per 100 sq. ft. of Area (b) Per linear ft. (c) Per \$100 of Remuneration (d) Per \$100 of Receipts (e) Per Unit	PROPERTY DAMAGE	BODILY INJURY	PROPERTY DAMAGE
Premises—Operations					4967.	19,145.
See 70-260						
Escalators (Number at Premises)	Subline 314	Number Insured	Per Landing			
cov. subj. to audit						
Independent Contractors		Cost	Per \$100 of Cost			
construction operations contractor		500,000	.025	.020	125.	91.
not railroads-excluding operations		500,000	.013	.011	65.	50.
on board ships loc.1) T39-999 16291		2,000,000	.003	.004	55.	80.
Excluded		(a) Receipts	(a) Per \$1,000 of Receipts			
Total Advance B.I. and P.D. Premiums					5212.	19,366.
Total Advance Premium					3 24,578.	
Location of all premises owned by, rented to or controlled (ENTER "RANGE" IF SAME AS ITEM 1. OF DECLARATIONS) by the named insured						
See NP1205						
Interest of named insured in such premises						
owner						
Part occupied by named insured						
entire						
"OWNER", "GENERAL LESSEE" OR "TENANT"						

The foregoing discloses all hazards insured hereunder known to exist at the effective date of this policy, unless otherwise stated herein.

When used as a premium basis:
 "admissions" means the total number of persons, other than employees of the named insured, admitted to the event insured or to events conducted on the premises whether on paid admission tickets, complimentary tickets or passes;
 "cost" means the total cost to the named insured with respect to operations performed for the named insured during the policy period by independent contractors of all work let or sub-let in connection with each specific project, including the cost of all labor, materials and equipment furnished, used or delivered for use in the execution of such work, whether furnished by the owner, contractor or subcontractor, including all fees, allowances, bonuses or commissions made, paid or due;
 "receipts" means the gross amount of money charged by the named insured for such operations by the named insured or by others during the policy period as are rated on a receipts basis other than receipts from telecasting, broadcasting or motion pictures, and includes taxes, other than taxes which the named insured collects as a separate item and remits directly to a governmental division;
 "remuneration" means the entire remuneration earned during the policy period by proprietors and by all employees of the named insured, other than chauffeurs (except operators of mobile equipment) and aircraft pilots and co-pilots, subject to any overtime earnings or limitation of remuneration rule applicable in accordance with the manuals in use by the company;
 "sales" means the gross amount of money charged by the named insured or by others trading under his name for all goods and products sold or distributed during the policy period and charged during the policy period for installation, servicing or repair, and includes taxes, other than taxes which the named insured and such others collect as a separate item and remit directly to a governmental division.

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but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured;

(f) to **bodily injury** or **property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, mists or gases, waste materials or other irritants, contaminants or pollutants on or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;

(g) to **bodily injury** or **property damage** due to war, whether or not declared, civil war, insurrection, rebellion or revolution or to any act or condition incident to any of the foregoing, with respect to

- (1) liability assumed by the insured under an incidental contract, or
- (2) expenses for first aid under the Supplementary Payments provision;

(h) to **bodily injury** or **property damage** for which the insured or his indemnitee may be held liable

- (1) as a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages, or
- (2) if not so engaged, as an owner or lessor of premises used for such purposes, if such liability is imposed
 - (i) by, or because of the violation of, any statute, ordinance or regulation pertaining to the sale, gift, distribution or use of any alcoholic beverage, or
 - (ii) by reason of the selling, serving or giving of any alcoholic beverage to a minor or to a person under the influence of alcohol or which causes or contributes to the intoxication of any person;

but part (ii) of this exclusion does not apply with respect to liability of the insured or his indemnitee as an owner or lessor described in (2) above;

(i) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;

(j) to **bodily injury** to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the insured under an incidental contract;

(k) to **property damage** to

- (1) property owned or occupied by or rented to the insured,
- (2) property used by the insured, or
- (3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control;

but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to **property damage** (other than to elevators) arising out of the use of an elevator at premises owned by, rented to or controlled by the named insured;

(l) to **property damage** to premises alienated by the named insured arising out of such premises or any part thereof;

(m) to loss of use of tangible property which has not been physically injured or destroyed resulting from

- (1) a delay in or lack of performance by or on behalf of the named insured of any contract or agreement, or
- (2) the failure of the named insured's products or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured;

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured;

(n) to **property damage** to the named insured's products arising out of such products or any part of such products;

(o) to **property damage** to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

(p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein;

(q) to **property damage** included within:

- (1) the **explosion hazard** in connection with operations identified in this policy by a classification code number which includes the symbol "x",
- (2) the **collapse hazard** in connection with operations identified in this policy by a classification code number which includes the symbol "c",
- (3) the **underground property damage hazard** in connection with operations identified in this policy by a classification code number which includes the symbol "u".

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) if the named insured is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor, and the spouse of the named insured with respect to the conduct of such a business;

(b) if the named insured is designated in the declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to his liability as such;

(c) if the named insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such;

(d) any person (other than an employee of the named insured) or organization while acting as real estate manager for the named insured; and

(e) with respect to the operation, for the purpose of locomotion upon a public highway, of mobile equipment registered under any motor vehicle registration law,

- (i) an employee of the named insured while operating any such equipment in the course of his employment, and
- (ii) any other person while operating with the permission of the named insured any such equipment registered in the name of the named insured and any person or organization legally responsible for such operation, but only if there is no other valid and collectible insurance available, either on a primary or excess basis, to such person or organization;

provided that no person or organization shall be an insured under this paragraph with respect to:

- (1) **bodily injury** to any fellow employee of such person injured in the course of his employment, or
- (2) **property damage** to property owned by, rented to, in charge of or occupied by the named insured or the employer of any person described in subparagraph (1).

This insurance does not apply to **bodily injury** or **property damage** arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in this policy as a named insured.

III. LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **bodily injury** or **property damage**, or (3) claims made or suits brought on account of **bodily injury** or **property damage**, the company's liability is limited as follows:

Coverage A—The total liability of the company for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one or more persons as the result of any one occurrence shall not exceed the limit of **bodily injury** liability stated in the declarations as applicable to "each occurrence".

Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of (1) all **bodily injury** included within the completed operations hazard and (2) all **bodily injury** included within the products hazard shall not exceed the limit of **bodily injury** liability stated in the declarations as "aggregate".

Coverage B—The total liability of the company for all damages because of **property damage** sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of **property damage** liability stated in the declarations as applicable to "each occurrence".

Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of all **property damage** to which this coverage applies and described in any of the numbered subparagraphs below shall not exceed the limit of **property damage** liability stated in the declarations as "aggregate".

- (1) all **property damage** arising out of premises or operations rated on a remuneration basis or contractor's equipment rated on a receipts basis, including **property damage** for which liability is assumed under any incidental contract relating to such premises or operations, but excluding **property damage** included in subparagraph (2) below;
- (2) all **property damage** arising out of and occurring in the course of operations performed for the named insured by independent contractors and general supervision thereof by the named insured, including any such **property damage** for which liability is assumed under any incidental contract relating to such operations, but this subparagraph (2) does not include **property damage** arising out of maintenance or repairs at premises owned by or rented to the named insured or structural alterations at such premises which do not involve changing the size of or moving buildings or other structures;
- (3) all **property damage** included within the products hazard and all **property damage** included within the completed operations hazard.

Such aggregate limit shall apply separately to the **property damage** described in subparagraphs (1), (2) and (3) above, and under subparagraphs (1) and (2), separately with respect to each project away from premises owned by or rented to the named insured.

Coverages A and B—For the purpose of determining the limit of the company's liability, all **bodily injury** and **property damage** arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

IV. POLICY TERRITORY

This insurance applies only to **bodily injury** or **property damage** which occurs within the policy territory.

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PENNSYLVANIA NATIONAL CASUALTY INSURANCE COMPANY
HARRISBURG, PENNSYLVANIA

EXTENSION SCHEDULE

Policy No.

GENERAL LIABILITY HAZARDS

DESCRIPTION OF HAZARDS	CODE NO.	PREMIUM BASES	RATES		ADVANCE PREMIUMS	
			Bodily Injury	Property Damage	Bodily Injury	Property Damage
			(a) Area (sq. ft.) (b) Frontage (c) Remuneration (d) Receipts (e) No. Units	(a) Per 100 sq. ft. of Area (b) Per linear ft. (c) Per \$100 of Remuneration (d) Per \$100 of Receipts (e) Per Unit		
Premises - Operations						
Insulation work installation or application of accoustical or thermal insulating material in buildings or within bldg. walls- NOC						
Loc. 1 T39-999 (313)	15161	c) 1,400,000	.276	.680	3516.	9520.
Loc. 2 T32-999 (313)	15161	c) 250,000	.357	3.324	812.	8310.
Loc. 3 T10-999 (313)	15161	c) 12,000	.775	3.156	85.	379.
Loc. 4 T16-999 (313)	15161	c) if any	.339	1.429	-	-
Loc. 5 T41-999 (313)	15161	c) 10,000	.494	2.902	45.	290.
Loc. 6 T45-999 (313)	15161	c) if any	.407	2.499	-	-
Loc. 7 T23-999 (313)	15161	c)if any	.512	.959	-	-
Contractors construction or erection exec. supervisors exercising supervision through superintendents and foremen- not direct supervision.						
Loc. 1 T39-999 (313)	15192	C)26,000	.990	.573	257.	136.
Loc. 3 T32-999 (313)	15192	c) if any	1.295	2.921	-	-
Loc. 9) T01-999 (313)	15192	c) if any	7.106	2.221	-	-
Air conditioning, heating or refrigeration systems or combined heating and air cond. system including duct work and piping-in- stallation, servicing or repair-including shop and repair including shop and retail stores or display rooms						
Loc 1) T39-999	17140	c) 50,000	.553	1.020	252.	510.
Paper hanging						
Loc. 1 T39-999 (313)	17235	c) if any	.253	1.110	-	-
Loc. 3) T32-999 (313)	17235	c) if any	.362	3.324	-	-
Loc. 4) T10-999 (313)	17235	c) if any	.711	3.156	-	-
Loc. 9) T01-999 (313)	17235	c) if any	1.747	2.841	-	-

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PERSONAL INJURY LIABILITY INSURANCE COVERAGE PART
PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY
HARRISBURG, PENNSYLVANIA

HOME OFFICE COPY
SCHEDULE

COVERAGE	General—Automobile Liability Policy No.	LIMITS OF LIABILITY	ADVANCE PREMIUM
P. Personal Injury Liability		\$ 1,000,000 aggregate	
The insurance afforded is only with respect to personal injury arising out of an offense included within such of the following groups of offenses as are indicated by specific premium charge or charges.			
GROUPS OF OFFENSES			ADVANCE PREMIUM
A. False Arrest, Detention or Imprisonment, or Malicious Prosecution			\$ 745.
B. Libel, Slander, Defamation or Violation of Right of Privacy			\$
C. Wrongful Entry or Eviction or Other Invasion of Right of Private Occupancy			\$
Insured's Participation 0%	Minimum Premium \$	N/A	Total Advance Premium \$ 745./

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Pennsylvania National Mutual Casualty Insurance Company
P.O. Box 2361 - Harrisburg, PA 17105

PREMISES MEDICAL PAYMENTS
INSURANCE COVERAGE PART

HOME OFFICE COPY

SCHEDULE		General—Automobile Liability Policy No.				ADVANCE PREMIUM
		COVERAGE				
(a) Premises and operations	15161, 15192, 17140	17235				\$ 157.
(b) Escalators						\$
(c) Sports activities						\$
					Total Advance Premium	\$ 157.

COVERAGE E—PREMISES MEDICAL PAYMENTS

The Company will pay to or for each person who sustains bodily injury caused by or on account of such bodily injury, provided such bodily injury arises out of and in the course of (a) a condition in the insured premises or (b) operations with respect to which the named insured is afforded coverage for bodily injury liability under this policy.

Exclusions

This insurance does not apply:

- (1) to bodily injury arising out of the ownership, maintenance, operation, use, loading or unloading of:
 - (i) any automobile or aircraft owned or operated by or rented or loaned to any insured, or
 - (ii) any other automobile or aircraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to the parking of an automobile on the insured premises, if such automobile is not owned by or rented or loaned to any insured;

- (2) arising out of (i) the ownership, maintenance, operation, use, loading or unloading of any mobile equipment while being used in any prearranged or organized racing, speed or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity or (ii) the operation or use of any snowmobile or trailer designed for use thereon;

- (3) arising out of the ownership, maintenance, operation, use, loading or unloading of:
 - (i) any watercraft owned or operated by or rented or loaned to any insured, or
 - (ii) any other watercraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to watercraft while ashore on the insured premises; or

- (4) arising out of and in the course of the transportation of mobile equipment by an automobile owned or operated by or rented or loaned to any insured;

- (a) to bodily injury

- (1) included within the completed operations hazard or the products hazard;
- (2) arising out of operations performed for the named insured by independent contractors other than (i) maintenance and repair of the insured premises or (ii) structural alterations at such premises which do not involve changing the size of or moving buildings or other structures;

- (3) resulting from the selling, serving or giving of any alcoholic beverage (i) in violation of any statute, ordinance or regulation, (ii) to a minor, (iii) to a person under the influence of alcohol or (iv) which causes or contributes to the intoxication of any person, if the named insured is a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages or, if not so engaged, is an owner or lessor of premises used for such purposes but only part (i) of this exclusion (b) (3) applies when the named insured is such an owner or lessor;

- (4) due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing;

- (c) to bodily injury

- (1) to the named insured, any partner therein, any tenant or other person regularly working on the insured premises or any employee of any of the foregoing if the bodily injury arises out of and in the course of his employment thereon;

- (2) to any other tenant if the bodily injury occurs on that part of the insured premises rented from the named insured or to any employee of such a tenant if the bodily injury occurs on the tenant's part of the insured premises and arises out of and in the course of his employment for the tenant;

- (3) to any person while engaged in maintenance and repair of the insured premises or alteration, demolition or new construction at such premises;

- (4) to any person if any benefits for such bodily injury are payable or required to be provided under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
- (5) to any person practicing, instructing or participating in any physical training, sport, athletic activity or contest unless a premium charge is entered for sport activities in the policy with respect to Premises Medical Payments Coverage;

- (d) to any medical expense for services by the named insured, any employee thereof or any person or organization under contract to the named insured to provide such services.

II. LIMITS OF LIABILITY

The limit of liability for Premises Medical Payments Coverage stated in the declarations as applicable to "each person" is the limit of the company's liability for all medical expense for bodily injury to any one person as the result of any one accident; but subject to the above provision respecting "each person", the total liability of the company under Premises Medical Payments Coverage for all medical expense for bodily injury to two or more persons as the result of any one accident shall not exceed the limit of liability stated in the declarations as applicable to "each accident".

When more than one medical payments coverage afforded by this policy applies to the loss, the company shall not be liable for more than the amount of the highest applicable limit of liability.

III. ADDITIONAL DEFINITIONS

When used in reference to this insurance (including endorsements forming a part of the policy):

"Insured premises" means all premises owned by or rented to the named insured with respect to which the named insured is afforded coverage for bodily injury liability under this policy, and includes the ways immediately adjoining on land.

"Medical expense" means expenses for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services.

IV. POLICY PERIOD; TERRITORY

This insurance applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, or Canada.

V. ADDITIONAL CONDITION

Medical Reports; Proof and Payment of Claim

As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require. The company may pay the injured person or any person or organization rendering the services and the payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

FORM NO. 10165



SOUTH CAROLINA AMENDATORY ENDORSEMENT
(Inland and Seacoast Territories)

MP 03 15
(Ed. 04 89)

The following clause is added with respect to coverage under Special Multi-Peril Policy:

- General Building Form
- Special Building Form
- Builders' Risk Completed Value Form
- Special Builders' Risk Completed Value Form
- Condominium General Building Form
- Condominium Special Building Form

Valuation Clause

With respect to loss to buildings insured against the perils of fire and lightning, the insured and the insurer:

- (1) agree that the value of buildings described in this policy is as indicated in the schedule below, and
- (2) fix the amount of insurance to be carried on the buildings in accordance with the schedule below.

AGREED VALUE OF BUILDINGS			
Loc. No. <u>1</u>	Bldg. No. <u>1</u>	\$ <u>893,000</u>	Loc. No. _____ Bldg. No. _____ \$ _____
Loc. No. <u>1</u>	Bldg. No. <u>2</u>	\$ <u>5,000</u>	Loc. No. _____ Bldg. No. _____ \$ _____
Loc. No. _____	Bldg. No. _____	\$ _____	Loc. No. _____ Bldg. No. _____ \$ _____

For Builders' Risk Completed Value Form and Special Builders' Risk Completed Value Form the Agreed Value of Buildings represents the value when completed.

This Endorsement must be attached to Change Endorsement when issued after the Policy is written.

MP 03 15 (Ed. 04 30)

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

**AMENDATORY ENDORSEMENT
PREJUDGMENT INTEREST**

The following is added to the Supplementary Payments provision in this policy:

The Company will pay, in addition to the applicable limit of liability, prejudgment interest awarded against the **insured** on that part of the judgment the Company pays. If the Company makes an offer to pay the applicable limit of its liability, the Company will not pay any prejudgment interest based on that period of time after the offer.

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

The Attaching Clause need be completed only when any of these endorsements are issued subsequent to preparation of the policy.

**PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY
HARRISBURG, PENNSYLVANIA**

..... Policy Number	..... Effective	..... Expiring	..... Issued to
..... Endorsement No.	..... Effective	..... Agent	..... Authorized Representative

SPECIAL NAMED INSURED ENDORSEMENT

It is agreed that the person(s) or organization(s) named in the Declarations of this policy is(are) as follows:

**Covil Corp., Inc. Covil Residential Insulation, Inc. CovilConst. Co., Inc.
(Dormant Corp.) Industrial and Assoc. Inc. (Dormant Corp.) John Hamrick Link-
Pres. James P. Covil-Vice Pres. Yvonne W. Walls-Corporate Sec. and Tres.
Charles McWhorter Assist. Corp. Sec.**

It is further agreed that all named insureds are owned and controlled by the same financial interest.

It is further agreed that the inclusion of more than one insured shall not operate to increase the limits of the Company's liability.

COINSURANCE CONTRACT



REPLACEMENT COST COVERAGE ENDORSEMENT

MP 04 20
(Ed. 01 83)

This endorsement applies only with respect to the premises described in the following Schedule and affords insurance on a replacement cost basis only on the property described below.

SCHEDULE

Location Of Premises Location No. Building No.		Property Covered on a Replacement Cost Basis (Specify Building or Personal Property of the Insured or both)
1,0	1	Both
1,	2	
2,	1	
2,	2	

1. Replacement Cost Clause: The provisions of Section I of this policy applicable to the property described as covered on a replacement cost basis are amended to substitute the term "replacement cost (without deduction for depreciation)" for the term "actual cash value" wherever it appears in this policy, and the Coinsurance Clause of this endorsement supersedes and replaces all other Coinsurance Clauses otherwise applicable, subject in all other respects to the provisions of this endorsement and of Section I of this policy.
2. This policy does not cover the following property on a replacement cost basis:
 - (a) stock (raw, in process or finished) or merchandise, including materials and supplies in connection therewith.
 - (b) property of others;
 - (c) household furniture or residential contents;
 - (d) manuscripts;
 - (e) paintings, etchings, pictures, tapestries, statuary, marbles, bronzes, antique furniture, rare books, antique silver, porcelains, rare glassware and bric-a-brac, or other articles of art, rarity or antiquity.
3. The Company shall not be liable under this endorsement for any loss unless and until the damaged or destroyed property is actually repaired or replaced by the insured with due diligence and dispatch.
4. Coinsurance Clause: This Company shall not be liable for a greater proportion of any loss or damage to the property covered under this policy than the limit of liability under this policy for such property bears to the amount produced by multiplying the coinsurance percentage applicable (specified in this policy) by the total of (a) the replacement cost (without deduction for depreciation) of that part of said property which is specifically described as covered on a replacement cost basis and (b) the actual cash value of that part of said property which is covered on an actual cash value basis at the time of loss.

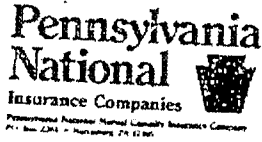
In the event that the aggregate claim for any loss is both less than \$10,000 and less than 5% of the limit of liability for all contributing insurance applicable to the property involved at the time such loss occurs, no special inventory or appraisal of the undamaged property shall be required, provided that nothing herein shall be construed to waive application of the first paragraph of this clause.

If insurance under Section I of this policy is divided into separate limits of liability, the foregoing shall apply separately to the property covered under each such limit of liability.

The value of property covered under Extensions of Coverage, and the cost of the removal of debris, shall not be considered in the determination of actual cash value or replacement cost when applying the Coinsurance Clause.
5. This Company's liability for loss on a replacement cost basis, shall not exceed the smallest of the following amounts:
 - (a) the amount of this policy applicable to the damaged or destroyed property;
 - (b) the replacement cost of the property or any part thereof identical with such property on the same premises and intended for the same occupancy and use; or
 - (c) the amount actually and necessarily expended in repairing or replacing said property or any part thereof.
6. The insured may elect to make claim under this policy in accordance with its provisions, disregarding this endorsement, except that the foregoing Coinsurance Clause shall apply; and the insured may make further claim for any additional liability brought about by this endorsement in accordance with its provisions, provided the Company is notified in writing within 180 days after loss of the insured's intent to make such further claim.

This Endorsement must be attached to Change Endorsement when issued after the Policy is written.

MP 04 20 (Ed. 01 83)



DEDUCTIBLE ENDORSEMENT

Basis of Insurance \$... Full Coverage Rate ... FIRE ECE VMM
Deductible Amount \$ See 70-16 Credit for Deductible See 70-16 Amount See 70-k16 % See 70-16 See 70-16 See 70-16
Limit of Liability \$... Rate for Deductible Insurance after Credit

1. Each claim for loss or damage (separately occurring) shall be adjusted separately and from each such adjusted claim the sum of the deductible specified above shall be deducted. In the event of any recovery and/or salvage on a loss which has been or is being or is about to be paid hereunder, such recovery and/or salvage shall accrue entirely to the benefit of this Company under this policy until the sum paid by them has been made up.

2. The deductible specified above shall apply separately to each:

- Occurrence
Location
Item

(Indicate one) except

3. It is a condition of this policy that the deductible amount specified shall be solely at the risk of the insured, and shall not be covered under any other policy of insurance, except as provided in Paragraph 4.

4. No additional insurance shall be permitted unless permission is granted by the completion of the following:

A. Permission is granted to carry additional insurance in the amount of \$... applying to property situated at ... which shall be deemed to be concurrent insurance.

B. When additional concurrent insurance is carried in accordance with Item A of this paragraph, the deductible amount specified herein shall apply to this policy, only to the extent of the pro rata proportion which this policy bears to the total permitted insurance.

C. Additional insurance carried in accordance with the foregoing shall be added to the sum set forth in this policy as "Basis of Insurance" for the purpose of determining compliance with any coinsurance, contribution, average, or distribution clause.

D. Additional insurance which is permitted by the terms of this endorsement shall not violate the conditions of Paragraph 3, whether or not such additional insurance contains a deductible clause.

E. When additional insurance is not disclosed and permission granted hereunder, the full amount of the deductible shall apply to any losses apportioned to this policy.

5. In consideration of the reduced rate(s) at which this insurance is written, this company shall in no event be liable with respect to any one loss for an amount greater than its pro rata proportion of the sum set forth as "Limit of Liability," or if more than one location be insured hereunder with a specific "Limit of Liability" applicable to each location, in no event shall this company be liable with respect to any location for an amount greater than its pro rata proportion of the "Limit of Liability" applicable thereto.

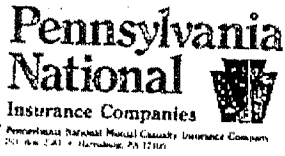
6. It is a condition of this policy that any coinsurance, contribution, average or distribution clause, which may be a part hereof, shall apply to the full value of the property insured, without reduction for the amount of the deductible specified herein, and that such deductible shall apply after any penalty has been assessed by the application of such coinsurance, contribution, average or distribution clause. For the purpose of determining compliance with any such coinsurance, contribution, average or distribution clause, the sum set forth as "Basis of Insurance" shall be applied to the full value of the property as aforesaid.

Attached to and forming part of Policy No. ...

of the ... (Name of Insurance Company)

Dated ... 19...

Agent



SUPPLEMENT TO DEDUCTIBLE ENDORSEMENT

1. The term "Occurrence" as contained in the deductible endorsement of this policy, shall be held to mean a single incident or event. When, however, the term "Occurrence" shall apply to loss or losses from windstorm if insured hereunder, it shall be held to mean a period of 48 consecutive hours.
2. When at the election of the policyholder, the deductible amount is applied to each location, the term "Location" insofar as such property is insured hereunder, shall be held to mean:
 - A. each building, including contents thereof, to the extent they are insured hereunder, or
 - B. a number of buildings including their contents, in a single group, and designated as a single location in this policy or in the application for insurance.
 - C. (if any other basis mutually agreed upon, indicate hereunder)

In the case of a policy written to cover more than one location subject to a deductible such locations will be designated in the policy.

3. The term "Item" shall be held to mean the individual descriptions of the property insured and designated by the terms "Item 1", "Item 2", etc. on the form attached to this policy.

All other terms and conditions of the policy remain unchanged.

Attached to and forming part of Policy No. _____,
 of the _____ (Name of Insurance Company) Dated _____, 19____.
 _____ Agent

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy.)

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY
HARRISBURG, PENNSYLVANIA

..... Policy Number	..... Effective	..... Expiring	..... Issued to
..... Endorsement No.	..... Effective	..... Expiring	..... Agent
..... Authorized Representative			

AMENDATORY ENDORSEMENT

Supplemental Schedule - Deductible Endorsement

Location # 1		Item # 1 Bldg.	
Basis of Insurance	<u>893,000</u>	Credit for	
Deductible Amount	<u>1,000</u>	Deductible Amount	<u>16%</u>
Limit of Liability	<u>893,000</u>		
Company Participation	<u>100%</u>		

Location # 1		Item # 1 Conts.	
Basis of Insurance	<u>1,200,000</u>	Credit for	
Deductible Amount	<u>1,000</u>	Deductible Amount	<u>16%</u>
Limit of Liability	<u>1,200,000</u>		
Company Participation	<u>100%</u>		

Location # 1		Item # 2 Bldg.	
Basis of Insurance	<u>5,000</u>	Credit for	
Deductible Amount	<u>1,000</u>	Deductible Amount	<u>15%</u>
Limit of Liability	<u>5,000</u>		
Company Participation	<u>100%</u>		

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy.)

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY
HARRISBURG, PENNSYLVANIA

Policy Number	Effective	Expiring	Issued to
Endorsement No.	Effective	Expiring	Agent
Authorized Representative			

AMENDATORY ENDORSEMENT

Supplemental Schedule - Deductible Endorsement

Location # 1	Item #
Basis of Insurance <u>2,000</u>	2 (conts.)
Deductible Amount <u>1,000</u>	Credit for
Limit of Liability <u>2,000</u>	Deductible Amount <u>10%</u>
Company Participation <u>100%</u>	
Location # 2	Item #
Basis of Insurance <u>92,000</u>	Credit for
Deductible Amount <u>1,000</u>	Deductible Amount _____
Limit of Liability <u>92,000</u>	
Company Participation <u>100%</u>	
Location # 2	Item #
Basis of Insurance <u>131,000</u>	Credit for
Deductible Amount <u>1,000</u>	Deductible Amount _____
Limit of Liability <u>131,000</u>	
Company Participation <u>100%</u>	



LOSS PAYABLE

No. 520
Ala.-Fla.-S. C.
(Edition 9-65)

It is stipulated that any loss due the Insured under this policy shall be held payable to Telephona Control
Corp. 302 Research Dr. Norcross, GA 30092
as their interest may appear, subject, nevertheless, to all conditions of the policy.

Note to Agents—The "attaching" portion may be torn off if the clause is attached when the policy is written.
Attached to and forming part of Policy No. 515 50 28 53-8 of the
PA NAT MUT CAS INS CO NAME OF INSURANCE COMPANY
issued at its Sam J Crain STATE _____ Agency.
Dated _____
No. 520 (9-65) (Ala., Fla., S. C.) Agent
No. 520 (9-65) (Ala., Fla., S. C.)



Pennsylvania National Mutual Casualty Insurance Company
P.O. Box 2361 • Harrisburg, PA 17105

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy.)

.....
Policy Number	Effective	Expiring	Issued to
.....
Endorsement No.	Effective		Agent
.....
			Authorized Representative

TANNING BOOTHS OR SUNTANNING PROCEDURES EXCLUSION ENDORSEMENT

It is agreed that this policy does not apply to **Bodily Injury, Property Damage or Personal Injury** arising out of the use of sunlamps, suntanning equipment, tanning booths or other similar equipment.

This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective	Policy No.	Endorsement No.
Named Insured	Countersigned by _____	
	(Authorized Representative)	

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

**BUSINESS OWNERS POLICY
 COMPREHENSIVE GENERAL LIABILITY INSURANCE
 CONTRACTUAL LIABILITY INSURANCE
 MANUFACTURERS AND CONTRACTORS LIABILITY INSURANCE
 OWNERS AND CONTRACTORS PROTECTIVE LIABILITY INSURANCE
 OWNERS, LANDLORDS AND TENANTS LIABILITY INSURANCE
 SMP LIABILITY INSURANCE
 STOREKEEPERS INSURANCE**

POLLUTION EXCLUSION

It is agreed that the exclusion relating to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants is replaced by the following:

- (1) to **bodily injury** or **property damage** arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
 - (a) at or from premises owned, rented or occupied by the **named insured**;
 - (b) at or from any site or location used by or for the **named insured** or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) which are at any time transported, handled, stored, treated, disposed of or processed as waste by or for the **named insured** or any person or organization for whom the **named insured** may be legally responsible; or
 - (d) at or from any site or location on which the **named insured** or any contractors or subcontractors working directly or indirectly on behalf of the **named insured** are performing operations:
 - (i) if the pollutants are brought on or to the site or location in connection with such operations; or
 - (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
- (2) to any loss, cost or expense arising out of any governmental direction or request that the **named insured** test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Subparagraphs (a) and (d) (i) of paragraph (1) of this exclusion do not apply to **bodily injury** or **property damage** caused by heat, smoke or fumes from a hostile fire. As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.



This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.
(The following information is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective _____ Policy No. _____ Endorsement No. _____
Named Insured _____

Countersigned by _____
(Authorized Representative)

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:
COMPREHENSIVE GENERAL LIABILITY INSURANCE
DRUGGISTS LIABILITY INSURANCE
MANUFACTURERS AND CONTRACTORS LIABILITY INSURANCE
OWNERS, LANDLORDS AND TENANTS LIABILITY INSURANCE
STOREKEEPERS INSURANCE
COMPLETED OPERATIONS AND PRODUCTS LIABILITY INSURANCE
CONTRACTUAL LIABILITY INSURANCE
PREMISES MEDICAL PAYMENTS INSURANCE
GARAGE INSURANCE

AMENDMENT OF "ALCOHOLIC BEVERAGE" EXCLUSION—SOUTH CAROLINA

It is agreed that that part of the alcoholic beverage exclusion which relates to the selling, serving or giving of any alcoholic beverage (a) to a person under the influence of alcohol or (b) which causes or contributes to the intoxication of any person, is deleted.

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMERCIAL PLEAS - CASE#2020CP4001226

This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective	Policy No.	Endorsement No.
Named Insured		Countersigned by _____ (Authorized Representative)

This endorsement modifies such insurance as is afforded by the provisions of the Policy relating to the following:

**COMPREHENSIVE GENERAL LIABILITY INSURANCE
 CONTRACTUAL LIABILITY INSURANCE
 MANUFACTURERS AND CONTRACTORS LIABILITY INSURANCE
 OWNERS, LANDLORDS AND TENANTS LIABILITY INSURANCE
 OWNERS AND CONTRACTORS PROTECTIVE LIABILITY INSURANCE**

AMENDMENT OF DEFINITION—INCIDENTAL CONTRACT

It is agreed that the definition of **incidental contract** is amended to include any easement or license agreement in connection with vehicle or pedestrian private railroad crossing at grade.

Instructions

The provisions of this endorsement may be incorporated into General Liability policies.

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective	Policy No.	Endorsement No.
Named Insured		
Additional Premium \$ _____	Countersigned by _____	(Authorized Representative)

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

COMPREHENSIVE GENERAL LIABILITY INSURANCE
MANUFACTURERS AND CONTRACTORS LIABILITY INSURANCE
OWNERS, LANDLORDS AND TENANTS LIABILITY INSURANCE
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY INSURANCE
STOREKEEPERS INSURANCE
SMP LIABILITY INSURANCE

Amendatory Endorsement

It is agreed that the exclusion relating to **bodily injury** to any employee of the **insured** is deleted and replaced by the following:

This insurance does not apply:

- (i) to **bodily injury** to any employee of the **insured** arising out of and in the course of his employment by the **insured** for which the **insured** may be held liable as an employer or in any other capacity;
- (ii) to any obligation of the **insured** to indemnify or contribute with another because of damages arising out of the **bodily injury**; or
- (iii) to **bodily injury** sustained by the spouse, child, parent, brother or sister of an employee of the **insured** as a consequence of **bodily injury** to such employee arising out of and in the course of his employment by the **insured**;

This exclusion applies to all claims and suits by any person or organization for damages because of such **bodily injury** including damages for care and loss of services.

This exclusion does not apply to liability assumed by the **insured** under an **incidental contract**.

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

IMPORTANT NOTICE -- PLEASE READ CAREFULLY

Please read the provisions of the Pollution Exclusion endorsement attached to this policy. It replaces the Pollution Exclusion contained in the policy wording.

This policy, with this Pollution Exclusion endorsement attached, does not provide coverage for liability resulting from pollution which occurs either gradually or in a sudden and accidental manner. Accordingly, this endorsement represents a reduction in the coverage afforded under your previous policy, by eliminating coverage for liability resulting from sudden and accidental pollution.

If you have any questions regarding this change, please contact your agent.



This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein
(The following information is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective _____ Policy No. _____ Endorsement No. _____
Named Insured _____

Countersigned by _____
(Authorized Representative)

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

- COMPREHENSIVE GENERAL LIABILITY INSURANCE
- COMPLETED OPERATIONS AND PRODUCTS LIABILITY INSURANCE
- MANUFACTURERS AND CONTRACTORS LIABILITY INSURANCE
- OWNERS, LANDLORDS AND TENANTS LIABILITY INSURANCE
- OWNERS AND CONTRACTORS PROTECTIVE LIABILITY INSURANCE
- SMP LIABILITY INSURANCE

DEDUCTIBLE LIABILITY INSURANCE

It is agreed that:

1. The company's obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages on behalf of the insured, applies only to the amount of damages in excess of any deductible amounts stated in the schedule below as applicable to such coverages, and the limit of liability shown in this policy as being applicable to "each occurrence" for such coverages shall be reduced by the amount of such deductible. The limit of liability shown in this policy as "aggregate", if any, for such coverages shall not be reduced by the application of such deductible amount.
2. The deductible amounts stated in the schedule apply as follows:
 - (a) **PER CLAIM BASIS**—if the deductible is on a "per claim" basis, the deductible amount applies under the Bodily Injury Liability or Property Damage Liability Coverage, respectively, to all damages because of bodily injury sustained by one person, or to all property damage sustained by one person or organization, as the result of any one occurrence.
 - (b) **PER OCCURRENCE BASIS**—if the deductible is on a "per occurrence" basis, the deductible amount applies under the Bodily Injury Liability or Property Damage Liability Coverage, respectively, to all damages because of all bodily injury or property damage as the result of any one occurrence, regardless of the number of persons or organizations who sustain damages because of that occurrence.
3. The terms of the policy, including those with respect to (a) the company's rights and duties with respect to the defense of suits and (b) the insured's duties in the event of an occurrence apply irrespective of the application of the deductible amount.
4. The company may pay any part or all of the deductible amount to effect settlement of any claim or suit and, upon notification of the action taken, the named insured shall promptly reimburse the company for such part of the deductible amount as has been paid by the company.

SCHEDULE

Coverage	Amount and Basis of Deductible
Bodily Injury Liability	\$ _____ per claim
	\$ _____ per occurrence
Property Damage Liability	\$ _____ per claim
	\$ 100. per occurrence

APPLICATION OF ENDORSEMENT (Enter here any limitations on the application of this endorsement. If no limitation is entered, the deductibles apply to all loss however caused):—



DEDUCTIBLE ON IA, II OR III
(For use with SMP Comprehensive Crime Coverage Endorsement Form Only)

MP 03 07
(Ed. 07 77)

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001228

It is agreed that, with respect to SMP Comprehensive Crime Coverage Endorsement Form, to which this endorsement is attached:

1. The Company shall not be liable under Insuring Agreement IA on account of loss through acts or defaults committed at any time, whether before or after this endorsement is effective, by any Employee or in which such Employee is concerned or implicated, unless the amount of such loss, after deducting the net amount of all reimbursement and recovery, including any cash deposit taken by the Insured, obtained or made by the Insured, other than from any bond or policy of insurance issued by a surety of insurance company and covering such loss, or by the Company on account thereof prior to payment by the Company of such loss, shall be in excess of

Dollars (\$ **250.**)

and then for such excess only, but in no event for more than the amount of insurance carried under Insuring Agreement IA on such loss.
2. The Company shall not be liable under Insuring Agreement II on account of any loss, except to the extent such loss is in excess of Dollars (\$ **250.**), with the insurance then applying to such excess only, subject otherwise to the applicable limit of the Company's liability.

3. The Company shall not be liable under Insuring Agreement III on account of any loss, except to the extent such loss is in excess of Dollars (\$ **250.**), with the insurance then applying to such excess only, subject otherwise to the applicable limit of the Company's liability.

4. In no event shall the Company be liable under any Insuring Agreement, as modified by this endorsement, for more than the amount specified in the Table of Limits of Liability as applicable to such Insuring Agreement subject, however, to Section 11.

5. Section 10 is deleted and the following inserted:

"Section 10. If the Insured shall sustain any loss covered by this endorsement to which a deductible amount applies and such loss exceeds the applicable amount of insurance hereunder plus such Deductible Amount, the Insured shall be entitled to all recoveries made after payment by the Company of loss covered by this endorsement (except from suretyship, insurance, reinsurance, security or indemnity taken by or for the benefit of the Company) by whomsoever made, less the actual cost of effecting such recoveries, until reimbursed for such excess loss; and any remainder, or, if there be no such excess loss, any such recoveries shall be applied first in reimbursement of the Company and thereafter in reimbursement of the Insured for that part of such loss within such Deductible Amount."

6. The Insured shall, within the time and in the manner prescribed in the said SMP Comprehensive Crime Coverage Endorsement, give the Company notice of any loss of the kind covered by Insuring Agreement IA whether or not the Company is liable therefor or for any part thereof, and upon the request of the Company shall file with it a brief statement giving the particulars concerning such loss.

This Endorsement must be attached to Change Endorsement when issued after the Policy is written.

MP 03 07 (Ed. 07 77)



This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No.

Named Insured

Countersigned by _____
(Authorized Representative)

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following
COMPREHENSIVE GENERAL LIABILITY INSURANCE
SMP LIABILITY INSURANCE

EXCLUSION

(Completed Operations Hazard and Products Hazard)

It is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and the Property Damage Liability Coverage does not apply to **bodily injury** or **property damage** included within the **Completed Operations Hazard** or the **Products Hazard**.

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FORGERY DEDUCTIBLE ON V
(For use with SMP Comprehensive Crime Coverage Endorsement Form Only)

MP 24 05
(Ed. 07 77)

It is agreed that, with respect to SMP Comprehensive Crime Coverage Endorsement Form, to which this endorsement is attached:

1. The Company shall not be liable under Insuring Agreement V on account of any loss through forgery or alteration committed by any person or in which such person is concerned or implicated, whether such forgery or alteration involves one or more instruments, unless such loss shall exceed **Dollars (\$ 250.** and loss for each event only but in no event for more than the amount of insurance carried under Insuring Agreement V on such loss.
2. The Insured shall, within the time and in the manner prescribed in the Policy, give the Company notice of any loss of the kind covered by Insuring Agreement V whether or not the Company is liable therefor or for any part thereof, and upon the request of the Company shall file with it a brief statement giving the particulars concerning such loss.

This Endorsement must be attached to Change Endorsement when issued after the Policy is written.

MP 24 05 (Ed. 07 77)

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CHANGE ENDORSEMENT

THIS ENDORSEMENT FORMS A PART OF THE POLICY NUMBERED BELOW:

ENDORSEMENT EFFECTIVE DATE 6/23/67	POLICY NUMBER 513 50 28 53 0	TERM 1 YRS	FROM 3/31/67	3.
---------------------------------------	---------------------------------	---------------	-----------------	----

COMPANY FMI	INSURED'S NAME AND MAILING ADDRESS Covil Corporation, Inc(See 70-53) PO Box 1854 Greenville, SC 29602	AUTHORIZED REPRESENTATIVE'S NAME AND MAILING ADL Sam J Crain & Co
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PRODUCER CODE 22 6729

POLICY CHANGES

Industrial & Assoc. Inc(Bermont Corp.) is deleted from Form 70-53

SPECIFY FORM NOS. AND EDITION DATES AFFECTED BY POLICY CHANGES:

SECTION I—PROPERTY COVERAGE

Coverage Description	Loc. No.	Bldg. No.	LIMITS OF LIABILITY		RATES		PREMIUMS		<input type="checkbox"/> Add'l <input type="checkbox"/> Return
			Previous	New	Previous	New	Previous	New	
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$

SECTION II—LIABILITY COVERAGE

COVERAGE	LIMITS OF LIABILITY		PREMIUMS		<input type="checkbox"/> Add'l <input type="checkbox"/> Return
	Previous	New	Previous	New	
SMP Liability Insurance Form: Bodily Injury and Property Damage Liability (Combined Single Limit)	\$ ea. Occurrence	\$ ea. Occurrence			
	\$ Aggregate	\$ Aggregate	\$	\$	\$
Premises Medical Payments	\$	\$			
<input type="checkbox"/> SMP Liability Insurance Form	\$ ea. Person	\$ ea. Person			
<input type="checkbox"/> Medical Payments Coverage Part	\$ ea. Accident	\$ ea. Accident	\$	\$	\$
<input type="checkbox"/> Forms other than SMP Liability Insurance Form	BODILY INJURY LIABILITY				
<input type="checkbox"/> Specify Coverage Part	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate			
	PROPERTY DAMAGE LIABILITY				
	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$	\$			
<input type="checkbox"/> Revised Dual Limits:	\$ Aggregate	\$ Aggregate			

INSTALLMENT PAYMENT PREMIUMS

Dec. 63	Previous Installments	Additional Premium	Return Premium	Revised Installments
Dates of subsequent installments, if payable in annual installments:	2.	\$	\$	\$
	3.	\$	\$	\$
PREMIUM DUE AT EFFECTIVE DATE OF ENDORSEMENT:		\$	\$	\$
Total for remainder of policy term:	7/29/67&T	\$	\$	\$

MP 12 01 (Ed. 02 79) Agency, By

CHANGE ENDORSEMENT

MP 12 01
(Ed. 02 79)

THIS ENDORSEMENT FORMS A PART OF THE POLICY NUMBERED BELOW:

ENDORSEMENT EFFECTIVE DATE 4/24/87	POLICY NUMBER 515 03 91 36 8	TERM 1 YRS	FROM 3/15/87	TO 3/15/88
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COMPANY PNI	INSURED'S NAME AND MAILING ADDRESS Carolina Investment Group (See 70-53) 4701 Hedgemore Dr. Suite 104 Charlotte, NC 28209	AUTHORIZED REPRESENTATIVE'S NAME AND MAILING ADDRESS Ben F Turner, Inc	PRODUCER CODE 21 6128
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POLICY CHANGES

Adding Form MP0127(4/86) to policy with no change in premium.

SPECIFY FORM NOS. AND EDITION DATES AFFECTED BY POLICY CHANGES:

SECTION I—PROPERTY COVERAGE

Coverage Description	Loc. No.	Bldg. No.	LIMITS OF LIABILITY		RATES		PREMIUMS		<input type="checkbox"/> Add'l <input type="checkbox"/> Return
			Previous	New	Previous	New	Previous	New	
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$

SECTION II—LIABILITY COVERAGE

COVERAGE	LIMITS OF LIABILITY		PREMIUMS		<input type="checkbox"/> Add'l <input type="checkbox"/> Return
	Previous	New	Previous	New	
SMP Liability Insurance Form: Bodily Injury and Property Damage Liability (Combined Single Limit)	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate			
<input type="checkbox"/> Premises Medical Payments SMP Liability Insurance Form	\$ ea. Person	\$ ea. Person	\$	\$	\$
<input type="checkbox"/> Medical Payments Coverage Part	\$ ea. Accident	\$ ea. Accident	\$	\$	\$
<input type="checkbox"/> Forms other than SMP Liability Insurance Form Specify Coverage Part	BODILY INJURY LIABILITY				
	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate			
	PROPERTY DAMAGE LIABILITY				
	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate			
<input type="checkbox"/> Revised Dual Limits:					

INSTALLMENT PAYMENT PREMIUMS

Doc. #2	Previous Installments	Additional Premium	Return Premium	Revised Installments
Dates of subsequent installments, if payable in annual installments: 2.	\$	\$	\$	\$
3.	\$	\$	\$	\$
PREMIUM DUE AT EFFECTIVE DATE OF ENDORSEMENT:		\$ n.c.	\$	
Total for remainder of policy term: 7/29/87		\$	\$	

MP 12 01 (Ed. 02 79) Agency, By

COINSURANCE CONTRACT

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SET TAB STOPS AT ARROWS



BUSINESSOWNERS POLICY CHANGE ENDORSEMENT

BU 12 01
(Ed. 01 83)

THIS ENDORSEMENT FORMS A PART OF THE POLICY NUMBERED BELOW

EFFECTIVE DATE 4/15/87	COMPANY PNI	POLICY NUMBER 525 02 11 71 7
Policy Period FROM 12 21 86	TO 12 21 87	<input type="checkbox"/> Standard Form <input checked="" type="checkbox"/> Special Form

Name Insured and Mailing Address	REPRESENTATIVE: Agent or Broker and Office Address
Seacon Square Condominium Assoc. 1036 East Ocean View Ave Norfolk, VA 23503	Commercial Ins 27 4132
	Authorized Representative

7/29/87er

POLICY CHANGES

Doc. #4, typed 6/18/87, effective 4/15/87 is corrected to show adding Loc 2 (in lieu of Loc 1) at 1052-1058 E. Oceanview Ave., Norfolk, VA

Coverage Description	Limits of Liability		Premiums		<input type="checkbox"/> Add'l. Premium <input type="checkbox"/> Return Premium
	Previous Limit	New Limit	Previous Premium	New Premium	
	\$	\$	\$	\$	

OPTIONAL COVERAGES

The following optional coverages are added under this policy when designated by an "X" in the box(es) shown below.			<input type="checkbox"/> Add'l. Premium <input type="checkbox"/> Return Premium
<input type="checkbox"/>	Employee Dishonesty	\$5,000 each occurrence	\$
<input type="checkbox"/>	Exterior Signs	\$	
<input type="checkbox"/>	Exterior Grade Floor Glass	Included under Coverage A or Coverage B	
<input type="checkbox"/>	Burglary and Robbery	Refer to Page 6 & 7 of the Standard Form	
<input type="checkbox"/>	Boiler, Pressure Vessels and Air Conditioning Equipment	Included under Coverage A or Coverage B	
<input type="checkbox"/>	Other (Describe)		

Doc. #5

Total Additional or Return Premium na

BU 12 01 (Ed. 01 83)

CHANGE ENDORSEMENT

MP 12 01
(Ed. 02 79)

THIS ENDORSEMENT FORMS A PART OF THE POLICY NUMBERED BELOW:

ENDORSEMENT EFFECTIVE DATE 9/9/87	POLICY NUMBER 515 50 28 53 B	TERM 1 YRS	FROM 3/31/87	TO 3/31/88
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COMPANY PA NAT MUT CAS INS CO

INSURED'S NAME AND MAILING ADDRESS Covil Corporation, Inc. (See 70-53) PO Box 1804 Greenville, SC 29602	AUTHORIZED REPRESENTATIVE'S NAME AND MAILING ADDRESS Sam J Crain & Co., Inc.
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PRODUCER CODE 22 6720

11/11/87 LB # 0285 POLICY CHANGES

Waiver of Subrogation endorsement is added to the policy - See Form 03-16 attached.

SPECIFY FORM NOS. AND EDITION DATES AFFECTED BY POLICY CHANGES:

SECTION I—PROPERTY COVERAGE

Coverage Description	Loc. No.	Bldg. No.	LIMITS OF LIABILITY		RATES		PREMIUMS		<input type="checkbox"/> Add'l <input type="checkbox"/> Return
			Previous	New	Previous	New	Previous	New	
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$

SECTION II—LIABILITY COVERAGE

COVERAGE	LIMITS OF LIABILITY		PREMIUMS		<input type="checkbox"/> Add'l <input type="checkbox"/> Return
	Previous	New	Previous	New	
SMP Liability Insurance Form: Bodily Injury and Property Damage Liability (Combined Single Limit)	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate			
<input type="checkbox"/> Premises Medical Payments SMP Liability Insurance Form	\$ ea. Person	\$ ea. Person	\$	\$	\$
<input type="checkbox"/> Medical Payments Coverage Part	\$ ea. Accident	\$ ea. Accident	\$	\$	\$
<input type="checkbox"/> Forms other than SMP Liability Insurance Form Specify Coverage Part	BODILY INJURY LIABILITY				
	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate			
	PROPERTY DAMAGE LIABILITY				
	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate			
<input type="checkbox"/> Revised Dual Limits:					

INSTALLMENT PAYMENT PREMIUMS

DOC #4	Previous Installments	Additional Premium	Return Premium	Revised Installments
Dates of subsequent installments: 2.	\$	\$	\$	\$
if payable in annual installments: 3.	\$	\$	\$	\$
PREMIUM DUE AT EFFECTIVE DATE OF ENDORSEMENT:	\$	\$	\$	\$
Total for remainder of policy term:	\$	\$	\$	\$

MP 12 01 (Ed. 02 79) Agency, By



Waiver of Subrogation Endorsement

It is agreed that with respect to such insurance as is afforded by the policy for Bodily Injury Liability and Property Damage Liability, condition 7, Subrogation, is amended to read as follows:

- 7. Subrogation, In the event of any payment under this policy, the Company shall be subrogated to all the insured's rights of recovery thereof against any person or organization except- Tyger Construction Co. in connection with the insured's contract

The insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

It is further agreed that the additional premium for this endorsement is a minimum charge and shall be retained in full by the Company in the event of cancellation or termination of this endorsement or the policy.

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY
Harrisburg, Pennsylvania

515 50 28 53 8	3/31/87	3/31/88	Covil Corporation, Inc.
<small>Policy Number</small>	<small>Effective</small>	<small>Expiring</small>	<small>(Issued to)</small>
XXX	9/9/87		Sam J. Crain & Co., Inc. 22 6729
<small>(Endorsement No.)</small>	<small>(Effective)</small>		<small>(Agent)</small>

.....
Authorized Representative

Form 03-16b

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CHANGE ENDORSEMENT

MP 12 01
(Ed. 02 79)

THIS ENDORSEMENT FORMS A PART OF THE POLICY NUMBERED BELOW:

ENDORSEMENT EFFECTIVE DATE 3/31/87	POLICY NUMBER 515 50 24 53 8	TERM 1 YRS	FROM 3/31/87	TO 3/31/88
COMPANY PNI				
INSURED'S NAME AND MAILING ADDRESS Covil Corp. PO Box 1804 Greenville, SC 29602		AUTHORIZED REPRESENTATIVE'S NAME AND MAILING ADDRESS Sam J Grain & Co.		
PRODUCER CODE 22 6729				
POLICY CHANGES				
Adding Location #2 at 130 Panaley Circle, Greenville, Greenville, SC for 31,000 All Risk, 1000 Ded, 80% Co-Insurance. Contents Coverage.				
Breakdown F -218 E 14 V 2 A 137				
SPECIFY FORM NOS. AND EDITION DATES AFFECTED BY POLICY CHANGES:				

SECTION I—PROPERTY COVERAGE

Coverage Description	Loc. No.	Bldg. No.	LIMITS OF LIABILITY		RATES		PREMIUMS 100%		<input checked="" type="checkbox"/> Add'l <input type="checkbox"/> Return
			Previous	New	Previous	New	Previous	New	
B	2	1	\$ nil	\$ 21,000			\$ nil	\$ 371.	\$ 371.
			\$	\$			\$	\$	\$
			\$	\$			\$	\$	\$

SECTION II—LIABILITY COVERAGE

COVERAGE	LIMITS OF LIABILITY		PREMIUMS		
	Previous	New	Previous	New	<input type="checkbox"/> Add'l <input type="checkbox"/> Return
SMP Liability Insurance Form: Bodily Injury and Property Damage Liability (Combined Single Limit)	\$ ea. Occurrence	\$ ea. Occurrence			
	\$ Aggregate	\$ Aggregate	\$	\$	\$
<input type="checkbox"/> Premises Medical Payments Form	\$ ea. Person	\$ ea. Person			
<input type="checkbox"/> Medical Payments Coverage Part	\$ ea. Accident	\$ ea. Accident	\$	\$	\$
<input type="checkbox"/> Forms other than SMP Liability Insurance Form Specify Coverage Part	BODILY INJURY LIABILITY				
	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate			
	PROPERTY DAMAGE LIABILITY				
	\$ ea. Occurrence	\$ ea. Occurrence	\$	\$	\$
	\$ Aggregate	\$ Aggregate	\$	\$	\$

Revised Dual Limits:

INSTALLMENT PAYMENT PREMIUMS

Doc. #1	Previous Installments	Additional Premium	Return Premium	Revised Installments
Dates of subsequent installments, 2.	\$	\$	\$	\$
if payable in annual installments: 3.	\$	\$	\$	\$
PREMIUM DUE AT EFFECTIVE DATE OF ENDORSEMENT: 3/31/87		\$ 371.	\$	\$
Total for remainder of policy term: 5/13/87ax		\$ 371.	\$	\$

MP 12 01 (Ed. 02 79)

Agency, By

CODED BY BR

CRB

SPECIAL MULTI-PERIL POLICY CONDITIONS AND DEFINITIONS Form MP 00 90 07 57
GENERAL CONDITIONS

The following Conditions apply to Section I and II except as otherwise indicated. Additional Conditions or modifications of the following Conditions may appear in the specific coverage sections.

1. Premium. All premiums for this policy shall be computed in accordance with the Company's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

If this policy is issued for a period in excess of one year with a specified expiration date and a premium is payable at each anniversary, such premium shall be determined annually on the basis of the rates in effect at the anniversary date.

If this policy is issued for a period without a specified expiration date, it may be continued by payment of the required premium for the succeeding annual period. Such premium must be paid to the Company prior to each anniversary date; if not so paid, this policy shall expire on the first anniversary date that the said premium has not been received by the Company.

2. Time of Inception. To the extent that coverage in this policy replaces coverage in other policies terminating noon standard time on the inception date of this policy, coverage under this policy shall not become effective until such other coverage has terminated.

3. Cancellation. This policy may be cancelled by the named insured by surrender thereof to the Company or any of its authorized agents or by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the named insured at the mailing address shown in the Declarations, written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the Company shall be equivalent to mailing.

If the named insured cancels, the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

Notice of cancellation addressed to the named insured and mailed to the mailing address shown in the Declarations shall be sufficient notice to effect cancellation of this policy.

4. Concealment or Fraud. This policy is void if any insured has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance.

5. Assignment. Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. However, if the named insured shall die, this insurance shall apply:

(a) to the named insured's legal representative, as the named insured, but only while acting within the scope of his duties as such; or

(b) to the person having temporary custody of the property of the named insured but only until the appointment and qualification of the legal representative.

6. Subrogation.

(a) In the event of any payment under this policy, the Company shall be subrogated to all the insured's rights of recovery against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

(b) The Company shall not be bound to pay any loss if the insured has impaired any right of recovery for loss; however, it is agreed that the insured may:

(1) as respects property while on the premises of the insured, release others in writing from liability for loss prior to loss, and such release shall not affect the right of the insured to recover hereunder, and

(2) as respects property in transit, accept such bills of lading, receipts or contracts of transportation as are ordinarily issued by carriers containing a limitation as to the value of such goods or merchandise.

7. Inspection and Audit. The Company shall be permitted but not obligated to inspect the named insured's property and operations at any time. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the named insured or others to determine or warrant that such property or operations are safe or healthful or are in compliance with any law, rule or regulation.

The Company may examine and audit the named insured's books and records at any time during the policy period and extensions and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

8. Liberalization Clause. In the event any filing is submitted to the insurance supervisory authorities on behalf of the Company, and:

(a) the filing is approved or accepted by the insurance authorities to be effective while this policy is in force or within 45 days prior to its inception; and

(b) the filing includes insurance forms or other provisions that would extend or broaden this insurance by endorsement or substitution of form, without additional premium:

the benefit of such extended or broadened insurance shall inure to the benefit of the insured as though the endorsement or substitution of form had been made.

9. Insurance Under More Than One Coverage, Part or Endorsement. In the event that more than one coverage, part or endorsement of this policy insures the same loss, damage or claim, the Company shall not be liable for more than the actual loss or damage sustained by the insured.

10. Waiver or Change of Provisions. The terms of this insurance shall not be waived, changed or modified except by endorsement issued to form a part of this policy.

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CONDITIONS APPLICABLE TO SECTION I

1. Policy Period. Territory. Section I of this policy applies only to loss to property during the policy period while such property is within or between the fifty states or the United States of America, the District of Columbia and Puerto Rico.

2. Deductible. Unless otherwise provided in the Declarations.

(a) The sum of \$100 shall be deducted from the amount of loss to property in any one occurrence. This deductible shall apply

- (1) separately to each building, including personal property therein;
- (2) separately to personal property in each building if no coverage is provided on the containing building; and
- (3) separately to personal property in the open (including within vehicles).

(b) The aggregate amount of this deductible in any one occurrence shall not exceed \$1,000.

3. Coinsurance Clause. The Company shall not be liable for a greater proportion of any loss to property covered than the limit of liability under this policy for such property bears to the amount produced by multiplying the actual cash value of such property at the time of the loss by the coinsurance percentage stated in the Declarations.

In the event that the aggregate claim for any loss is both less than \$10,000 and less than 5% of the limit of liability for all contributing insurance applicable to the property involved at the time such loss occurs, no special inventory or appraisal of the undamaged property shall be required providing that nothing herein shall be construed to waive the application of the first paragraph of this clause.

If insurance under Section I of this policy is divided into separate limits of liability, the foregoing shall apply separately to the property covered under each such limit of liability.

4. Removal. This policy covers loss by removal of the property covered hereunder from premises endangered by the perils insured against, and the amount of insurance applies pro rata for five days at each proper place to which such property shall necessarily be removed for preservation.

5. Debris Removal. This policy covers expense incurred in the removal of debris of the property covered which may be occasioned by loss by any of the perils insured against in this policy. The total amount recoverable under this policy for both loss to property and debris removal expense shall not exceed the limit of liability applying to the property. Cost of removal of debris shall not be considered in the determination of actual cash value when applying the Coinsurance Clause.

6. War Risk And Governmental Action Exclusion. This policy under Section I shall not apply to loss caused, directly or indirectly, by or due to any act or condition incident to the following:

- (a) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack (i) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (ii) by military, naval or air forces; or (iii) by an agent of any such government, power, authority or forces, it being understood that any discharge, explosion or use of any weapon of war employing nuclear fission or fusion shall be conclusively presumed to be such a hostile or warlike action by such a government, power, authority or forces;
- (b) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence; seizure or destruction under quarantine or custom's regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

7. Nuclear Clause And Nuclear Exclusion.

(a) Nuclear Clause (Not Applicable in New York). The word "fire" in this policy is not intended to and does not embrace nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and loss by nuclear reaction or nuclear radiation or radioactive contamination is not intended to be and is not insured against by this policy, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by "fire" or any other perils insured against by this

policy. However, subject to the foregoing and all provisions of this policy, direct loss by "fire" resulting from nuclear reaction or nuclear radiation or radioactive contamination is insured against by this policy.

(b) Nuclear Clause (Applicable only in New York). This policy does not cover loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination, all whether directly or indirectly resulting from an insured peril under this policy.

(c) Nuclear Exclusion (Not Applicable in New York). Loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing is not insured against by this policy, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by any of the perils insured against by this policy; and nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, is not "explosion" or "smoke". This clause applies to all perils insured against hereunder except the peril of fire, which is otherwise provided for in the nuclear clause above.

8. Other Insurance.

(a) If at the time of loss there is other insurance written in the name of the insured upon the same plan, terms, conditions and provisions as contained in this policy, herein referred to as Contributing Insurance, the Company shall be liable for no greater proportion of any loss than the limit of liability under this policy bears to the whole amount of insurance covering such loss.

(b) If at the time of loss there is other insurance other than that as described in (a) above, the Company shall not be liable for any loss hereunder until:

- (1) the Liability of such other insurance has been exhausted, and
- (2) then for only such amount as may exceed the amount due from such other insurance, whether collectible or not.

9. Duties Of The Named Insured After A Loss. In case of loss the named insured shall:

- (a) give immediate written notice of such loss to the Company;
- (b) protect the building and personal property from further damage, make reasonable temporary repairs required to protect the property, and keep an accurate record of repair expenditures;
- (c) prepare an inventory of damaged personal property showing in detail, quantity, description, actual cash value and amount of loss. Attach to the inventory all bills, receipts and related documents that substantiate the figures in the inventory;
- (d) exhibit the remains of the damaged property as often as may be reasonably required by the Company and submit to examination under oath;
- (e) submit to the Company within 60 days after requested a signed, sworn statement of loss that sets forth to the best of the named insured's knowledge and belief:
 - (1) the time and cause of loss;
 - (2) interest of the insured and all others in the property involved and all encumbrances on the property;
 - (3) other policies of insurance that may cover the loss;
 - (4) changes in title or occupancy of the property during the term of the policy;
 - (5) specifications of any damaged building and detailed estimates for repair of the damage;
 - (6) an inventory of damaged personal property described in (c) above;
- (f) give notice of such loss to the proper police authority if loss is due to a violation of law.

10. Appraisal. If the named insured and the Company fail to agree on the amount of the loss, either can demand that the amount of loss be set by appraisal. If either party makes a written demand for appraisal, each shall select a competent independent appraiser. Each shall notify the other of the selected appraiser's identity within twenty (20) days of the receipt of the written demand.

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

The two appraisers shall select a competent, impartial umpire. If the appraisers are unable to agree upon an umpire within fifteen (15) days the named insured or the Company may petition a judge of a Court of Record in the state where the insured premises is located to select an umpire.

The appraisers shall then set the amount of the loss. If the appraisers submit a written report or an agreement to the Company, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of loss.

Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and compensation of the umpire shall be paid equally by the named insured and the Company.

11. **Company Options.** If the Company gives notice within thirty (30) days after it has received a signed, sworn statement of loss, it shall have the option to take all or any part of the property damaged at an agreed value, or to repair, rebuild or replace it with equivalent property.

12. **Abandonment Of Property.** The Company need not accept any property abandoned by an insured.

13. **Payment Of Loss.** The Company will pay all adjusted claims within thirty (30) days after presentation and acceptance of the proof of loss.

14. **Privilege To Adjust With Owner.**

(a) Except as provided in (b) below, or unless another payee is specifically named in the policy, loss, if any, shall be adjusted with and payable to the named insured.

(b) In the event claim is made for damage to property of others held by the insured, the right to adjust such loss or damage with the owner or owners of the property is reserved to the Company and the receipt of payment by such owner or owners in satisfaction thereof shall be in full satisfaction of any claim of the insured for which such payment has been made.

If legal proceedings be taken to enforce a claim against the insured as respects any such loss or damage, the Company reserves the right at its option without expense to the insured to conduct and control the defense on behalf of and in the name of the insured. No action of the Company in such regard shall increase the liability of the Company under this policy, nor increase the limits of liability specified in the policy.

15. **Suit.** No suit shall be brought on this policy unless the insured has complied with all the policy provisions and has commenced the suit within one year after the loss occurs.

16. **Permits And Use.** Except as otherwise provided, permission is granted:

(a) to make alterations and repairs;

(b) in the event of loss hereunder, to make reasonable repairs, temporary or permanent, provided such repairs are confined solely to the protection of the property from further damage, and provided further that the insured shall keep an accurate record of such repair expenditures. The cost of any such repairs directly attributable to damage by any peril insured against shall be included in determining the amount of loss hereunder. Nothing herein contained is intended to modify the policy requirements applicable in case loss occurs, and in particular the requirement that, in case loss occurs, the insured shall protect the property from further damage.

17. **Vacancy, Unoccupancy and Increase of Hazard.**

(a) This Company shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant is vacant beyond a period of sixty consecutive days. "Vacant" or "Vacancy" means containing no contents pertaining to operations or activities customary to occupancy of the building, but a building in process of construction shall not be deemed vacant.

(b) Permission is granted for unoccupancy.

(c) Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured.

18. **Protective Safeguards.** It is a condition of this insurance that the insured shall maintain so far as is within his control such protective safeguards as are set forth by endorsement hereto.

Failure to maintain such protective safeguards shall suspend this insurance only as respects the location or situation affected for the time of such discontinuance.

19. **Mortgage Clause—Applicable Only To Buildings.** This clause is effective if a mortgagee is named in the Declarations. The word "mortgagee" includes "trustee". Loss to buildings shall be payable to the named mortgagee as interest may appear, under all present or future mortgages on the buildings described in the Declarations in order of precedence of mortgages on them.

As it applies to the interest of any mortgagee designated in the Declarations, this insurance shall not be affected by any of the following:

(a) any act or neglect of the mortgagor or owner of the described buildings;

(b) any foreclosure or other proceedings or notice of sale relating to the property;

(c) any change in the title or ownership of the property;

(d) occupancy of the premises for purposes more hazardous than are permitted by this policy;

provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the premium.

The mortgagee shall notify the Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of the mortgagee. Unless permitted by this policy, such change of ownership or occupancy or increase of hazard shall be noted on the policy and the mortgagee shall on demand pay the premium for the increased hazard for the term it existed under this policy. If such premium is not paid, this policy shall be null and void.

The Company reserves the right to cancel this policy at any time as provided by its terms. If so canceled, this policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation and shall then cease. The Company shall have the right to cancel this agreement on ten days notice to the mortgagee.

When the Company shall pay the mortgagee any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, the Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the mortgagee to whom such payment shall have been made, under the mortgage debt. In lieu of taking such subrogation, the Company may, at its option, pay to the mortgagee the whole principal due or to grow due on the mortgage, with interest accrued and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities. However, no subrogation shall impair the right of the mortgagee to recover the full amount of said mortgagee's claim.

20. **Recoveries.** In the event the Company has made a payment for loss under the policy and a subsequent recovery is made of the lost or damaged property, the insured shall be entitled to all recoveries in excess of the amount paid by the Company, less only the actual cost of effecting such recoveries.

21. **Loss Clause.** Any loss hereunder shall not reduce the amount of this insurance.

22. **No Benefit To Bailee.** This insurance shall not inure directly or indirectly to the benefit of any carrier or other bailee.

23. **No Control.** This insurance shall not be prejudiced

(a) by any act or neglect of the owner of any building if the insured is not the owner thereof, or by any act or neglect of any occupant (other than the insured) of any building when such act or neglect of the owner or occupant is not within the control of the insured, or

(b) by failure of the insured to comply with any warranty or condition contained in any endorsement attached to this policy with regard to any portion of the premises over which the insured has no control;

CONDITIONS APPLICABLE TO SECTION II

1. Supplementary Payments. The Company will pay in addition to the applicable limit of liability:

(a) all expenses incurred by the Company, all costs taxed against the insured in any suit defended by the Company and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the Company's liability thereon.

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed \$250 per bail bond, but the Company shall have no obligation to apply for or furnish any such bonds.

(c) expenses incurred by the insured for first aid to others at the time of an accident for bodily injury to which this policy applies;

(d) reasonable expenses incurred by the insured at the Company's request in assisting the Company in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed \$25 per day.

2. Premium. Premium designated in this policy as "advance premium" is a deposit premium only which shall be credited to the amount of the earned premium due at the end of the policy period. At the close of each period (or part thereof terminating with the end of the policy period) designated in the Declarations as the audit period the earned premium shall be computed for such period and, upon notice thereof to the named insured shall become due and payable. If the total earned premium for the policy period is less than the premium previously paid, the Company shall return to the named insured the unearned portion paid by the named insured.

The named insured shall maintain records of such information as is necessary for premium computation and shall send copies of such records to the Company at the end of the policy period and at such times during the policy period as the Company may direct.

3. Financial Responsibility Laws. When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law. The insured agrees to reimburse the Company for any payment made by the Company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

4. Insured's Duties in the Event of Occurrence, Claim or Suit.

(a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable.

(b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

(c) The insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

5. Medical Reports: Proof and Payment of Claim. As soon as practicable the injured person or someone on his behalf shall give to the Company written proof of claim, under oath if required and shall, after each request from the Company, execute authorization to enable the Company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the Company

when and as often as the Company may reasonably require. The Company may pay the injured person or any person or organization rendering the services and the payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the Company.

6. Action Against Company. No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Company as a party in any action against the insured to determine the insured's liability, nor shall the Company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Company of any of its obligations hereunder.

7. Other Insurance. The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the Company's liability under this policy shall not be reduced by the existence of such other insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the Company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

(a) Contribution by Equal Shares. If all of such other valid and collectible insurance provides for contribution by equal shares, the Company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(b) Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, the Company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

8. Annual Aggregate. If this policy is issued for a period in excess of one year, any limit of the Company's liability stated in this policy as "aggregate" shall apply separately to each consecutive annual period.

9. Nuclear Exclusion.

1. This policy does not apply.

(a) Under any Liability Coverage, to bodily injury or property damage

(1) with respect to which an insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(2) resulting from the hazardous properties of nuclear material and with respect to which (i) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (ii) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America or any agency thereof with any person or organization.

(b) Under any Medical Payments Coverage or under any Supplementary Payments provision relating to first aid, to expenses incurred with respect to bodily injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

(c) Under any Liability Coverage to bodily injury or property damage resulting from the hazardous properties of nuclear material, if

(1) the nuclear material (i) is at any nuclear facility owned by, or operated by or on behalf of, an insured or (ii) has been discharged or dispersed therefrom;

(2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or

(3) the bodily injury or property damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such nuclear facility and any property thereat.

II. As used in this exclusion

"hazardous properties" include radioactive, toxic or explosive properties;

"nuclear material" means source material, special nuclear material or byproduct material.

"source material", "special nuclear material", and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor.

"waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

(a) any nuclear reactor,

(b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,

(c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235.

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property.

DEFINITIONS APPLICABLE TO SECTION II

When used in the provisions applicable to Section II of this policy (including endorsements forming a part hereof)

"automobile" means a land motor vehicle, trailer or semitrailer designed for travel on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment;

"bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;

"collapse hazard" includes "structural property damage" as defined herein and property damage to any other property at any time resulting therefrom. "Structural property damage" means the collapse of or structural injury to any building or structure due to (1) grading of land, excavating, borrowing, filling, back-filling, tunneling, pile driving, cofferdam work or caisson work, or (2) moving, shoring, underpinning, raising or demolition of any building or structure or removal or rebuilding of any structural support thereof. The collapse hazard does not include property damage (1) arising out of operations performed for the named insured by independent contractors, or (2) included within the completed operations hazard or the underground property damage hazard, or (3) for which liability is assumed by the insured under an incidental contract;

"completed operations hazard" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include bodily injury or property damage arising out of:

- (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
- (c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations";

"elevator" means any hoisting or lowering device to connect floors or landings, whether or not in service, and all appliances thereof including any car, platform, shaft, hoistway, stairway, runway, power equipment and machinery; but does not include an automobile servicing hoist, or a hoist without a platform outside a building if without mechanical power or if not attached to building walls, or a hood or material hoist used in alteration, construction or demolition operations, or an inclined conveyor used exclusively for carrying property or a dumbwaiter used exclusively for carrying property and having a compartment height not exceeding four feet;

"explosion hazard" includes property damage arising out of blasting or explosion. The explosion hazard does not include property damage (1) arising out of the explosion of air or steam vessels, piping under pressure, prime movers, machinery, or power transmitting equipment, or (2) arising out of operations performed for the named insured by independent contractors, or (3) included within the completed operations hazard or the underground property damage hazard, or (4) for which liability is assumed by the insured under an incidental contract;

"incidental contract" means any written (1) lease of premises, (2) easement agreement, except in connection with construction or demolition

operations on or adjacent to a railroad, (3) undertaking to indemnify a municipality required by municipal ordinance, except in connection with work for the municipality, (4) sidetrack agreement, or (5) elevator maintenance agreement.

"insured" means any person or organization qualifying as an insured in the "Persons Insured" provision of the applicable insurance coverage. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the company's liability;

"mobile equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the named insured, including the ways immediately adjoining, or (3) designed for use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air-compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment;

"named insured" means the person or organization named in Item 1. of the declarations of this policy;

"named insured's products" means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including any container thereof (other than a vehicle), but "named insured's products" shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold;

"occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

"policy territory" means:

- (1) the United States of America, its territories or possessions, or Canada, or
- (2) international waters or air space, provided the bodily injury or property damage does not occur in the course of travel or transportation to or from any other country, state or nation, or
- (3) anywhere in the world with respect to damages because of bodily injury or property damage arising out of a product which was sold for use or consumption within the territory described in paragraph (1) above, provided the original suit for such damages is brought within such territory;

"products hazard" includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

"property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period;

"underground property damage hazard" includes underground property damage as defined herein and property damage to any other property at any time resulting therefrom. "Underground property damage" means property damage to wires, conduits, pipes, mains, sewers, tanks, tunnels, any similar property, and any apparatus in connection therewith, beneath the surface of the ground or water caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, back-filling or pile driving. The underground property damage hazard does not include property damage (1) arising out of operations performed for the named insured by independent contractors, or (2) included within the completed operations hazard, or (3) for which liability is assumed by the insured under an incidental contract.

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

SMP AMENDATORY ENDORSEMENT

In consideration of the premium charged, this endorsement is made a part of this policy.

The SMP Policy is amended as follows:

1. SUBROGATION

General Condition 6. "Subrogation" of the SMP Policy Conditions and Definitions Form is replaced by the following:

6. Subrogation.

(a) In the event of any payment under this policy, the Company shall be subrogated to all the insured's rights of recovery against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights except as provided below.

(b) When SMP Condominium Additional Policy Provision Endorsement MP 00 80 is attached to this policy, the waiver of subrogation condition, paragraph 1. of Form MP 00 80 is deleted and replaced by the following:

The Company waives its rights to subrogation against any unit-owner of the condominium described in the declarations.

(c) As respects coverage provided under Section I-Property Coverage of this policy, this insurance shall not be invalidated should the insured waive in writing any or all right of recovery against any party for loss. Provided, however, that in the event the insured waives only a part of his rights against any particular third party, this Company shall be subrogated with respect to all rights of recovery which the insured may retain against any such third party for loss from the perils insured against to the extent that payment therefor is made by this Company; all subject to the following additional provisions:

- (1) This condition does not apply to crime, inland marine or glass coverage written under Section I. Property Coverage of this policy;
- (2) If made before loss has occurred, such agreement may run in favor of any third party;
- (3) If made after loss has occurred, such agreement may run only in favor of a third party falling within one of the following categories at the time of loss:
 - (i) a third party insured under this policy;

or

- (ii) a corporation, firm, or entity (a) owned or controlled by the named insured or in which the named insured owns capital stock or other proprietary interest, or (b) owning or controlling the named insured or owning or controlling capital stock or other proprietary interest in the named insured; or

(iii) a tenant of the named insured.

(d) Except as provided in paragraphs (b) and (c) above the Company shall not be bound to pay any loss if the insured has impaired his right of recovery for loss. However, it is agreed that the insured may, as respects property in transit, accept such bills of lading, receipts or contracts of transportation as are ordinarily issued by carriers containing a limitation as to the value of such goods or merchandise.

2. PERMITS AND USE

In the Conditions Applicable to Section I of the SMP Policy Conditions and Definitions Form:

A. Condition 16. Permits and Use is amended by adding the following:

(c) Without prejudice to this insurance, there to be an error in stating the name, number, street or location of any building(s) covered hereunder, or of building(s) and personal property if covered under a single item of insurance, where there is no willful concealment or misrepresentation.

B. Condition 17. Vacancy, Unoccupancy, and Increase of Hazard is replaced by the following:

Permission is granted for:

(a) The described building(s) to be vacant without limit of time, subject to a 15% reduction in the amount of loss payment otherwise due under this policy while the involved building(s) is vacant beyond a period of 60 consecutive days. This penalty will not be applicable during the period of any extension whereby the 60 day period is extended by endorsement.

("Vacant" or "Vacancy" means containing no contents pertaining to operations or activities customary to occupancy of the building. A building in the course of construction shall not be considered vacant.)

(b) Unoccupancy.

Provisions (a) and (b) above do not apply to the perils of vandalism or malicious mischief or sprinkler leakage.

ELECTRONICALLY FILED - 2020 MAY 08 6:29 PM - RICHLAND - COMMON PLEAS CASE #2020CP01226

(c) Increased hazards and for change in use or occupancy.

3. PERSONAL PROPERTY OF THE INSURED

The following words are deleted from Personal Property of the Insured in Section I. Property Covered:

A. "and usual to the occupancy of the insured"

in the General Personal Property Form and Special Personal Property Form

B. "and usual to the occupancy of the named insured"

in the Condominium Unit-owners General Personal Property Form and Condominium Unit-owners Special Personal Property Form

4. EXTENSIONS OF COVERAGE

In the General Building Form
Special Building Form
Condominium General Building Form
Condominium Special Building Form

the following words are deleted from A. Newly Acquired Property under Extensions of Coverage:

"but not exceeding \$100,000"

5. PROPERTY NOT COVERED

The following is added to the provisions of the General Building Form, the Special Building Form, the Builders' Risk Completed Value Form, the Special Builders' Risk Completed Value Form, the Condominium General Building Form and the Condominium Special Building Form respecting Property Not Covered:

This policy does not cover land (including land on which covered property is located) or water.

6. DEBRIS REMOVAL

In the Conditions Applicable to Section I of the SMP Policy Conditions and Definitions Form, the following is added to Condition 5., Debris Removal:

The total liability under this policy for debris removal expense only shall not exceed a) \$5,000, plus b) 25% of: i) the amount recoverable under this policy for loss to property plus ii) the deductible in this policy applicable to such loss. Nor will this insurance cover debris removal expenses reported to the Company more than 180 days after the earlier of the date of direct loss or the expiration of this policy.

This Debris Removal coverage does not apply to the cost to extract pollutants from land or water, or to remove, restore or replace polluted land or water.

7. POLLUTANTS CLEAN UP AND REMOVAL

The following is added to the General Building Form

Special Building Form
Condominium General Building Form
Condominium Special Building Form

This insurance covers expense to extract pollutants from land or water at the described premises if the release, discharge or dispersal of the pollutants is occasioned by loss caused by any of the perils insured against in this policy during the policy period. Such expenses must be reported to the Company within 180 days after the earlier of the date of direct loss or the expiration of this policy.

The liability of the Company for loss under this coverage shall not exceed \$10,000 in the aggregate for the sum of all such expense incurred arising out of insured perils occurring during each separate twelve month period of this policy. This limit applies as an additional amount of insurance.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

8. POLLUTION EXCLUSION

The following is added to the Special Building Form

Special Personal Property Form
Condominium Special Building Form
Condominium Special Personal Property Form
Condominium Unit-Owners Special Personal Property Form
Special Builders' Risk Completed Value Form

This policy does not insure under this form against loss caused by the release, discharge or dispersal of pollutants unless the release, discharge or dispersal is itself caused by fire, lightning, aircraft, explosion, riot, civil commotion, smoke, vehicles, windstorm or hail to property contained in any building, vandalism, malicious mischief or leakage or accidental discharge from automatic fire protective systems. But if loss by any of the above twelve perils ensues, then this Company shall be liable for only loss caused by the ensuing peril.

**9. APPLICABLE ONLY TO COVERAGE FOR
BUSINESS INTERRUPTION, TUITION FEES,
EXTRA EXPENSE, RENT OR RENTAL VALUE
OR OTHER CONSEQUENTIAL LOSS**

The following is added to the
Combined Business Interruption and Extra Ex-
pense Endorsement

- Extra Expense Endorsement
- Loss of Rents Endorsement
- Tuition Fees Endorsement
- Loss of Business Income Endorsement
- Gross Earnings Endorsement
- Loss of Earnings Endorsement

The length of time to which this insurance applies
shall not include any increased period of time re-
quired due to the enforcement of any law regulat-
ing the prevention, control, repair, clean-up or
restoration of environmental damage.

ELECTRONICALLY FILED - 2020 May 08 6:29 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

**SPECIAL MULTI-PERIL POLICY
SECTION I—SPECIAL BUILDING FORM**

ELECTRONICALLY FILED IN 2020 May 08 08:29 AM - RICHMOND - AND - COMMON PLEAS - CASE# 2020CP401266

I. PROPERTY COVERED

BUILDING(S): Buildings(s) or structure(s) shall include attached additions and extensions; fixtures, machinery and equipment constituting a permanent part of and pertaining to the service of the building(s); materials and supplies intended for use in construction, alteration or repair of the building(s) or structure(s); yard fixtures; personal property of the

insured used for the maintenance or service of the building(s), including fire extinguishing apparatus, outdoor furniture, floor coverings and appliances for refrigerating, ventilating, cooking, dishwashing and laundering (but not including other personal property in apartments or rooms furnished by the named insured as landlord); all while at the designated premises.

II. ADDITIONAL COVERAGE

COLLAPSE—This policy insures against risk of direct physical loss involving collapse of a building or any part of a building caused only by one or more of the following:

- a. fire; lightning; windstorm; hail; explosion; smoke; aircraft; vehicles; riot; civil commotion; vandalism or malicious mischief; breakage of glass; falling objects; weight of snow, ice or sleet; water damage; all only as insured against in this policy;
- b. hidden decay;
- c. hidden insect or vermin damage;
- d. weight of people or personal property;
- e. weight of rain which collects on a roof;
- f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

This Company shall not be liable for loss to the following types of property under items b., c., d., e. and f. unless the loss is a direct result of the collapse of a building:

- 1. Outdoor radio or television antennas, including their lead-in wiring, masts or towers; awnings; gutters and downspouts; yard fixtures;
- 2. If specifically covered in this policy, outdoor swimming pools; fences; piers, wharves and docks; beach or diving platforms or appurtenances; retaining walls; walks, roadways and other paved surfaces.

Collapse does not include settling, cracking, shrinkage, bulging or expansion.

This Additional Coverage does not increase the amount(s) of insurance provided in this policy.

III. PROPERTY NOT COVERED

This policy does not cover:

- A. Outdoor swimming pools; fences; piers, wharves and docks; beach or diving platforms or appurtenances; retaining walls not constituting a part of a building; walks, roadways and other paved surfaces.
- B. The cost of excavations, grading or filling; foundations of buildings, machinery, boilers or engines whose foundations are below the under-surface of the lowest basement floor, or where there is no basement.

below the surface of the ground; pilings, piers, pipes, flues and drains which are underground; pilings which are below the low water mark.

- C. Outdoor signs, whether or not attached to a building or structure.
- D. Lawns; outdoor trees, shrubs and plants, except as provided in the Extensions of Coverage.
- E. Property which is more specifically covered in whole or in part by this or any other contract of insurance, except for the amount of loss which is in excess of the amount due from such more specific insurance.

IV. PROPERTY SUBJECT TO LIMITATIONS

The following property is subject to these additional limitations:

- A. Plumbing, heating, air conditioning or other equipment or appliances (except fire protective systems) are not covered against loss caused by or resulting from freezing while the designated buildings are vacant or unoccupied, unless the insured shall have exercised due diligence with respect to maintaining heat in the buildings or unless such equipment and appliances had been drained and the water supply shut off during such vacancy or unoccupancy.
- B. Steam boilers, steam pipes, steam turbines or steam engines are not covered against loss caused by any condition or occurrence within such boilers, pipes, turbines or engines (except direct loss resulting from the explosion of accumulated gases or unconsumed fuel within the firebox, or combustion chamber, of any fired vessel or within the flues or passages which conduct the gases of combustion therefrom).
- C. Hot water boilers or other equipment for heating water are not covered against loss caused by any condition or occurrence within such boilers or equipment, other than an explosion.
- D. Glass is not covered against loss for more than \$50 per plate, pane, multiple plate, insulating unit, radiant heating panel, jalousie, louver or shutter, nor for more than \$250 in any one occurrence, unless caused by fire, lightning, windstorm, hail, aircraft, vehicles, discharge from fire protection or building service equipment, explosion, riot or civil commotion, and then the Company shall be liable only to the extent that such perils are insured against in this policy.
- E. Fences, pavements, outdoor swimming pools and related equipment, retaining walls, bulkheads, piers, wharves or docks, when covered under this policy, are not covered against loss caused by freezing or

thawing, impact of watercraft, or by the pressure or weight of ice or water whether driven by wind or not.

- F. Metal smokestacks and, when outside of buildings, (1) awnings of fabric or slat construction, canopies of fabric or slat construction, including their supports, and (2) radio or television antennas, including their lead-in wiring, masts or towers are not covered against loss caused by ice, snow or sleet, nor by windstorm or hail.
- G. The interior of buildings is not covered against loss caused by rain, snow, sand or dust, whether driven by wind or not, unless (1) the buildings shall first sustain an actual damage to roof or walls by the direct action of wind or hail, and then the Company shall be liable for loss to the interior of the buildings as may be caused by rain, snow, sand or dust entering the buildings through openings in the roof or walls made by direct action of wind or hail; or (2) such loss results from fire, lightning, aircraft, vehicles, explosion, riot or civil commotion, vandalism or malicious mischief, weight of ice, snow or sleet, to the extent that such perils are insured against in this policy.

H. Buildings or structures in process of construction, including materials and supplies therefor, when covered under this policy, are not covered against loss unless caused by fire, lightning, windstorm, hail, aircraft, vehicles, smoke, explosion, riot or civil commotion, vandalism or malicious mischief, and then the Company shall be liable only to the extent that such perils are insured against in this policy.

I. Property undergoing alterations, repairs, installation or servicing is not covered against loss if such loss is directly attributable to the operations or work being performed thereon, unless such loss is excluded by this policy, and then the Company shall be liable for only loss caused by such ensuing peril.

V. EXTENSIONS OF COVERAGE

Except with respect to Extension D. Replacement Cost:

(A) Each of the limits of liability specified for the following Extensions of Coverage applies as an additional amount of insurance.

(B) The Coinsurance Clause shall not apply to loss under the Extensions of Coverage.

The total amount recoverable under the Extensions of Coverage in this form and Extensions of Coverage in any other form made a part of this policy are not cumulative and shall not exceed the largest amount recoverable under any single form made a part of this policy.

When, in accordance with the Other Insurance condition, there is Contributing Insurance, the Company shall not be liable for more than its pro rata share of the limits set forth in the following Extensions of Coverage.

A. Newly Acquired Property: The insured may apply up to 25% of the limit of liability specified for Building(s), but not exceeding \$100,000, to cover direct loss in any one occurrence by a peril not otherwise excluded to the following described property:

1. New buildings and new structures being constructed on the designated premises and intended for similar occupancy when not otherwise covered by insurance. This coverage shall cease 30 days from the date construction begins or on the date the values of new construction are reported to the Company, or on the expiration date of the policy, whichever occurs first.

2. Buildings acquired by the insured at any location, elsewhere than at the designated premises, within the territorial limits of this policy and used for similar occupancies or warehouse purposes. This coverage shall cease 30 days from the date of such acquisition or on the date values of the buildings are reported to the Company, or on the expiration date of the policy, whichever occurs first.

Additional premium shall be due and payable for values so reported from the date construction begins or the property is acquired.

B. Off-Premises: The insured may apply up to 2% of the limits of liability specified for Building(s), but not exceeding \$5,000, at a described location to cover direct loss in any one occurrence by a peril not otherwise excluded to property covered under Building(s) while removed

from designated premises for purposes of cleaning, repairing, reconstruction or restoration. This Extension of Coverage shall not apply to property in transit, nor to property on any premises owned, leased, operated or controlled by the insured.

C. Outdoor Trees, Shrubs and Plants: The insured may apply up to \$1,000 to cover outdoor trees, shrubs and plants at the designated premises against direct loss in any one occurrence by the perils of fire, lightning, explosion, riot, civil commotion or aircraft, but only to the extent such perils are insured against herein. The Company shall not be liable for more than \$250 on any one tree, shrub or plant, including expense incurred for removing debris thereof.

D. Replacement Cost: In the event of loss to a building structure covered under this policy, when the full cost of repair or replacement is less than \$1,000, the coverage of this policy is extended to cover the full cost of repair or replacement (without deduction for depreciation). Coverage shall be applicable only to a building structure covered hereunder, but excluding outdoor furniture, outdoor equipment, floor coverings, awnings, and appliances for refrigerating, ventilating, cooking, dishwashing and laundering, all whether permanently attached to the building structure or not

The Company shall not be liable under this Extension of Coverage unless the whole amount of insurance applicable to the building structure for which claim is made is equal to or in excess of the amount produced by multiplying the co-insurance percentage applicable (specified in the Declarations) by the actual cash value of such property at the time of the loss.

VI. PERILS INSURED AGAINST

This policy insures against risks of direct physical loss unless the loss is excluded in VII. Exclusions below, subject to the provisions and stipulations herein and in the policy of which this form is made a part.

VII. EXCLUSIONS

1. This policy does not insure against loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

A. Loss occasioned directly or indirectly by enforcement of any ordinance or law regulating the use, construction, repair, or demolition of buildings or structures including debris removal expense.

B. Loss caused directly or indirectly by the interruption of power or other utility service furnished to the designated premises if the interruption takes place away from the designated premises. If a peril insured against ensues on the designated premises, this Company will pay only for loss caused by the ensuing peril.

C. Loss caused by, resulting from, contributed to or aggravated by any of the following:

1. earth movement, including but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or shifting;

2. flood, surface water, waves, tidal water or tidal wave overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;

3. water which backs up through sewers or drains; or

4. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;

unless fire or explosion as insured against ensues, and then this Company shall be liable for only loss caused by the ensuing fire or

explosion; but these exclusions shall not apply to loss arising from theft.

5. volcanic eruption unless direct loss by fire or breakage of glass or safety glazing material ensues. In this event, this Company shall be liable for only the direct loss to the property insured caused by the ensuing fire and if an insured peril, the ensuing breakage of glass or safety glazing material.

Volcanic eruption means the eruption, explosion or effusion of a volcano.

D. War Risk and Governmental Action Exclusion as contained in the SMP Policy Conditions and Definitions Form.

E. Nuclear Clause and Nuclear Exclusion as contained in the SMP Policy Conditions and Definitions Form.

2 This policy does not insure under this form against loss caused by

A. wear and tear, deterioration, rust or corrosion, mould, wet or dry rot, inherent or latent defect, smog, smoke, vapor or gas from agricultural or industrial operations; mechanical breakdown, including fracture or bursting caused by centrifugal force; settling, cracking, shrinkage, bulging or expansion of pavements, foundations, walls, floors, roofs or ceilings, animals, birds, vermin, termites or other insects; unless loss by a peril not otherwise excluded ensues and then the Company shall be liable for only such ensuing loss.

If loss by water not otherwise excluded ensues, this policy shall also cover the cost of tearing out and replacing of any part of the building covered required to effect repairs to the plumbing, heating or air conditioning system or domestic appliance from which the water escapes, but excluding loss to the system or appliance from which the water escapes;

B. explosion of steam boilers, steam pipes, steam turbines or steam engines (except direct loss resulting from the explosion of accumulated gases or unconsumed fuel within the firebox, or combustion chamber, of any fired vessel or within the flues or passages which conduct the gases of combustion therefrom) if owned by, leased by or operated under the control of the insured, or for any ensuing loss except by fire or explosion not otherwise excluded, and then the Company shall be liable for only such ensuing loss;

C. vandalism, malicious mischief, theft or attempted theft, if the building had been vacant or unoccupied beyond a period of 30 consecutive days immediately preceding the loss, unless loss by a peril not excluded in this policy ensues, and then the Company shall be liable for only such ensuing loss; nor shall this exclusion be applicable to such unoccupancy as is usual or incidental to the described occupancy;

D. leakage or overflow from plumbing, heating, air conditioning or other equipment or appliances (except fire protective systems) caused by or resulting from freezing while the building is vacant or unoccupied, unless the insured shall have exercised due diligence with respect to maintaining heat in the buildings or unless such equipment and appliances had been drained and the water supply shut off during such vacancy or unoccupancy;

E. theft (including but not limited to burglary and robbery) of any property which at the time of loss is not installed or attached to and made a part of a building or structure (except direct loss by pillage and looting occurring during and at the immediate place of a riot or civil commotion), unless loss by a peril not excluded in this policy ensues from theft or attempted theft, and then the Company shall be liable for only such ensuing loss;

F. unexplained or mysterious disappearance of any property, or shortage disclosed on taking inventory, or caused by any willful or dishonest act or omission of the insured or any associate, employee or agent of any insured;

G. continuous or repeated seepage or leakage of water or steam from within a plumbing, heating or air conditioning system or from within a domestic appliance which occurs over a period of weeks, months or years;

H. collapse, except as provided above in the Collapse Additional Coverage. If a peril not otherwise excluded ensues on the described premises, this Company will pay only for loss caused by the ensuing peril.

3. This policy does not insure under this form against loss occasioned directly or indirectly by any electrical injury or disturbance to electrical appliances, devices, fixtures or wiring caused by electrical currents artificially generated unless fire as insured against ensues, and then this Company shall be liable only for loss caused by the ensuing fire.

4. This policy does not insure against loss caused by any of the following. However, any ensuing loss not excluded or excepted in this policy is covered.

A. Weather conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss;

B. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;

C. Faulty, inadequate or defective:

1. planning, zoning, development, surveying, siting;

2. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

3. materials used in repair, construction, renovation or remodeling; or

4. maintenance;

of part or all of any property on or off the described premises.

VIII. VALUATION

The following bases are established for valuation of property:

All property at actual cash value at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with

material of like kind and quality within a reasonable time after such loss, nor in any event for more than the interest of the named insured.

SPECIAL MULTI-PERIL POLICY
SECTION I—SPECIAL PERSONAL PROPERTY FORM

I. PROPERTY COVERED

PERSONAL PROPERTY OF THE INSURED: Business personal property owned by the insured and usual to the occupancy of the insured, including the insured's interest in personal property owned by others to the extent of the value of labor, materials and charges furnished, performed or incurred by the insured; all while (1) in or on the building(s), or (2) in the open (including within vehicles) on or within 100 feet of the designated premises.

This coverage shall also include Tenant's Improvements and Betterments, meaning the insured's use interest in fixtures, alterations, installations or additions constituting a part of the building(s) occupied but not owned by the insured and made or acquired at the expense of the

insured exclusive of rent paid by the insured, but which are not legally subject to a removal by the insured.

PERSONAL PROPERTY OF OTHERS: This insurance shall cover for the account of the owner(s) (other than the named insured) personal property belonging to others in the care, custody or control of the insured, while (1) in or on the building(s), or (2) in the open (including within vehicles) on or within 100 feet of the designated premises.

Loss shall be adjusted with the named insured for the account of the owners of the property, except that the right to adjust any loss with the owners is reserved to the Company and the receipts of the owners in satisfaction thereof shall be in full satisfaction of any claim by the named insured for which payments have been made.

II. ADDITIONAL COVERAGE

COLLAPSE—This policy insures against risk of direct physical loss involving collapse of a building or any part of a building caused only by one or more of the following:

- a. fire; lightning; windstorm; hail; explosion; smoke; aircraft; vehicles; riot; civil commotion; vandalism or malicious mischief; breakage of glass; falling objects; weight of snow, ice or sleet; water damage; all only as insured against in this policy;
- b. hidden decay;
- c. hidden insect or vermin damage;
- d. weight of people or personal property;
- e. weight of rain which collects on a roof;
- f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation

This Company shall not be liable for loss to the following types of property, if otherwise covered in this policy, under items b., c., d., e. and f., unless the loss is a direct result of the collapse of a building:

outdoor radio or television antennas, including their lead-in wiring, masts or towers, awnings; gutters and downspouts; yard fixtures; outdoor swimming pools; fences; piers, wharves and docks; beach or diving platforms or appurtenances; retaining walls; walks, roadways and other paved surfaces.

Collapse does not include settling, cracking, shrinkage, bulging or expansion.

This Additional Coverage does not increase the amount(s) of insurance provided in this policy.

III. PROPERTY NOT COVERED

This policy does not cover:

- A. Property sold by the insured under conditional sale, trust agreement, installment payment or other deferred payment plan, after delivery to customers.
- B. Aircraft, watercraft, including motors, equipment and accessories (except rowboats and canoes, while out of water and on the designated premises); and automobiles, trailers, semi-trailers or any self-propelled vehicles or machines, except such property not licensed for use on public thoroughfares and operated principally on the premises of the insured

This provision does not apply to the following types of property when held for sale or sold but not delivered:

- 1. Watercraft (including motors, equipment and accessories) while not afloat.
- 2. Motorcycles, motorscooters and snowmobiles, or
- 3. Trailers designed for use with private passenger vehicles for general utility purposes or carrying boats

This provision does not apply to the following types of property when manufactured, processed or warehoused by the insured:

- 1. Aircraft;
- 2. Watercraft, including motors, equipment and accessories, while not afloat, or
- 3. Automobiles, trailers, semi-trailers or any self-propelled vehicles or machines.
- C. Personal property while waterborne.
- D. Household and personal effects contained in living quarters occupied by the insured, any officer, director, stockholder or partner of the insured or relatives of any of the foregoing, except as provided in the Extensions of Coverage.
- E. Accounts, bills, currency, deeds, evidences of debt, money and securities.
- F. Outdoor signs, whether or not attached to a building or structure.
- G. Growing crops and lawns.
- H. Property which is more specifically covered in whole or in part by this or any other contract of insurance, except for the amount of loss which is in excess of the amount due from such more specific insurance.

IV. PROPERTY SUBJECT TO LIMITATIONS

The following property is subject to these additional limitations:

- 1. Except for loss caused by the "specified perils":
 - (a) Fur and fur garments are covered for not exceeding loss in the aggregate of \$2,500 in any one occurrence for all contributing insurance.
 - (b) Jewelry and watches, watch movements, jewels, pearls, precious and semi-precious stones, bullion, gold, silver, platinum and other precious alloys or metals are covered for not exceeding loss in the aggregate of \$2,500

in any one occurrence for all contributing insurance. This limitation shall not apply to jewelry and watches valued at \$50 or less per item.

(c) Patterns, dies, molds, models and forms are covered for not exceeding loss in the aggregate of \$2,500 in any one occurrence for all contributing insurance.

(d) Stamps, tickets and letters of credit are covered for not exceeding loss in aggregate of \$250 in any one occurrence for all contributing insurance.

2. Valuable papers and records meaning computer programs and books of account, manuscripts, abstracts, drawings, card index systems and other records including film, tape, disc, drum, cell and other magnetic recording or storage media for electronic data processing, are covered only against loss caused by the "specified perils".

3. Animals and pets are not covered, except when held for sale or sold but not delivered, and then only against death or destruction directly resulting from or made necessary by the "specified perils".

4. Outdoor trees, shrubs and plants are not covered, except: (a) when held for sale or sold but not delivered, and then only against direct loss by the "specified perils", or (b) as provided in the Extensions of Coverage.

5. Glass, glassware, statuary, marbles, bric-a-brac, porcelains and other articles of a fragile or brittle nature are covered against loss by breakage only if directly caused by the "specified perils".

This limitation shall not apply to bottles or similar containers of property for sale, or sold but not delivered, nor to lenses of photographic or scientific instruments.

6. Steam boilers, steam pipes, steam turbines and steam engines are not covered against loss caused by bursting, rupture, cracking or explosion originating therein (other than explosion of accumulated gases or unconsumed fuel within a fire box or combustion chamber).

7. Machines and machinery are not covered against loss caused by rupture, bursting or disintegration of their rotating or moving parts resulting from centrifugal or reciprocating force.

The term "specified perils" shall mean direct loss by fire, lightning, aircraft, explosion, riot, civil commotion, smoke, vehicles, windstorm or hail to property contained in any building, vandalism and malicious mischief, leakage or accidental discharge from automatic fire protective systems.

V. EXTENSIONS OF COVERAGE

Each of the limits of liability specified or the following Extensions of Coverage applies as an additional amount of insurance. The Coinsurance Clause shall not apply to loss under the Extensions of Coverage.

The total amount recoverable under the Extensions of Coverage in this form and Extensions of Coverage in any other form made a part of this policy are not cumulative and shall not exceed the largest amount recoverable under any single form made a part of this policy.

When, in accordance with the Other Insurance condition, there is Contributing Insurance, the Company shall not be liable for more than its pro rata share of the limits set forth in the following Extensions of Coverage.

A. Property at Newly Acquired Locations: The insured may apply up to 10% of the limit of liability specified for Personal Property of the Insured, but not exceeding \$10,000, to cover direct loss in any one occurrence by a peril not otherwise excluded to such property at any location (except fairs and exhibitions) acquired by the insured for similar occupancies or warehousing purposes, elsewhere than at the designated premises within the territorial limits of this policy. This coverage shall cease 30 days from the date of such acquisition or on the date values at such locations are reported to the Company, or on the expiration date of the policy, whichever occurs first. Additional premium shall be due and payable for values so reported from the date the property is acquired.

B. Personal Effects: The insured may apply up to \$500 to cover direct loss in any one occurrence by the perils not otherwise excluded to personal effects while located on the designated premises belonging to the insured, officers, partners or employees thereof, and limited to \$100 on personal effects owned by any one individual. This Extension of Coverage does not apply if the loss is covered by any other insurance, whether collectible or not, or which would have been covered by such other insurance in the absence of this policy. At the option of the Company, loss under this Extension of Coverage may be adjusted with and payable to the insured.

C. Valuable Papers and Records: The insured may apply up to \$500 to cover direct loss in any one occurrence by a peril not otherwise excluded to valuable papers and records consisting of computer programs and books of account, manuscripts, abstracts, drawings, card index systems, film, tape, disc, drum, cell and other magnetic recording or storage media for electronic data processing, and other records, all the property of the insured at designated premises. This Extension of Coverage covers only the cost of research and other expense necessarily incurred by the insured to reproduce, replace or restore such valuable papers and records. The total amount payable in any one occurrence under this Extension of Coverage shall not exceed the limit specified above, regardless of the number of premises designated in the Declarations.

D. Outdoor Trees, Shrubs and Plants: The insured may apply up to \$1,000 to cover outdoor trees, shrubs and plants at the designated premises against direct loss in any one occurrence by the perils of fire, lightning, explosion, riot, civil commotion or aircraft, but only to the extent such perils are insured against herein. The Company shall not be

liable for more than \$250 on any one tree, shrub or plant, including expense incurred for removing debris thereof.

E. Extra Expense: The insured may apply up to \$1,000 to cover the necessary extra expense incurred by the insured in order to continue as nearly as practicable the normal operations of the insured's business immediately following damage by a peril not otherwise excluded under this form to the buildings or personal property situated at the designated premises.

"Extra expense" means the excess of the total cost incurred during the period of restoration chargeable to the operations of the insured's business over and above the total cost that would normally have been incurred to conduct the business during the same period had no loss occurred. Any salvage value of property obtained for temporary use during the period of restoration, which remains after the resumption of normal operations, shall be taken into consideration in the adjustment of any loss hereunder.

"Period of restoration" means that period of time, commencing with the date of damage and not limited by the date of expiration of this policy, as would be required with the exercise of due diligence and dispatch to repair, rebuild or replace such part of said buildings or personal property as have been damaged.

The Company shall not be liable under this Extension of Coverage for:

1. loss of income;
2. the cost of repairing or replacing any of the described property, or the cost of research or other expense necessary to replace or restore computer programs and books of account, manuscripts, abstracts, drawings, card index systems, film, tape, disc, drum, cell and other magnetic recording or storage media for electronic data processing, and other records that have been damaged by a peril not otherwise excluded, except cost in excess of the normal cost of such repair, replacement or restoration necessarily incurred for the purpose of reducing the total amount of extra expense; in no event shall such excess exceed the amount by which the total extra expense otherwise payable under this Extension of Coverage is reduced; or
3. any other consequential or remote loss

F. Damage to Buildings from Theft, Burglary or Robbery: This policy includes loss (except by fires or explosion) to that part of the building occupied by the insured and containing property covered, and to equipment therein pertaining to the service of the building but not building property or equipment removed from premises, directly resulting from theft, burglary or robbery (including attempt thereof), provided the insured is the owner of such building or equipment or is liable for such damage, but in no event shall this coverage apply to glass (other than glass building blocks) or to any lettering or ornamentation thereon.

G. Transportation: The insured may apply up to \$1,000 to cover insured personal property (other than property in the care, custody or control of salesmen) during transportation by motor vehicles owned, leased or operated by the insured for loss in any one occurrence caused by:

1. fire, lightning, windstorm and hail, explosion, smoke, riot, riot attending a strike and civil commotion, vandalism and malicious mischief; or
2. collision, overturning or upset of the vehicle; meaning thereby the violent and accidental contact of the vehicle conveying the property described herein with any other vehicle or object excluding any loss or damage done by coming in contact with any portion of the road bed or by means other than as expressly indicated; or
3. theft of an entire shipping bale, case or package from a vehicle while such property is contained in a fully enclosed and securely locked body or compartment and theft results from forcible entry, evidenced by visible marks upon such body or compartment.

H. Non-Owned Personal Property: The insured may apply at each location up to 2% of the limit of liability specified for Personal Property of the Insured at such location, but not exceeding \$2,000, as an additional amount of insurance, to cover for the account of the owners thereof (other than the named insured) direct loss by a peril insured against to personal property, similar to that covered by this policy, belonging to others while in the care, custody or control of the named insured and all while (1) in or on the building(s), or (2) in the open (including within vehicles) on or within 100 feet of the designated premises.

Loss shall be adjusted with the named insured for the account of the owners of the property, except that the right to adjust any loss with the owners is reserved to the Company and the receipts of the owners in satisfaction thereof shall be in full satisfaction of any claim by the named insured for which payments have been made. As respects personal property belonging to others, this provision shall replace any loss payable provision of this policy.

I. Off-Premises: The insured may apply up to 2% of the limit of liability specified for Personal Property of the Insured, but not exceeding \$5,000 nor less than \$1,000, at a described location to cover direct loss in any one occurrence by a peril not otherwise excluded to the property covered under Personal Property of the Insured (other than merchandise or stock) while removed from designated premises. This Extension of Coverage shall not apply: (a) to loss by theft, (b) to property in transit nor (c) to property on any premises owned, leased, operated or controlled by the insured.

VI. PERILS INSURED AGAINST

This policy insures against risks of direct physical loss unless the loss is excluded in VII. Exclusions below, subject to the provisions and stipulations herein and in the policy of which this form is made a part.

VII. EXCLUSIONS

1. This policy does not insure against loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

A. Loss occasioned directly or indirectly by enforcement of any ordinance or law regulating the use, construction, repair or demolition of property, including debris removal expense.

B. Loss caused directly or indirectly by the interruption of power or other utility service furnished to the designated premises if the interruption takes place away from the designated premises. If a peril insured against ensues on the designated premises, this Company will pay only for loss caused by the ensuing peril.

C. Loss caused by, resulting from, contributed to or aggravated by any of the following:

1. earth movement, including but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or shifting;
2. flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;
3. water which backs up through sewers or drains; or
4. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;

unless fire or explosion as insured against ensues, and then this Company shall be liable for only loss caused by the ensuing fire or explosion; but these exclusions shall not apply to loss arising from theft.

5. volcanic eruption unless direct loss by fire or breakage of glass or safety glazing material ensues. In this event, this Com-

pany shall be liable for only the direct loss to the property insured caused by the ensuing fire and if an insured peril, the ensuing breakage of glass or safety glazing material.

Volcanic eruption means the eruption, explosion or effusion of a volcano.

D. War Risk and Governmental Action Exclusion as contained in the SMP Policy Conditions and Definitions Form.

E. Nuclear Clause and Nuclear Exclusion as contained in the SMP Policy Conditions and Definitions Form.

2. This policy does not insure under this form against loss caused by:

A. unexplained or mysterious disappearance of property, or shortage of property disclosed on taking inventory;

B. actual work upon, installation or testing of property covered, failure, breakdown or derangement of machines or machinery; unless loss by fire or explosion not otherwise excluded ensues and then the Company shall be liable for only such ensuing loss;

C. any electrical injury or disturbance to electrical appliances, devices, fixtures or wiring caused by electrical currents artificially generated unless fire as insured against ensues, and then this Company shall be liable for only loss caused by the ensuing fire;

D. leakage or overflow from plumbing, heating, air conditioning or other equipment or appliances (except fire protective systems) caused by or resulting from freezing while the described building is vacant or unoccupied, unless the insured shall have exercised due diligence with respect to maintaining heat in the buildings or unless such equipment and appliances had been drained and the water supply shut off during such vacancy or unoccupancy;

E. delay, loss of market, interruption of business, nor consequential loss of any nature;

- F. (a) wear and tear, marring or scratching;
 - (b) deterioration, inherent vice, latent defect;
 - (c) rust, mold, wet or dry rot, contamination;
 - (d) dampness or dryness of atmosphere, changes in or extremes of temperature;
 - (e) smog, smoke from agricultural smudging or industrial operations; or
 - (f) birds, vermin, rodents, insects or animals;
- unless loss by fire, smoke (other than smoke from agricultural smudging or industrial operations), explosion, collapse of a building, glass breakage or water not otherwise excluded ensues, then this policy shall cover only such ensuing loss.

If loss by water not otherwise excluded ensues, this policy shall also cover the cost of tearing out and replacing of any part of the building covered required to effect repairs to the plumbing, heating or air conditioning system or domestic appliance but excluding loss to the system or appliance from which the water escapes;

- G. explosion of steam boilers, steam pipes, steam turbines or steam engines (except direct loss resulting from the explosion of accumulated gases or unconsumed fuel within the firebox, or combustion chamber, of any fired vessel or within the flues or passages which conduct the gases of combustion therefrom) if owned by, leased by or operated under the control of the insured, or for any ensuing loss except by fire or explosion not otherwise excluded, and then the Company shall be liable for only such ensuing loss;
- H. voluntary parting with title or possession of any property by the insured or others to whom the property may be entrusted if induced to do so by any fraudulent scheme, trick, device or false pretense;
- I. any fraudulent, dishonest or criminal act done by or at the instigation of any insured, partner or joint adventurer in or of any insured;

an officer, director or trustee of any insured; pilferage, appropriation or concealment of any property covered due to any fraudulent, dishonest or criminal act of any employee while working or otherwise, or agent of any insured, or any person to whom the property covered may be entrusted;

J. continuous or repeated seepage or leakage of water or steam from within a plumbing, heating or air conditioning system or from within a domestic appliance which occurs over a period of weeks, months or years;

K. rain, snow or sleet to property in the open; or

L. collapse, except as provided above in the Collapse Additional Coverage. If a peril not otherwise excluded ensues on the described premises, this Company will pay only for loss caused by the ensuing peril.

3. This policy does not insure against loss caused by any of the following. However, any ensuing loss not excluded or excepted in this policy is covered.

A. Weather conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss;

B. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;

C. Faulty, inadequate or defective:

- 1. planning, zoning, development, surveying, siting;
- 2. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- 3. materials used in repair, construction, renovation or remodeling; or
- 4. maintenance.

of part or all of any property on or off the described premises.

VIII. VALUATION

The following bases are established for valuation of property:

A. The value of all stock actually sold but not delivered shall be the price at which it was sold, less all discounts and unincurred expenses.

B. Tenants' Improvements and Betterments

- 1. If repaired or replaced at the expense of the named insured within a reasonable time after loss, the actual cash value of the damaged or destroyed improvements and betterments
- 2. If not repaired or replaced within a reasonable time after loss, that proportion of the original cost at time of installation of the damaged or destroyed property which the unexpired term of the lease or rental agreement, whether written or oral, in effect at the time of loss bears to the periods from the dates such improvements or betterments were made to the expiration date of the lease.
- 3. If repaired or replaced at the expense of others for the use of the named insured, there shall be no liability hereunder.

C. Valuable Papers and Records

1. Books of account, manuscripts, abstracts, drawings, card index systems and other records (except film, tape, disc, drum, cell and other magnetic recording or storage media for electronic data processing) for not exceeding the cost of blank books, cards or other blank material plus the cost of labor incurred by the named insured for transcribing or copying such records.

2. Film, tape, disc, drum, cell and other magnetic recording or storage media for electronic data processing for not exceeding the cost of such media in unexposed or blank form

3. Computer programs for not exceeding the cost of labor incurred by the named insured for transcribing or copying such programs

D. All other property at actual cash value at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, nor in any event for more than the interest of the named insured

EXHIBIT 14

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HAMPTON)
)
 Nell Ashworth, Individually and as)
 Personal Representative of the Estate)
 of Robert J. Ashworth,)
)
 Plaintiff,)
 vs.)
)
 Fisher Controls International, LLC,)
 etc. et al.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTEENTH JUDICIAL CIRCUIT
 C/A NO.: 19-CP-25-00325

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HAMPTON)
)
 DAVID D. ROLLINS,)
)
 Plaintiff,)
 vs.)
)
 AIR & LIQUID SYSTEMS)
 CORPORATION, et al.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTEENTH JUDICIAL CIRCUIT
 C/A NO.: 2019-CP-25-00118

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 BARBARA SAN NICOLAS,)
)
 Plaintiffs,)
 vs.)
)
 BORG-WARNER MORSE TEC)
 LLC, et al.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT
 C/A NO.: 2017-CP-40-05764

SCHEDULING ORDER

Deadlines for the March 23, 2020 Asbestos Term of Court:

1. Motions for Summary Judgment deadlines are as follows:
 - a. Motions filed and served by February 7, 2020;
 - b. Responses filed and served by February 28, 2020;
 - c. Replies filed and served by March 6, 2020;
 - d. Hearing tentatively scheduled for March 13, 2020.

2. Motions *in Limine* deadlines are as follows
 - a. Filed and served by February 21, 2020;
 - b. Responses filed and served by March 3, 2020;
 - c. No replies will be considered;
 - d. Hearing tentatively scheduled for March 13, 2020.

3. Mediation will be held February 25, 2020 in Charleston, SC at the offices of Haynsworth Sinkler Boyd with Mediator Tim Wills.

4. Jury selection and trial will begin March 23, 2020.

[SIGNATURE PAGE TO FOLLOW]

IT IS SO ORDERED.

By: _____
Jean Hofer Toal
Chief Justice, Retired
Acting Circuit Court Judge
jtoal@sccourts.org

Columbia, South Carolina
January 29, 2020



Hampton Common Pleas

Case Caption: David D Rollins VS Air & Liquid Systems Corporation , defendant,
et al
Case Number: 2019CP2500118
Type: Order/Scheduling Order

IT IS SO ORDERED.

s/ Jean H. Toal #2758

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE NO.: 2020-CP-40-01226

COVIL CORPORATION, by and)
through its duly appointed)
Receiver, Peter D. Protopapas,)

Plaintiff,)

v.)

PENNSYLVANIA NATIONAL)
MUTUAL CASUALTY)
INSURANCE COMPANY,)

Defendant.)

**REPLY MEMORANDUM OF COVIL
CORPORATION IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

The Receiver of Covil Corporation hereby submits this reply memorandum in support of his motion for partial summary judgment. In its opposition to the Receiver’s motion, Pennsylvania National Mutual Casualty Company (“Penn National”) asserts four reasons why this Court should decline to rule in the Receiver’s favor, even though the Receiver is entitled to prevail as a matter of law under this Court’s jurisprudence and prior rulings. This reply brief succinctly sets forth the reasons why the Receiver’s motion should be granted.

I. THIS COURT HAS JURISDICTION OVER THIS CASE UNDER SOUTH CAROLINA LAW AND STATE AND FEDERAL JURISPRUDENCE

This case involves a failure by Penn National to pay \$50,000 in settlement of a single asbestos-related bodily injury case, referred to herein as *Rollins*. The facts of the *Rollins* coverage dispute in this case are not disputed: the *Rollins* plaintiff was exposed to asbestos as a result of Covil’s operations at the Bowater paper mill in Catawba, South Carolina, during the policy period of one Penn National primary policy, *i.e.*, March 11, 1986 to January 25, 1987. This Penn National

primary policy (policy number 515 5028 537, issued for the period March 31, 1986 to March 31, 1987) provides \$1,000,000 in limits for each and every occurrence. The *Rollins* \$50,000 settlement is well within the \$1,000,000 limit of the Penn National policy. A representative of Penn National attended the mediation at which the *Rollins* case was settled and “expressed a willingness to contribute toward settlement on behalf of Covil” but then declined to contribute not only the \$50,000 amount required to settle *Rollins* but any amount whatsoever even though the \$50,000 was, and is, well within the Penn National policy limit for the *Rollins* occurrence.

This case involves one case, *i.e.*, *Rollins*, and the Receiver’s request that this Court rule that Penn National is required to pay the \$50,000 demanded of Penn National for this settlement.

This Court has jurisdiction over this case. Not only did this Court supervise the *Rollins* case, but this Court has jurisdiction over a breach of contract case involving an amount in controversy of \$50,000. Furthermore, as is clear from the face of the insurance contract, the Penn National policy was issued to Covil at its address in Greenville, South Carolina. The exposure took place in South Carolina. The *Rollins* case was brought and settled in South Carolina. There is no dispute that South Carolina substantive law applies to this action, and Penn National does not suggest otherwise.

Rather, Penn National makes the specious argument that a federal court should decide this dispute, despite the uncontroverted facts that (i) no federal court has jurisdiction over a \$50,000 contract dispute, (ii) Penn National is no longer a party to the North Carolina action to which it wants this Court to defer, (iii) South Carolina substantive law, decided by South Carolina state courts, applies, and (iv) this Court is highly familiar with *Rollins*, with the Receiver, with Covil, and with the specific matters of law raised by this case.

The simple answer to Penn National’s argument that this Court should not decide this case is that this case presents an actual justiciable controversy over one insurance contract and a \$50,000 claim under that contract in a Court that has exclusive jurisdiction over this case under both South Carolina and federal law. There is no just cause to delay the Receiver’s right to adjudicate this dispute with Penn National in this Court. Nor is there any reason to deny or delay granting the Receiver’s motion for partial summary judgment.

II. THERE IS NO “LATE NOTICE” DEFENSE IN THIS CASE

Penn National rests the principal part of its defense on a claim of “late notice.” Leaving aside the fact that Penn National failed to submit any competent evidence on this issue, and that a demonstration of prejudice is required for assertion of this defense, Penn National’s “late notice” defense is disposed of by Penn National’s stark but telling admission:

“a representative of Penn National attended the mediation and expressed a willingness to contribute toward settlement on behalf of Covil . . .”

Defendant Penn National’s Memorandum of Law In Opposition to Covil’s Motion for Partial Summary Judgment (“Opposition”), p. 17. In other words, Penn National was present at the mediation that resulted in the *Rollins* settlement, had the opportunity to meet the \$50,000 demand, and even to offer a different number. It, however, did nothing. Although it clearly had the ability to meet the \$50,000 settlement demand, which was well within its policy limit of \$1,000,000, Penn National refused “to contribute the amount requested by Covil at the mediation.” *Id.* And, in fact, Penn National never offered anything. Penn National has since that time refused to reimburse the \$50,000 *Rollins* settlement.

This Court can summarily dispose of Penn National's "late notice" excuse with this straightforward admission by Penn National. Penn National was present at the mediation which resulted in the settlement of *Rollins*, had the opportunity to settle the case within its policy limit, for the sum of \$50,000, knew that there was bodily injury during its policy period and "expressed a willingness to contribute toward settlement on behalf of Covil," but then declined to do so, failing to meet its contractual obligations, breaching its contract, and resulting in this suit.

There simply is no "late notice" defense in this case.

III. THE ROLLINS SETTLEMENT IS COVERED UNDER PENN NATIONAL'S POLICY

This case involves bodily injury taking place during a discrete period, *i.e.*, March 11, 1986 to January 25, 1987, when Covil was performing operations at the Bowater paper mill in Catawba, South Carolina. This exposure was the result of operations conducted by Covil smack in the middle of Penn National's policy number 515 5028 537, in effect during the policy period of March 31, 1986 to March 31, 1987. Penn National admits – as it must – that the exposure and resulting bodily injury took place during its policy period. It further admits that its policy fully covers, with a \$1,000,000 policy limit for each "occurrence", bodily injury resulting from the conduct of Covil's operations.

The Receiver respectfully submits that this case is governed completely by the following determinations as a matter of law by this Court:

- The "completed operations hazard" and "product liability hazard" apply *only* when a plaintiff is exposed to asbestos products *after* Covil completed its installation or removal operations or work at a particular jobsite;

- As to this individual asbestos lawsuit, it is Penn National's burden to prove that the suit seeks the recovery of damages that are subject to the exclusion applicable to the "completed operations" or "product liability" provisions of the policy;
- Every asbestos insulation contracting, or "operations," claim against Penn National results from a separate "occurrence", thus entitling Covil to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities;
- As to this asbestos "operations" claim against Covil, Penn National is obligated to pay "in full" up to its "per occurrence" limit of liability; and
- Penn National bears the burden of proving the applicability of its exclusion for product liability and completed operations claims.

These matters of law have been determined by this Court in the specific context of Covil and this Court's supervision of the Receiver and the Receivership. The January 8, 2020 attached Order for Rule to Show Cause (the "Covil Order") governs disposition of this case.

This case involves Penn National's assertion that an exclusion (for the "completed operations hazard" and the "products hazard") bars coverage for *Rollins*. Penn National bears the burden of demonstrating that this exclusion applies. As held by this Court:

"The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: "Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna Cas. and Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)); see also *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144-48, 781 S.E.2d 137, 141-44 (2015) (upholding circuit court decision to construe an ambiguous terms in favor of coverage, and noting that "ambiguous terms are to be construed strictly against the insurer"). Courts have held that this basic principle also applies to "limitations" on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403

(R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Accident Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).”

Covil Order, p. 17. While the Covil Order deals largely with the applicability of aggregate limits, this Court’s discussion of the burden of proving the applicability of an exclusion is equally apt.

Penn National has done nothing even remotely to attempt to meet its burden.

In fact, Penn National admits that the operations at Bowater were conducted during its policy period and that this is the period of bodily injury. Penn National attempts to meet this burden in two ways. First, Penn National points to language in a 1986 Covil subcontract that required Covil to “[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on requiring piping systems.” Opposition, p. 20. The implication by Penn National – never clearly stated and certainly never proven by any competent evidence – is that Covil supplied asbestos-containing “materials” in 1986 and 1987. However, Covil was not using or supplying or “furnishing” asbestos-containing materials in 1986 or 1987 and Penn National has presented no proof of any kind to this effect or that this is a “product liability” exposure as its Opposition implies.

Second, Penn National argues that it does not need to cover the *Rollins* action because Mr. Rollins’ exposure was take-home, and that means that exposure to asbestos during the policy period took place after Covil either completed its work on the Bowater contract or after Covil relinquished possession of the products it installed at Bowater. This is simply not an accurate reading of the exclusion.

Although the “products hazard” and the “completed operations hazard” exclusions may apply in different factual scenarios depending upon the individual case, it is established that the risk insured by both exclusions is “the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself” Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971).

The evidence in this case is that Mr. Rollins was exposed to asbestos during the same period of time in which Covil performed Contract No. 4192-F-6410 at Bowater, between March 1986 and January 1987. Covil did not relinquish possession of the operations of Contract No. 4192-F-6410 until January 1987. Courts considering this same fact pattern have held that the products hazard exclusion applies only if bodily injury or property damage first occurs after the insured completes all of its work under the contract: Regardless of the involvement of the insured’s products, so long as an accident occurs on the insured’s business premises or away from his premises, *but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.*

Friestad v. Travelers Indem. Co., 260 Pa. Super. 178, 186, n.5 (1978) (emphases added).¹ Other courts have noted that the “products hazard” exclusion applies only when the injury is caused by a defective product placed into the stream of commerce. *See, e.g., B & R Farm Servs., Inc. v. Farm Bureau Mutual Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985). A federal decision applying South Carolina law held more than sixty years ago that an exclusion for “Products Liability” did not apply because the insured had not completed *all of its work* on a construction project, even though the insured previously completed all of its work on the occupied unit where an explosion occurred. *Heyward v. American Cas. Co. of Reading, Pa.*, 129 F.Supp. 4, 10 (D.S.C. 1955).

¹ The *Friestad* court relied substantially on Dean Henderson’s article. 260 Pa. Super. at 182-185.

Penn National's position on the exclusion especially lacks merit because by 1986, new pipe insulation being installed at jobsites did not contain asbestos. Penn National has no evidence to suggest otherwise, and cannot rely on this implication to overcome summary judgment when no such claim was made in the underlying *Rollins* action.

The short answer is that Penn National has failed to meet its burden. The more substantial answer is that this case is governed by the important principles of law enunciated in the Covil Order, which should be announced as governing law in this case.

IV. PENN NATIONAL IS RESPONSIBLE FOR THE ENTIRE \$50,000 SETTLEMENT SOUGHT BY THE RECEIVER

Penn National's final argument is that the \$50,000 sought from Penn National under its 1986-1987 policy should be spread on a "pro-rata/time-on-risk" basis to as-yet unidentified insurers, citing *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40 (2011). Opposition, p. 21, n. 20. On this argument as well, Penn National has failed to heed, let alone grapple with, this Court's consideration of this very issue, in the specific context of Covil's ASBESTOS cases. While *Crossman* has bearing on allocation for product liability/completed operations cases, this is not such a case, as Penn National readily admits. For operations cases, such as this, the pro-rata rule of *Crossman* does not apply, but, rather, "in the case of operations claims where the policies in effect during the conduct of the operations will apply on an 'all sums' basis." Covil Order, p. 19. As previously held by this Court, in a ruling which MIGHT be repeated in this case:

"The Court is mindful of the South Carolina Supreme Court's decision in *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and notes that it speaks generally to allocation of loss in a continuous injury situation such as asbestos-related disease but does not address the particular circumstances presented by this Receivership, i.e., the applicability of operations coverage and the impracticability of allocation of loss to Covil itself. Therefore, the Court

will apply the rule of Crossman Communities of N.C., Inc. except in the case of operations claims where the policies in effect during the conduct of the operations will apply on an “all sums” basis.”

Covil Order, pp. 18-19. Thus, there can be no allocation to other insurers. Penn National failed in its proof or to meet its burden. Most importantly, on this issue, it failed to appreciate the teaching and the articulated reasoning of this Court.

CONCLUSION

For the reasons set forth herein, in Covil’s motion, in the attached Covil Order, and otherwise, the Receiver of Covil respectfully requests that his motion for partial summary judgment be granted, that this case not be stayed, but, rather, proceed to full adjudication, and that a judgment be entered in Covil’s favor, as requested by Covil’s motion for partial summary judgment.

Respectfully submitted,

s/ G. Murrell Smith, Jr.

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Attorneys for the Receiver

June 18, 2020.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 ROXANNE FALLS, Individually and as)
 Personal Representative of the Estate of)
 CHARLOTTE GAYE SMITH,)
)
 Plaintiffs,)
)
 vs.)
)
 CBS Corporation, et al.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE SIXTH JUDICIAL CIRCUIT
 C/A NO.: 2015-CP-46-02155

**ORDER FOR RULE TO SHOW CAUSE
 HEARING**

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 TIMOTHY W. HOWE, Individually and as)
 Personal Representative of the Estate of)
 Wayne Ervin Howe, deceased, and Jeanette)
 Howe,)
)
 Plaintiffs,)
)
 vs.)
)
 Air & Liquid Systems Corporation, et al.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE SIXTH JUDICIAL CIRCUIT
 C/A NO.: 2015-CP-46-03456

**ORDER FOR RULE TO SHOW CAUSE
 HEARING**

ELECTRONICALLY FILED - 2020 Jan 08 11:39 AM - YORK - COMMON PLEAS - CASE#2015CP4602155
 ELECTRONICALLY FILED - 2020 Jun 18 3:34 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001226

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
)	
DENVER D. TAYLOR and JANICE)	
TAYLOR,)	
)	
Plaintiffs,	)	ORDER FOR RULE TO SHOW CAUSE
	)	HEARING
vs.)	
)	
Air & Liquid Systems Corporation, et al.,)	
)	
Defendants.)	
)	
)	

This matter comes before this Court by way of a Motion for a Rule to Show Cause initiated by Peter D. Protopapas, as the duly appointed Receiver of Covil Corporation (“Receiver”). The Receiver’s Motion for a Rule to Show Cause against United States Fidelity and Guaranty Company (“USF&G”), Zurich American Insurance Company (“Zurich”), and Sentry Insurance, a Mutual Company (“Sentry”) (collectively “Insurers”) seeks an order holding these Insurers in contempt for violating this Court’s (1) November 2, 2018 Order Appointing a Receiver for Covil Corporation;¹ (2) February 28, 2019 Order requiring Covil’s Insurers to attend mediation;² (3) September 19, 2019 Order requiring Covil’s Insurers to respond and produce required documents before September 30, 2019;³ and (4) October 28, 2019 Order for Rule to Show Cause.⁴

¹ See November 2, 2018, Order Appointing Receiver in *Taylor v. Air & Liquid, et al.* (C/A No. 2018-CP-40-04940).

² See February 28, 2019, Order Granting Plaintiff’s Motion to Compel Attendance at Mediation in *Nolen v. Daniel, et al.* (C/A No. 2016-CP-40-04184); *Greene v. Armstrong, et al.* (C/A No. 2016-CP-40-00173); *Thompson v. Armstrong, et al.* (2016-CP-40-2498); and *Taylor v. Air & Liquid, et al.* (C/A No. 2018-CP-04940).

³ See September 19, 2019, Order for Rule to Show Cause in *Hopper v. Air & Liquid, et al.* (C/A/No. 2019-CP-40-00076).

⁴ See October 28, 2019, Order for Rule to Show Cause in *Hopper v. Air & Liquid, et al.* (C/A/No. 2019-CP-40-00076).

The South Carolina Supreme Court appointed the undersigned to serve as the Chief Judge of Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system. The asbestos litigation in South Carolina constitutes a significant number of complex multi-party cases. A typical case will include an injured plaintiff alleging that an asbestos-related cancer was caused by dozens of different defendants.

This Court has worked diligently to manage this docket and to organize this complicated statewide litigation into an orderly process whereby cases are assigned for trial in a predictable fashion. This process is designed to allow the litigants to participate in discovery in an orderly fashion to facilitate the evaluation of litigation positions well before trial, and to try the cases as necessary.

The Supreme Court's charge to this Court includes facilitating meaningful mediations of asbestos cases consistent with the South Carolina Rules of Alternative Dispute Resolution. The Rules mandate attendance at mediation of "a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim" on behalf of any insured party against whom a claim is made. SCRADR 6(b)(4).

Although this Court manages a large asbestos docket involving scores of different defendants, the matters associated with defendant Covil Corporation have required a very significant amount of this Court's time and attention for the reasons explained in more detail below.

From the time of its original formation in or about 1954, Covil Corporation was engaged in the installation and removal of insulation in various industrial facilities across South Carolina. Covil's operations involved the installation, removal and disturbance of insulation materials, typically supplied, required or acquired by other parties. At pertinent times insulation materials contained asbestos and Covil's operations are alleged to have resulted in bodily injury to South Carolina citizens. In 1991, Covil's business failed and it ceased operations. Thereafter, in 1993 the State of South Carolina rescinded Covil's corporate charter for failing to file the appropriate documentation with the Secretary of State.

Despite Covil's failure as a going concern and its subsequent forfeiture of its corporate charter, it continued to be sued in numerous asbestos cases. Through the management of the South Carolina asbestos docket, this Court observed several irregularities in the way that Covil conducted itself in its litigation. In the fall of 2018, Covil inexplicably defaulted on two mesothelioma asbestos cases pending before this Court, and shortly thereafter on November 2, 2018, the undersigned appointed Peter D. Protopapas to serve as a Receiver for Covil Corporation to manage its affairs according to South Carolina law.

During the ensuing months, this Court conducted numerous hearings regarding issues related to Covil. Over time, it became clear to this Court that certain of Covil's primary insurers (USF&G, Zurich, and Sentry) were operating an otherwise defunct Covil for purposes of managing Covil's asbestos litigation and had been doing so for over two decades without any apparent involvement from the insured – Covil Corporation. For over two decades, these primary Insurers pretended to be Covil. The primary insurers never sought the appointment of a receiver to represent Covil's interests in the defense of its asbestos cases. In fact, despite numerous opportunities to do so, at no time did any of Covil's Insurers even disclose to this Court their scheme to operate Covil as an undisclosed alter ego of these insurance companies.

As Covil's Receiver began to undertake his responsibilities, it became evident to this Court that Covil's Insurers would not willingly cooperate with the Receiver.⁵ In fact, several of these Insurers went to great lengths to thwart the Receiver's efforts to understand the basic nature and amount of the asbestos insurance coverage available to Covil. As a result of the insurers' refusal to cooperate, the Receiver began to seek this Court's intervention to determine the nature and amount of insurance available to Covil for its asbestos litigation. This information is critical to the Receiver's ability to manage Covil's asbestos

⁵ The Court's discussion of Covil's Insurers does not apply to TIG Insurance Company, as successor in interest to Fairmont Specialty Company, formerly known as Ranger Insurance Company ("TIG"). Unlike Covil's other insurers, TIG has cooperated with this Court and the Receiver. After producing the requisite materials, TIG acknowledged its responsibilities and reached an amicable settlement with Covil's Receiver. The Court commends TIG and its counsel for their cooperation and professionalism throughout this process. The Court also dissolved its Order to Show Cause as it related to Hartford and notes that Hartford also has reached an agreement to resolve its differences with Covil's Receiver.

litigation and, specifically, to participate meaningfully in mediation sessions scheduled for Covil's asbestos cases as required by the South Carolina Rules of Alternative Dispute Resolution.

Proceedings before this Court on the issue of Covil's participation in mediation exercises have demonstrated a lack of clarity regarding what constitutes "full authority" for claims filed against Covil Corporation. This lack of clarity continually delays settlement, stalls negotiations, and slows the ability of this Court to manage the South Carolina asbestos docket. An inquiry into the insurance coverage of Covil Corporation is warranted to fully determine the amount of authority available for settlement of asbestos personal injury actions filed against Covil Corporation.

Over time, this Court entered a series of escalating orders designed to require the Insurers to produce relevant insurance information to Covil's Receiver and to participate in asbestos mediations as scheduled on the South Carolina docket. Although several asbestos cases have been resolved under this system, except as noted above in note 5, the Insurers have yet to comply with this Court's Orders regarding the full production of the relevant insurance information to Covil's Receiver. These Insurers' defiance of this Court's lawful orders has impeded Covil's Receiver in his work under this Court's mandate, has interrupted this Court's ability to manage the numerous asbestos cases pending on its docket, and has required this Court unnecessarily to expend valuable time and resources in numerous hearings designed to encourage these Insurers to conduct themselves in accordance with the basic tenets of well-established South Carolina law. The Court has experienced problems with these Insurers when they were animating an otherwise defunct Covil and controlling its behavior in asbestos litigation before the appointment of the Receiver. *See* Order Granting Plaintiff's Motion for New Trial in *Crawford v. Ceeanese Corp.*, C/A No. 2017-CP-42-04429 (where this Court found that Covil's insurers had been improperly operating, controlling, and abusing Covil for many years).

Unfortunately, this Court's persistence and patience have been unsuccessful in causing these Insurers fully to disclose and produce the insurance information or the details concerning their respective insuring relationship with Covil to the Receiver for their insured, Covil. After numerous attempts to achieve

compliance, this Court scheduled a show cause hearing on November 12, 2019, where the Insurers were directed to appear to discuss by policy and annual period (or portion thereof) the original and remaining limits of Covil's insurance policies under all applicable coverage parts, including separately as to the product liability/completed operations coverage part and the operations/premises coverage part and to provide an accounting of the amounts paid in settlement for each claim paid or settled, who authorized payment, under what coverage parts of the policies settlements or judgments were paid, documentation or other evidence supporting the analysis and characterization of claims as products/completed operations or operations/premises claims, method of allocation of settlements or judgments paid among Insurers, policies and policy years and if no payment was made because of a denial of coverage, the stated basis at the time of settlement for such denial. With the exceptions noted above in note 5, the Insurers failed and refused to comply with this order.

In sum, after months of work by this Court and its Receiver, it appears to this Court that these Insurers have refused to provide complete policy limits and settlement authority information to their insured's Receiver, even after this Court ordered the Insurers to provide the information by September 30, 2019, under penalty of perjury, and again in a show cause hearing scheduled on November 12, 2019. Despite their assertions in their memoranda submitted to this Court following the November 12, 2019 hearing, the Court has given the Insurers ample opportunity to respond to Receiver's arguments and explain to the Court why they should not be held in contempt for failing to abide by this Court's September 19, 2019 Order. Despite these Insurers not complying with the clear terms of the September 19, 2019 Order to respond to the areas of inquiry under the penalty of perjury by September 30, 2019, the Court allowed these Insurers to submit additional affidavits and evidence after the November 12, 2019 hearing. However, as the Court noted at the hearing, these Insurers were already in contempt of this Court's order by not providing proper responses under perjury by the September 30, 2019 deadline, and the supplemental submissions, although potentially helpful to the Court in making this ruling, do not necessarily cure the Insurers' contempt. The Court has diligently reviewed and considered the extensive filings submitted by both the

Receiver and these Insurers after the November 12, 2019 hearing. The Court finds the submissions by these Insurers are not relevant to, and do not cure, their contemptuous conduct. Rather, these filings have consumed additional countless hours of this Court's time while these Insurers continue to play games rather than comply with this Court's orders.

The Court is particularly concerned with the fact that these Insurers continue to claim ignorance surrounding their responsibility to their insured and their obligations under this Court's orders. The Court has held multiple hearings wherein the Court has allowed the Receiver and the Insurers to present arguments pertaining to these issues, and the Receiver has been trying to obtain the requested information since his appointment, well over a year ago. These Insurers cannot continue to plead ignorance in order to avoid the consequences of their own conduct and prolong the much-needed resolution of pending asbestos cases. The Insurers have continuously attempted to impede the Receiver's ability to determine the amounts of coverage available to Covil and have violated the South Carolina Alternative Dispute Resolution Rules by refusing to provide the Receiver with the necessary coverage information to fully participate in the mediation of these claims. In fact, because of these Insurers' obstinate refusal to comply with this Court's order and their past conduct, the Receiver has been forced to go to great lengths in order to present evidence to this Court and piece together the secondary evidence of insurance. While the Insurers have produced thousands of pages of documents, the production does not satisfy this Court's order as these Insurers have still not produced full coverage information or policies to the Receiver or fully disclosed the nature and extent of their insuring relationship.

During these hearings, the Court has been presented with evidence in the form of documents and sworn testimony indicating that Covil purchased products liability and completed operations liability insurance from USF&G (now a part of Travelers) from 1954 to 1964. Specifically, Palmer Covil (the founder of Covil Corporation) testified in a deposition in 1977 that Covil purchased USF&G general liability insurance coverage from 1954 to 1964. Moreover, Palmer Covil identified the Goldsmith Agency as the broker responsible for selling USF&G coverage to Covil. Former Lieutenant Governor Nick

Theodore provided an affidavit, as a former employee and partner of this agency, that he recalled selling USF&G insurance to Covil during this time period (until his agency lost the business to an agent selling insurance issued by Sentry). The Court finds this evidence and testimony to be persuasive, credible, and consistent with other known facts in this case.

On the other hand, USF&G reports only that it has been unable to locate these insurance policies. However, the Court has also been presented with evidence that USF&G undertook a systematic corporate program to destroy or discard its historical insurance policies which included policies and other related documentation from the period of time for which policies were issued to Covil as demonstrated by the evidence before this Court. In its arguments before the Court on November 12, 2019, and its memorandum submitted after the hearing, USF&G argues the Court should disregard its historical conduct because past conduct cannot be the basis of a finding of contempt. However, USF&G failed to inform the Court of the systematic destruction of policies until the Receiver brought the matter to the attention of the Court at the most recent hearing. The Court is concerned by the Insurers' failure to fully represent facts to the Court regarding the insurance coverage issued to Covil, especially considering that the Insurers acted as the alter ego of Covil for numerous years. The Court has given the Insurers ample opportunity to inform the Court of the necessary facts surrounding these coverage issues, and the Insurers have continuously refused to provide full information, misrepresented information, and attempted to prevent this Court from ruling on these issues.

The Court is deeply troubled by USF&G's historical behavior, including the widespread destruction of its insureds' insurance policies in an effort to evade liability under these policies. The Court is even more troubled by the fact that USF&G never mentioned, in numerous hearings on this very topic, that its policy destruction "purge" was the reason that USF&G is now unable to produce Covil's policies to the receiver. In this regard, USF&G has flagrantly defied this Court's orders and attempted to make a mockery of this Court's important work. Rarely, if ever, has this Court encountered such a degree of corporate

dishonesty as has been on display from USF&G during these proceedings. USF&G owes this Court a duty of candor, and should have been forthright.

The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black's Law Dictionary* (8th Ed. 2004). The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had “consciousness of guilt” or other motivations to avoid the evidence being heard or introduced to the jury.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate. These elements are:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) that the evidence was destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hawkins v. College of Charleston, 2013 WL 6050324, *2 (4th Cir. 2013) (quoting *Cytec Carbon Fibers, LLC v. Hopkins*, No. 2:11-cv-0217, 2012 WL 6044778 (D.S.C. Oct. 22, 2012)).

As to the first element, USF&G had a duty to preserve this evidence. “A party has a duty to preserve evidence during litigation and at any time ‘before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation.’” *Id.* at *3 (quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). There is a common law duty to preserve evidence, and a party can only be sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. Pre-litigation discussions or requests to inspect can also trigger a duty to preserve relevant evidence and it can be said that the obligation to preserve evidence

runs first to counsel, who then has an ethical obligation to notify and advise their client on its obligations to safeguard and preserve the evidence relevant to the litigation on a continuing basis.

Covil is unable to identify a specific date on which USF&G's duty to preserve records arose. However, by 1976, USF&G had received correspondence from Covil requesting USF&G to respond to an asbestos case, and by June 1983, USF&G had received correspondence from Covil serving as Covil's final written demand that USF&G afford a defense to Covil in an asbestos case. As a result of this exchange of correspondence, USF&G knew by at least June 1983 that its insurance policies issued to Covil would be highly relevant documents for years to come. Despite this fact, USF&G reports that it has been unable to locate the early policies issued to Covil – policies that it denies having issued – or an actual copy of a later policy that it admits to having issued to Covil.

The evidence demonstrates that USF&G cannot locate the early policies USF&G issued to Covil, or the later policy it admits having issued to Covil, because USF&G destroyed the policies. In 1984, the year after Covil's counsel demanded a defense from USF&G, which was facing a growing number of long-tail claims like the asbestos claims here, USF&G deliberately began purging old policies and policy information, including information on policy limits. To support its contentions regarding the destruction of policies, the Receiver submitted documents from the *Western MacArthur* litigation; most importantly the Pillsbury Report, which USF&G Filed in *Western MacArthur* litigation (*Western MacArthur Company v. General Accident Insurance Company of America*, Case No. 721595-7, In the Superior Court for Alameda County, California).⁶

⁶ The Pillsbury Report is an 85-page document, filed in *United States Fidelity & Guaranty Company, et al. v. American Re-Insurance Company, et al.* Index No. 604517/2002, in the Supreme Court of the State of New York, County of New York. An expert witness, Philip L. Pillsbury, Jr., of the New York law firm, Pillsbury and Levinson, was retained by the reinsurers of USF&G to evaluate, in the context of California bad faith and insurance practice, the potential exposure for damages, which USF&G faced in a jury trial in 2002. This material was presented by Covil, at the November 12, 2019 hearing to describe the significant corporate misconduct leading to USF&G's contention that it was unable to locate copies of Covil's early insurance policies, which the Receiver found highly probative of the key issues in the proceeding. There was no objection regarding the Court's consideration of the documents, and Defendant

As stated in the Pillsbury report, an April 30, 1984 memorandum from Charles Watson, then a Vice President of USF&G, the new document destruction policy mandated the “purging of *each* file, not just files that can be discarded in entirety,” required that doubts should be resolved “in favor of discarding unless there are legal restraints,” and admonished that “we must be absolutely sure that we have thoroughly cleaned existing files.” Similarly, a March 16, 1984 Department Circular detailing the Records Management Program noted: “All existing departmental files are to be in full compliance including having been completely purged of all obsolete and duplicate material.”

As detailed in the expert report of Philip Pillsbury, which USF&G filed on February 21, 2017 as an exhibit to its opposition to a motion in the *Western MacArthur* reinsurance matter then pending in New York, USF&G’s employees were given just two months to comply with the document destruction. Relying on USF&G’s historical records, Mr. Pillsbury also described the deposition testimony of Randolph Rohrbaugh, the USF&G Vice President of Quality Assurance, who testified that, at a meeting concerning the USF&G document destruction program among USF&G management and attorneys in 1984, “there was a discussion as to whether USF&G should retain its records information about insureds’ policies given that insureds would bear the burden of proof as to those policies.” *See* Pillsbury Report at 18.

In short, the evidence shows that USF&G plainly undertook its purge of policy-related materials in anticipation of litigation. Having destroyed its policy records, USF&G then could require its policyholders to provide copies of their policies to USF&G in order for USF&G to provide coverage. Beginning in the late 1980s, however, USF&G realized that policyholders could prove coverage for long-tail liability claims with secondary evidence, even if USF&G had destroyed the actual historical policy records in its possession. In his report in the reinsurance matter, Mr. Pillsbury describes the USF&G decision to reverse course on the document destruction policy. *See* Pillsbury Report at 18–19. Summarizing the deposition of Kenneth Ford, the USF&G in-house counsel in the Claims Legal Division, Mr. Pillsbury notes that Ford

USF&G and others requested the court allow them to submit further documentation. The court has considered the report and the additional insurers’ submissions in drafting this order.

“testified at deposition that USF&G decided to ‘stop the destruction’ after policyholders began to prove coverage for the long-tail claims with ‘partial information concerning a policy,’ and the burden was shifted to the insurer to prove there wasn’t a policy or at least to prove the policy terms, and USF&G was not able to rebut some of that information.” *Id.* at 19. The reversal of course apparently occurred after USF&G destroyed evidence of the coverage it had provided to Covil between 1954 and 1964 and the actual policy it admits to having issued to Covil in the 1976 to 1978 periods.

Recently produced documents from USF&G itself further support that had USF&G not destroyed its historical policies, it would have been able to locate coverage it issued to Covil in the 1950s and 1960s and the actual policy it admits to having issued to Covil in 1976 to 1978. USF&G Claims Register documents⁷ produced to the Receiver by USF&G on November 22, 2019, and December 5, 2019, over two months after this Court’s deadline for production, show USF&G paid claims on Covil policies made by third-party business entities such as Daniel Construction, Tennessee Eastman, Raburn Mills, First Baptist Church and Hicks & Ingle Company during the period from 1955 to 1962, further supporting the fact that USF&G issued general liability insurance coverage to Covil during this timeframe and, due to its conduct, has been unable to produce full and complete coverage information. Furthermore, although it claims to have what it calls a “certified” copy of the 1976 to 1978 primary policy it admits having issued to Covil, USF&G has not been transparent with either Covil or the court. This so-called “policy” is a collection of forms, not an actual insurance policy, and there is no competent proof of an aggregate limit for products or completed operations claims. USF&G’s use of the word “certified” is also misleading since the documents have no independent verification of their source or accuracy.

⁷ The Court understands that USF&G utilized Claims Registers to maintain an index of all paid claims, and specifically that an entry was not placed on a claims register until a clerk had reviewed the relevant insurance policy to ensure that there was coverage for the loss. An April 1947 booklet entitled “Claim Department Clerical Instructions” detailed USF&G’s instructions to clerical staff regarding entry of claims in the claims register: “After the clerk has checked the policy or bond information to determine if there is coverage for the loss, she enters it on the claim register as provided on that form. She assigns the number next in order to the last one used. A separate sheet is used on each class of claims for each month. A carbon copy of the claim register is sent to the Home Office on the first of each month on AL [Automobile Bodily Injury], L [Other Bodily Injury], C [Compensation], and MP [Miscellaneous Property Damage] claims.”

By failing to maintain documents relevant to pending and future asbestos personal injury and insurance litigation, USF&G had a culpable state of mind because it either intentionally or negligently destroyed the evidence. The destruction of the documentary evidence that Covil seeks significantly hampers Covil's Receiver's ability to reconstruct its insurance program and other information relevant to pending and future asbestos personal injury and insurance litigation.

The "culpable" state of mind requirement does not require willful destruction. Rather, the moving party need only show that the evidence was destroyed "knowingly, even without intent [to breach the duty to preserve it], or negligently." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107–12 (2d Cir. 2001). "[T]he Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of the sanctions." *Sampson v. City of Cambridge, Maryland*, 251 F.R.D. 172, 179 (D. Md. 2008) (citing *Silvestri*, 271 F.3d at 590).

Here, the evidence before the Court shows that USF&G's conduct of destroying or losing relevant documents satisfies the required minimum level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires USF&G to have some degree of fault, which is the case in this matter. Whether the Court finds that USF&G was negligent, grossly negligent, or willful in destroying the evidence, the Court concludes that USF&G had a culpable state of mind when it spoliated the evidence at issue.

The last of the three independent elements, relevance to the party's claims, is also clearly present on these facts. Under Rule 401 of the South Carolina Rules of Evidence, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." "Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Thus, any evidence which assists a jury at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely

within the trial judge's discretion. *Strickland v. Coastal Design Assocs., Inc.*, 294 S.C. 421, 425, 365 S.E.2d 226, 228 (Ct. App. 1987).

Here, Covil has met its burden of showing the spoliated evidence is highly relevant to its case. The fact that USF&G destroyed or lost such evidence is extremely damaging to Covil's ability to reconstruct its insurance policies. As such, USF&G should not profit or benefit from its failure to preserve this evidence. Of course, Covil has no way of knowing precisely what has been destroyed. However, there is reason to believe that the destroyed evidence would have aided Covil's position, which has suffered irreparable prejudice due to USF&G's spoliation. USF&G is hereby ORDERED to produce ALL documents related to these issues, including all transcripts, from the *Western Asbestos* litigation, including the subsequent re-insurance litigation, to Covil's Receiver by January 13, 2020.

By destroying relevant evidence, USF&G has succeeded in hiding significant evidence of its insurance coverage and attempted to deprive Covil of the opportunity to present critical evidence of insurance coverage. Thus, the Court finds that USF&G spoliated relevant evidence and will issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field.

When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). Over the years, courts have found numerous sanctions to be appropriate for the spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines plus attorney's fees and applied almost every other sanction available for the failure to provide discovery.

Among the tools that judges may use to combat spoliation is the adverse inference jury instruction/presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d

679 (Ct. App. 1997). The presumption does not arise from the failure to present the evidence, but rather from the role that the spoliating party had in preventing it from being reviewed by the jury or court. When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers v. S.C.E.&G. Co.*, 427 S.E.2d 687, 689 (S.C. Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ.*, 302 S.C. 390, 396 S.E.2d 369). Based on the evidence established by Covil's Receiver regarding the existence of Covil insurance coverage issued by USF&G, and based on the evidence demonstrating USF&G's spoliation of evidence regarding the existence of the coverage, this Court holds that USF&G's issued general liability insurance coverage to Covil Corporation on an annual basis, including products and completed operations coverage, between 1954 and 1964, without an aggregate limit of liability for damages paid for bodily injury or property damage. The court also makes a similar finding as to the 1976 to 1978 policy, SMP 490049.

Further, necessitated by the Supreme Court's charge to this Court to manage the South Carolina statewide asbestos litigation cases and as a direct result of these Insurers' recalcitrance in refusing to cooperate with this process, this Court and its Receiver are now left to discharge their respective duties by reconstructing the nature and scope of Covil's historical insurance program (without the cooperation of the Insurers) so as to facilitate the management of the South Carolina asbestos docket. In this effort, the Court will apply the following principles of South Carolina insurance law.

1. "Trigger of Coverage." The term "trigger of coverage" describes the necessary events for a liability policy to respond to a suit seeking damage because of bodily injury. The Court rules that the policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured's policies in effect from a person's first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a "continuous trigger of coverage" or an "injury in fact trigger of coverage" inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of

asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result such that the court need not choose between these conceptually similar approaches. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996) (“We find no error in the trial court’s use of an injury-in-fact analysis to apply a continuous trigger.”).

2. The Distinction Between “Operations” and “Completed Operations.” The Court finds that the policies at issue contain separate and distinct coverage parts for “operations” and “completed operations.” As a general matter, the policies contain no aggregate limit of liability for the operations coverage part, although the Court has also held that the USF&G policies issued to Covil between 1954 and 1964 also contain no aggregate limit of liability for the products and completed operations coverage part as well. The operations coverage part for each one of the policies at issue in this case responds repeatedly to each and every “occurrence” without a total “cap” on the insurers’ liability to pay, subject only to a “per occurrence” limit of liability. The same is true of products and completed operations claims covered under the 1954 to 1964 USF&G policies. Most of the asbestos contracting claims against Covil invoke the operations coverage part because they did not result from its “completed operations.”

The insurers have conflated the separate “operations” coverage part with the “completed operations” coverage part and have applied their policies in a manner that has not been adopted by the state courts in South Carolina. The Court is aware that the insurers contend that aggregate limits of liability apply to any third party’s claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of “completed operations” that focuses on the inception date of a policy.

This Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to “guess” the view the Maryland Court of Appeals would take if the issue of interpreting the “completed operations” provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has “spoken” definitively on this issue. However,

this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

This Court finds that the “completed operations hazard” described in the insurers’ policies, and the corresponding aggregate limits of liability in the policies that contain such aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite.

The Court holds that any aggregate limit of liability in the insurers’ policies applies only to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos attributed to Covil *after* Covil completed its work at a particular jobsite. No aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite.⁸ See, e.g., *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) (“*Gerling*”) (“Operations” coverage “protected [the insured] from claims for asbestos-related injuries resulting from asbestos exposure on [the insured’s] premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products”); *Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”).

⁸ Covil contends that policies in addition to those issued by USF&G between 1954 and 1964 do not contain any aggregate limits of liability at all. The court has not reached any conclusion as to this contention, except to conclude, in accordance with well-settled South Carolina law, that the burden is on the insurer to prove any limitation on coverage, including a limitation such as an aggregate limit of liability.

3. Burden Of Proof. The Insurers bear the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits and the “exhaustion” of the aggregate limits of liability in their policies.

The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: “Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna Cas. and Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)); *see also Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) (upholding circuit court decision to construe an ambiguous terms in favor of coverage, and noting that “ambiguous terms are to be construed strictly against the insurer”). Courts have held that this basic principle also applies to “limitations” on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Accident Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).

Consequently, as to any individual asbestos lawsuit, it is the Insurers’ burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the “completed operations” provisions in their policies, where such aggregate limits have been proven by each particular Insurer as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, the insurers bear the burden of demonstrating that aggregate limits in their policies, if any, apply to any particular asbestos suits.

4. Occurrences. The policies at issue provide coverage for legal liabilities resulting from an

“occurrence.” An “occurrence” is typically defined as an accident, including exposure to substantially similar conditions, that results in bodily injury during the policy period. Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death “occurrences” have resulted from its asbestos “operations.” Covil is therefore entitled to multiple “per occurrence” limits of liability to resolve each of the asbestos suits.

The asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil’s operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Covil resulted from multiple “occurrences” under the standard definition of “occurrence” used during the time of the insurers’ policies. *See, e.g., Gerling*, 419 F.3d at 184 (“[I]f claims arising from multiple occurrences triggered [operations] coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.”).

5. Allocation of Losses to Covil’s Policies. Exposure to asbestos results in progressive injury spanning many years, thereby triggering coverage under multiple policies. Exposure to asbestos during the conduct of operations that results in bodily injury during the policy period or periods during which the operations were conducted also presents an allocation issue. And, here, Covil is in a Receivership, with no assets other than its insurance policies and proceeds, which also affects any allocation of loss since Covil itself cannot absorb any allocation of loss. Finally, the Court notes that the language of the policies typically requires the insurers to pay “all sums” – meaning everything – for which the insured is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.

The Court is mindful of the South Carolina Supreme Court’s decision in *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and notes that it speaks generally to allocation of loss in a continuous injury situation such as asbestos-related disease but does not

address the particular circumstances presented by this Receivership, *i.e.*, the applicability of operations coverage and the impracticability of allocation of loss to Covil itself. Therefore, the Court will apply the rule of *Crossman Communities of N.C., Inc.* except in the case of operations claims where the policies in effect during the conduct of the operations will apply on an “all sums” basis. The Court also interprets *Crossman* such that allocation of loss will not be made to policy years when Covil does not have any available or responsive coverage.

Finally, each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit. This approach “ensures that [Covil] is indemnified by one [or more] insurer for the full extent of the loss up to the policy’s limits, but apportions liability among all insurers whose policies were triggered by the claimant’s asbestos-related bodily injury.” *Armstrong*, 45 Cal. App. 4th at 55.

This Court further finds that no aggregate limit of liability for product liability or completed operations claims has been or can be proven, and therefore no aggregate limit for product liability or completed operations claims exists, for the following Covil insurance policies:

<u>Policy Period</u>	<u>Insurer</u>	<u>Policy Number</u>
April 21, 1964 – April 21, 1965	Hardware Mutual Casualty Co.	39 04132 02 01
April 21, 1965 – April 1, 1966	Hardware Mutual Casualty Co.	39 04132 02 01
April 21 1966 – March 31, 1967	Hardware Mutual Casualty Co.	39 04132 02
March 31, 1967 – March 31, 1968	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1968 – March 31, 1969	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1969 - March 31, 1970	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1974 – March 31, 1975	Maryland Casualty Company	41-206393
March 31, 1975 – March 31, 1976	Maryland Casualty Company	41-206393

March 31, 1976 – March 31, 1977	USF&G	SMP 490049
March 31, 1977 – March 31, 1978	USF&G	SMP 490049

This Court further orders that this Order be forwarded to the South Carolina Attorney General and to the South Carolina Department of Insurance for their consideration and further action, as they may deem appropriate.

AND IT SO ORDERED this 8 day of January, 2020.

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.



York Common Pleas

Case Caption: Charlotte Gaye Smith , plaintiff, et al VS CBS Corporation ,
defendant, et al
Case Number: 2015CP4602155
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE NO. 2020-CP-40-01226

COVIL CORPORATION, by and
through its duly appointed Receiver,
Peter D. Protopapas,

Plaintiff,

vs.

PENNSYLVANIA NATIONAL
MUTUAL CASUALTY
INSURANCE COMPANY,

Defendant,

**DEFENDANT PENN NATIONAL'S
MOTION FOR RECONSIDERATION**

COMES NOW Defendant Pennsylvania National Mutual Casualty Insurance Company (“Penn National”), by and through counsel, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and moves the Court to reconsider its Order entered on August 13, 2020, granting the Motion for Partial Summary Judgment filed by Plaintiff Covil Corporation (“Covil”) in this action.

The undisputed facts in the present matter are as follows:

1. Penn National issued a liability insurance policy, policy no. 515 50 28 53 (the “Penn National policy”), to Covil with annual policy periods from March 31, 1986 to March 31, 1988.

2. The *Rollins* Asbestos Action¹ was filed against Covil on April 5, 2019, alleging that Mr. Rollins suffered from mesothelioma as a result of exposure to asbestos.

On April 10, 2019, an Amended Complaint was filed in the *Rollins* Asbestos Action, which was

¹ The asbestos lawsuit at issue in this action is captioned *David D. Rollins v. Covil Corp.* et al, C.A. No. 2019-CP25-0118 (the “*Rollins* Asbestos Action”), filed in Hampton County, South Carolina.

served on Covil on April 25, 2019. Covil filed its Answer to the Amended Complaint on May 28, 2019, through defense counsel retained by other insurers to whom Covil had tendered the Rollins Asbestos Action at that time; however, Covil did not provide notice to Penn National of the *Rollins* Asbestos Action at that time.

3. Only after the pleadings had been closed and discovery (both fact and also expert) had long since been completed did Covil send its first notice of the *Rollins* Asbestos Action to Penn National on January 27, 2020.

4. Then, on February 10, 2020, the Receiver for Covil wrote to counsel for Penn National to advise that a mediation had been scheduled for February 25, 2020, in the *Rollins* Asbestos Action, providing notice to Penn National just twelve (12) business days before the date of the mediation, expecting Penn National to participate in a settlement in an action that had been litigated for nearly ten (10) months without any prior notice to (and hence, participation by) Penn National in such action.

5. As a condition for coverage, the Penn National policy requires that “[i]f claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.”

6. Covil failed to comply with this condition for coverage under the policies. Covil did not provide any notice or forward any suit papers in the *Rollins* Asbestos Action to Penn National until January 27, 2020—over nine (9) months after it had been served with the complaint in such action. Then, less than a month after providing Penn National with its first notice of the *Rollins* Asbestos Action, and while Penn National was still in the process of gathering information from the defense counsel retained by other insurers to whom Covil

had provided timely notice, Covil settled the claims asserted against it during the course of a mediation conducted on February 25, 2020 (of which Covil provided even less notice to Penn National).

7. Given that Covil and its other insurers are funding the settlement at issue, the rights of an innocent third-party are not jeopardized by Covil's failure to comply with the notice conditions in the policies. Therefore, Covil is not entitled to coverage under the Penn National policy for the settlement in Rollins Asbestos Action because it failed to comply with the conditions for coverage under the policies regardless of whether Penn National was "substantially prejudiced" by Covil's untimely notice (which it was).

8. Furthermore, even if "substantial prejudice" was required in order to relieve Penn National of its coverage obligations in relation to the *Rollins* Asbestos Action under the Penn National policy, Penn National was "substantially prejudiced" by Covil's untimely notice. By the time Covil provided any notice of the Rollins Asbestos Action, the litigation had been pending for over nine (9) months with discovery all but completed, the trial date just eight (8) weeks away. Then, the parties in the *Rollins* Asbestos Action engaged in a mediated settlement conference with notice of just twelve (12) business days to Penn National—during which Covil and its other insurers (to whom timely notice was provided) settled the claims against Covil in the *Rollins* Asbestos Action—precluding Penn National from meaningfully participating in the mediation given the untimely notice and lack of information and documentation provided by Covil to Penn National prior to the mediation.

9. Alternatively, the "Completed Operations Hazard and Products Hazard" exclusion in the Penn National policy bars coverage for the claims asserted against Covil in the *Rollins* Asbestos Action.

10. The “Completed Operations Hazard and Products Hazard” exclusion in the Penn National policy bars coverage under the policy for “bodily injury” included in the “completed operations hazard” and the “products hazard”.

11. The only exposure that Covil identifies with respect to Mr. Rollins as contributing to his diagnosis with mesothelioma is “take home” exposure via his step-father, Mr. Ashworth, who is alleged to have been present at Bowater, while Covil performed piping system and insulation work between March 11, 1986 and January 25, 1987, under a subcontract which required Covil to “[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on required piping systems.”

12. Covil does not contend and it is not alleged in the *Rollins* Asbestos Action that Mr. Rollins was ever present at Bowater while Covil was allegedly performing operations at the facility, but rather contends that Mr. Rollins was exposed to asbestos dust that his stepfather brought home with him when he returned home from work at Bowater during the relevant time-period.

13. The “bodily injury” as alleged in the *Rollins* Asbestos Action falls within the “products hazard” in the Penn National policy effective from March 31, 1986 to March 31, 1987, because such “bodily injury” is alleged to have arisen from Covil’s products away from premises owned by or rented to Covil and after physical possession of such products had been relinquished to others during that time period. Accordingly, coverage for the claims asserted against Covil in the *Rollins* Asbestos Action is barred by the “Completed Operations Hazard and Products Hazard” exclusion in the 1986-1987 Penn National policy. Additionally, the “bodily injury” as alleged in the *Rollins* Asbestos Action would also be excluded as within the “completed operations hazard” because the alleged injury arose out of Covil’s operations and

occurred after such operations had been completed and away from premises owned by or rented to Covil.

14. Furthermore, in the alternative, Covil's Motion for Partial Summary Judgment is premature insofar as discovery in this case has yet to be completed. Penn National will need to engage in discovery in this action, including, but not limited to, Covil's tender of the *Rollins Asbestos Action* to Penn National and other insurers and the reason for the failure to delay tendering this matter to Penn National, the nature and timing of the alleged asbestos exposure in such action, the settlement entered into by Covil in such action, including the total amount of the settlement and the amount (if any) that Covil itself paid to settle such action, etc.

WHEREFORE, Penn National respectfully requests that the Court reconsider and reverse its grant of Covil's Motion for Partial Summary Judgment, and its corresponding holding that the Penn National policy provides coverage to Covil for the claims asserted against it in the *Rollins Asbestos Action*.

Respectfully submitted this the 24th day of August, 2020.

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

Vs.

Pennsylvania National Mutual Casualty
Insurance Co.,

Defendant.

Case Number: 2020-CP-40-01226

**RECEIVER'S RESPONSE TO PENN
NATIONAL'S MOTION FOR
RECONSIDERATION**

Peter D. Protopapas, in his capacity as Receiver for Covil Corporation (“the Receiver”), and acting by and through the undersigned counsel, files this Response to Pennsylvania National Mutual Casualty Insurance Co.’s (“Penn National”) August 24, 2020 Motion for Reconsideration (“Motion”) of this Court’s August 13, 2020 Order granting Covil Corporation’s (“Covil”) Motion for Partial Summary Judgment.

Penn National’s Motion merely repeats the same arguments that this Court already considered and rejected in granting Covil’s motion. Penn National does not identify a single error of law or fact in the Court’s Order. Rather, its only basis for asking the Court to reverse itself is because it does not like the Court’s decision. Penn National’s motion should be denied.

I. Factual Background

On February 28, 2020, the Receiver for Covil Corporation filed this lawsuit, which alleges that Penn National breached one of the two insurance contracts it has with Covil when it refused to participate in the settlement of the *David D. Rollins* matter pending against Covil.

On April 22, 2020, the Receiver moved for partial summary judgment on the ground that Penn National breached its insurance contract with Covil, which was in effect during the relevant

time period, Penn National policy number 515 5028 537, for the policy period March 31, 1986 to March 31, 1987, when it attended the court-ordered mediation in the *Rollins* case. At that time, Penn National declined to contribute any dollar amount to settle *Rollins*, even though the \$50,000 required to settle the case was within the limits of the insurance policy Penn National issued to Covil. In Penn National's May 8, 2020 Opposition, it argued, among other things, that an exclusion in its policy, the "completed operations hazard" and the "products hazard," bars coverage for *Rollins*. See Penn National's Opposition. Covil filed its Reply in support of summary judgment on June 18, 2020.

After carefully considering the pleadings, the parties' briefing, and the entire record before it, the Court granted Covil's Motion in its August 13, 2020 Order ("Order").¹ Penn National filed its Motion for Reconsideration on August 24, 2020.

II. Argument and Authorities

A. Legal Standard

Penn National moves for reconsideration under Rule 59(e), SCRPC. Under that Rule, "a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment." *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (citing *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995)). The trial court has the discretion to deny a motion to reconsider "on the brief filed by the parties *without oral argument*." *Pollard v. Cnty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 534 (Ct. App. 1995) (emphasis in original).

¹ Pursuant to the Supreme Court's COVID-19 guidelines, the Court decided the motion on the briefing as there was no need for "further input from the lawyers." See *Re: Operation of the Trial During the Coronavirus Emergency*, S.C. Sup. Ct. Order dated April 3, 2020.

B. The Court has already ruled on the arguments Penn National raises in its Motion.

This Court already considered and rejected each of the arguments Penn National raises in its Motion. Penn National has failed to identify any legal or factual issue that the Court overlooked or erred in deciding. Its motion should be denied.

1. The Court properly rejected Penn National’s late notice defense.

Penn National re-asserts that it is not responsible for breach of its insurance contract with Covil because it did not receive timely notice of the *Rollins* action. Motion at 2-3. Specifically, it contends it had no duty to defend or indemnify Covil for the *Rollins* action. *Id.*

Penn National briefed these issues in its Opposition, including its alleged “substantial prejudice,” so it may not ask the Court to reconsider this argument. Opposition at 5-8, 12-17. Thus, as the Court found previously,

Penn National admits that “a representative of Penn National attended the mediation and expressed a willingness to contribute toward settlement on behalf of Covil.” . . . Penn National engaged the same defense counsel as all other Covil insurers to defend Covil’s interests for Penn National in the *Rollins* action and other Covil asbestos personal injury claims. *Id.* at 7. It had access to all of the same materials as the insurers that elected to resolve the *Rollins* action at mediation. Yet, Penn National alone states that “Penn National was not in a position to contribute the amount requested by Covil at the mediation.” *Id.* at 17.

Order at 9. After further analysis, the Court correctly held, “Penn National’s alleged late notice of the *Rollins* action is not a valid defense to breach of its insurance contract with Covil.” Order at 9.

2. The Court ruled that Penn National did not meet its burden to show that the “product liability hazard” exclusion or the “completed operations hazard” exclusion applies.

Penn National argues, “Alternatively, the ‘Completed Operations Hazard and Products Hazard’ exclusion in the Penn National policy bars coverage for the claims asserted against Covil in the *Rollins* Asbestos Action.” Motion at 3. The Court carefully considered both Covil’s and Penn National’s arguments on this issue. It set out the governing law and carefully analyzed the

undisputed facts in a lengthy analysis that Covil will not quote verbatim here. Order at 4-8. Ultimately, the Court held that Penn National has not met its burden of establishing that this action falls within either the “product liability hazard” or the “completed operations hazard.” *Id.* at 8. There is nothing new in Penn National’s Motion that affects the Court’s analysis or ruling, and the Motion should be denied.

3. Summary judgment is not premature.

Finally, Penn National complains that summary judgment is premature because it did not have the opportunity to engage in discovery. Motion at 5. But Penn National made this exact conclusory argument in its Opposition. Opposition at 5 n.8. And the Court found, “It had access to all of the same materials as the insurers that elected to resolve the Rollins action at mediation.” Order at 9. Again, a Penn National representative even attended the parties’ mediation. *Id.* Moreover, in its Opposition, Penn National did not submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct in order to present “facts essential to justify [its] opposition.” Rule 56(f), SCRCF; *see also Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003) (holding trial court properly granted a summary judgment motion filed four months after action was commenced and rejecting argument that it was premature because the opposing party failed to explain what discovery was needed and what issues of fact it was likely to uncover). Therefore, Penn National’s unsupported, and self-serving assertion that it needed additional time for discovery is not a valid ground for opposing summary judgment. The Court properly rejected this argument—which was relegated to a one-sentence footnote that cannot be supplemented here, and there is no reason to reconsider the Court’s decision. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 482 (Ct. App. 1990) (holding parties cannot use Rule 59(e) to raise new argument or supplement the record).

C. The Court may not consider any new arguments because, to the extent they exist, they could have been raised in Penn National's Opposition.

Penn National's Motion is a re-hash of its Opposition to Covil's Motion for Partial Summary Judgment. Even if the Court finds otherwise, however, its Motion makes no argument that could not have been raised in its original Opposition. Accordingly, any new argument raised in the Motion would be improperly before the court.

III. Conclusion

Nothing has changed since Penn National filed its Opposition to Covil's motion for summary judgment, which was correctly decided by the Court. The Court, therefore, should deny Penn National's motion on the briefing.

Respectfully submitted,

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This 27th Day of August, 2020

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

v.

Pennsylvania National Mutual Appellant.
Casualty Insurance Company,

NOTICE OF APPEAL

Pennsylvania National Mutual Casualty Insurance Company appeals the following Order of the Honorable Jean H. Toal filed on August 13, 2020. Appellant received written notice of entry of the Order in this action on or after August 13, 2020.

September 14, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

Appellate Case No. 2020-001239

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

February 8, 2021.



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CERTIFICATE OF SERVICE

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

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Mar 01 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefler Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

Appellate Case No. 2020-001239

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TABLE OF CONTENTS

I. STATEMENT OF ISSUES ON APPEAL - 1 -

II. STATEMENT OF THE CASE..... - 2 -

III. STATEMENT OF FACTS - 6 -

 1. Rollins Lawsuit - 6 -

 2. Penn National Policies - 8 -

 3. Late Notice of the Rollins Lawsuit - 8 -

IV. STANDARD OF REVIEW - 11 -

V. ARGUMENT AND ANALYSIS - 12 -

 A. The Trial Court’s Grant of Summary Judgment on the Record Developed in This
 Case Was Both Improper and Premature..... - 12 -

 1. Covil’s Motion for Partial Summary Judgment Was Not Properly
 Supported. - 12 -

 2. Covil’s Motion for Partial Summary Judgment Was Premature - 15 -

 B. The Trial Court Erred When It Held That Covil’s Late Notice of the Rollins
 Lawsuit Did Not Bar Coverage for Covil..... - 19 -

 C. The Trial Court Erred When It Held That the Products Hazard Exclusion and the
 Completed Operations Exclusion Did Not Apply to Bar Coverage for Covil Under
 the Penn National Policies - 28 -

 1. The Products Hazard Exclusion..... - 32 -

 2. The Completed Operations Hazard Exclusion..... - 37 -

VI. CONCLUSION..... - 40 -

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.</i> , 483 N.E.2d 1076 (Ind. 1985)	36
<i>B.L.G. Enter. v. First Fin. Ins. Co.</i> , 334 S.C. 529, 514 S.E.2d 327 (1999)	20, 28, 29, 32
<i>Baughman v. American Tel. & Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991)	<i>passim</i>
<i>Covil Corp. v. Zurich Am. Ins. Co.</i> , 2020 U.S. Dist. LEXIS 33140 (D.S.C. 2020)	6
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003)	14
<i>Federated Mut. Ins. Co. v. Piedmont Petroleum Corp.</i> , 314 S.C. 393, 444 S.E.2d 532 (Ct. App. 1994).....	32
<i>Friestad v. Travelers Indem. Co.</i> , 393 A.2d 1212 (Pa. Super. 1978).....	35, 36
<i>Froneberger v. Smith</i> , 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013).....	11, 13
<i>Generali Ins. Co. v. United States Fire Ins. Co.</i> , 886 F.3d 346 (4th Cir. 2018)	39
<i>Goldston v. State Farm Mut. Auto. Ins. Co.</i> , 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004).....	29
<i>Greenwood Dev. Corp. v. Cincinnati Ins. Co.</i> , 2012 U.S. Dist. LEXIS 204018 (D.S.C. 2012).....	27
<i>Hatchett v. Nationwide Mut. Ins. Co.</i> , 244 S.C. 425, 137 S.E.2d 608 (1964)	22, 27
<i>Heyward v. American Casualty Co.</i> , 129 F.Supp. 4 (E.D.S.C. 1955)	35, 36
<i>John Doe v. Batson</i> , 345 S.C. 316, 548 S.E.2d 854 (2001)	18, 39

<i>McLaughlin v. Williams</i> , 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008).....	11
<i>MGC Mgmt v. Kinghorn Ins. Agency</i> , 336 S.C. 542, 520 S.E.2d 820 (Ct. App. 1999).....	29
<i>Mullis v. U.S. Bankruptcy Court</i> , 828 F.2d 1385 (9th Cir. 1987)	21
<i>Neumayer v. Philadelphia Indem. Ins. Co.</i> , 427 S.C. 261, 831 S.E.2d 406 (2019)	17, 19, 21
<i>Ohio Cas. Ins. Co. v. Scott & Jones</i> , 2006 U.S. Dist. LEXIS 113027 (D.S.C. 2006).....	37
<i>Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass’n</i> , 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991).....	<i>passim</i>
<i>Radeker v. Wickensimer</i> , 2019 S.C. C.P. LEXIS 7796 (Greenville Cty., Sept. 23, 2019).....	21
<i>Robertson v. First Union Nat’l Bank</i> , 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002), <i>cert. denied</i> , 357 S.C. 191, 592 S.E.2d 625 (2004)	13, 14, 19
<i>South Carolina Mun. Ins. & Risk Fund v. City of Myrtle Beach</i> , 368 S.C. 240, 628 S.E.2d 276 (Ct. App. 2006).....	32
<i>Tucker v. State Farm Mut. Auto. Ins. Co.</i> , 232 S.C. 615, 103 S.E.2d 272 (1958)	22
<i>W.N. Leslie, Inc. v. Travelers Ins. Co.</i> , 264 S.C. 408, 215 S.E.2d 448 (1975)	38
<i>In re Wallace & Gale Co.</i> , 385 F.3d 820 (4th Cir. 2004)	17, 38
<i>Wright v. UNUM Life Ins. Co.</i> , 2001 U.S. Dist. LEXIS 26063 (D.S.C. 2001).....	28
<i>Zurich Am. Ins. Co. v. Covil Corp.</i> , 2020 U.S. Dist. LEXIS 138062 (M.D.N.C.).....	6
Statutes	
S.C. Code Ann. §15-73-10, <i>et seq.</i>	8
S.C. Code Ann. §36-2-314.....	8

RULES

Rule, 56(c).....12, 15
Rule 56(e).....14
Rule 56(f)18
Rule 59(e).....5

I. STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in granting partial summary judgment in favor of Covil Corporation where Covil Corporation's motion for summary judgment was not properly supported through sworn affidavits, pleadings, depositions, answers to interrogatories, and admissions on file?
2. Whether the trial court erred in granting partial summary judgment in favor of Covil Corporation when Pennsylvania National Mutual Casualty Insurance Company had no opportunity, let alone a full and fair opportunity, to engage in discovery prior to the entry of partial summary against it?
3. Whether the trial court erred when it found that coverage was afforded to Covil Corporation under the policies of insurance issued by Pennsylvania National Mutual Casualty Insurance Company for the Rollins Lawsuit even though Covil Corporation violated the conditions contained in the policies by: (1) failing to provide written notice of the Rollins Lawsuit to Pennsylvania National Mutual Casualty Insurance Company as soon as practicable after it was served with the Lawsuit, and (2) failing to immediately forward copies of the Summons and Complaint to Pennsylvania National Mutual Casualty Insurance Company?
4. Whether the trial court erred when it found that coverage was afforded to Covil Corporation under the policies of insurance issued by Pennsylvania National Mutual Casualty Insurance Company for the Rollins Lawsuit even though Covil Corporation violated the conditions contained in the policies because Pennsylvania National Mutual Casualty Insurance Company was not substantially prejudiced by Covil Corporation's untimely notice?

5. Whether the trial court erred by finding that coverage for Covil Corporation under the policies of insurance issued by Pennsylvania National Mutual Casualty Insurance Company for the Rollins Lawsuit was not barred through the operation of the products hazard exclusion?
6. Whether the trial court erred by finding that coverage for Covil Corporation under the policies of insurance issued by Pennsylvania National Mutual Casualty Insurance Company for the Rollins Lawsuit was not barred through the operation of the completed operations hazard exclusion?

II. STATEMENT OF THE CASE

On February 28, 2020, Peter D. Protopapas, appointed Receiver for Covil Corporation (“Covil”), filed this action against Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) alleging damages in an amount “not greater than \$74,999.99” resulting from a single claim asserted against Penn National for breach of contract. [Complaint, p.5, ¶18 (RI p. 22)] Specifically, Covil alleged that Penn National provided coverage under two policies of insurance for Covil’s liability in an underlying lawsuit, *David D. Rollins v. Covil Corporation, et al.*,” Civil Action No. 2019-CP-25-0118, in Hampton County, South Carolina (“Rollins Lawsuit”). [Complaint, p.3, ¶¶8-11 (RI p. 20)] Covil asserted that Penn National breached its policies when it failed to participate in a mediated settlement conference held in the Rollins Lawsuit and refused to contribute \$50,000 towards the settlement that was reached in the Rollins Lawsuit. [Complaint, p.4, ¶¶15-18 (RI pp. 21-22)]

On March 30, 2020, Penn National filed its Notice of Motion and Motion to Transfer Venue and Answer to Complaint. In its Answer, Penn National denied the material allegations contained in the Complaint, including the court’s jurisdiction over the matter and proper venue.

[Defendant's Answer, pp.3-5 (RI pp. 25-27)] Penn National admitted that it did, in fact, attend the mediation in the Rollins Lawsuit, but questioned whether coverage was provided under the policies of insurance issued by Penn National to Covil for the Rollins Lawsuit. [Defendant's Answer, pp.4-5 (RI pp. 26-27)] In addition, Penn National raised certain defenses in its Answer, including Covil's failure to comply with its duties under the policies, including the duty to provide timely notice to Penn National of the Rollins Lawsuit, and other policy provisions and exclusions. [Defendant's Answer, pp.5-6, First Defense, Third Defense, Fourth Defense (RI pp. 27-28)]

Without engaging in any discovery or even addressing Penn National's motion to transfer venue, and a mere twenty-three (23) days after Penn National filed its Answer, Covil moved for partial summary judgment. [Covil's Motion for Partial Summary Judgment (RI pp. 34-43)] In its motion, Covil argued that the injuries alleged in the Rollins Lawsuit fell within the coverage period of the policies of insurance issued by Penn National, that Covil paid amounts in settlement of the Rollins Lawsuit for those injuries, and that therefore Penn National breached its policies when it failed to reimburse Covil for the amounts paid in settlement of the Rollins Lawsuit. [Covil's Motion for Partial Summary Judgment, pp.7-8 (RI pp. 40-41)] Covil also addressed two exclusions contained in the policies issued by Penn National, specifically the products hazard exclusion and the completed operations exclusion. [Covil's Motion for Partial Summary Judgment, pp.8-9 (RI pp. 41-42)] Covil did not address, or even mention, Penn National's defense, raised in its Answer, of late notice.

Of significance, in making its motion for summary judgment, Covil did not attach or submit any supporting affidavits. Instead, Covil merely attached "exhibits" consisting of: uncertified copies of what Covil alleged to be the policies of insurance issued by Penn National

[Covil's Motion for Partial Summary Judgment, Exhs. A, B (RI pp. 44-55)];¹ the Amended Complaint filed in the Rollins Lawsuit [Covil's Motion for Partial Summary Judgment, Exh. D (RI pp. 59-109)]; an unsworn three-page excerpt from the deposition of Robert Ashworth (not taken in the present action or even in the Rollins Lawsuit but in a different asbestos personal injury lawsuit) [Covil's Motion for Partial Summary Judgment, Exh. E (RI pp. 113-116)]; an unsworn twelve-page excerpt from the deposition of Mr. Rollins (again, not taken in the present action or in the Rollins Lawsuit but in yet another asbestos personal injury lawsuit) [Covil's Motion for Partial Summary Judgment, Exh. F (RI pp. 117-120)]; an unsigned, partial Subcontract Agreement between Bowater Carolina Company and Covil [Covil's Motion for Partial Summary Judgment, Exh. G (RI pp. 121-125)]; unverified, unsigned, and unidentified handwritten notes [Covil's Motion for Partial Summary Judgment, Exh. H (RI pp. 126-127)]; an unverified and unauthenticated interoffice memo from Bowater Carolina Company to Covil [Covil's Motion for Partial Summary Judgment, Exh. I (RI pp. 128)]; and a copy of an article from the Spring 1971 edition of the Nebraska Law Review [Covil's Motion for Partial Summary Judgment, Exh. J (RI pp. 129-161)]. Of note, these documents were not produced in any discovery in the present case (as no discovery had yet been undertaken).

Penn National filed its Memorandum of Law in Opposition to Covil's Motion for Partial Summary Judgment on May 8, 2020. [Penn National's Memo in Opposition (RI p. 162)] In its Opposition, Penn National moved to stay the present action pending the disposition of identical coverage issues pending in federal court. [Penn National's Memo in Opposition, pp. 10-12 (RI pp. 171-173)] Penn National also raised defenses of late notice and the application of the

¹ Penn National denies that what was attached to Covil's Motion for Partial Summary Judgment constitutes complete copies of its policies. Penn National provided complete copies of its policies with its Memorandum in Opposition to Motion for Partial Summary Judgment. See, [Penn National's Memo in Opposition, Exhs. 13-1, 13-2 (RI pp. 422-465, RII 466-514)]

products hazard exclusion and the completed operations hazard, which barred coverage in its entirety for the Rollins Lawsuit under the Penn National Policies. [Penn National's Memo in Opposition, pp.12-22 (RI pp. 173-183)] Finally, and not insignificantly, Penn National argued that granting summary judgment at this stage in the litigation, i.e. a mere twenty-three (23) days after Penn National had filed its Answer, was premature because Penn National did not have a full and fair opportunity to engage in, let alone complete, discovery. [Penn National's Memo in Opposition, pp.22-23 (RI pp. 183-184)]

Without the benefit of a hearing, on August 13, 2020, Retired Justice Jean H. Toal issued an Order Granting Covil's Motion for Partial Summary Judgment. In the Order, the trial court considered extrinsic evidence, not duly supported by any filed affidavits, and found that Penn National had coverage for the damages alleged in the Rollins Lawsuit and that the exclusions for products hazard and completed operations hazard did not apply. [Order dated 8/13/2020, pp.3-8 (RI pp. 4-9)] The trial court further found that because Penn National actually attended the mediation, its late notice defense was invalid. [Order dated 8/13/2020, p.9 (RI p. 10)] Ultimately, the trial court held "that there is no triable issue that Penn National was required to defend Covil against the *Rollins* action, and is required to indemnify Covil against the settlement of the *Rollins* action." [Order dated 8/13/2020, p.10 (RI p. 11)]

On August 24, 2020, Penn National moved pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, for reconsideration of the Order granting partial summary judgment in favor of Covil. [Penn National's Motion for Reconsideration (RII pp. 553-557)] On September 21, 2020, again without the benefit of a hearing, the trial court denied Penn National's Motion for Reconsideration in its entirety. [Order dated 9/21/2020 (RI pp. 13-17)] Penn National timely filed its Notice of Appeal on September 14, 2020. [Notice of Appeal (RII pp. 563-564)]

III. STATEMENT OF FACTS

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. In 1991, Covil went out of business and its charter was thereafter administratively revoked.

[Complaint, p.3, ¶7 (RI p. 20)] On or about November 2, 2018, Retired Justice Toal appointed Mr. Protopapas as the Receiver for Covil, with the power and authority to administer all of Covil's assets. [Covil's Motion for Partial Summary Judgment, Exh. C (RI p. 56-58)]

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. 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.). One of the cases filed against Covil is the Rollins Lawsuit.

1. *Rollins Lawsuit*

On April 5, 2019, David D. Rollins filed a lawsuit in Hampton County, against fifty-three (53) defendants, alleging that he was exposed to asbestos fibers both during his employment and while he lived with his parents who brought asbestos fibers home on their clothes from their respective places of employment. [Penn National's Memo in Opposition, Exh. 4, p.29, ¶73 (RI p. 268)] Mr. Rollins was diagnosed with malignant Meosthelioma on or about January 17, 2019. [*Id.* at ¶72 (RI p. 268)] In the Amended Complaint filed in the Rollins Lawsuit on April 10, 2019, Mr. Rollins alleged that his exposure to asbestos occurred continuously between 1973 and 2001. Specifically, Mr. Rollins alleged that he was exposed to

“take-home” asbestos fibers from dust carried home by Mr. Rollins’ father, mother, and stepfather from their respective job sites. This “take-home” exposure allegedly occurred between 1973 and 1991. Mr. Rollins also worked at locations where asbestos fibers were present from 1988 until 2001. [*Id.* at ¶¶74-78 (RI pp. 268-270)]

In the Rollins Lawsuit, Mr. Rollins alleged liability against the defendants, which were separated into two categories and identified as being either a “Product Defendant” or a “Premises Defendant.” These categories were specifically defined in the Amended Complaint:

3. Plaintiff’s claims against the Product Defendants, as defined herein, arise out of Defendants’ purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.
4. Plaintiff’s claims against the Premises Defendants, as defined herein, arise out of Defendants’ ownership and/or control of real property located in South Carolina and the purchase and use of asbestos-containing products on their premises located in South Carolina.

[Penn National’s Memo in Opposition, Exh. 5, p.5 (RI p. 303)] In the Rollins Lawsuit, Covil was designated as a Product Defendant:

25. Defendant, COVIL CORPORATION was and is a South Carolina corporation with its principle place of business in South Carolina. At all times material hereto, COVIL CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation. COVIL CORPORATION is sued as a ***Product Defendant***. Plaintiff’s claims against COVIL CORPORATION arise out of this Defendant’s business activities in the State of South Carolina.

[*Id.* p.12 (RI p. 310)] (emphasis added).

Mr. Rollins alleged six claims in the Rollins Lawsuit: (1) products liability: negligence; (2) products liability: strict liability pursuant to S.C. Code. Ann. §15-73-10, *et seq.*; (3) vicarious liability based on respondeat superior; (4) premises liability: negligence as to premises owner/contractor; (5) products liability: breach of implied warranties pursuant to S.C. Code. Ann. §36-2-314; and (6) fraudulent misrepresentation. [*Id.* ¶¶85-157 (RI pp. 330-348)]

2. *Penn National Policies*

Penn National issued a Special Multi-Peril Policy to Named Insured, Covil Corporation, Inc., Policy No. 515 50 28 53-7, for the policy period of March 31, 1986 through March 31, 1987 (“1986-87 Policy”). The 1986-87 Policy provided both commercial property coverage and general liability coverage. The liability limits on the 1986-87 Policy was \$1 million per occurrence and in the aggregate. [Penn National’s Memo in Opposition, Exh. 13, p.1 (RI p. 423)] This policy was renewed, Policy No. 515 50 28 53-8, for the next policy period of March 31, 1987 through March 31, 1988 (“1987-88 Policy”), with identical coverages, policy forms and liability limits. [Penn National’s Memo in Opposition, Exh. 13, pp.44-91 (RII pp. 467-514)] (The 1986-87 Policy and the 1987-88 Policy will collectively be referred to as the “Penn National Policies.”)

3. *Late Notice of the Rollins Lawsuit*

The Amended Complaint in the Rollins Lawsuit was served on Covil on April 25, 2019. [Penn National’s Memo in Opposition, Exh. 5, p.1 (RI p. 292)] Mr. Protopapas entered a special appearance in the Rollins Lawsuit as Receiver for Covil on May 13, 2019, [Penn National’s Memo in Opposition, Exh. 6 (RI p. 351)] and Covil filed an Answer to the Amended Complaint on May 28, 2019 [Penn National’s Memo in Opposition, Exh. 7 (RI p. 353)], through defense

counsel retained by other insurers to whom Covil had tendered the Rollins Lawsuit at that time. Covil did not provide notice to Penn National of the Rollins Lawsuit when it was served on Covil.

On June 6, 2019, Mr. Rollins was deposed in the Rollins Lawsuit [Penn National's Memo in Opposition, Exh. 8, pp.5-15 (RI pp. 396-406)], and the parties engaged in other fact and expert discovery as required by the Master Asbestos Discovery/Scheduling Order, adopted and filed in the Rollins Lawsuit on May 8, 2020. [Penn National's Memo in Opposition, Exh. 9 (RI pp. 408)] It was not until January 27, 2020, after the pleadings had been closed and discovery (both fact and also expert) had long since been completed, that Covil sent its first notice of the Rollins Lawsuit to Penn National. In fact, the "notice" provided by Covil at that time consisted of an email sent by the Receiver's office to various counsel for different insurers for Covil. In that email dated January 27, 2020, Mr. Protopapas stated:

As you know, Peter D. Protopapas, as Receiver for Covil Corporation, was served via process on **April 25, 2019** with the attached lawsuit captioned **ROLLINS vs. Air & Liquid, et al (Case Number 2019-CP-25-00118)**.

This matter is pending in **HAMPTON** County, South Carolina **AND IS SET FOR TRIAL on March 23, 2020** (please see attached order for date certain).

Again, the Receiver respectfully requests that the insurers provide and/or continue to provide a defense to Covil Corporation in these asbestos lawsuits. To the extent that a defense will not be provided, please advise so that I can take the actions necessary to protect Covil Corporation.

[Penn National's Memo in Opposition, Exh. 5, p.2 (RI p. 292)] (emphasis in original).

Contrary to the statement in the email sent by Mr. Protopapas on January 27, 2020, Covil had not previously provided notice to Penn National of the Rollins Lawsuit. The email to counsel for Penn National was the first notice that Penn National had received with regard to

the Rollins Lawsuit. However, based upon the language in the email sent by Mr. Protopapas, Covil had previously provided notice to its other insurers and some or all of these other insurers were defending Covil in the Rollins Lawsuit.

Cognizant that Covil had not timely notified Penn National of the Rollins Lawsuit, counsel for the Receiver sent a letter to Penn National and its counsel on February 3, 2020.

In that letter, Covil officially tendered the Rollins Lawsuit to Penn National:

Covil hereby tenders this suit to Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) for defense and indemnity, pursuant to the terms and conditions of the insurance policies issued to and/or covering Covil.

[Penn National’s Memo in Opposition, Exh. 10 (RI p. 413)] Although Covil enclosed a copy of the Amended Complaint filed in the Rollins Lawsuit with its letter dated February 3, 2020, Covil did not enclose any additional pleadings filed or discovery exchanged in the Rollins Lawsuit, and did not provide any information regarding the status of the Rollins Lawsuit or the identity of Covil’s defense counsel in that Lawsuit.

On February 10, 2020, Mr. Protopapas wrote to counsel for Penn National to notify Penn National for the first time that a mediation had been scheduled in the Rollins Lawsuit for February 25, 2020. Covil provided this notice of the mediation just twelve (12) business days before the date of the mediation.

On February 14, 2020, Penn National sent a letter to Mr. Protopapas, advising that it had contacted defense counsel for Covil in the Rollins Lawsuit (who had been retained by another insurer) and had requested copies of discovery for review and evaluation. However, given that Penn National was unable to evaluate coverage due to the limited information provided to Penn National at that time, Penn National also requested that Covil execute a Non-Waiver Agreement in order to allow Penn National to investigate the matter without either party waiving

any rights under the Penn National Policies. [Penn National's Memo in Opposition, Exh. 12 (RI pp. 418-421)]

Given the late notice of the mediation and lack of sufficient information and documentation provided by Covil to Penn National prior to the mediation, Penn National was unable to evaluate its potential coverage obligation or the liability and damages exposure for Covil prior to the mediation. As such, although a representative of Penn National attended the mediation, Penn National was not in a position to contribute to any settlement. Covil alleges in the present action that Penn National declined to contribute \$50,000 to the settlement, which Covil alleges resulted in "other Covil assets" being expended to resolve the action. [Complaint, ¶¶12-13 (RI p. 21)]

IV. STANDARD OF REVIEW

This Court is tasked with reviewing whether the trial court correctly granted summary judgment in favor of Covil. In so doing, this Court is to apply the standard that should have been applied by the trial court, specifically "summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Froneberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013)(quoting *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011)). In reviewing whether summary judgment was properly granted, this Court is to consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008).

In the present case, the trial court failed to hold Covil to its burden of clearly establishing the absence of any genuine issues of material fact. Based on nothing more than bald assertions

made by Covil in its motion, and unsupported and unverified documents attached to the motion but never produced in discovery in this case, the trial court granted summary judgment on the coverage issues in favor of Covil. The trial court's grant of summary judgment cannot stand. Penn National respectfully requests that this Court review this matter in the light most favorable to Penn National, vacate the entry of judgment, and remand this case with instructions to enter summary judgment in Penn National's favor, or alternatively, remand this case for discovery.

V. ARGUMENT AND ANALYSIS

A. The Trial Court's Grant of Summary Judgment on the Record Developed in This Case Was Both Improper and Premature.

1. *Covil's Motion for Partial Summary Judgment Was Not Properly Supported.*

The Supreme Court of South Carolina has characterized summary judgment as a "drastic remedy" that should be "cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)(quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C. 1975)). To prevent an unwarranted deprivation of the right to trial, the Rules of Civil Procedure set forth certain requirements that must be met prior to the entry of summary judgment.

Specifically, the Rule states:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule, 56(c), SCRPC. The trial court failed to follow this directive when it granted partial summary judgment in favor of Covil.

In the present case, the truth is that there were "no depositions, answers to interrogatories

and admissions on file” on which the trial court could have based its summary judgment ruling simply because no discovery had yet been initiated, let alone completed. When the trial court granted summary judgment, the only documents “on file” were the Covil’s unverified Complaint (to which no documents were either attached or incorporated) [Complaint (RI pp. 19-22)] and Penn National’s Notice of Motion and Motion to Transfer and Answer to Complaint [Penn National’s Answer (RI pp. 23-30)]. In its Answer, Penn National denied the material allegations contained in the Complaint, including that Penn National had breached its policies with regard to the underlying Rollins Lawsuit and that Covil was damaged as a result. Based on this record, and the directive that the court is to consider the evidence in the light most favorable to the non-moving party, i.e. Penn National, there was insufficient evidence on which to grant partial summary judgment in favor of Covil. See, Froneberger, 406 S.C. at 55-56. 748 S.E.2d at 634-35 (finding that summary judgment on agency was improperly granted where defendant’s assertion of non-employment was disputed by the plaintiff).

It appears that the trial court granted summary judgment to Covil based on bald, unsupported assertions contained in Covil’s motion and the documents attached thereto. However, there were no affidavits attached to Covil’s motion for partial summary judgment that supported any “facts” asserted in Covil’s motion, or that identified or in any way provided a basis for the trial court, or this Court on review, to determine the attached documents’ authenticity and genuineness. [Covil’s Motion for Partial Summary Judgment (RI pp. 34-43)] As this Court has found, “affidavits are the principal means of bringing information before the court in a motion for summary judgment.” *Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 351, 565 S.E.2d 309, 316 (Ct. App. 2002), *cert. denied*, 357 S.C. 191, 592 S.E.2d 625 (2004)(quoting James F. Flanagan, South Carolina Civil Procedure 454 (2nd ed. 1996)). The

Rules of Civil Procedure set forth the requirements for affidavits filed in conjunction with motions for summary judgment:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Rule 56(e), SCRPC.

In the present case, no affidavits were attached to Covil's motion for partial summary judgment to support the "undisputed" evidence referred to in both the motion and the trial court's order granting summary judgment. See, [Covil's Motion for Partial Summary Judgment, pp.1-5, 7-9; Order dated 8/13/2020, pp.5-9 (RI pp. 34-38, 40-42; RI pp. 6-10)] The documents attached to Covil's motion for partial summary judgment were not authenticated by anyone with personal knowledge of the documents. Furthermore, the documents themselves were not sworn or certified copies. Indeed, they had never been produced in discovery in this case to Penn National. Without some measure that the information and documents attached to Covil's motion would be admissible into evidence, the trial court erred in relying on them in granting summary judgment in Covil's favor.² See, *Robertson*, 350 S.C. at 352, 565 S.E.2d at 316 (finding that an unsigned statement in opposition to defendant's motion for summary judgment could not be considered by the court); *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003)(finding that the trial court properly refused to consider the plaintiff's verified complaint

² It is true that Retired Justice Toal, who granted judgment in favor of Covil in the present case, presided over the Rollins Lawsuit, and therefore, may have some personal knowledge herself regarding the facts of that case. However, as alleged in the present action, the Rollins Lawsuit was never tried, but settled by the parties prior to trial, and therefore, no facts were definitively established by a factfinder in that case. Therefore, Retired Justice Toal was constrained to limit her consideration of the evidence properly before her in this case when considering Covil's motion for partial summary judgment. Her failure to do so constitutes error.

as an affidavit because the allegations therein were not based on personal knowledge, would not by themselves be admissible in evidence, and did not affirmatively show that the plaintiff was competent to testify to matters stated therein).

2. Covil's Motion for Partial Summary Judgment Was Premature.

Covil's motion for partial summary judgment was not supported, as required, by "depositions, answers to interrogatories and admissions on file." Rule 56(c), SCRPC. In truth, Covil was unable to so support its motion for partial summary judgment for the simple fact that no discovery had yet been commenced in the present case. Covil filed its motion for partial summary judgment a mere twenty-three (23) days after Penn National filed its Notice of Motion and Motion to Transfer Venue and Answer to Amended Complaint.³ Between the time of Penn National's Answer and Covil's Motion for Partial Summary Judgment, no interrogatories were served on any party, no depositions were scheduled or taken, and no documents were requested or produced. In fact, no discovery of any kind was undertaken by any party. Indeed, even if written discovery had been served, Covil's motion for summary judgment was filed prior to the expiration of any deadline for response. Accordingly, the trial court's grant of partial summary judgment in this case was premature.

The Supreme Court of South Carolina has declared that summary judgment "*must not* be granted" until the opposing party has had a full and fair opportunity to complete discovery. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543 (emphasis added). In the present case, the parties have had *no* opportunity, let alone a full and fair opportunity, to complete any discovery. Accordingly, this Court should vacate the order granting partial summary judgment to Covil and

³ Penn National filed its Notice of Motion and Motion to Transfer Venue and Answer to Complaint on March 30, 2020. [Penn National's Answer (RI pp. 23-30)] Covil filed its Motion for Partial Summary Judgment on April 22, 2020. [Covil's Motion for Partial Summary Judgment (RI pp. 34-43)]

remand for the completion of discovery.

The Supreme Court's decision in *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) is instructive. In *Baughman*, 271 plaintiffs brought a lawsuit for personal injuries caused by pollution from a refinery operated by the defendants. After two years of discovery, including the taking of approximately 300 depositions, the defendants moved for partial summary judgment. *Id.* at 104-05, 410 S.E.2d at 539-40. As one of the bases for opposing the motion, the plaintiffs argued that the motion was premature. The Supreme Court agreed and reversed the entry of partial summary judgment in favor of the defendants, holding that the plaintiffs' development of evidence "should not be precipitously terminated by summary judgment." *Id.* at 114, 410 S.E.2d at 545. In support of its holding, the Supreme Court emphasized two points:

First, Plaintiffs have demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of medical causation and that they are not merely engaged in a "fishing expedition." ...

Second, Plaintiffs were not dilatory in seeking discovery on the issue of causation, but have been reasonably diligent in pursuit of a qualified expert to substantiate their claims. ...

Id. at 112-13, 410 S.E.2d at 544.

In the present case, Penn National has demonstrated that discovery will uncover relevant evidence. Specifically, in its Answer, Penn National raised the defense of late notice and the applicability of exclusions contained in the Penn National Policies. See, [Penn National's Answer, pp.5-6, First Defense, Third Defense, Fourth Defense (RI pp. 27-28)] To its Memorandum in Opposition to Covil's Motion for Partial Summary Judgment, Penn National attached communications between Mr. Protopapas, the Receiver for Covil, and counsel for Penn National that indicate that notice of the Rollins Lawsuit was not provided to Penn National for

over nine (9) months after Covil was served with the Rollins Lawsuit, and less than two months prior to trial. [Penn National's Memo in Opposition, Exhs.5, 6, 10, 11, 12, 14 (RI pp. 291-349, 350-351, 411-413, 414-416, 417-421; RII pp. 515-519)] An insured's failure to comply with its obligations contained in the conditions to an insurance policy bars all coverage for the insured under that policy. See, *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 265-66, 831 S.E.2d 406, 408 (2019); *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655, 657 (Ct. App. 1991). Penn National should have been allowed to engage in discovery to support its defense of late notice.

Furthermore, Penn National raised the defense of the exclusions contained in the Penn National Policies, including the products hazard exclusion and the completed operations exclusion. These exclusions bar coverage for injuries arising out of an insured's products or operations if such injuries occurred away from the premises of the insured after such products were relinquished or operations completed. As pled in the Complaint, Penn National was not involved in the Rollins Lawsuit, and therefore, the evidence regarding the method, manner, and extent of Mr. Rollins' exposure is relevant to whether these exclusions apply to bar coverage for the Rollins Lawsuit. See, *In re Wallace & Gale Co.*, 385 F.3d 820, 833 (4th Cir. 2004) (holding that exposure to asbestos that occurred both during and after an insured's operations were included within the completed operations hazard). Again, Penn National should have been allowed to engage in discovery to determine the applicability of the products hazard exclusion and completed operations exclusion contained in its Policies.

Finally, it cannot be said that Penn National was dilatory in its pursuit of discovery. Indeed, no discovery was or could have been completed in the present case as Covil filed its motion for summary judgment within twenty-three (23) days of Penn National's filing of

its Answer. Pursuant to the Supreme Court's holding in *Baughman*, this Court should vacate the grant of partial summary judgment in favor of Covil because it was premature. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544.

In its Order denying Penn National's Motion for Reconsideration, the trial court dismissed Penn National's argument that the granting of summary judgment in the present case was premature based on the failure of Penn National to submit a Rule 56(f) affidavit in support of its position. [Order dated 9/21/2020, p.4 (RI p. 16)] Although Penn National did not submit a Rule 56(f) affidavit, the Supreme Court has held that strict compliance with this technical requirement of Rule 56 is not mandated where the need for further discovery is otherwise made known to the trial court. *Baughman*, 306 S.C. at 112 n.4, 410 S.E.2d at 544 n.4. See also, *John Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001)(finding that trial court improperly granted summary judgment for defendant because plaintiff did not have a full and fair opportunity to complete discovery even though no Rule 56(f) affidavit was filed). It is undisputed that Penn National argued to the trial court in its Memorandum of Law submitted in opposition to the motion that discovery was needed in the present case before Covil's motion for partial summary judgment could be considered. [Penn National's Memo in Opposition, pp.22-23 (RI pp. 183-184)] Further, from the timing of the motion for partial summary judgment, i.e. twenty-three (23) days after Penn National's Answer was filed, and the unverified nature of the evidence referred to by Covil in support of its motion for partial summary judgment, it was clear that no discovery had yet been completed in this case. Accordingly, the failure of Penn National to file a Rule 56(f) affidavit is not fatal to its argument that the entry of summary judgment was premature in this case.

In the present case, Covil rushed to obtain judgment in its favor on whether

Penn National breached its Policies when it failed to contribute to a settlement of the Rollins Lawsuit. In so doing, Covil attempted to prevent any discovery into whether: (1) coverage was barred under the Penn National Policies by Covil's failure to provide timely notice of the Rollins Lawsuit to Penn National; and (2) coverage was excluded under the products hazard and/or completed operations hazard exclusions contained in the Penn National Policies. The trial court's acquiescence in Covil's procedural antics by granting judgment in favor of Covil regarding coverage under the Penn National Policies should not be condoned by this Court. As this Court has previously found, "[s]ummary judgment is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law." *Robertson*, 350 S.C. at 345, 565 S.E.2d at 312. In the present case, further inquiry into the facts is required to determine whether Penn National did, in fact, breach its Policies with regard to the Rollins Lawsuit or whether Penn National's defenses to coverage are valid. Penn National respectfully requests that summary judgment in favor of Covil be vacated and this case remanded for discovery.

B. The Trial Court Erred When It Held That Covil's Late Notice of the Rollins Lawsuit Did Not Bar Coverage for Covil.

The trial court found that coverage was afforded under the Penn National Policies for the Rollins Lawsuit. In so doing, the trial court disregarded the fundamental tenant that an insured is obligated to comply with the duties ascribed to it in the insurance policy as a condition of coverage. Although this issue was raised by Penn National, the trial completely ignored Covil's actions in determining whether the insured's duty was met, concentrating instead on whether Penn National suffered any prejudice from the late notice. Prejudice, however, must only be shown if the rights of innocent third-parties are at issue. *Neumayer*, 427 S.C. at 266-67, 831 S.E.2d at 408-09. Here, the only issue is whether Covil should be reimbursed for

the amount it paid to settle the Rollins Lawsuit. Because the Rollins Lawsuit has already been settled and the settlement amount paid [Complaint, ¶¶12-13 (RI p. 21)], the rights of any third-parties are not at issue. Therefore, the sole inquiry is whether Covil complied with its duties under the Penn National Policies. It did not, and the trial court never found that it did. [Order dated 8/13/2020, p.9 (RI p. 10)] Therefore, summary judgment in favor of Covil should be vacated on this separate basis.

It is axiomatic that insurers have the right under their insurance policies to limit their liability and impose conditions on their obligations as long as the limitations and conditions do not violate statutory provisions or public policy. *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999). The Penn National Policies both contained the same conditions, which stated:

CONDITIONS APPLICABLE TO SECTION II⁴

4. Insured's Duties in the Event of Occurrence, Claim or Suit.

- (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable.
- (b) If a claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.
- (c) The insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits, and in enforcing any right of contribution or indemnity against any person or organization

⁴ Under the Penn National Policies, Section I provides Property Coverage, and Section II provides liability coverage. [Penn National's Memo in Opposition, Exh.13-1, p.2; Exh. 13-2, p.2 (RI p. 423, RII p. 467)]

who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

[Penn National's Memo in Opposition, Exhs. 13-1, p.34; 13-2, p.36 (RI p. 456; RII p. 502)]

Accordingly, under the Penn National Policies, the insured has the duty to: (1) notify Penn National in writing *as soon as practicable* of an "occurrence" which may result in a claim against it; (2) *immediately* send copies to Penn National of any demands, notices, summons, or legal papers received in connection with any lawsuit; and (3) cooperate with Penn National in the defense of the lawsuit.

South Carolina courts have universally found that similar notice and cooperation clauses are valid and enforceable. *Neumayer*, 427 S.C. at 266, 831 S.E.2d at 408. In the present case, Covil was served with the Rollins Lawsuit on April 25, 2019. [Penn National's Memo in Opposition, Exh. 5 (RI pp. 291-349)]⁵ Counsel was retained and an Answer was filed on behalf of Covil in the Rollins Lawsuit on May 28, 2019. [Penn National's Memo in Opposition, Exh. 7 (RI pp. 352-391)] The Rollins Lawsuit was not tendered to Penn National for defense and indemnity until February 3, 2020, over nine (9) months later. [Penn National's Memo in Opposition, Exh. 10 (RI pp. 412-413)] This tender to Penn National was three (3) weeks prior to the scheduled mediation and eight (8) weeks prior to trial. [Penn National's Memo in Opposition, Exh. 14 (RII pp. 516-519)] Covil clearly breached the notice provision in the Penn

⁵ Even though the referenced documents were not submitted for consideration by the court by way of an affidavit, this Court is able to take judicial notice of pleadings filed in the courts of this State. See, e.g., *Radeker v. Wickensimer*, 2019 S.C. C.P. LEXIS 7796, *2 n.1 (Greenville Cty., Sept. 23, 2019); *Mullis v. U.S. Bankruptcy Court*, 828 F.2d 1385, 1388 (9th Cir. 1987).

National Policies.⁶

Under South Carolina law, the failure of an insured to comply with policy conditions requiring that the insured provide timely notice, forward suit papers and cooperate with the insurer with respect to a claim or lawsuit will bar coverage for the insured under the policy. See, *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655, 657 (Ct. App. 1991)(quoting *Lee v. Metro. Life Ins. Co.*, 180 S.C. 475, 186 S.E. 376 (S.C. 1936))(holding that the insured was not entitled to coverage where he failed to provide timely notice of the claim and also failed to forward suit papers until approximately four months after he had received them); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 435, 137 S.E.2d 608, 613 (1964)(stating that it is “well settled” that the insured’s failure to adhere to the notice provisions will bar recovery under the policy); *Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 616, 103 S.E.2d 272, 273 (1958)(finding that the insured’s breach of the cooperation clause relieved the insurer of its coverage obligation under the policy).

The case of *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991) is determinative. In the *Prior* case, William F. Prior (“Prior”), a medical doctor, brought a declaratory judgment action against his professional liability insurance carrier, S.C. Medical Malpractice Liability Insurance Joint Underwriting Association (JUA), to determine if JUA owed a duty to defend Prior in a medical malpractice action and to indemnify him for the judgment entered in that case. *Id.* at 248, 407 S.E.2d at 656. Prior’s patient brought suit against Prior on May 1, 1986; however, Prior did not advise JUA of the lawsuit at that time, but instead hired his own attorney to defend the suit. *Id.*

⁶ It is telling that neither Covil argued, nor the trial court found, that Covil actually complied with the notice provisions contained in the Penn National Policies with regard to the Rollins Lawsuit. [Covil’s Motion for Partial Summary Judgment (RI pp. 34-43); Order dated 8/13/2020, p.9 (RI p. 10)]

After the attorney retained directly by Prior withdrew from the case in August 1986, Prior forwarded the suit papers to JUA on August 21, 1986. *Id.* At that time, JUA began to defend Prior, but under a reservation of rights to later disclaim coverage. *Id.* JUA subsequently withdrew its defense of Prior on several grounds, including Prior's breach of its duty to notify JUA of the lawsuit in a prompt fashion and forward suit papers immediately to JUA. *Id.* The case then proceeded to trial in October 1986, with the jury returning a verdict against Prior in the amount of \$15,000 in actual damages and \$80,000 in punitive damages. *Id.* After the case was affirmed on appeal, Prior brought the declaratory judgment action against JUA seeking indemnification. *Id.*

On appeal in the declaratory judgment action, this Court held that Prior was not entitled to coverage under the policy issued by JUA because Prior failed to timely notify JUA of the lawsuit:

JUA had no duty to defend because Prior failed to timely notify JUA. "No rule of law is more firmly established in this jurisdiction than that one suing on a policy of insurance, where the notice required by the policy is not timely given, cannot recover ..." *Lee v. Metropolitan Life Ins. Co.*, 180 S.C. 475, 486, 186 S.E. 376, 381 (1936). In November 1984, Prior knew that the Patient was complaining of his conduct, but he did not contact JUA until August 1986. Prior also failed to forward the summons and complaint to JUA until approximately four months after he received them. JUA's insurance policy clearly states that it is the insured's duty to notify JUA "upon the Insured's becoming aware of any alleged injury..." Prior was aware that the policy imposed an obligation to advise JUA any time there was a claim or lawsuit.

Id. at 249–50, 407 S.E.2d at 657. Prior argued that JUA could not show that it was substantially prejudiced by any delay in providing notice of the underlying malpractice lawsuit and therefore JUA should be required to provide coverage despite Prior's breach of the notice provisions.

This Court rejected this argument:

Prior argues that JUA must show that it was substantially prejudiced by

the delay in order to deny coverage. The cases upon which Prior relies, however, involve innocent third parties. Here there is no innocent third party beneficiary. The Patient has been paid her judgment. “The failure to give the required notice in the allotted time is fatal to the right of recovery, even if it be shown that the insurance company has suffered no harm by the delay.” *Lee v. Metropolitan Life Ins. Co.*, 180 S.C. at 487, 186 S.E. at 381. Prior failed to notify JUA in a timely manner, thus violating the insurance policy. This failure justified JUA’s refusal to defend and to deny coverage.

Id.

The holding in *Prior* applies with equal force and dictates the result in the present case. Indeed, the facts of the present case are even more egregious than in *Prior*. Covil did not provide any notice or forward any suit papers in the Rollins Lawsuit to Penn National until January 27, 2020—over nine (9) months after it had been served with the complaint. [Penn National’s Memo in Opposition, Exh. 5 (RI pp. 292-349)] Then, less than a month after providing Penn National with its first notice of the *Rollins Asbestos Action*, and while Penn National was still in the process of gathering information from the defense counsel retained by other insurers, Covil settled the claims asserted against it during the course of a mediation conducted on February 25, 2020. [Penn National’s Memo in Opposition, Exh.10 (RI pp. 412-413)] Covil alleges that the Rollins Lawsuit was settled at mediation and that Covil contributed \$50,000 of its own assets to the settlement. [Complaint, ¶¶12-13 (RI p. 21)]

Clearly, Covil failed to comply with the conditions for coverage under the Penn National Policies. Further, Covil admits that the entirety of the settlement in the Rollins Lawsuit has been paid. Therefore, no rights of an innocent third-party are jeopardized by Covil’s failure to comply with the notice conditions in the policies. Contrary to the trial court’s holding, and based on this Court’s decision in *Prior*, Covil is not entitled to coverage under the Penn National Policies for the settlement in the Rollins Lawsuit.

In its decision granting summary judgment, the trial court disregarded Penn National's late notice defense based on its finding that Penn National was not substantially prejudiced by Covil's conduct. In the decision, the trial court states:

Penn National had access to all available information related to the Rollins action, attended the Rollins mediation with a "willingness to contribute toward settlement," and then made the deliberate decision not to resolve Rollins, presumably because it believe [sic] that its policy exclusion barred coverage. Penn National's deliberate choice to decline to settle the Rollins action within its policy limit is not equivalent to the late notice defenses established in the cases it cites. Penn National's alleged late notice of the Rollins action is not a valid defense to breach of its insurance contract with Covil.

[Order dated 8/13/2020, p.9 (RI p. 10)] The trial court's findings and conclusions are in error.

First and foremost, whether an insured has complied with the notice provisions contained in an insurance policy should focus on the insured's actions, specifically the timing and provision of the notice. The trial court failed to even address Covil's actions, or inactions, in this regard.

Second, the law in South Carolina is clear: if the insured is seeking coverage under an insurance policy, the insured's breach of the notice conditions will obviate coverage under that policy.

Prior, 305 S.C. at 250, 407 S.E.2d at 657.

If this Court should find, however, contrary to established case law, that "substantial prejudice" must be shown, the facts of this case demonstrate that Penn National was in fact "substantially prejudiced" by Covil's failure to comply with the timely notice condition contained in the Penn National Policies. By the time that Covil provided notice to Penn National, Covil had already filed an Answer on May 28, 2019 [Penn National's Memo in Opposition, Exh. 7 (RI pp. 353-391)], completed written discovery, and participated in depositions in the case [Penn National's Memo in Opposition, Exh. 8, pp.5-15 (RI pp. 396-406)]. In fact, under the Master Asbestos Discovery/Scheduling Order, the following deadlines had

already expired by the time that Penn National was first put on notice of the Rollins Lawsuit:

- Plaintiff's Deposition (June 19, 2019)
- Defendants Answer Master Discovery (July 12, 2019)
- Designate Fact Witnesses (August 8, 2019)
- Designate Expert Witnesses (August 8, 2019)
- Deposition of Plaintiff's fact witnesses except for family members who do not have product identification testimony (January 13, 2020)
- Deposition of Defendants' fact witnesses except for Defendants' 30(b)(6) witnesses (January 13, 2020)

[Penn National's Memo in Opposition, Exh. 9 (RI pp. 408-410)]

Additionally, the Pre-trial Scheduling Order entered by the Court in the Rollins Lawsuit set a deadline of February 7, 2020, for the filing of motions for summary judgment (which was just eleven (11) days after Penn National had received its first notice of the action) and set trial for March 23, 2020 (just eight (8) weeks after Penn National's first notice of the action). [Penn National's Memo in Opposition, Exh. 14 (RII pp. 516-519)]

Adding to the prejudice to Penn National, the parties in the Rollins Lawsuit participated in a mediation on February 25, 2020, less than a month after Penn National received its first notice of the action. Covil did not provide notice of the mediation to Penn National until February 10, 2020, providing even less time for Penn National to gather the necessary information and documents in order to evaluate the matter for potential settlement.

[Penn National's Memo in Opposition, Exh. 11 and Exh, 12, (RI pp. 415-416; 418-421)] As such, although a representative of Penn National attended the mediation, and expressed a

willingness to contribute toward settlement on behalf of Covil, Penn National was not in a position to contribute the amount requested by Covil at the mediation.⁷

Under these facts, Penn National was “substantially prejudiced” by Covil’s untimely notice in this matter. Under similar circumstances, a federal court in South Carolina found that the insurer was substantially prejudiced by the insured’s late notice:

By the time Cincinnati received the summons and complaint, mediation had already occurred, the parties had conducted discovery, and trial was scheduled to begin the following Monday. Thus, Stringer Development’s failure to forward a copy of the summons and complaint in a timely manner deprived Cincinnati of any realistic opportunity to analyze coverage of the claims asserted in the complaint in time to participate in the investigation, defense, and/or settlement negotiations in any meaningful way, thereby prejudicing Cincinnati.

Greenwood Dev. Corp. v. Cincinnati Ins. Co., 2012 U.S. Dist. LEXIS 204018, *29 (D.S.C.

2012). See also, *Hatchett*, 244 S.C. at 434, 137 S.E.2d at 613 (finding that insured’s late notice substantially prejudiced the insurer because the insurer was unable to investigate promptly, sponsor a defense, and negotiate a settlement).

⁷ In justifying her decision to reject Penn National’s late notice defense, the trial court found that “Penn National engaged the same defense counsel as all other Covil insurers to defend Covil’s interests for Penn National in the Rollins action and other Covil asbestos personal injury claims,” and “[Penn National] had access to all the same materials as the insurers that elected to resolve the Rollins action at mediation.” [Order dated 8/13/2020, p.9 (RI p. 10)] This is simply not true. Penn National never defended Covil in the Rollins Lawsuit and was not contemporaneously provided with the discovery obtained in that case, facts not disputed by Covil and which actually form the bases for Covil’s breach of contract claim in this action. [Complaint, ¶16 (RI p. 21)] In support of these “findings,” the trial court cites to page 7 of Penn National’s Memorandum of Law in Opposition to Covil’s Motion for Partial Summary Judgment. However, on page 7 of its Memorandum, Penn National states, “Despite the untimely notice of the *Rollins* Asbestos Action and the mediation, Penn National responded to the notice on February 14, 2020, advising that it had located and contacted defense counsel for Covil in the action (who had been retained by other insurers who had been provided notice of the action) and had requested copies of discovery for review and evaluation.” [Penn National’s Memo in Opposition, p.7 (RI p. 168)] See also, [Penn National’s Memo in Opposition, Exh. 12 (RI pp 418-421)] Clearly, Penn National did not have copies of the discovery or other materials in the Rollins Lawsuit prior to its efforts to obtain the same after untimely notice was provided.

Therefore, even if “substantial prejudice” is required before coverage for Covil can be barred for Covil’s failure to comply with the notice conditions in the Policies, which Penn National disputes, the trial court erred in finding as a matter of law that Penn National was not “substantially prejudiced” by Covil’s untimely notice.

Coverage under the Penn National Policies was obviated when Covil failed to comply with his contractual obligations to provide written notice of the Rollins Lawsuit as soon as practicable and to immediately send copies of the Summons and Complaint to Penn National. “[B]reach of an insurance policy’s notice clause automatically relieves the insurer of its obligations under the contract, including the payment of proceeds due, and the duty to defend and to indemnify the insured.” *Wright v. UNUM Life Ins. Co.*, 2001 U.S. Dist. LEXIS 26063, *4 (D.S.C. 2001). Because Covil does not dispute that it failed to provide timely notice to Penn National of the Rollins Lawsuit, Penn National had no obligation to indemnify Covil for any moneys it paid to settle the Rollins Lawsuit. Accordingly, the trial court erred when it found that coverage was afforded under the Penn National Policies despite Covil’s untimely notice. Penn National respectfully requests that summary judgment in favor of Covil be vacated and this case be remanded with instructions to enter summary judgment in Penn National’s favor.

C. The Trial Court Erred When It Held That the Products Hazard Exclusion and the Completed Operations Exclusion Did Not Apply to Bar Coverage for Covil Under the Penn National Policies.

A fundamental tenet of insurance policy construction is: “When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.” *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Because an insurance policy is to be interpreted according to the language contained therein, “[t]he court’s duty is limited to the interpretation of the contract made by the parties themselves

regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully.” *Id.* “An insurer’s obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction.” *MGC Mgmt v. Kinghorn Ins. Agency*, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999).

The trial court failed to follow these bedrock principles when it found that two exclusions contained in the Penn National Policies, the products hazard exclusion and the completed operations exclusion, clearly did not apply to the Rollins Lawsuit. The trial court erred in so finding. In reviewing the trial court’s determination regarding the applicability of exclusions, no deference is given to the trial court’s findings. *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 167, 594 S.E.2d 511, 516 (Ct. App. 2004).

The coverage afforded by the Penn National Policies is governed by the language contained therein. The grant of coverage under the Policies is found in the insuring agreement, which states:

INSURING AGREEMENT

I. COVERAGE A – BODILY INJURY LIABILITY COVERAGE B – PROPERTY DAMAGE LIABILITY

The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as damages because of
Coverage A. **bodily injury** or
Coverage B. **property damage**
to which this insurance applies, caused by an **occurrence**, and the company shall have the right and duty to defend any suit against the **insured** seeking damages on account of such **bodily injury** or **property damage**, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company’s liability has been exhausted by payment of judgments or settlements.

[Penn National's Memo in Opposition, Exh. 13, pp.2, 45 (RI p. 424; RII p. 468)] The bolded terms are specifically defined by the Penn National Policies, as follows:

DEFINITIONS APPLICABLE TO SECTION II

When used in the provisions applicable to Section II of this policy (including endorsements forming a part hereof)

"bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;

"occurrence" means an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**;

[Penn National's Memo in Opposition, Exh. 13, pp.36, 81 (RI p. 458; RII p. 504)] Therefore, under the plain terms of the Penn National Policies, coverage is only provided for "bodily injury" that occurs during the policy period and which is caused by an "occurrence," as those terms are defined in the Penn National Policies. However, even if a claim falls within the insuring agreement contained in an insurance policy, exclusions contained within that policy can preclude coverage.

The Penn National Policies contain two exclusions that apply to bar coverage for the Rollins Lawsuit. Specifically, the Penn National Policies state:

EXCLUSION (Complete Operations Hazard and Products Hazard)

It is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and the Property Damage Liability Coverage does not apply to **bodily injury** or **property damage** included within the **Completed Operations Hazard** or the **Products Hazard**.

[Penn National's Memo in Opposition, Exh. 13, pp. 30, 68 (RI p. 452; RII p. 491)] The Penn National Policies define the bolded terms as:

DEFINITIONS APPLICABLE TO SECTION II

When used in the provisions applicable to Section II of this policy (including endorsements forming a part thereof)

* * *

“completed operations hazard” includes **bodily injury** and **property damage** arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. “Operations” include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include **bodily injury** or **property damage** arising out of:

- (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
- (c) operations for which the classification stated in the policy or in the company’s manual specifies “including completed operations”;

* * *

“**products hazard**” includes **bodily injury** and **property damage** arising out of the named insured’s products or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs away from the premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

[Penn National’s Memo in Opposition, Exh. 13, pp.36, 81 (RI p. 458; RII p. 504)] If either the completed operations hazard exclusion or the products hazard exclusion applies to the Rollins Lawsuit, no coverage is afforded under the Penn National Policies. *South Carolina Mun. Ins. & Risk Fund v. City of Myrtle Beach*, 368 S.C. 240, 245, 628 S.E.2d 276, 279 (Ct. App. 2006).

1. The Products Hazard Exclusion

The Penn National Policies clearly exclude from coverage all claims of bodily injury if the bodily injury is included in the “products hazard,” as that term is defined by the Penn National Policies. South Carolina courts have routinely upheld the validity and enforceability of the products hazard exclusion. See, e.g., *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 536, 514 S.E.2d 327, 330-31(1999). According to the plain language contained in the Penn National Policies, claims of bodily injury are included in the products hazard if: (1) the bodily injury arises out of the named insured’s products; (2) the bodily injury occurs away from the named insured’s premises; and (3) physical possession of such products has been relinquished by the named insured to others. The allegations made and damages sought in the Rollins Lawsuit are clearly within the products hazard exclusion.

It is axiomatic that an insurer’s duty to defend is based on the allegations contained in the underlying complaint. *Federated Mut. Ins. Co. v. Piedmont Petroleum Corp.*, 314 S.C. 393, 396, 444 S.E.2d 532, 533 (Ct. App. 1994). The allegations in the Rollins Lawsuit establish that Covil was being sued in its capacity as a “Product Defendant.”⁸

⁸ Other defendants were sued in their capacities as “Premises Defendants.”

25. ... At all times material hereto, COVIL CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retained substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation. COVIL CORPORATION is sued as a ***Product Defendant***. ...

[Penn National's Memo in Opposition, Exh. 5, p.12 (RI p. 310)](emphasis added). The Rollins Lawsuit defined what it meant by designating a defendant as a "Product Defendant:"

3. Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.

[*Id.* at p.5 (RI p. 303)] Based on these designations, the plaintiff in the Rollins Lawsuit then asserted claims, designated as either products liability claims [*Id.* at pp.32-42, 49; First Cause of Action, Second Cause of Action, Fifth Cause of Action (RI pp. 330-340, 347)] or premises liability claims [*Id.* at pp.45-49; Fourth Cause of Action (RI pp. 343-347)]. Because Covil was identified as a "Products Defendant," only products liability claims were asserted against it.

The Rollins Lawsuit does not allege the specific circumstances and/or any dates that Mr. Rollins might have been exposed to asbestos fibers from Covil's products. In its motion for partial summary judgment, Covil alleges, without any supporting affidavits, that Covil was retained to supply materials and install piping insulation at a facility at which Mr. Rollins' stepfather worked. The Rollins Complaint does allege that Mr. Rollins was exposed to "take-home" asbestos fibers in the dust attached to his stepfather's clothes and person when he came home from work. [*Id.* at ¶77 (RI p. 328)]

Because no discovery has been done in the present action, and Penn National was unable to participate in the defense of the Rollins Lawsuit because of Covil's late notice, Penn National

cannot confirm or refute the dates and circumstances of Mr. Rollins' exposure to asbestos fibers from Covil's products.⁹ What is undisputed is that the Rollins Lawsuit alleged liability against Covil based on Covil's products, including "take-home" exposure. Based on the allegations asserted in the Rollins Lawsuit, it is clear that the products hazard exclusion applies to bar coverage. All the elements for application of the products hazard exclusion are met:

(1) the Rollins Lawsuit alleges that Mr. Rollins' mesothelioma arose out of exposure to Covil's products; (2) it is not disputed that Mr. Rollins' bodily injury claim occurred away from Covil's premises; and (3) because the exposure to Mr. Rollins is alleged to be "take-home" exposure, physical possession of Covil's products must necessarily have been relinquished.

Despite this rather straightforward construction of the products hazard exclusion, and despite the fact that Penn National never had the chance to engage in discovery, the trial court found as a matter of law that the products hazard exclusion did not apply. Although unclear, it appears that the trial court found, based on the unverified documents attached to Covil's motion for partial summary judgment and her own recollection of what was established in the Rollins Lawsuit,¹⁰ that because the "take-home" fibers were the result of on-going installation of insulation by Covil during the periods of the Penn National Policies, Covil never "relinquished" physical possession of its products. [Order dated 8/13/2020, pp.6-8 (RI pp. 7-9)]

⁹ Throughout its Order granting Covil's Motion for Partial Summary Judgment, the trial court frequently states that "Penn National agrees ..." or that "Penn National does not dispute ..." This is, in fact, not true. Because no discovery was completed in the present case, and Penn National was not involved in the Rollins Lawsuit, Penn National is not in a position to either confirm or deny the "facts" stated in the Order. The only admissions made by Penn National in the present case are contained in Penn National's Answer where Penn National admitted that it issued the Penn National Policies but denied that any coverage was afforded under those Policies for the Rollins Lawsuit.

¹⁰ As way of example, in the Order, Retired Justice Toal states: "Additionally, no evidence in this case or in the underlying Rollins action suggests that Covil supplied asbestos insulation to the Bowater facility between 1986 and 1987." [Order dated 8/13/2020, p.6 (RI p. 7)]

In support of its conclusion, the trial court cites to three cases, each of which are unavailing and actually support the applicability of the products hazard exclusion to the Rollins Lawsuit. In *Heyward v. American Casualty Co.*, 129 F.Supp. 4 (E.D.S.C. 1955), the federal district court was tasked with determining whether coverage was afforded for an explosion that occurred during the insured's installation of heating and plumbing units at a housing project. The insured entered into a contract to install all heating and plumbing units in the housing project, and as each unit was completed, the unit was leased to residents. An explosion occurred after the heating and plumbing fixtures were installed in one unit and that unit was leased. *Id.* at 6. The insured tendered the resulting lawsuit to its insurance carrier, who denied coverage based on the completed operations hazard and products hazard exclusions. *Id.* at 6-7. The court found that the products hazard exclusion was not implicated by the underlying lawsuit because there were no claims asserted against the insured for products liability:

“Products Liability”, to the average person, refers to liability arising out of the use of, or existence of any condition in goods or products manufactured, sold, handled or distributed by the insured. The suit in the State Court involved no such liability, but is based on the alleged negligent construction by the plaintiff.

Id. at 9. Accordingly, *Heyward* does not support the trial court's conclusion that the products hazard exclusion does not apply to the Rollins Lawsuit. To the contrary, because the Rollins Lawsuit asserted liability against Covil as a “product defendant,” *Heyward* supports the application of the products hazard exclusion to preclude coverage for such liability.

Similarly, in *Friestad v. Travelers Indem. Co.*, 393 A.2d 1212 (Pa. Super. 1978), a case interpreting Pennsylvania law, the court found that the insured's liability for injuries caused by a furnace fire after the furnace was installed by the insured was not excluded by the products

hazard exclusion specifically because the liability of the insured was not based on the product but on its service in installing the furnace. *Id.* at 1217.

Hence, it is more preferable by far to define the products hazard in terms of products liability law, and apply the exclusion only when a product, other than a service, is the cause in fact of damages or injuries to a third person.

* * *

Hence, we conclude that the lower court erred in holding that Friestad's installation of the Sears furnace in the Thompson home fell within the products hazard provision of the contract. Under the proper reading of the policy, the furnace installation in this case was a completed operations hazard.

Id. See also, *B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077

(Ind. 1985)(interpreting Indiana law, the trial court found, "The claims in this case have nothing to do with any defect in a product. They arose because of negligent release of the product from the premises. Product liability clauses are designed to cover situations such as the asphyxiation of a car's passengers by a defective exhaust system; premises liability coverage is designed to cover the pedestrian who is injured if a car rolls out of the factory door due to some negligent act of an employee.")

All the cases cited to by the trial court do not support its conclusion that the products hazard exclusion does not apply to the Rollins Lawsuit. To the contrary, each one of the cases cited by the trial court held that claims of products liability *are* excluded from coverage by the products hazard exclusion. See, *Heyward*, 129 F.Supp. at 9; *Friestad*, 393 A.2d at 1217; *B&R Farm*, 483 N.E.2d at 1077. It is undisputed that the Rollins Lawsuit alleged products liability claims against Covil. Therefore, the products hazard exclusion clearly applies to bar coverage for the Rollins Lawsuit. The trial court erred in failing to so find.¹¹

¹¹ The trial court also made the "finding," again based on no evidence presented by either party in this case, that none of the materials used by Covil in its pipe insulation operations in 1986 contained asbestos. [Order dated 8/13/2020, p.8 (RI p. 9)] If that is in fact true, then the products hazard would

2. *The Completed Operations Hazard Exclusion*

The completed operations hazard exclusion may also apply to bar coverage for the Rollins Lawsuit under the Penn National Policies. Based on the plain language contained in the Penn National Policies, the completed operations hazard exclusion applies to claims:

(1) arising out of Covil's operations; (2) after such operations are completed (as further described in the Policies' definition); and (3) if the bodily injury occurs away from Covil's premises.

Again, because no discovery was completed in the present action, Penn National has not had the opportunity to obtain evidence to support this exclusion. However, based on the admissions made by Covil in its motion for partial summary judgment, it appears clear that Covil is not disputing that in the Rollins Lawsuit, Mr. Rollins alleged that he suffered mesothelioma arising out of Covil's operations of installing insulation at a facility where Mr. Rollins' stepfather worked. Therefore, the requirements of arising out of operations and occurring away from Covil's premises are met. The determinative issue is whether Mr. Rollins' exposure to asbestos occurred after Covil's operation were completed.

The Penn National Policies state that an insured's operations "shall be deemed completed at the earliest" of three potential times: (1) when the contract entered into by the insured is completed, (2) when all operations at a specific site are completed, or (3) "when the portion of the work out of which the injury or damage arises has been put to its intended use."

[Penn National's Memo in Opposition, Exh. 13, pp.36, 81(RI p. 458; RII p. 504)] If it is in fact true, as Covil argued and the trial court "found," that Covil was engaged in installing insulation

clearly apply since any products producing asbestos fibers/dust would have already been installed and relinquished by Covil prior to its operations in 1986. *See, Ohio Cas. Ins. Co. v. Scott & Jones*, 2006 U.S. Dist. LEXIS 113027, *6 (D.S.C. 2006) (finding no coverage under the products-completed operations exclusion for a product sold by the insured and used for five years on premises not owned by the insured).

on pipes in the facility where Mr. Rollins' stepfather worked between March 11, 1986 and January 25, 1987 [Order dated 8/13/2020, p.3 (RI p. 4)], and that Mr. Rollins' exposure to asbestos for which Covil is liable only occurred during this time period, then some of the exposure occurred before Covil's contract was completed and the work at the particular site was completed. However, the completed operations hazard exclusion also applies if the *portion* of the operations out of which the injury arises was put to its intended use.

As indicated above, Mr. Rollins' exposure during the periods of the Penn National Policies only occurred through "take-home" asbestos. If this "take-home" exposure occurred because a portion of Covil's operations had already been put to its intended use, then the completed operations hazard exclusion would apply to bar coverage. This, however, is a genuine issue of disputed fact, which has not been established either by any "evidence" submitted by Covil in support of its motion for partial summary judgment or by any "findings" made by the trial court. See, *W.N. Leslie, Inc. v. Travelers Ins. Co.*, 264 S.C. 408, 415, 215 S.E.2d 448, 451 (1975)(holding that whether a portion of the insured's work was put to its intended use was a jury issue). Therefore, it was improper for the trial court to grant judgment in favor of Covil on the grounds that the completed operations hazard exclusion did not apply as a matter of law.

In its decision, the trial court also ignored case law from the Fourth Circuit that has interpreted the completed operations hazard with regard to asbestos injury claims. In interpreting an identical policy provision, the Fourth Circuit held that claims arising from exposure to asbestos that occurs during an insured's operations and continues thereafter are included within the completed operations hazard. *In re Wallace & Gale Co.*, 385 F.3d 820, 833-34 (4th Cir. 2004). Although the Fourth Circuit was applying Maryland law, the canons of insurance policy

construction under Maryland law and South Carolina law are the same. Because the Rollins Lawsuit alleges that Mr. Rollins' exposure to asbestos occurred both prior to, during and after the periods of the Penn National Policies, the completed operations hazard exclusion applies to bar coverage for the Rollins Lawsuit. See, *Generali Ins. Co. v. United States Fire Ins. Co.*, 886 F.3d 346, 354 (4th Cir. 2018)(completed operations hazard also applies to injuries where starting point of bodily injury occurred during the insured's operations and continued thereafter).

Finally, the trial court "found" that "[b]y 1986 asbestos was not found in pipe insulation." [Order dated 8/13/2020, p.8 (RI p. 9)] Therefore, during the periods of the Penn National Policies, i.e. 1986 through 1988, Covil apparently was not installing asbestos-containing insulation in any facility. Based on this "finding," Covil must have completed all asbestos-related operations prior to the inception of the Penn National Policies. Therefore, any injuries suffered by Mr. Rollins during the periods of the Penn National Policies must have occurred in the completed operations hazard. Accordingly, the completed operations hazard exclusion applies to bar coverage for the Rollins Lawsuit as a matter of law. The trial court erred in failing to so hold.¹² See, *Generali Ins.*, 886 F.3d at 356-57 (finding that because the insured admitted that it had ceased the sale and installation of all asbestos products by 1972, years before the policies at issue incepted, any bodily injury claims triggering those policies clearly occurred after the insured completed its asbestos-related operations and fell within the completed operations

¹² In its Order granting partial summary judgment for Covil, the trial court held that Penn National failed to meet its burden of proving that either the products hazard exclusion or the completed operations hazard exclusion applied. [Order dated 8/13/2020, pp.4-5 (RI pp. 5-6)] The simple truth is that Penn National was deprived of the opportunity to conduct discovery into the applicability of the exclusions in its Policies because Covil immediately filed its Motion for Partial Summary Judgment after Penn National filed its Answer. By so doing, Covil prevented Penn National from engaging in discovery to support its exclusions and the trial court then held this against Penn National by finding that "Penn National has not met its burden in this case." [*Id.* at p.5 (RI p. 6)] Clearly, the entry of summary judgment in favor of Covil was premature and should be vacated. See, *Doe*, 345 S.C. at 322, 548 S.E.2d at 857.

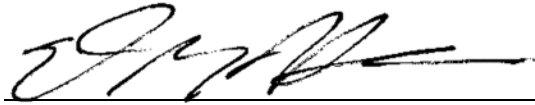
hazard).

VI. CONCLUSION

This case presents the issue of whether Penn National breached its Policies when it did not agree to contribute to the settlement of the Rollins Lawsuit, an underlying asbestos liability lawsuit filed against its insured, Covil. Within twenty-three (23) days of Penn National's filing of its Answer, in which it disputed that coverage existed for the Rollins Lawsuit, Covil rushed to obtain judgment in its favor on the coverage issue. Covil did not wait until discovery was completed in this case. Instead, it presented unverified, unsubstantiated, and unsworn documents, unaccompanied by any affidavit, to the trial court in the hopes that the court would unquestioningly grant judgment in its favor. And, the trial court did.

The trial court's grant of partial summary judgment in favor of Covil cannot stand because it is not based on any evidence required by Rule 56 of the Rules of Civil Procedure – it is not based on any discovery responses, pleadings, admissions or affidavits. Furthermore, summary judgment was granted prior to Penn National having the opportunity to engage in any discovery, contrary to the mandates of this and the Supreme Court. Finally, the only evidence properly before the Court in this case is that Covil breached its obligations under the Penn National Policies to provide timely notice of the Rollins Lawsuit and that the Rollins Lawsuit is otherwise excluded from coverage through operation of the products hazard exclusion. Penn National respectfully requests that this Court vacate the entry of summary judgment in favor of Covil and remand this case with instructions to enter summary judgment in Penn National's favor, or alternatively, to remand this case to allow the parties to engage in discovery.

March 1, 2021.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Mar 01 2021

SC Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

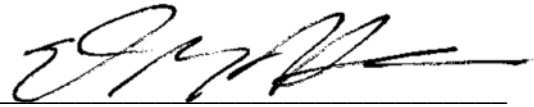
Appellant.

Appellate Case No. 2020-001239

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Appellant complies with Rule 211(b) of the SCACR.

This the 1st day of March, 2021.



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Appellant.

Appellate Case No. 2020-001239

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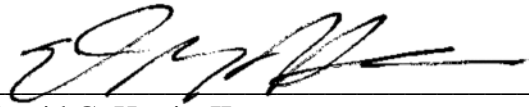
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	3
A. Current Status of Covil Corporation	3
B. The <i>Rollins</i> Action	4
C. The Penn National Coverage	5
D. The <i>Rollins</i> Settlement.....	6
E. The Circuit Court Action.....	6
F. Chief Justice Toal’s Ruling On Partial Summary Judgment.....	7
STANDARD OF REVIEW	8
ARGUMENT	9
A. The Receiver’s Motion Was Neither Premature Nor Un-Supported By The Evidence, and These Issues Are Not Preserved for Review.....	9
B. Chief Justice Toal Correctly Held That Penn National Could Not Sustain Its Burden Of Proof On Policy Exclusions	16
C. Chief Justice Toal Correctly Disposed Of Penn National’s Notice Defense.....	24
CONCLUSION.....	28

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>CASES</u>	
SOUTH CAROLINA	
<i>Atl. Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)	10
<i>Baughman v. Am. Tel. & Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991)	15
<i>Bayle v. S.C. Dep’t of Transp.</i> , 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).....	9
<i>B.L.G. Enters., Inc. v. First Fin. Ins. Co.</i> , 334 S.C. 529, 514 S.E.2d 327 (1999)	24
<i>Burnett v. S.C. State Highway Dep’t</i> , 252 S.C. 568, 167 S.E.2d 571 (1969)	10, 11
<i>David v. McLeod Reg’l Med. Ctr.</i> , 367 S.C. 242, 626 S.E.2d 1 (2006)	8, 9
<i>Doe ex rel. Doe v. Batson</i> , 345 S.C. 316, 548 S.E.2d 854 (2001)	15, 16
<i>Elam v. South Carolina Dep’t of Transp.</i> , 361 S.C. 9, 602 S.E.2d 772 (2004)	10, 11
<i>Ex parte: Builders Mut. Ins. Co.</i> , 431 S.C. 93, 847 S.E.2d 87 (2020)	12, 13
<i>Greenwood Development Corp. v. Cincinnati Insurance Co.</i> , 2012 U.S. Dist LEXIS 204018, 2012 WL 12981762 (D.S.C. 2012).....	26
<i>Hatchett v. Nationwide Insurance Co.</i> , 244 S.C. 425, 137 S.E.2d 608 (1964)	26
<i>Heyward v. American Casualty Co. of Reading, Pa.</i> , 129 F.Supp. 4 (E.D.S.C. 1955)	19, 20
<i>M & M Corp. of S.C. v. Auto-Owners Ins. Co.</i> , 390 S.C. 255, 701 S.E.2d 33 (2010)	22
<i>Middleborough Horiz. Prop. Regime Council of Co–Owners v. Montedison S.p.A.</i> , 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).....	15
<i>Neumayer v. Philadelphia Indem. Ins. Co.</i> , 427 S.C. 261, 831 S.E.2d 406 (2019)	24, 27
<i>Prior v. South Carolina Medical Malpractice Liability Insurance Joint Underwriting Association</i> , 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991).....	26

<i>Prof'l Bankers Corp. v. Floyd</i> , 285 S.C. 607, 331 S.E.2d 362 (Ct. App. 1985).....	11
<i>Regions Bank v. Schmauch</i> , 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).....	9
<i>Robertson v. First Union Nat. Bank</i> , 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002).....	9
<i>Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals</i> , 340 S.C. 57, 530 S.E.2d 383 (2000)	11
<i>State v. Stone</i> , 376 S.C. 32, 655 S.E.2d 487 (2007)	12
<i>Staubes v. City of Folly Beach</i> , 339 S.C. 406, 529 S.E.2d 543 (2000)	12
<i>Vermont Mut. Ins. Co. v. Singleton</i> , 316 S.C. 5, 446 S.E.2d 417 (1994)	24, 25
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998)	12
 OTHER JURISDICTIONS	
<i>B & R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.</i> , 483 N.E.2d 1076 (Ind. 1985)	18, 19, 21
<i>Bixler v. J.C. Penney Co.</i> , 376 N.W.2d 209 (Minn. 1985).....	15
<i>Boyer Metal Fab, Inc. v. Maryland Casualty Co.</i> , 750 P.2d 1195 (Or. Ct. App. 1988).....	17, 18
<i>Century Sur. Co. v. Hipner, LLC</i> , 377 P.3d 784, 788 (Wyo. 2016).....	25
<i>CPS Chemical Co. v. Cont'l Ins. Co.</i> , 489 A.2d 1265 (N.J. Super. Ct. Law Div. 1984)	18
<i>CPS Chemical Co. v. Cont'l Ins. Co.</i> , 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985).....	18
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938).....	22
<i>Friestad v. Travelers Indemnity Co.</i> , 393 A.2d 1212 (Pa. Super. Ct. 1978).....	18, 19, 21
<i>Highlands Ins. Co. v. Hobbs Grp., LLC</i> , 373 F.3d 347, 351 (3d Cir. 2004).....	22
<i>In re GNC Corp.</i> , 789 F.3d 505 (4th Cir. 2015)	11

In re The Wallace & Gale Company,
385 F.3d 820 (4th Cir. 2004)22, 23

Jessco, Inc. v. Builders Mut. Ins. Co.,
472 F. App'x 225 (4th Cir. 2012)27

State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of Louisiana,
56 So. 3d 1236 (La. Ct. App. 2011).....25

Szczeklik v. Markel Intern. Ins. Co., Ltd.,
942 F. Supp. 2d 1254 (M.D. Fla. 2013).....20, 21

W. Emp'rs Ins. Co. v. Arciero & Sons, Inc.,
146 Cal. App. 3d 1027 (Cal. Ct. App. 1983)18

RULES

Rule 56, SCRCF.....2, 3, 9, 10, 14, 15, 16

Rule 59, SCRCF.....10, 11

Rule 208, SCACR.....12

OTHER

Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations –
What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971)1, 17, 18

I. STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court properly grant partial summary judgment where the Receiver's motion was sufficiently supported by evidence that was before the Court without objection from Penn National and the motion was not premature?
2. Did the circuit court properly find Penn National failed to meet its burden to prove a policy exclusion applied to bar coverage to Covil where the underlying injury occurred *before* Covil completed its work installing insulation materials at the Bowater Paper Mill ("Bowater") in Catawba, South Carolina?
3. Did the circuit court properly find Penn National's purported late notice defense failed where Penn National had sufficient notice of the action and attended mediation with a willingness to contribute toward settlement?

II. STATEMENT OF THE CASE

Appellant Pennsylvania National Mutual Insurance Company ("Penn National") insured Covil against suits seeking the recovery of damages for bodily injury during the period of two Penn National policies issued to Covil between 1986 and 1988. The Penn National policies exclude coverage for damages for bodily injury within either the "products hazard" or the "completed operations hazard." It has been understood for decades that the risk insured by the "products hazard" and the "completed operations hazard" excluded from the Penn National policies is "the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself." Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). The Penn National policies therefore cover Covil against the possibility that its goods, products or work will cause third-party bodily injury or property damage *before* Covil "relinquished" its products or *before* Covil "completed" its work.

David Rollins ("Rollins") sued Covil through its Court-appointed Receiver, Peter D. Protopapas, in 2019 for contributing to his mesothelioma. The evidence adduced in the asbestos

litigation established that Rollins was exposed to asbestos attributed to Covil *before* Covil completed its work installing insulation materials at Bowater. The Receiver therefore requested that Penn National attend a court-ordered mediation so that it could settle the *Rollins* lawsuit. Penn National *attended* the mediation but *refused* to fund the *Rollins* settlement based on its policy exclusions for products and completed operations. The Receiver settled *Rollins* and paid the settlement amount.

The Receiver thereafter sued Penn National for breach of contract. He moved for partial summary judgment based on the complaint in the *Rollins* action, deposition testimony from the asbestos litigation, Covil's Bowater contract, Covil's Bowater payment records, and one of the two Penn National policies. Penn National opposed the Receiver's motion and requested additional time to conduct discovery. It did not, however, submit the required Rule 56(f), SCRCF, affidavit to support its purported need to engage in fact-finding before the circuit court ruled on the Receiver's motion. Penn National did not object to any evidence submitted by the Receiver in support of his motion.

The circuit court granted the Receiver's motion, finding Penn National could not meet its burden to show the "products hazard" or the "completed operations hazard" barred coverage for the *Rollins* settlement. The circuit court also held that Penn National failed to meet its burden to support its "late notice" defense, particularly since Penn National attended the mediation session that resulted in the *Rollins* settlement. The circuit court did not, however, rule on Penn National's purported need to conduct discovery necessary to oppose the Receiver's motion.

Penn National sought reconsideration of the circuit court's order granting the Receiver's motion and filed the instant appeal of the circuit court's order granting the Receiver's motion for partial summary judgment while its motion for reconsideration was pending. The circuit court

subsequently denied Penn National's motion for reconsideration, holding that its ruling on the Receiver's motion was not premature in that Penn National did not require discovery and because Penn National did not submit a Rule 56(f), SCRCF, affidavit in support of its request for additional time. Penn National did not appeal the circuit court's order denying reconsideration.

III. STATEMENT OF FACTS

A. Current Status of Covil Corporation

From the time of its original formation in or about 1954, Covil Corporation ("Covil") was engaged in the installation and removal of insulation in various industrial facilities across South Carolina and elsewhere. Covil's operations involved the installation, removal and disturbance of insulation materials, typically supplied, required or acquired by other parties. At certain times, insulation materials contained asbestos, and Covil's operations are alleged to have resulted in bodily injury in South Carolina and elsewhere. In 1991, Covil's business failed, and it ceased operations. Thereafter, in 1993, the State of South Carolina rescinded Covil's corporate charter for failing to file the appropriate documentation with the Secretary of State.

Despite Covil's failure as a going concern and its subsequent forfeiture of its corporate charter, Covil continued to be sued in numerous asbestos cases. In the fall of 2018, Covil defaulted on two mesothelioma asbestos cases pending in South Carolina.¹ On November 2, 2018, Chief Justice Jean Hoefler Toal (Ret.), serving as the state's asbestos judge, appointed Peter D. Protopapas to serve as a Receiver (the "Receiver") for Covil to manage its affairs according to South Carolina law. Among other things, the Order empowers the Receiver "with the power and authority to fully administer all assets" of Covil. (R. p. 56). This order "is inclusive of, but not

¹ See *James Michael Hill v. Advance Auto Parts, Inc. et al.*, November 2, 2018 Order Granting Default Judgment, C/A No. 2018-CP-40-04680 (Richland Cty. Ct. Comm. Pleas); *Denver D. Taylor et al. v. Air & Liquid Sys. Corp., et al.*, November 2, 2018 Order Granting Default Judgment, C/A No. 2018-CP-40-04940 (Richland Cty. Ct. Comm. Pleas).

limited to, 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." (*Id.*).

B. The Rollins Action

David D. Rollins sued Covil, and others, in the case styled *David D. Rollins v. Air & Liquid Systems Corp.*, C/A No. 2019-CP-25-00118, pending in Hampton County, South Carolina (the "Rollins Action"). Rollins alleged that he suffered from mesothelioma as a result of exposure to asbestos. (R. pp. 62–63, 66). He was diagnosed with mesothelioma on or around January 17, 2019. (R. p. 87). Rollins produced a pathology report in support of his allegation of asbestos-related disease. (R. pp. 111–12).

Among other things, Rollins alleged "take home" exposure to asbestos via his stepfather, Robert J. Ashworth ("Ashworth"), with whom he lived between 1980 and 1991. (R. pp. 87–88, 120). Ashworth invariably returned home from work covered in dust from working at plants with asbestos. (R. pp. 87–88, 119). The dust filled the family home and family vehicles. (R. p. 119). Rollins recalled that Ashworth worked as a pipefitter welder supervisor at numerous facilities, including at Bowater. (R. pp. 118–19). Ashworth performed pipe, pump and boiler work at Bowater between 1986 and 1988. (R. pp. 114–16). Ashworth died of asbestos-related cancer in November 2018. (R. p. 118).

Covil performed insulation work at Bowater when Ashworth worked at the facility. (R. pp. 114–15, 126–27). On February 26, 1986, Covil entered a subcontract with BE&K Construction Company, denominated as "Contract No. 4192-F-6410," to "[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on required piping systems" at Bowater. (R. p. 121–25). The contract required Covil to maintain at least \$1,000,000 in liability insurance coverage to respond to claims seeking the

recovery of damages for bodily injury and property damage during Covil's work. (*Id.*). Covil worked on the Bowater pipe insulation project at least between March 11, 1986 and January 25, 1987. (R. p. 126–27). Covil was paid more than \$1.2 million for this work. (R. p. 128).

C. The Penn National Coverage

Penn National issued two successive primary comprehensive general liability insurance policies to Covil. (R. pp. 44–55). The policies were written on standard forms. (*Id.*).

Penn National issued the first policy for the March 31, 1986 to March 31, 1987 period (the “Relevant Policy”) and the second policy for the March 31, 1987 to March 31, 1988 period. (R. pp. 47, 53). Both policies provide \$1,000,000 in coverage for claims seeking the recovery of damages against Covil for bodily injury and property damage “per occurrence” and in the aggregate. (R. pp. 44–55). Covil's procurement of the Penn National policies therefore satisfied the insurance requirements of Contract No. 4192-F-6410, which governed Covil's work at Bowater. (R. pp. 121–25).

Both of the Penn National policies exclude coverage for claims seeking the recovery of damages for bodily injury or property damage within either the “products hazard” or “completed operations hazard” of the policies. Penn National had not produced complete copies of the policies at the time Covil filed its motion for summary judgment in the circuit court.²

Nevertheless, a standard definition³ of a “products hazard” exclusion used by insurers in the 1980s included the following verbiage pertinent to the issues on appeal:

[B]odily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned

² Penn National submitted the policy materials as an exhibit to its memorandum in opposition to the Receiver's motion for summary judgment. (R. pp. 423–514).

³ Penn National admitted this standard definition mirrors the definition in the Penn National policies. (R. p. 179).

by or rented to the named insured and after physical possession of such products has been relinquished to others

A standard definition⁴ of a “completed operations hazard” exclusion used by insurers in the 1980s included the following verbiage pertinent to the issues on appeal:

[B]odily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured

Penn National denied coverage for the *Rollins* action based on the “products hazard” and “completed operations hazard” exclusions found in its policies.

D. The *Rollins* Settlement

Penn National received notice of the *Rollins* action in January 2020 and attended the court-ordered mediation in *Rollins* on February 25, 2020, in Charleston. The Receiver requested \$50,000 to settle *Rollins*—a fraction of the \$1,000,000 bodily injury limits of liability afforded by the Relevant Policy. Penn National, however, refused to commit to pay that amount. The Receiver thereafter settled *Rollins* without Penn National’s participation.

E. The Circuit Court Action

The Receiver filed the instant action styled *Covil Corporation v. Pennsylvania National Mutual Insurance Co.*, in the Court of Common Pleas for the Fifth Judicial Circuit against Penn National on February 28, 2020 (the “Coverage Action”). The complaint alleges that Penn National breached its insurance contract with Covil when, as noted above, Penn National attended the court-ordered mediation in *Rollins* yet declined to contribute any dollar amount toward settlement even

⁴ Penn National admitted this standard definition mirrors the definition in the Penn National policies. (R. p. 179).

though the \$50,000 request was well within the limits of the Relevant Policy it issued to Covil. (R. pp. 21–22).

The Receiver moved for partial summary judgment in the Coverage Action on April 22, 2020 (the “Motion”). He asserted coverage for the settlement of the *Rollins* action was not barred by either the “products hazard” exclusion or the “completed operations hazard” exclusion in the Relevant Policy. (R. pp. 41–42). The Motion sought only to establish Penn National’s liability under the Relevant Policy. (R. pp. 40–43). It did not seek to establish the amount Penn National was required to pay.

F. Chief Justice Toal’s Ruling On Partial Summary Judgment

Chief Justice Toal began her ruling on the Motion (“the Order”) by noting that the “principal dispute between Covil and Penn National is whether an exclusion in the Penn National Policy applies to bar coverage for the *Rollins* action.” (R. p. 5). There was no dispute that Rollins suffered from bodily injury during the period of the Relevant Policy. (R. p. 4). Chief Justice Toal then quoted venerable South Carolina Supreme Court authority holding that “[i]nsurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” (R. p. 5–6 (quoting *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2004))). Chief Justice Toal found Penn National could not meet its burden to show that the exclusions in the Relevant Policy for “products hazard” or “completed operations hazard” bodily injury damages barred coverage for the *Rollins* settlement:

[T]he evidence from the *Rollins* action demonstrates that while Mr. Rollins’ stepfather, Robert Ashworth, performed pipefitting work at the Bowater facility between 1986 and 1987, Covil employees also were at the site at the same time performing insulation work. Covil’s operations at the Bowater facility were not complete at the time that Mr. Ashworth worked at Bowater—they were ongoing, and happening simultaneously with, Mr. Ashworth’s work.

(R. pp. 6–7).

Chief Justice Toal easily disposed of Penn National’s “late notice” defense based on its involvement in the *Rollins* action *and* its participation in the court-ordered mediation that produced the settlement:

Penn National admits that “a representative of Penn National attended the mediation and expressed a willingness to contribute toward settlement on behalf of Covil.” Penn National engaged the same defense counsel as all other Covil insurers to defend Covil’s interests for Penn National in the *Rollins* action and other Covil asbestos personal injury claims. It had access to all of the same materials as the insurers that elected to resolve the *Rollins* action at mediation. Yet, Penn National alone states that “Penn National was not in a position to contribute the amount requested by Covil at the mediation.”

Penn National had access to all available information related to the *Rollins* action, attended the *Rollins* mediation with a “willingness to contribute toward settlement,” and then made the deliberate decision not to resolve *Rollins*, presumably because it believe[d] that its policy exclusion barred coverage. Penn National’s deliberate choice to decline to settle the *Rollins* action within its policy limit is not equivalent to the late notice defenses established in the cases it cites. Penn National’s alleged late notice of the *Rollins* action is not a valid defense to breach of its insurance contract with Covil.

(internal citations omitted) (R. p. 10).

Therefore, Chief Justice Toal granted the Receiver’s motion for partial summary judgment, holding that Penn National breached its insurance contract with Covil. (R. p. 11). She subsequently denied Penn National’s motion for reconsideration. (R. pp. 13–17).

IV. STANDARD OF REVIEW

The Receiver agrees that an appellate court conducts a *de novo* review of a grant of partial summary judgment. *See David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) (“When reviewing an order granting summary judgment, the appellate court applies the

same standard as the trial court.”). Summary judgment is appropriate when “there is no genuine issue as to any material fact.” Rule 56(c), SCRPC.

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). As Chief Justice Toal properly found, and as is discussed further herein, Penn National failed to meet its burden to prove the application of the policy exclusions and a breach of a condition to coverage as a matter of law.

Moreover, this Court reviews the question of whether the circuit court erred in finding additional discovery unnecessary for the purposes of summary judgment under an abuse of discretion standard. *See Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 347, 565 S.E.2d 309, 313 (Ct. App. 2002) (finding “no abuse of discretion in the trial court’s finding that discovery was complete for the purposes of summary judgment”); *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (“The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.”). Chief Justice Toal did not abuse her discretion in finding further discovery was not necessary for the purposes of summary judgment.

V. ARGUMENT

A. The Receiver’s Motion Was Neither Premature Nor Un-Supported By The Evidence, and These Issues Are Not Preserved for Review

Initially, the Receiver notes Penn National’s arguments that it needed additional discovery, the Receiver’s Motion was premature, and the Receiver’s motion was not properly supported are not preserved for appellate review.

As to Penn National's arguments related to discovery and the timing of the Receiver's motion, Penn National is precluded from arguing this on appeal because it did not file a notice of appeal from the circuit court's September 21, 2020 Order denying its motion for reconsideration ("Order Denying Reconsideration"). While Penn National raised this argument to the circuit court in its memorandum in opposition to the Receiver's motion for partial summary judgment, the circuit court did not rule the issue in the Order from which appeal was actually taken. The Order on appeal found Penn National did not meet its burden to show a policy exclusion applied and did not meet its burden in proving the validity of its late notice defense. (R. pp. 4–11). Penn National re-raised its argument that summary judgment was premature because it needed additional discovery in its motion to reconsider. (R. p. 557). In denying reconsideration, the circuit court found summary judgment was not premature because Penn National did not need additional discovery and did not submit a Rule 56(f), SCRPC, affidavit to support its argument. (R. p. 16). As the issue was not ruled upon by the circuit court until the unappealed Order Denying Reconsideration, Penn National's arguments regarding the timing of summary judgment and its need for additional discovery are not properly before this Court. *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a Rule 59(e), SCRPC] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

Rule 203 of the South Carolina Appellate Court Rules firmly requires would-be appellants to serve a notice of appeal "within thirty (30) days after receipt of written notice of entry of the order or judgment" and attach a copy of the order to be challenged on appeal. Timely service of the notice is a jurisdictional requirement, and, without a properly-served notice of appeal, this

Court does not have jurisdiction over the unappealed order. *See Burnett v. S.C. State Highway Dep't*, 252 S.C. 568, 571, 167 S.E.2d 571, 572 (1969); *Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000). In the instant case, the circuit court issued the Order on August 13, 2020. On August 24, 2020, Penn National filed a Motion to Reconsider the Order. On September 14, 2020, Penn National timely appealed the Order while its Motion to Reconsider was still pending before the circuit court.⁵ The circuit court issued the Order Denying Reconsideration on September 21, 2020. Importantly, Penn National never appealed the subsequent Order Denying Reconsideration. Therefore, its arguments about the timing of the Receiver's motion and its purported need for further discovery are not properly before this Court. *See In re GNC Corp.*, 789 F.3d 505, 512 (4th Cir. 2015) (granting a motion to dismiss an appeal where a party timely filed a notice of appeal of an order but failed to file either "an amended notice of appeal or a new notice of appeal within 30 days of the entry of" the order denying their Rule 60 motion); *see also Prof'l Bankers Corp. v. Floyd*, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985) ("An appealable order from which no appeal is taken becomes the law of the case . . .").

Moreover, Penn National's brand-new argument that the Receiver's motion for summary judgment was not properly supported is clearly not preserved for review as Penn National did not raise the arguments to the circuit court at all. In its initial brief, Penn National argues for the first time that the circuit court erred in relying on the documents attached to the Receiver's Motion to

⁵ While a timely Rule 59(e), SCRPC, motion stays the time limit for filing a notice of appeal from an order, it does not follow that once a party chooses to appeal the original order that their notice of appeal automatically subsumes any future order issued by the circuit court. *See Elam*, 361 S.C. at 15, 602 S.E.2d at 775 ("A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.").

grant summary judgment. (App. Br., pp. 12–14). Throughout its initial brief, Penn National refers to the evidence submitted by the Receiver as unverified, unsubstantiated, and unsworn. (App. Br., pp. 3–4, 18, 33–34, 39). However, in the circuit court, Penn National did not object to these documents, raise any argument that the court should not consider them, or raise any argument that the Receiver’s motion was not sufficiently supported. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 489 (2007) (“If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.”). Accordingly, this argument is also not preserved for appellate review.⁶ *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

Penn National’s treatise on the “drastic” nature of summary judgment and its apparent need to conduct fulsome discovery before its *affirmative defenses* on policy exclusions and a condition to coverage lacks merits and can be summarily rejected. Insurance coverage litigation is based on the evidence developed in the underlying liability action from which a coverage determination is sought. *See, e.g., Ex parte: Builders Mut. Ins. Co.*, 431 S.C. 93, 109, 847 S.E.2d 87, 95 (2020)

⁶ In its Statement of the Case, Penn National suggests the circuit court erred in deciding the Receiver’s motion for summary judgment prior to “addressing Penn National’s motion to transfer venue” and in ruling on the Receiver’s motion for summary judgment and Penn National’s motion to reconsider “[w]ithout the benefit of a hearing.” (App. Br., pp. 3, 5). However, neither of these arguments are preserved for review because they were not raised to and ruled on by the circuit court and are not contained in the statement of issues on appeal. *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.”); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review.”). Further, as noted in the Order, these motions were fully briefed and hearings were not necessary in light of the ongoing Coronavirus emergency and guidance from the South Carolina Supreme Court. (R. p. 3).

(explaining the primary source of evidence in a coverage dispute is the record from the underlying proceeding).

The ability of Penn National and the Receiver to conduct discovery against each other in the Coverage Action yielding “answers to interrogatories” and “admissions on file” could not and would not change the nature of the testimonial and documentary evidence adduced in the *Rollins* action and upon which the Receiver based his motion for partial summary judgment. That evidence existed before the Receiver filed the Coverage Action. It is the very evidence upon which the Receiver settled *Rollins*, and upon which the Receiver demanded that Penn National fund the *Rollins* settlement. The nature and manner of Rollins’ injurious exposure to asbestos attributed to Covil is detailed in the deposition testimony adduced in the *Rollins* action. The nature of Covil’s work at Bowater is described in documents produced in the underlying litigation.

Consequently, Penn National’s stated need to “engage in discovery” in the Coverage Action “to determine the applicability of the products hazard exclusion and completed operations hazard exclusion in its Policies,” (App Br., p. 17), is an attempted delay tactic. All of that evidence was adduced in the *Rollins* Action and has been available to Penn National.

Penn National’s apparent need to conduct discovery in the Coverage Action to support its “late notice” defense, (App. Br., p. 16), is also of no moment. Penn National attended the mediation that produced the settlement in *Rollins*. It knows that it did not fund the settlement. It knows why it chose not to fund the settlement. It does not need to obtain discovery from the Receiver to find this out. Further, Penn National submitted evidence to the circuit court in opposition to the Receiver’s motion and in support of its “late notice” defense, such a January 2020 email sent on behalf of the Receiver to Penn National, filings in the *Rollins* Action, and correspondence between the Receiver and Penn National about *Rollins* and the *Rollins* mediation. The Receiver did not

dispute that notice occurred in January 2020, and Penn National already possessed all of the evidence it needed to make its “late notice” argument prior to the circuit court’s adjudication of the Receiver’s motion for partial summary judgment. This argument just fails.

In short, all of the documents relevant to the Receiver’s motion were *historical* in nature, such as the insurance policies, the Bowater contract, and a list of labor costs showing when Covil performed much of its work at the site. This evidence was attached as exhibits to the Receiver’s motion. Additionally, the Receiver has no personal knowledge of Covil’s work at Bowater thirty-four years ago; thus, he could not possibly supply Penn National with any other pertinent facts. Penn National received copies of all of the discovery materials in *Rollins*. All of the *Ashworth*⁷ materials were available to it, as well. Penn National could have relied on these materials in support of its opposition to the Receiver’s motion. In fact, Penn National did just that by submitting 14 exhibits.

Moreover, the Receiver’s motion for partial summary judgment solely concerned matters—policy exclusions and the Receiver’s alleged failure to provide timely notice of the *Rollins* Action—upon which Penn National has the burden of proof. Discovery from the Receiver in the Coverage Action is not relevant to those issues. The evidence necessary for Chief Justice Toal to rule on whether Penn National could meet its burden of proof as a matter of law on affirmative defenses to its liability to pay the *Rollins* settlement arose solely in the *Rollins* action.

Although Penn National repeatedly argues that the Receiver’s motion was premature because the Receiver filed it “a mere twenty-three (23) days after Penn National” filed its answer, this does not make the Receiver’s motion improper. (App. Br., p. 15). Rule 56(a), SCRC, P.

⁷ Ashworth brought a suit in the Delaware Superior Court for his asbestos-related cancer. See *Robert Ashworth and Nell Ashworth v. Air & Liquid Sys. Corp. et al.*, C/A No. N17C-04-003 ADB (Del. Sup. Ct.).

indicates a party may “at any time after the expiration of 30 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part” of the case. The Receiver commenced this action on February 28, 2020, and moved for partial summary judgment over 50 days later, on April 22, 2020. (R. pp. 18–22, 34–161). The circuit court did not rule on the Receiver’s motion until August 13, 2020, almost four months after it was filed. At no point in its arguments to the circuit court did Penn National cite to any discovery it attempted to undertake within the four months that the Receiver’s motion was pending. *See Middleborough Horiz. Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479–80, 465 S.E.2d 765, 771 (Ct. App. 1995) (affirming summary judgment where appellants “advance[d] no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment”). Instead, Penn National relied on conclusory and self-serving arguments that it needed to do more discovery without specifying what evidence it was likely to discover, needed to discover, or currently sought through outstanding discovery requests. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (explaining the nonmoving party must demonstrate that further discovery will likely uncover additional relevant evidence “and that they are not merely engaged in a ‘fishing expedition’” (quoting *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209 (Minn. 1985))). To this day, Penn National has failed to suggest its bald, conclusory requests for further discovery would amount to anything other than a fishing expedition and an unnecessary delay.

As Chief Justice Toal noted in the unappealed Order Denying Reconsideration, Penn National did not submit a Rule 56(f), SCRPC affidavit outlining why it needed additional time for discovery. *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) (“Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why

he needs more time for discovery.”); Rule 56(f), SCRCP (“Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.”). Penn National argues “strict compliance” with the Rule 56(f) affidavit is “not mandated where the need for further discovery is otherwise made known to the trial court.” (App. Br., pp. 17–18). Although a Rule 56(f) affidavit may not be a hardened requirement, it was definitely within the circuit court’s discretion to find one necessary under the facts of this case. To be sure—and contrary to Penn National’s conclusory assertion—the need for further *relevant* discovery was never made known to the circuit court.

Accordingly, Chief Justice Toal did not abuse her discretion in finding additional discovery was not necessary prior to a determination of the Receiver’s motion for summary judgment.

B. Chief Justice Toal Correctly Held That Penn National Could Not Sustain Its Burden Of Proof On Policy Exclusions

Penn National waits until page 34 of its initial brief to actually analyze the legal issues arising from the two policy exclusions to which it pointed in refusing to fund the *Rollins* settlement.

Those issues are quite simple:

- Was Rollins’ mesothelioma attributed to Covil caused by products Covil placed into the stream of commerce during the period of the Relevant Policy?
- Was Rollins’ mesothelioma attributed to Covil caused by Covil’s completed work during the period of the Relevant Policy?

Chief Justice Toal concluded correctly that the answer to both questions is “no,” such that Penn National could not sustain its burden of proof to establish the applicability of any policy exclusion.

Rollins established in his lawsuit that he suffers from mesothelioma. He established further that “take home” asbestos exposures via Ashworth substantially contributed to his asbestos-related disease. Those “take home” exposures occurred during the period of the Relevant Policy because Rollins incurred “take home” exposure via Ashworth between 1980 and 1991. Rollins described a family home and family vehicles filled with asbestos dust during at least the entirety of the period of the Relevant Policy.

It has been long-established that the risk insured by the “products hazard” and the “completed operations hazard” is “the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself.” Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). By contrast, “[w]here an insured begins an operation and the evidence shows it is still in progress” when an injury or damage occurs, the applicable hazard is “premises-operations” and not “completed operations.” *Id.* at 434–35.

Despite Penn National’s characterization of Dean Henderson’s article as “evidence” upon which the Receiver relied, (App. Br., p. 4),⁸ the article is actually the seminal academic exploration of the “products hazard” and the “completed operations hazard” in liability insurance policies. A Westlaw search reveals that courts have readily accepted Henderson’s formulation, *citing it more than 150 times*. For example, in *Boyer Metal Fab, Inc. v. Maryland Casualty Co.*, 750 P.2d 1195, 1197 n.2 (Or. Ct. App. 1988), the Oregon Court of Appeals cited Dean Henderson’s article for the proposition that “the purpose of the product hazard and completed operations hazard coverage is

⁸ The Receiver submitted Henderson’s article as an exhibit in its hard copy, non-electronic, form. (R. pp. 129–161).

to insure against the risk that the product or work, if defective, *will cause bodily injury or damage to property of others after it leaves the insured's hands.*" (emphasis added); *see also W. Emp'rs Ins. Co. v. Arciero & Sons, Inc.*, 146 Cal. App. 3d 1027, 1031 (Ct. App. 1983) (quoting Henderson directly).

Another case that looked substantially to Dean Henderson's formulation is *Friestad v. Travelers Indemnity Co.*, 393 A.2d 1212 (Pa. Super. Ct. 1978), which the Receiver cited for its *legal discussion*, and not because the facts of that case are factually analogous to this one. There, the Superior Court looked to Henderson's article in its discussion of the basic "timing" issues underlying the "products hazard" and "completed operations hazard" in liability insurance policies:

Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, *but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.*

Id. at 1215 n.5 (emphases added). It is not surprising, then, that other courts have noted that the "products hazard" applies only when the injury *is caused by a defective product placed into the stream of commerce*, or when injury or damage is *caused by the insured's completed work*. *See B & R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985); *see also CPS Chemical Co. v. Cont'l Ins. Co.*, 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *reversed on other grounds by* 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("Commentators are in *complete agreement* that [the completed operations hazard] refers to accidents *caused by defective workmanship which arise after completion of work* by the insured on construction or service contracts." (emphases added)).

Penn National's attempt to embrace the Receiver's cited authorities as supporting application of the policy exclusions to the *Rollins* settlement is unavailing. At issue is the scope and extent of the "products hazard" and "completed operations hazard" in liability insurance policies and whether these exclusions bar coverage for the *Rollins* settlement, and not whether *the results* reached in factually different litigation are relevant here. *Friestad* and *B & R Farm Services* elucidate issues of insurance contract interpretation relevant to this matter, as does another case that Penn National curiously seeks to embrace, *Heyward v. American Casualty Co. of Reading, Pa.*, 129 F.Supp. 4 (E.D.S.C. 1955). In *Heyward*, the insured contracted to perform the entire plumbing and heating portion of a new housing project in Aiken, South Carolina. Prior to the completion of the project, however, individual housing units in the project became usable for occupancy. An explosion in one of the occupied units caused injury before the completion of the project.

The insured was sued for causing injury and damage. Its policy contained an earlier version of an exclusion for products and completed operations called "Products Liability." As respects products, it excluded coverage for liability arising out of

goods or products manufactured, sold, handled or distributed by the Insured, other than equipment rented to or located for use of others but not sold, if the accident or occurrence takes place after the Insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the Insured.

Id. at 7. As respects operations, it excluded coverage if "the accident or occurrence takes place after such operations have been completed or abandoned at the place of accident or occurrence thereof and away from premises owned, rented or controlled by the Insured." *Id.*

The insurer denied coverage based on the exclusion for “Products Liability.” The district court disagreed with this assertion. It first questioned whether the policy’s exclusion for “products” even applied to injury and damage arising out of insured’s plumbing and heating work:

I must conclude that a plumbing and heating contractor’s comprehensive liability coverage is not covered under the heading ‘Products’, and that the policy here involved should be construed to cover the liability for accidents arising from plaintiff’s operations whether the accident happened before or after the housing project was completed.

Id. at 9.

The district court then analyzed the timing of the plaintiff’s injury in connection with the contracting work the insured undertook at the project. It held that the insurer was not entitled to summary judgment because “the entire work that [the insured] had agreed to perform had been completed.” *Id.* at 10. Although the insured might have completed its work on the unit where the explosion occurred, “[t]here is no showing, however, *that the entire work* which plaintiff had agreed to do had been completed.” *Id.* (emphasis added); *see also Szczeklik v. Markel Intern. Ins. Co., Ltd.*, 942 F. Supp. 2d 1254, 1265 (M.D. Fla. 2013) (finding the “products hazard” exclusion did not apply because “the product in this case (*i.e.*, the rim) was not a ‘completed’ product ready for resale by Neubert, but rather was a component of a final product akin to a work in progress”).

Here, Rollins’ injury did not occur after Covil “relinquished control” of the Bowater job site. Covil supplied and installed all insulation on required piping systems at Bowater between March 11, 1986, and January 25, 1987, during the period of the Relevant Policy. Rollins’ stepfather, Ashworth, did pipe, pump, and boiler work at Bowater *while* Covil installed insulation at the site. Asbestos dust on Ashworth’s clothing, in turn, injuriously exposed Rollins to asbestos during the period of the Relevant Policy.

It is therefore indisputable from underlying case testimony that Ashworth did pipe, pump, and boiler work at Bowater *while* Covil was installing “all insulation on required piping systems” at the site in 1986 and 1987. Ashworth thus was exposed to asbestos *during* the period of the Penn National coverage and *before* Covil completed its work at Bowater. Covil’s completed work, or its “completed operations,” *did not cause* Ashworth’s mesothelioma. Covil’s products released into the stream of commerce *did not cause* Ashworth’s mesothelioma. By the same token, Rollins incurred “take home” exposure to asbestos via Ashworth *before* Covil completed its piping insulation work at Bowater under Contract No. 4192-F-64, and, therefore, also *before* Covil relinquished possession over the products it installed as part of the contract.

The case law and commentary is clear that the “products hazard” applies *only* when injury is caused by a “completed” product placed into the stream of commerce,⁹ or by a product previously installed at a job site *and* the injury occurs *after* the insured “has relinquished control of [the] jobsite.”¹⁰ Injuries caused by “un-completed” products, injuries caused by “component” products, or injuries caused by products installed as part of a continuing installation or construction project are *not* within the “products hazard.” It is only *after* the insured “has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.” *Friestad*, 393 A.2d at 1215 n.5. There is no evidence that Covil had relinquished control over the Bowater jobsite when Ashworth was exposed to asbestos for which Covil was allegedly responsible. In fact, all of the evidence is to the contrary. Penn National thus could not, and still cannot, establish the applicability of either its “products hazard” or “completed operations hazard” exclusions to bar coverage for the *Rollins* settlement. Again, it is well-established in South

⁹ See, e.g., *B & R Farm Servs., Inc.*, 483 N.E.2d at 1077; *Szczeklik*, 942 F. Supp. 2d at 1265.

¹⁰ See, e.g., *Friestad*, 393 A.2d at 1215 n.5.

Carolina that “[p]olicies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer.” *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010).

Penn National’s reliance on the insurers’ oft-cited Fourth Circuit decision articulating an “*Erie* guess”¹¹ on the state of Maryland law—*In re The Wallace & Gale Company*, 385 F.3d 820 (4th Cir. 2004)—is not helpful here. The *Wallace & Gale* line of decisions, arising from the bankruptcy and district courts in Maryland, involve the applicability of aggregate limits of liability when multiple successive liability insurance policies cover a claim for damages for bodily injury arising from the insured’s installation activities. The issue in that particular situation is whether aggregate limits of liability apply under policies *covering the claimant’s bodily injury* but which were issued after the cessation of work activities that caused the claimant’s injury attributed to the insured.

The *Wallace & Gale* line of Maryland-related decisions do not involve application of policy exclusions, under which the insurer always has the burden of proof. Nor do the decisions hold, as Penn National asserts in parenthetical commentary, that “exposure to asbestos that occurred both during and after an insured’s operations were included within the completed operations hazard.” (App. Br., p.17). Penn National’s facile summary is shorn of context:

That argument, however, on its face is far broader than the district court's decision we have quoted just above from 275 B.R. at 241. For example, a claimant’s initial exposure which occurred while *Wallace & Gale* was still conducting operations was not subject to any aggregate limit for policies in effect at that time even if the exposure extended beyond the operations of *Wallace & Gale*. Also,

¹¹ See *Highlands Ins. Co. v. Hobbs Grp., LLC*, 373 F.3d 347, 351 (3d Cir. 2004) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and explaining, “a federal court must apply the substantive law of the forum state—and where the state's highest court has not spoken definitively on a particular issue, the federal court must make an informed prediction[(or *Erie* guess)] as to how the highest state court would decide the issue”).

if exposure which began during operations continued after operations were completed, *the aggregate limits of policies which came into effect after operations would apply*, but, as stated, *the aggregate limits would not apply to those policies in effect at the time of the exposure during Wallace & Gale's operations.*

Id. at 834 (emphases added).

The issue in the Maryland cases concerns the “inception” dates of each of the many policies covering the claimant’s injuries. If a policy covering a claimant’s injury “came into effect after operations” were completed, the aggregate limits of liability in the policy will apply to the claim. If, however, a claimant’s “initial exposure” occurred while the insured was conducting operations, the claim would be covered without an aggregate limit of liability.

The Receiver has asserted successfully in other cases that the *Wallace & Gale* “Erie guess” line of decisions from Maryland is not relevant in South Carolina for many reasons. Here, these decisions are also distinguishable because Penn National relies on policy exclusions under which it alone has the burden of proof. Moreover, the Receiver did not seek a ruling of partial summary judgment under the *second* Penn National policy, which “came into effect” after Covil’s completed its work at Bowater. The Relevant Policy had a period of March 31, 1986, to March 31, 1987. Covil supplied and installed all insulation on required piping systems at Bowater between March 11, 1986, and January 25, 1987, during the period of the Relevant Policy.

To the extent that the *Wallace & Gale* line of cases have any potential application here, they do not cause the *Rollins* settlement to fall within either the “products hazard” or the “completed operations hazard” in the Relevant Policy. Covil’s “operations” during the period of the Relevant Policy caused injury to Ashworth. It then caused injury to Rollins before Covil completed its work at Bowater. Penn National’s position that Chief Justice Toal erred in holding

that it could not sustain its burden of showing the applicability of its policy exclusions lacks merit. The decision should be affirmed.¹²

C. Chief Justice Toal Correctly Disposed Of Penn National’s Notice Defense

The circuit court did not err in finding Penn National failed to meet its burden of proving the applicability of a “late notice” defense. First, Penn National has failed to show it received untimely notice. Second, even if it did receive untimely notice, Penn National has failed to show it was substantially prejudiced by any late notice.

“Although exclusions in an insurance policy are construed against the insurer, . . . insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition.” *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535–36, 514 S.E.2d 327, 330 (1999). Notice clauses are an approved means for an insurer to limit its liability. The Receiver is aware of the fact that “[c]ommon sense dictates that the insurer must have notice of a claim or lawsuit in order to properly investigate and defend against it, and these clauses ensure that the insurer receives notice by imposing this obligation on the insured.” *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019). Here, however, the Receiver provided ample notice to Penn National of the *Rollins* action. Penn National’s argument to the contrary is without merit.

The burden of proof as to whether an insured failed to comply with the notice provision in an insurance contract rests entirely with the insurer. *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994). Even if an insurer does not receive timely notice, the insurer

¹² *At most*, Penn National would have an issue of allocation between covered and non-covered portions of the \$50,000 *Rollins* loss. The Receiver, however, did not seek a summary judgment ruling on the amount of money Penn National owes for *Rollins* and allocation is therefore not at issue in this appeal.

must also show substantial prejudice to the insurer's rights. *Id.* at 12, 446 S.E.2d at 421. "A vast majority of jurisdictions now follow the modern trend and have adopted the notice-prejudice rule." *Century Sur. Co. v. Hipner, LLC*, 377 P.3d 784, 788 (Wyo. 2016). "The function of the notice requirements is simply to prevent the insurer from being prejudiced, not to provide a technical escape hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract" *State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of La.*, 56 So. 3d 1236, 1246 (La. Ct. App. 2011). Here, the circuit court rightly saw through Penn National's attempted "escape hatch" argument. Respectfully, this Court, like the circuit court, should reject Penn National's argument.

Reduced to its essence, Penn National's "late notice" defense is that it should be relieved from liability for the *Rollins* settlement because it received untimely notice of a lawsuit *that settled in connection with a mediation that its representatives prepared for and attended*. Chief Justice Toal correctly noted in her order granting partial summary judgment that Penn National is not actually pursuing a "late notice" defense. (R. p. 10). Penn National had sufficient notice of the court-ordered mediation for its representative to attend, with an apparent "willingness to contribute toward settlement." (R. p. 10, 169). It then decided not to contribute to the settlement in disregard of the evidence indicating coverage was necessary under the Relevant Policy. As Chief Justice Toal also noted in the Order, "Penn National's deliberate choice to decline to settle the *Rollins* action within its policy limit is not equivalent to the late notice defenses established in the cases it cites."¹³ (R. p. 10).

¹³ In its brief, Penn National incorrectly claims "Covil does not dispute that it failed to provide timely notice to Penn National." (App. Br., p. 27). Covil and the Receiver clearly do dispute Penn National's argument.

Penn National's "late notice" defense lacks merit for other reasons, too. Its dissertation on the decision in *Prior v. South Carolina Medical Malpractice Liability Insurance Joint Underwriting Association*, 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991), is not helpful because the decision in that case did not turn on whether notice was timely. Instead, the insured's claim was not covered by the insurance policy, and as a result, the insurer "had no duty to defend the claim." *Id.* at 249, 407 S.E.2d at 657. Here, Penn National chose not to contribute to the *Rollins* settlement because it erroneously believed that coverage for the *Rollins* settlement did not exist under the Relevant Policy.

Penn National's other authorities are equally distinguishable. In the unpublished decision of *Greenwood Development Corp. v. Cincinnati Insurance Co.*, 2012 U.S. Dist LEXIS 204018, 2012 WL 12981762, at *1 (D.S.C. 2012), the insurer received notice after mediation occurred, and less than a week before trial. As a result, the court noted that the insurer was unable "to analyze coverage" or "participate in . . . settlement negotiations." *Id.* at *11. Penn National, however, analyzed coverage before attending the *Rollins* mediation and decided not to contribute to the settlement of the case based on policy exclusions. The same goes for *Hatchett v. Nationwide Insurance Co.*, 244 S.C. 425, 137 S.E.2d 608 (1964). There, the insurer showed prejudice because the insured's untimely notice precluded the insurer from trying to negotiate a settlement. *Id.* at 435, 137 S.E.2d at 613. Here, Penn National could have negotiated a settlement at the *Rollins* mediation but chose not to do so based on erroneous coverage defenses.

The evidence in this case establishes Penn National was not provided late notice. However, even if Penn National was given late notice, it cannot show it was substantially prejudiced thereby. Penn National argues it is automatically excused from the substantial prejudice requirement under the facts of this case because the rights of innocent third parties are not at issue. (App. Br., p. 19).

Penn National's argument that it is not required to even show substantial prejudice is unavailing and contrary to the public policy of our State. (App. Br., p. 25); *Jessco, Inc. v. Builders Mut. Ins. Co.*, 472 F. App'x 225, 230 (4th Cir. 2012) ("Under South Carolina law, however, recovery under the Policy is barred only if BMIC proves that it was substantially prejudiced by the late notice."); *Neumayer*, 427 S.C. at 272, 831 S.E.2d at 411 (providing the policy behind the laws concerning notice clauses is not meant to provide a "technical escape-hatch" for the insurer to deny coverage). Nevertheless, contrary to Penn National's assertion, the rights of innocent third parties are plainly implicated. Covil had a valid insurance policy with Penn National and coverage was due. Because of Penn National's refusal to participate in the *Rollins* settlement, the Receiver was forced to use Covil's funds to settle the case. The use of these funds, which should not have been tapped into in the first place, depleted the assets of an already-dissolved corporation attempting to defend numerous lawsuits. Because Covil has less money to defend and satisfy its liabilities to other innocent claimants with valid claims against Covil, the rights of innocent third parties are clearly impacted.

Furthermore, Penn National's claims that it was substantially prejudiced by the Receiver's alleged late notice are entirely without merit. Penn National attended the mediation with the very same materials provided to the other insurers. Penn National's conclusory complaints of substantial prejudice fail to enumerate a single thing it would have done differently. Therefore, Penn National cannot prove substantial prejudice.

The Receiver only seeks from Penn National the settlement amount he incurred in *Rollins*. He incurred this expense after Penn National received notice of the litigation. He incurred this expense in connection with a mediation that Penn National attended. He incurred this expense in connection with a settlement that Penn National could have funded subject to a reservation of

rights on coverage issues. Penn National chose, with open eyes, not to pay the *Rollins* settlement. It has no “late notice” defense. The Court should affirm the order granting partial summary judgment in all respects.

VI. CONCLUSION

Penn National refused to fund the *Rollins* settlement based on two policy exclusions and a supposed breach by the Receiver of a condition to coverage. Penn National had the burden of proof on these three affirmative defenses. All of the documentation relevant to the two policy exclusions is historical in nature. It, along with relevant deposition testimony, was adduced in the underlying liability actions. It was accessible to Penn National just as it was to the Receiver. Chief Justice Toal held that Penn National could not sustain its burden of proof as to either of the two policy defenses. Thus, Chief Justice Toal properly granted partial summary judgment on the policy exclusions.

Chief Justice Toal also properly granted partial summary judgment on Penn National’s “late notice” defense because, among other reasons, Penn National attended the mediation session that resulted in the settlement at issue with a willingness to contribute toward settlement. Notice thus was not untimely.

Further, Penn National’s arguments related to discovery, the timing of the Receiver’s motion, and the evidence submitted in support of the Receiver’s motion are not preserved for appellate review. And, even if these arguments are properly before this Court, Chief Justice Toal did not abuse her discretion in finding further discovery was not necessary in the case prior to a determination of the Receiver’s motion for partial summary judgment.

The Court should therefore affirm the order of partial summary judgment in all respects.

(Signature page follows)

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February 24, 2021.

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-40-01226

Appellate Case No. 2020-001239

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company,

Appellant.

PROOF OF SERVICE

I certify that a true copy of Respondent's Final Brief in this case has been served on the following, this 24th day of February, 2021, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

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February 24, 2021

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Appellate Case No. 2020-001239

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TABLE OF CONTENTS

INTRODUCTION - 1 -

ARGUMENT AND ANALYSIS - 2 -

I. The Timing and Propriety Of The Granting Of Summary Judgment In Favor Of Covil
Is Properly Before This Court..... - 2 -

 A. The Fact That The Granting Of Summary Judgment Would Be Premature
 Was Raised Before The Trial Court, And Therefore Is Properly Preserved
 For Review..... - 3 -

 B. The Fact That The Granting Of Summary Judgment Would Be Inappropriate
 Based On The Record Was Raised Before The Trial Court, And Therefore Is
 Properly Preserved For Review. - 7 -

II. Covil Has Not Shown That It Actually Complied With The Notice Provisions In The
Penn National Policies. - 9 -

III. The Products Hazard Exclusion Applies To Bar Coverage For The Rollins Lawsuit
Under the Penn National Policies. - 15 -

CONCLUSION..... - 21 -

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ashworth v. Air & Liquid Systems Corp., et al.</i> , Civil Action No. N17C-04-003 ASB.....	6
<i>Atlantic Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012)	4
<i>Baughman v. American Tel. & Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991)	7
<i>CAMICO Mut. Ins. Co. v. Jackson CPA Firm</i> , 2016 U.S. Dist. LEXIS 1777122 (D.S.C. 2016).....	13
<i>City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund</i> , 382 S.C. 535, 677 S.E.2d 574 (2009)	20
<i>Covil Corp. v. Zurich Am. Ins. Co.</i> , 2020 U.S. Dist. LEXIS 33140 (D.S.C. 2020).....	22
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003)(holding that verified Complaint should not have been considered in ruling on motion for summary judgment because it did not satisfy the affidavit requirements contained in Rule 56(e))	8
<i>Elam v. South Carolina Dep't of Transp.</i> , 361 S.C. 9, 602 S.E.2d 772 (2004)	2
<i>Engineered Prod., Inc. v. Aetna Cas. & Sur. Co.</i> , 295 S.C. 375, 368 S.E.2d 674 (Ct. App. 1988).....	16, 17
<i>Factory Mut. Liab. Ins. Co. v. Kennedy</i> , 256 S.C. 376, 182 S.E.2d 727 (1971)	13
<i>Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC</i> , 761 Fed. Appx. 178 (4th Cir. 2019).....	10, 13
<i>Froneberger v. Smith</i> , 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013).....	7
<i>Goldston v. State Farm Mut. Auto. Ins. Co.</i> , 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004).....	21
<i>Greenwood Dev. Corp. v. Cincinnati Ins. Co.</i> , 2012 U.S. Dist. LEXIS 204018 (D.S.C. 2012).....	13

<i>Hatchett v. Nationwide Mut. Ins. Co.</i> , 244 S.C. 425, 137 S.E.2d 608 (1964)	9
<i>Jessco, Inc. v. Builders Mut. Ins. Co.</i> , 472 Fed. Appx. 225 (4th Cir. 2012).....	13
<i>Lee v. Metropolitan Life Ins. Co.</i> , 180 S.C. 475, 186 S.E. 376 (1936)	11
<i>Merit Ins. Co. v. Koza</i> , 274 S.C. 362, 264 S.E.2d 146 (1980)	10
<i>Neumayer v. Philadelphia Indem. Ins. Co.</i> , 427 S.C. 261, 831 S.E.2d 406 (2019)	11, 13
<i>Ohio Cas. Ins. Co. v. Scott & Jones</i> , 2006 U.S. Dist. LEXIS 113027 (D.S.C. 2006).....	20
<i>Oncology & Hematology Assocs. v. South Carolina Dep’t of Health & Envtl. Control</i> , 387 S.C. 380, 692 S.E.2d 920 (2010)	5
<i>Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass’n</i> , 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991).....	9, 12, 13
<i>Robertson v. First Union Nat’l Bank</i> , 350 S.C. 339, 565 S.E.2d S.E.2d 309, 316 (Ct. App. 2002), <i>cert. denied</i> , 357 S.C. 191, 592 S.E.2d 625 (2004)	8
<i>Schulmeyer v. State Farm Fire & Cas. Co.</i> , 353 S.C. 491, 579 S.E.2d 132 (2003)	17
<i>South Carolina Dep’t of Transp. v. Thompson</i> , 357 S.C. 101, 590 S.E.2d 511 (Ct. App. 2003).....	10
<i>Tucker v. State Farm Mut. Auto. Ins. Co.</i> , 232 S.C. 615, 103 S.E.2d 272 (1958)	13
<i>Vermont Mut. Ins. Co. v. Singleton</i> , 316 S.C. 5, 446 S.E.2d 417 (1994)	13
<i>Wright v. UNUM Life Ins. Co.</i> , 2001 U.S. Dist. LEXIS 26063 (D.S.C. 2001).....	10, 11
Statutes	
S.C. Code Ann. §15-73-10.....	18
S.C. Code Ann. §36-2-314.....	18

Other Authorities

Roger C. Henderson, *Insurance Protection for Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415 (1971)17

Rule 30 SCRCP.....5

Rule 30(b)(6), SCRCP5

Rule 33, SCRCP.....5

Rule 33(a), SCRCP5

Rule 34, SCRCP.....5

Rule 34(b), SCRCP.....5

Rule 37(a)(2), SCRCP5

Rule 37(b), SCRCP.....5

Rule 56(c), SCRCP8

INTRODUCTION

The present case is nothing more than a blatant attempt by Plaintiff Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas (“Covil”) to bully Defendant Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) into paying money to settle an underlying asbestos personal injury case (the “Rollins Lawsuit”) for which there clearly is no coverage under the policies of insurance issued by Penn National (the “Penn National Policies”). In this case, it is undisputed that Covil failed to provide timely notice to Penn National of the Rollins Lawsuit, waiting until the eleventh hour to do so. Notice of the Rollins Lawsuit was finally provided to Penn National nine (9) months after Covil was served with the Rollins Lawsuit, two (2) months prior to trial, and just twelve (12) business days before the scheduled mediation. When Penn National was unable to contribute the amount of money sought by Covil at the mediation due to Covil’s delayed notice to Penn National which deprived Penn National of the time and information it needed to evaluate both Covil’s potential liability in the Rollins Lawsuit and also Penn National’s potential coverage for that liability, Covil settled the Rollins Lawsuit at the mediation and then just three (3) days after the mediation, filed the present action against Penn National for coverage.

Determined to avoid discovery, Covil then filed a motion for partial summary judgment on the merits of the coverage issue just twenty-three (23) days after Penn National had filed its Motion to Transfer Venue and Answer. As clearly shown from the fact that Covil moved for summary judgment a mere three (3) months after it initially gave notice of the Rollins Lawsuit to Penn National, Covil has raced to obtain a coverage ruling in this case.

However, in its rush to judgment, Covil’s method was fatally flawed. Covil presented no competent evidence to the trial court to support entry of summary judgment in its favor in this

case. In addition, Covil's haste prevented the parties from engaging in any discovery, a tactic clearly frowned upon by the appellate courts of this State.

On appeal and in support of the trial court's order granting summary judgment in its favor, Covil does not: (1) cite to any allegations in the Rollins Lawsuit that implicate coverage under the Penn National Policies; or (2) cite to any actual language in the Penn National Policies under which coverage is provided. Instead, Covil hides behind meritless preservation arguments and its baseless contention that, in clear ignorance of the lack of any opportunity to actually conduct discovery in this case, Penn National failed to meet its burden of proof regarding the application of the policy exclusions.

A measured yet straightforward review of the Rollins Lawsuit and the terms of the Penn National Policies shows that Covil is not entitled to coverage under the Penn National Policies for the Rollins Lawsuit. First, Covil breached the conditions of the Penn National Policies when it failed to provide timely notice of the Rollins Lawsuit to Penn National. Second, the Rollins Lawsuit sought liability against Covil based on products liability claims – claims which are specifically excluded from coverage under the Penn National Policies due to the products hazard exclusion in the policies. Accordingly, Penn National respectfully requests that this Court vacate the entry of summary judgment in favor of Covil and remand this case with instructions to enter summary judgment in Penn National's favor, or alternatively, to allow the parties to engage in discovery.

ARGUMENT AND ANALYSIS

I. The Timing and Propriety Of The Granting Of Summary Judgment In Favor Of Covil Is Properly Before This Court.

It is axiomatic that issues are preserved for appellate review when they are raised to and ruled on by the lower court. *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 23, 602

S.E.2d 772, 779-80 (2004). In this case, the propriety of granting summary judgment – not only because of the failure of Penn National to have a full and fair opportunity to conduct discovery but also the unsupported record before the court – was raised by Penn National in its opposition to Covil’s Motion for Partial Summary Judgment. The trial court then ruled on Penn National’s objections and nevertheless granted partial summary judgment in favor of Covil. These issues are properly before this Court for its review.

A. *The Fact That The Granting Of Summary Judgment Would Be Premature Was Raised Before The Trial Court, And Therefore Is Properly Preserved For Review.*

In its Memorandum of Law in Opposition to Covil’s Motion for Partial Summary Judgment, Penn National specifically argued that summary judgment should not be granted because it was premature given that Penn National did not have a full and fair opportunity to complete discovery in this case. [Penn National’s Memo in Opposition, pp.22-23 (RI pp. 183-184)] In its Order Granting Covil Corporation’s Motion for Partial Summary Judgment, the trial court found that “Penn National had access to all available information related to the Rollins action, ...” [Order dated 8/13/2020, p.9 (RI p. 10)] In fact, in its Order denying Penn National’s Motion for Reconsideration, based in part on the fact that the order granting partial summary judgment was premature because no discovery had been completed, the trial court held that “the court has already ruled on the arguments Penn National raises in its Motion.” [Order dated 9/21/2020, p.3 (RI p. 15)]

In subparagraph 3 under this holding, the court specifically addressed that summary judgment was not premature, and found that it had ruled on this argument in its previous order:

Penn National complains that summary judgment is premature because it did not have the opportunity to engage in discovery. Penn National made this exact argument in its Opposition. The Court found, “It had access to

all of the same materials as the insurers that elected to resolve the Rollins action at mediation.” Order [dated 8/13/2020] at 9.

[Order dated 9/21/2020, p.4 (RI p.16)] Clearly, Penn National raised the issue of whether the summary judgment motion was premature and the trial court ruled on that issue in its Order Granting Partial Summary Judgment. Penn National’s appeal of the Order Granting Partial Summary Judgment places this issue squarely before this Court for its review. See, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 286 (2012)(reversing Court of Appeals’ declination to review issue on the grounds that the issue was in fact raised and ruled on by the lower court).

In its Brief, Covil argues that any discovery in the present case would have been unavailing and therefore was unnecessary. (Respondent’s Brief, pp.13-16) Because the coverage issue in this case is based on the pleadings and discovery in the Rollins Lawsuit, Covil argues that any discovery in the present action was unwarranted. Covil’s argument is wholly without merit. First, there is no evidence that Penn National received all the pleadings and discovery in the Rollins Lawsuit at any time. Covil did not attach any documents to its motion for partial summary judgment indicating that it provided a complete copy of the discovery and pleadings in the Rollins Lawsuit to Penn National. On the other hand, Penn National attached documents to its Opposition to Covil’s Motion for Partial Summary Judgment showing that it only received a copy of the Complaint filed in the Rollins Lawsuit. [Penn National’s Memo in Opposition, Exh. 10 (RI p. 412-413)] Covil apparently indicated that Penn National could receive copies of the information obtained by its defense counsel in the Rollins Lawsuit if Penn National would agree to pay for the defense costs incurred. [*Id.*, Exh. 11 (RI pp. 415-416)] Penn National requested copies of the discovery and pleadings in the Rollins Lawsuit. [*Id.*, Exh. 12 (RI p. 418-421)]

However, there is no verification that a complete copy of the discovery and pleadings in the Rollins Lawsuit was actually provided to Penn National.

Furthermore, Penn National is entitled to the production of information and documents in the present case under the discovery rules of the Rules of Civil Procedure. Specifically, the Rules of Civil Procedure require that information and documents provided to a party be verified and be complete. See, Rule 33(a), SCRCPP (“Each interrogatory shall be answered separately and fully in writing under oath ...”); Rule 34(b), SCRCPP (“The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested ...”). Under the Rules of Civil Procedure, failure to provide information or complete production of requested documents subjects the party to a motion to compel and sanctions. See, Rule 37(a)(2), SCRCPP (“If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovery party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.”); Rule 37(b), SCRCPP. Without the safeguards provided in the Rules of Civil Procedure, Penn National cannot be assured that it has all the information and documents from the Rollins Lawsuit. See also, *Oncology & Hematology Assocs. v. South Carolina Dep’t of Health & Env’tl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010)(“discovery serves an important tool in the truth-seeking function our legal system”).

Furthermore, and not insignificantly, the portions of transcripts from deposition testimony that Covil attached to its Motion for Partial Summary Judgment were from depositions

that were **not** taken in the Rollins Lawsuit. See, [Covil's Motion for Partial Summary Judgment, Exhs. E¹ & F² (RI p. 113, 117)]. Therefore, even if Penn National was able to informally obtain copies of all the discovery and pleadings in the Rollins Lawsuit, which there is no evidence that it did, it is obvious that this information by itself would not have provided Penn National with all the relevant information and documents regarding the coverage issues – clearly, it would not have provided the actual evidence on which Covil moved for partial summary judgment.

Covil also takes the position that by arguing that summary judgment was premature, Penn National only wants to engage in a fishing expedition and cannot show what evidence would have been developed in discovery in the present case. [Respondent's Brief, p.15] That is simply not true. In its Brief, Penn National detailed exactly what discovery was needed in the present case, specifically evidence regarding what notice was provided by Covil to Penn National and its other insurers regarding the Rollins Lawsuit and when; the method, manner and extent of Mr. Rollins' exposure to asbestos; the role that Covil's products played in the asbestos exposure suffered by Mr. Rollins; and whether any of that exposure occurred during the Penn National Policies. See, Penn National's Brief, pp.16-19.

The significance of this need for discovery in the present case is made more apparent because the trial court granted summary judgment in favor of Covil on the grounds that Penn National did not meet its burden of proving the applicability of policy exclusions. By immediately filing its motion for partial summary judgment, Covil sought to prevent Penn National from engaging in discovery regarding the coverage issues, and then argued that Penn

¹ Deposition of Robert Ashworth taken in *Ashworth v. Air & Liquid Systems Corp., et al.*, Civil Action No. N17C-04-003 ASB. (RI p. 113)

² Deposition of David Rollins taken in *Taylor v. Air & Liquid Systems Corp., et al.*, Civil Action No. 2018-CP-40-04940. (RI p. 117)

National had no evidence to support its denial of coverage. The trial court acquiesced in Covil's procedural tactics; this Court should not also condone such antics.

By filing its Motion for Partial Summary Judgment on the coverage issues a mere twenty-three (23) days from Penn National's filing of its Answer, Covil prevented Penn National from the opportunity to develop evidence in discovery. As the Supreme Court has held, a party's development of evidence in a litigated case "should not be precipitously terminated by summary judgment." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 114, 410 S.E.2d 537, 545 (1991). Because Penn National has not had a full and fair opportunity to complete discovery in the present case, the order granting partial summary judgment in favor of Covil should be vacated and this case remanded for discovery.

B. *The Fact That The Granting Of Summary Judgment Would Be Inappropriate Based On The Record Was Raised Before The Trial Court, And Therefore Is Properly Preserved For Review.*

Penn National also raised the issue of whether summary judgment for Covil was properly supported in the lower court. In its Opposition to Covil's Motion for Partial Summary Judgment, Penn National repeatedly argued that, "Covil's Motion for Partial Summary Judgment should be denied based on the record before the Court." [Penn National's Memo in Opposition, p.22 (RI p. 183)] See also, [*Id.* at p.5, n.8 (RI p. 166)] The trial court rejected this argument and ruled in favor of Covil, granting its motion for partial summary judgment. [Order dated 8/13/2020, p.2 (RI p. 3)] On review of an order granting summary judgment, this Court is tasked with a *de novo* review of this decision; specifically whether summary judgment is supported by "the pleadings, depositions, affidavits and discovery on file." See, *Froneberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013). In carrying out this review, the Court is required to review the materials reviewed by the trial court to determine whether:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(c), SCRPC.

In its Brief, Covil does not – indeed cannot – dispute that the order granting summary judgment was not based on the pleadings, depositions, answers to interrogatories and admissions on file. First, although Penn National denied coverage in the pleadings after this action was filed, there is no evidence – and no depositions or discovery of any kind undertaken by the parties prior to the entry of summary judgment in favor of Covil – that Penn National denied coverage for the Rollins Lawsuit prior to the settlement entered into by Covil in such lawsuit. Furthermore, Covil cannot dispute that its exhibits to its Motion for Partial Summary Judgment were not submitted into evidence through use of an affidavit.

In reviewing whether summary judgment was properly granted in favor of Covil, this Court cannot rely on the unsworn and unauthenticated documents attached to Covil’s motion for partial summary judgment. *See, Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)(holding that verified Complaint should not have been considered in ruling on motion for summary judgment because it did not satisfy the affidavit requirements contained in Rule 56(e)); *Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 352, 565 S.E.2d S.E.2d 309, 316 (Ct. App. 2002), *cert. denied*, 357 S.C. 191, 592 S.E.2d 625 (2004)(finding that an unsigned “appraisal review” was not admissible as evidence on summary judgment motion). Accordingly, because there is no competent evidence before this Court to support the trial court’s order, this Court should vacate the order granting partial summary judgment in favor of Covil.

II. Covil Has Not Shown That It Actually Complied With The Notice Provisions In The Penn National Policies.

In its Brief, Covil did not argue that it complied with the notice conditions contained in the Penn National Policies. In truth, Covil cannot make this argument because it did not comply with the policy conditions that required Covil to provide notice to Penn National of the Rollins Lawsuit immediately. Covil admits that the first notice that it provided to Penn National of the Rollins Lawsuit was in January 2020. See, Respondent's Brief, p.6 ("Penn National received notice of the Rollins action in January 2020 ..."). The Rollins Lawsuit was filed on April 5, 2019. [Penn National's Memo in Opposition, Exh.4 (RI p. 237)] The Amended Complaint was served on Covil on April 25, 2019. [*Id.*, Exh. 5 (RI p. 292)] The Receiver entered a special appearance for Covil in the Rollins Lawsuit on May 13, 2019. [*Id.*, Exh. 6 (RI p. 351)] There was a nine month delay between the time when Covil was served with the Rollins Lawsuit and when notice of the Rollins Lawsuit was provided to Penn National. Such an unreasonable delay clearly violates the notice provisions in the Penn National Policies and voids coverage as a matter of law. See, *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655, 657 (Ct. App. 1991)(finding that four (4) month delay constituted untimely notice and barred coverage under policy); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 434-35, 137 S.E.2d 608, 612-13 (1964)(holding that four (4) month delay in providing notice of accident, and six (6) week delay in providing notice of lawsuit violated notice provision in automobile policy and obviated coverage as a matter of law).

Covil cannot show that it provided timely notice to Penn National of the Rollins Lawsuit. Indeed, Covil does not provide any explanation as to why notice of the Rollins Lawsuit was not provided to Penn National for nine (9) months. Instead, Covil merely repeats that Penn National had "ample" notice. (Respondent's Brief, pp. 25-27) However, merely repeating a conclusory

statement does not make it so, and counsel's remarks, by themselves, are not evidence of compliance with policy conditions. See, *South Carolina Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 413 (Ct. App. 2003)("Arguments made by counsel are not evidence.").

Covil repeatedly argues that because a representative of Penn National was in attendance at the mediation of the Rollins Lawsuit, that is sufficient by itself to show as a matter of law that Covil did not breach the notice provisions in the Penn National Policies. (Respondent's Brief, pp. 2, 6, 8, 14, 25-26, 27-28) Covil's arguments are wholly without merit. The insured's compliance, or non-compliance, with policy conditions are based on the insured's actions or inactions, not on the insurer's actions. The focus of this inquiry is solely on the actions taken by the insured. See, *Merit Ins. Co. v. Koza*, 274 S.C. 362, 365-66, 264 S.E.2d 146, 147-48 (1980)(finding that insurer's knowledge of claim from a third-party was not sufficient to fulfill the insured's duty to comply with notice condition); *Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC*, 761 Fed. Appx. 178, 183 (4th Cir. 2019)(under South Carolina law, "even where an insurer has actual knowledge of a potential claim or occurrence triggering coverage under the policy, the insured is not relieved of his contractual obligation to provide the legal papers to the insurer unless the insurer waives that provision.").

Therefore, the determinative issue is when notice was first provided by Covil to Penn National of the Rollins Lawsuit. The undisputed answer is nine (9) months after the Rollins Lawsuit was served on Covil. This ends the inquiry. Covil breached the notice provisions in the Penn National Policies, therefore voiding coverage for the Rollins Lawsuit. Summary judgment should have been granted in favor of Penn National because Covil failed to comply with the notice provisions contained in the Penn National Policies. See, *Wright v. UNUM Life Ins. Co.*,

2001 U.S. Dist. LEXIS 26063, *4 (D.S.C. 2001)(“As a general rule, breach of an insurance policy’s notice clause automatically relieves the insurer of its obligations under the contract, including the payment of proceeds due, and the duty to defend and to indemnify the insured.”).

Covil attempts to muddy the waters by claiming that Penn National cannot show that it was prejudiced by the late notice. However, South Carolina law is clear: where the rights of innocent third-parties are not affected, an insured’s failure to give timely notice of the claim voids all coverage for that claim without any showing of prejudice.

No rule of law is more firmly established in this jurisdiction than that one suing on a policy of insurance, where the notice required by the policy is not timely given, cannot recover. And the Court has gone so far as to hold that the failure to give the required notice in the allotted time is fatal to the right of recovery, even if it be shown that the insurance company has suffered no harm by the delay.

Lee v. Metropolitan Life Ins. Co., 180 S.C. 475, 486-87, 186 S.E. 376, 381 (1936). It is only where rights of innocent third-parties are at issue that an insurer must show prejudice before the failure to comply with a notice provision will void coverage.

Courts eventually recognized the potential inequities in permitting an insurer to avoid coverage to an innocent third party merely because the at-fault party – the insured – did not inform its insurer or a lawsuit. Accordingly, many jurisdictions, including South Carolina, judicially adopted a notice-prejudice rule, whereby the insurer had the burden to show that it was substantially prejudiced by the failure of its insured to comply with the notice and cooperation provisions.

Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019).

However, where the insured has paid its obligation to the innocent third-party, such as in the present case, the insurance company does not have to show prejudice. It merely needs to show that the insured failed to comply with the notice provisions of its policy.

[The insured] argues that [the insurer] must show that it was substantially prejudiced by the delay in order to deny coverage. The cases upon which [the insured] relies, however, [involve] innocent third-parties. Here there

is no innocent third-party beneficiary. The Patient has been paid her judgment. The failure to give the required notice in the allotted time is fatal to the right of recovery, even if it be shown that the insurance company has suffered no harm by the delay. [The insured] failed to notify [the insurer] in a timely manner, thus violating the insurance policy. This failure justified [the insurer's] refusal to defend and deny coverage.

Prior, 305 S.C. at 250, 407 S.E.2d at 657.³

In the present case, it is undisputed that the full settlement has been paid in the Rollins Lawsuit. Covil is merely seeking reimbursement of a portion of that settlement from Penn National. [Complaint, ¶13 (RI p. 21)]; (Respondent's Brief, p.6-7, 27) Here, there is no innocent third-party because the plaintiff in the Rollins Lawsuit has been paid his settlement. Because the rights of an innocent third-party is not at issue, Covil's failure to provide timely notice of the Rollins Lawsuit to Penn National violated the Penn National Policies and justifies the denial of coverage.

Covil's attempts to distinguish the *Prior* case is unavailing. In *Prior*, this Court clearly held that the failure to comply with the notice provisions contained in the policy, by itself, voided coverage under the policy. See, *Prior*, 305 S.C. at 249, 407 S.E.2d at 657 ("Even if the Patient's claim had arisen from professional services, JUA had no duty to defend because *Prior* failed to timely notify JUA.") Covil's attempt to distinguish *Prior* because "that case did not turn on whether notice was timely," (Respondent's Brief, p.26) is simply not true.

In a feeble attempt to show that prejudice must be shown prior to the avoidance of coverage in this case, Covil argues that "the rights of innocent third parties are plainly

³ Covil argues that late notice should not be used as an "escape hatch" to avoid coverage in the absence of any prejudice to the insurer. (Respondent's Brief, p.25) Tellingly, to support its argument that prejudice is required to be shown in every circumstance, Covil cites to cases from other jurisdictions, specifically Wyoming and Louisiana. However, this is not the law in South Carolina. In South Carolina, where the rights of innocent third-parties are not at issue, because their claims have been fully paid, an insurer does not have to show prejudice to deny coverage when the insured failed to comply with policy conditions to provide timely notice.

implicated.” (Respondent’s Brief, p.27) Covil argues that because it was forced to use its own funds to satisfy the settlement it agreed to pay in the Rollins Lawsuit, Covil now “has less money to defend and satisfy its liabilities to other innocent claimants.” (*Id.*) However, potential future claimants are not the “innocent third-parties” to whom reference is made in the cases requiring the showing of prejudice prior to the voidance of coverage due to late notice. In every case where prejudice was required to be shown before an insurer could deny coverage for failure to comply with its policy’s notice provisions, the innocent third-party was the actual claimant whose claim against the insured was being denied. See, e.g., *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 422 (1994)(insurer must show that delay “engendered substantial prejudice to Vermont’s ability to investigate or defend against the Singleton’s claim.”). In accord, *Neumayer*, 427 S.C. at 272-73, 831 S.E.2d at 411-12; *Factory Mut. Liab. Ins. Co. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729-30 (1971); *Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 623-24, 103 S.E.2d 272, 277 (1958); *Founders*, 761 Fed. Appx. at 183-84; *Jessco, Inc. v. Builders Mut. Ins. Co.*, 472 Fed. Appx. 225, 230 (4th Cir. 2012); *CAMICO Mut. Ins. Co. v. Jackson CPA Firm*, 2016 U.S. Dist. LEXIS 1777122, *33-37 (D.S.C. 2016); *Greenwood Dev. Corp. v. Cincinnati Ins. Co.*, 2012 U.S. Dist. LEXIS 204018, *29 (D.S.C. 2012). See also, *Prior*, 305 S.C. at 250, 407 S.E.2d at 657 (because the judgment against the insured has been paid, no rights of innocent third-parties were at issue). Covil’s argument that Penn National must show prejudice because the rights of potential future claimants may be implicated is simply not the law in South Carolina.

Lastly, Penn National’s presence at the mediation of the Rollins Lawsuit does not, as a matter of law, show that Penn National received timely notice of the Rollins Lawsuit. First, it is clear that Justice Toal has sanctioned Covil’s other insurance carriers when they have failed to

come to scheduled mediations. See, [Order dated 1/8/2020, pp.1-2 (RII pp. 532-533)]

Furthermore, Covil's Receiver, Mr. Protopapas, when he first notified Penn National about the mediation scheduled in the Rollins Lawsuit, threatened such sanctions against Penn National if Penn National failed to come to the mediation held in the Rollins Lawsuit:

The trial judge for this matter requires that insurance companies attend mediations with full settlement authority. This requirement is echoed in South Carolina's ADR rules. Judges in South Carolina have sanctioned defendants/insurers that fail to comply with the ADR rules. Attached is an order granting sanctions for failure to participate in a mediation in a non-asbestos case.

[Penn National's Memo in Opposition, Exh.11 (RI pp. 415-416)] Penn National attended the mediation. However, it was unable to pay the amount of money being requested by Covil because it did not have sufficient time or information (due to Covil's failure to provide timely notice) to evaluate Covil's potential liability in the Rollins Lawsuit and Penn National's potential coverage for that liability. See, [*Id.*, Exh. 12 (RI p. 418-421) ("... Penn National is unable to evaluate coverage in lieu of the limited information presently in our possession...")]. Penn National's presence at the mediation of the Rollins Lawsuit has no bearing on whether Covil actually complied with the notice provisions in the Penn National Policies. To hold otherwise would discourage carriers from attending mediations where late notice is an issue.

Covil is required to comply with the conditions in the Penn National Policies, including the condition that it provide notice to Penn National immediately when it has been sued in a lawsuit. The undisputed fact is that Covil failed to provide such notice to Penn National regarding the Rollins Lawsuit. Covil's breach of the policy conditions voids coverage under the policy. Penn National respectfully requests that this Court vacate the grant of partial summary judgment in favor of Covil and enter judgment in favor of Penn National.

III. The Products Hazard Exclusion Applies To Bar Coverage For The Rollins Lawsuit Under the Penn National Policies.

At the trial court, Penn National argued that a comparison between the Amended Complaint filed in the Rollins Lawsuit and the provisions in the Penn National Policies showed that the products hazard exclusion applied to exclude coverage for the Rollins Lawsuit under the Penn National Policies. Specifically, the Rollins Lawsuit only alleged products liability claims against Covil and products liability claims are specifically excluded by the products hazard exclusion. Therefore, summary judgment in favor of Penn National should have been granted based on the products hazard exclusion. Penn National also argued that the completed operations hazard exclusion may also apply, but that discovery was needed to determine the applicability of this exclusion. Therefore, summary judgment in favor of the insured on the completed operations hazard exclusion should be vacated because it was premature.

Without once citing to the actual language of the exclusions at issue, Covil argues in its Brief that the products hazard exclusion does not apply, borrowing language from the completed operations hazard exclusion, to “injuries caused by ‘un-completed’ products, injuries caused by ‘component’ products, or injuries caused by products installed as part of a continuing installation or construction project.” (Respondent’s Brief, pp. 21-22) Of significance, Covil cites to no case law to support this argument.

Covil shies away from citing to either the Penn National Policies or the allegations contained in the Rollins Lawsuit because neither the policies nor the Rollins Lawsuit support the granting of partial summary judgment in Covil’s favor on this issue. A straightforward review of the actual language of the Penn National Policies and the allegations made and claims asserted against Covil in the Rollins Lawsuit shows that the products hazard exclusion clearly excludes coverage for the Rollins Lawsuit.

The Penn National Policies state that “it is agreed that such insurance as is afford [under the Penn National Policies] does not apply to **bodily injury** ... included within the ... **Products Hazard.**” [Penn National’s Memo in Opposition, Exh.13, pp. 30, 68 (RI p. 452; RII p. 491)]

“Products hazard” is specifically defined in the Penn National Policies as:

“**products hazard**” includes **bodily injury** and **property damage** arising out of the named insured’s products or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs away from the premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

[*Id.* at pp. 36, 81 (RI p. 458; RII p. 504)] Nowhere does the policy require that the products hazard exclusion will only apply to “completed” products, and not to “un-completed” products, component parts, or products installed as part of a continuing installation. The sole requirements as stated in the policy language are that the (1) bodily injury occur away from premises owned by or rented to Covil, and (2) physical possession of the product be relinquished by Covil to others. Because the Covil’s liability in the Rollins Lawsuit allegedly arose from “take-home” asbestos exposure, both requirements are aptly met: (1) Mr. Rollins’ injury occurred away from premises owned by or rented to Covil, and (2) physical possession of the product was relinquished by Covil before Mr. Rollins was exposed to the asbestos fibers “taken-home” by his step-father.

Covil avoids this straightforward analysis by conflating the requirements of the products hazard exclusion with the completed operations hazard exclusion, which expressly requires that the “bodily injury” occur “after such operations have been completed ...” [*Id.* (RI p. 458; RII p. 504)], language missing from the definition of “products hazard.” This Covil cannot do. The law in South Carolina is clear: “Exclusions in an insurance policy are to be read independently of each other; they are not to be read cumulatively.” *Engineered Prod., Inc. v. Aetna Cas. & Sur.*

Co., 295 S.C. 375, 378, 368 S.E.2d 674, 675 (Ct. App. 1988). Accordingly, the language of the products hazard exclusion alone is determinative of whether coverage is afforded for the claims asserted against Covil in the Rollins Lawsuit. Because only products liability claims are asserted against Covil in the Rollins Lawsuit, the products hazard exclusion clearly applies to preclude coverage. See, *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (the language contained in the insurance policy alone determines the policy's force and effect).

Covil's ubiquitous citations in its Brief to Roger C. Henderson, *Insurance Protection for Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415 (1971) do not support its argument on appeal. (Respondent's Brief, pp. 1, 17, 18, 19) The quotation cited to by Covil is taken from the section of the 1971 Nebraska Law Review article dedicated to a discussion regarding "Damage to Property Other Than the Product or Work Itself." *Id.* at p. 441 (RI p. 156). The full context of the single sentence oft-cited by Covil is:

The products hazard and completed operations provisions are not intended to cover damage to the insured's products or work project out of which an accident arises. The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damages person bargained.

Id.(RI p. 156)⁴ However, the coverage being sought by Covil is not for its liability for damage to its own product, but for Mr. Rollins' contraction of a disease caused by exposure to its product. Therefore, this section of the Nebraska Law Review article is not relevant.

Another section of the same 1971 Nebraska Law Review article addresses the coverage actually intended to be provided by "products hazard" coverage, which was first introduced in 1966. "It is clear that the new products hazard provision will protect against defective products, breached warranties and misrepresentations." *Id.* at p.426 (RI p. 144). The 1971 Nebraska Law Review article, although having no precedential value, is helpful in understanding what products hazard coverage was intended to cover. The Penn National Policies, however, exclude coverage for bodily injury included within the products hazard. Using the interpretation of the products hazard included in the 1971 Nebraska Law Review article, by including a products hazard exclusion, the Penn National Policies were not intended to provide coverage for bodily injury claims arising from defective products and breached warranties. The Rollins Lawsuit, however, only asserted claims against Covil for products liability. [Penn National's Memo in Opposition, Exh. 5, ¶¶ 85-117, 150-53; First Cause of Action (Products Liability: Negligence), Second Cause of Action (Products Liability: Strict Liability – S.C. Code Ann. §15-73-10), Fifth Cause of Action (Products Liability: Breach of Implied Warranties – S.C. Code Ann. §36-2-314)(RI pp. 330-340, 347)]. Even under the rationale propounded by the 1971 Nebraska Law Review article, the products hazard exclusion in the Penn National Policies would bar coverage for Covil for the claims asserted against it in the Rollins Lawsuit. Summary Judgment was improperly granted

⁴ The 1971 Nebraska Law Review article discusses coverages provided by policies that include products hazard and completed operations hazard coverage. In the Penn National Policies, coverage for the products hazard and completed operations hazard are specifically excluded, not included.

for Covil and should have been entered in favor of Penn National on the coverage issues in this case.

Covil's argument on appeal can be distilled to the following convoluted contentions: Covil was involved in a project in which it installed insulation at the Bowater facility where Mr. Rollins' step-father, Robert Ashworth, worked. During Covil's work at the Bowater facility, Mr. Ashworth was exposed to asbestos. Mr. Ashworth then brought home the asbestos fibers on his clothes and person, therefore exposing Mr. Rollins to "take-home" asbestos. Because Covil's work at the Bowater facility was not "completed" during the 1986-87 Policy, the first Penn National Policy, the products hazard exclusion does not apply. Covil's argument misses the mark.

The issue is coverage for Mr. Rollins' injury, not Mr. Ashworth's injury. Although no discovery was completed and therefore Penn National cannot confirm or deny whether Mr. Rollins' injury was caused by take-home asbestos fibers during the 1986-87 Policy period,⁵ even assuming Covil's unsupported statements to be true, Mr. Rollins was never present at the Bowater facility during any time that Covil was performing work at that facility. Mr. Rollins' only exposure during that time period was to asbestos fibers brought home from the Bowater facility by Mr. Ashworth. As to Mr. Rollins' injury, the injurious exposure clearly occurred away from Covil's premises after Covil relinquished control over its products and the fibers taken home by Mr. Ashworth. By the plain language of the products hazard exclusion contained

⁵ Indeed, in the Complaint filed in the present action, Covil alleged that Mr. Rollins was exposed to both direct asbestos fibers and take-home asbestos fibers resulting from Covil's operations: "(a) at a facility in 1986 and 1988; (b) at Bowater's Rock Hill/Catawba plant; (c) at a Celanese facility as part of an ongoing business relationship; (d) at a Hoechst Celanese facility and Hoechst Fibers facility; and (e) at such other places as the record supports." [Complaint, ¶11 (RI pp. 20-21)] Covil may have settled the Rollins Lawsuit based on exposures that occurred outside of the Penn National Policy periods. Because no discovery was allowed, Penn National was unable to obtain information regard the basis for Covil's actual liability in the Rollins Lawsuit.

in the Penn National Policies, there is no coverage for Covil's alleged liability in the Rollins Lawsuit.

Furthermore, and significantly, Justice Toal, in her order granting partial summary judgment in favor of Covil, specifically found:

Most importantly, Penn National has not proven that any of the materials subject to the 1986 contract contained asbestos. By 1986 asbestos was not found in pipe insulation.

[Order dated 8/13/2020, p.8 (RI p. 9)] Covil did not appeal this finding by Justice Toal.

Therefore, if Covil's liability is not based on products which it brought to the Bowater facility during the 1986-87 Policy period, but is based on products it had previously brought to the Bowater facility, the products hazard exclusion would clearly apply, even under Covil's strained interpretation of the same. See, Ohio Cas. Ins. Co. v. Scott & Jones, 2006 U.S. Dist. LEXIS 113027, *6 (D.S.C. 2006)(finding that the products-completed operations exclusion applied to preclude coverage for the underlying lawsuit which "arises from a product sold by Scott and Jones and, for five years used on premises not owned by Scott and Jones").

On appeal, this Court is tasked with reviewing the plain language in the Penn National Policies to determine whether the allegations made and claims asserted against Covil in the Rollins Lawsuit are covered under that language. *City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 543-44, 677 S.E.2d 574, 578 (2009). It is clear that in the Rollins Lawsuit, Covil was being sued as a "Product Defendant." [Penn National's Memo in Opposition, Exh.5, ¶25 (RI p. 310)] It is equally clear that the Penn National Policies excluded coverage for injuries arising out of the products hazard. [*Id.*, Exh. 13, pp. 30, 36, 68, 81 (RI pp. 452, 458; RII pp. 491, 504)] A straightforward comparison of the Rollins Lawsuit and the Penn National Policies plainly shows that no coverage is afforded under the Penn National Policies for

the Rollins Lawsuit. Accordingly, the order granting summary judgment for Covil should be vacated and judgment entered in favor of Penn National based on the products hazard exclusion. See, Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 167, 594 S.E.2d 511, 516 (Ct. App. 2004)(in reviewing a summary judgment order regarding coverage, “the appellate court does not have to defer to the trial court’s findings.”).

CONCLUSION

A careful review of the Rollins Lawsuit and the Penn National Policies shows that there is no coverage for Covil’s liability in the Rollins Lawsuit under the Penn National Policies. First, in failing to provide notice to Penn National of the Rollins Lawsuit for nine (9) months, Covil did not comply with the policy conditions requiring that Covil immediately forward copies of lawsuits to Penn National. Second, the damages sought against Covil in the Rollins Lawsuit arose from Covil’s liability as a “Product Defendant” and from products liability claims. This liability is excluded from coverage under the Penn National Policies through the operation of the products hazard exclusion, and potentially the completed operations hazard exclusion. It is clear that further information would have been obtained from depositions, answers to interrogatories and admissions to clearly set forth that coverage under the Penn National Policies was not afforded for Covil’s liabilities in the Rollins Lawsuit.

However, Covil did not wait to allow Penn National a full and fair opportunity to conduct any discovery in this case. Instead, Covil immediately moved for summary judgment on coverage under the Penn National Policies a mere three (3) months after it first gave notice to Penn National of the Rollins Lawsuit, and only twenty-three (23) days after Penn National filed an Answer in the present action. It is obvious that Covil rushed to obtain a coverage determination against Penn National – a coverage determination that it was otherwise enjoined

from obtaining against its other insurers.⁶ In its haste, Covil failed to present any properly supported evidence to support its position. As a result, Justice Toal erroneously granted partial summary judgment in Covil's favor. Covil's race to obtain a favorable coverage ruling should not be sanctioned by this Court.

Penn National respectfully requests that the grant of partial summary judgment in favor of Covil be vacated and that judgment be granted in favor of Penn National, or in the alternative, that the case be remanded to allow Penn National a full and fair opportunity to conduct discovery.

March 1, 2021.



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⁶ See, *Covil Corp. v. Zurich Am. Ins. Co.*, 2020 U.S. Dist. LEXIS 33140, *42-43 (D.S.C. 2020) (“Nonetheless, the Court finds it proper, as both expressly authorized by an Act of Congress and necessary in aid of its jurisdiction, to enjoin the Receiver from further pursuing judicial determinations in underlying state tort suits regarding insurance coverage issues arising from policies issued or allegedly issued to Covil by the Insurers.”).

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

Appellate Case No. 2020-001239

CERTIFICATE OF COUNSEL

I hereby certify that this Final Reply Brief of Appellant complies with Rule 211(b) of the SCACR.

This the 1st day of March, 2021.



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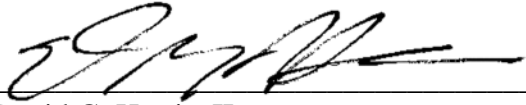
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I hereby certify that a copy of the foregoing Final Reply Brief of Appellant was served on
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The South Carolina Court of Appeals

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Re: Covil Corporation v. Pennsylvania National Mutual Casualty Insurance
Company
Appellate Case No. 2020-001239

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by
Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen

CLERK

cc: The Honorable Jean Hoefler Toal

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

Pennsylvania National Mutual Casualty Insurance
Company, Appellant.

Appellate Case No. 2020-001239

Appeal From Richland County
Jean Hoefler Toal, Acting Circuit Court Judge

Opinion No. 5888
Heard November 2, 2021 – Filed January 5, 2022

AFFIRMED

David G. Harris, II, Brady A. Yntema, and David L.
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Columbia, G. Murrell Smith, Jr., of Smith Robinson
Holler DuBose Morgan, of Sumter, and William Bradley
Nes, of Washington, DC, all for Respondent.

THOMAS, J.: Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas (Covil), filed this action against Pennsylvania National Mutual Casualty Insurance Company (Penn) alleging breach of insurance contracts based on Penn's failure to participate in the settlement of an underlying claim against Covil. Penn appeals the circuit court's order granting partial summary judgment to Covil, arguing the court erred in (1) granting partial summary judgment where Covil's motion was not supported by sworn affidavits and summary judgment was premature; (2) finding Covil's late notice of the underlying claim did not bar coverage; and (3) holding coverage existed despite a products hazard and operations hazard exclusion in the Penn insurance contracts. We affirm.

FACTS

Covil is a corporation that operated between 1954 and 1991. Its operations "included the installation, repair, replacement, removal or disturbance of thermal insulation and other building materials." Covil's operations allegedly exposed persons to asbestos, resulting in claims and lawsuits against it. Penn insured Covil under comprehensive general liability policies between March 1986 and March 1988. One of the lawsuits against Covil, *Rollins v. Air & Liquid Systems Corp.*, alleged David Rollins was exposed to asbestos due to Covil's operations during the covered period. In November of 2018, the circuit court appointed Protopapas to serve as a Receiver for Covil.

Rollins filed his action on April 22, 2019, alleging he suffered from mesothelioma due to, *inter alia*, exposure at home from his stepfather, who worked at the Bowater Paper Mill where Covil did work between 1986 and 1988. Rollins' at home exposure allegedly occurred because his stepfather routinely came home from work covered in asbestos dust between 1980 and 1991.

On January 27, 2020, Covil's Receiver emailed Penn and requested it attend a court-ordered mediation to settle the *Rollins* action. The notice "respectfully request[ed] that the insurers provide and/or continue to provide a defense to Covil Corporation in these asbestos lawsuits. To the extent that a defense will not be provided, please advise so that [Covil] can take the actions necessary" The email indicated a copy of the *Rollins* complaint was attached. On February 3, 2020, Covil tendered the complaint by letter to Penn for defense and indemnity. The letter requested Penn "immediately advise in writing whether [it would] . . . accept Covil's tender of [the] suit and . . . provide a full and complete defense of th[e] matter."

Penn responded by sending a Non-Waiver Agreement to Covil's Receiver signed by Penn but not signed by Covil. Penn alleged it was notified of the pending lawsuit on January 27, 2020, and notified of the mediation on February 13, 2020. The mediation was held on February 25, 2020. Penn admitted it "attended the mediation, and expressed a willingness to contribute some amount to the settlement on behalf of Covil." The Receiver settled Rollins' claim for a confidential amount.

On February 28, 2020, Covil filed this breach of contract action against Penn, alleging that although Penn attended the mediation, it refused to participate in the settlement and refused to contribute \$50,000 to the settlement. Covil sought damages of up to \$74,999.99 for breach of contract, including, *inter alia*, actual damages, consequential damages, attorney's fees, and prejudgment interest. On April 22, 2020, Covil filed a motion for partial summary judgment, arguing Penn wrongly refused to pay the settlement based on exclusions in its policies.

Penn filed a return to the motion for summary judgment, arguing the first notice it had of the lawsuit was the email sent on January 27, 2020. Penn argued Covil was served with the *Rollins* action in April of 2019, Rollins was deposed in February and June of 2019 without any notice to Penn, and the parties engaged in other discovery as required by the Master Asbestos Discovery/Scheduling Order. Penn argued that due to the late notice, it was unable to evaluate the potential coverage prior to the mediation. Penn also argued the "Completed Operations Hazard and Products Hazard" exclusion in the policies barred coverage. In addition, Penn argued summary judgment was premature because it had not had a full and fair opportunity for discovery.

Citing *Re: Operation of the Trial Courts During the Coronavirus Emergency*, South Carolina Supreme Court Order dated April 3, 2020, the trial court found the motions had been fully and comprehensively briefed and a hearing was unnecessary. The court found Penn failed to prove the exclusions it relied on barred coverage. The court also found Penn's late notice defense was "not a valid defense to breach of its insurance contract with Covil." Thus, by order filed August 13, 2020, the court found Penn was "required to indemnify Covil against the settlement of the *Rollins* action."

Penn moved for reconsideration, again arguing it had late notice, its policy exclusion applied, and summary judgment was premature because discovery was not yet completed. The court denied the motion. This appeal followed.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRPC" *Callawassie Island Members Club, Inc. v. Dennis*, 429 S.C. 493, 497, 839 S.E.2d 101, 103 (Ct. App. 2019), *cert. denied*, Jan. 22, 2021. The standard in Rule 56(c) "provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

LAW/ANALYSIS

I. Unsupported and Premature Grant of Summary Judgment

Penn argues the circuit court's grant of summary judgment was improper because it was unsupported and premature. We disagree.

A. Unsupported

For the first time on appeal, Penn argues the circuit court erred in granting summary judgment because Covil's motion for summary judgment was unsupported by failing to include affidavits or authenticated documents. Because this issue was neither raised to nor ruled upon by the circuit court, it is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

B. Premature

Penn also argues the circuit court erred in granting summary judgment because it was premature and denied it a full and fair opportunity to complete discovery. We disagree.

As noted by the circuit court, this action arises out of the *Rollins* asbestos personal injury action against Covil. There is no dispute that the exposure to asbestos alleged in *Rollins* occurred while Covil was performing operations at the Bowater Paper Mill during the period of Penn's policy number 515 5028 537, which was effective March 31, 1986, to March 31, 1987. As stated by the circuit court, "[t]he

principal dispute [in this case] is whether an exclusion in the Penn . . . policy applies to bar coverage for the *Rollins* action." As also found by the circuit court, Penn failed to submit a Rule 56(f) affidavit explaining the discovery it needed to conduct. Penn merely presented an "unsupported . . . and self-serving assertion that it needed additional time for discovery"

In its argument regarding prematurity, Penn relies on *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). In *Baughman*, our supreme court reversed a grant of summary judgment to the defendant as premature. *Id.* at 114, 410 S.E.2d at 545. However, the court in *Baughman* found the plaintiffs had demonstrated a likelihood that further discovery would uncover additional, relevant evidence. *Id.* at 112, 410 S.E.2d at 544. Also, the court found the plaintiffs had not been dilatory in seeking discovery. *Id.* at 113, 410 S.E.2d at 544.

Here, even if Penn was not dilatory for failing to provide evidence it began discovery between the filing of this action in February 2020 and the filing of the court's order granting partial summary judgment in August 2020, it did not demonstrate further discovery would uncover additional, relevant evidence. Instead, it argues the additional discovery was needed to support the issues raised in this appeal: late notice and the applicability of exclusions in the policies. However, as found by the circuit court, Penn failed to submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct. Thus, we find no reversible error. *See* Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); Rule 56(f), SCRCP (applying when it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition"); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 320, 548 S.E.2d 854, 856 (2001) (stating that a party opposing summary judgment is required to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial); *id.* at 321, 548 S.E.2d at 857 (finding Rule 56(f), SCRCP "requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery").

II. Late Notice

Penn argues the circuit court erred in finding Covil's late notice of the *Rollins* lawsuit did not bar coverage for Covil. We disagree.

The policies at issue contained notice provisions as follows:

Insured's Duties in the Event of Occurrence, Claim[,] or Suit.

(a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured . . . shall be given by or for the insured to [Penn] . . . as soon as practicable.

(b) If claim is made or suit is brought against the insured, the insured shall immediately forward to [Penn] every demand, notice, summons[,] or other process received

The circuit court found that although Penn argued a late notice defense, it admitted "a representative of Penn . . . attended the mediation and expressed a willingness to contribute toward [the] settlement on behalf of Covil." The court also found Penn hired the same defense counsel as the other insurers, had access to the same evidence as the other insurers, and deliberately decided not to contribute by "presumably" relying on its policy exclusions. Without citing waiver, the circuit court appears to have concluded Penn waived its rights under the notice provision by attending the mediation. Although Penn sent Covil a Non-Waiver Agreement, it admitted it thereafter attended the mediation and expressed a willingness to contribute toward settlement on behalf of Covil. In addition, Penn did not cite to any discovery it attempted to undertake during the pendency of the action between February 2020, when the action was filed, and August 2020, when the circuit court ruled on Covil's motion for partial summary judgment.

"An insurance contract, like any other contract, may be altered by the contracting parties, and the insurer may, of course, waive any provision for forfeiture therein." *Fender v. New York Life Ins. Co.*, 158 S.C. 331, 340, 155 S.E. 577, 580 (1930) (quoting *Gandy v. Orient Ins. Co.*, 52 S.C. 224, 229, 29 S.E. 655, 656 (1898)). "Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994) (per curiam). "Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver." *Id.* Although waiver is an affirmative defense and must be specifically pled, waiver may be inferred by acts inconsistent with the known right despite the failure to specifically plead waiver.

Id.; *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981).

In this case, the circuit court relied on Penn's attendance at the mediation and Penn's expressed willingness to contribute to the settlement. We find Penn's actions at mediation inferred a waiver of its right to timely notice. *See Dreher v. S.C. Dep't of Health & Env't Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("[A]n appellate court may affirm the lower court's decision for any reason appearing in the record[. T]he prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court's decision."); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

III. Exclusion

Penn argues the circuit court erred in finding its products hazard and completed operations hazards exclusion did not apply to bar coverage. We disagree.

On an endorsement page entitled "Exclusion," the policy states that bodily injury liability coverage does not apply to bodily injury "included within the **Completed Operations Hazard** or the **Products Hazard**." The definitions section of the policy provides as follows:

"[C]ompleted operations hazard" includes **bodily injury** . . . arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** . . . occurs *after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured*. "Operations" include materials, parts[,] or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed[,]
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed[,] or

(3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

(Italics added.)

The policy defines "products hazard" as follows:

"[P]roducts hazard" includes **bodily injury** . . . arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** . . . occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

According to Penn, the products hazard exclusion applies if (1) the bodily injury arises out of the insured's products; (2) the bodily injury occurs away from the insured's premises; and (3) physical possession of the products has been relinquished. Penn argues Rollins designated Covil as a "Product Defendant" in his complaint; thus, only products liability claims (rather than premises liability claims) were asserted against Covil. Penn next argues Covil relinquished possession of the products *as they were installed during the work* rather than at the end of the contract at Bowater, and because Rollins alleged exposure due to "take-home" exposure, physical possession of Covil's products must necessarily have been relinquished. Penn maintains the exclusion applied because the exposure to asbestos during the policy period took place after Covil either completed its work on the Bowater contract or after Covil relinquished possession of the products it installed at Bowater.

Quoting Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971), the circuit court found "it is established that the risk insured by the 'products hazard' and the 'completed operations hazard' is 'the possibility that the goods, products[,] or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself . . .'" The court rejected Penn's argument that Covil relinquished its possession of its product during the relevant period.

Penn argues several cases cited by the circuit court support its arguments. The circuit court cited *Friestad v. Travelers Indemnity Co.*, 393 A.2d 1212 (Pa. Super. Ct. 1978). In *Friestad*, the court noted the following:

Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.

Id. at 1215 n.5. In *Friestad*, the insured heating company installed a furnace, which caused a fire due to faulty installation. *Id.* at 1213. In a declaratory judgment action, the trial court entered judgment in favor of the insurer. *Id.* at 1212. The appellate court reversed, finding the trial court erred in determining the installation of the furnace "fell within the products hazard provision of the contract." *Id.* at 1217. Penn relies on language in *Friestad* that states "it is more preferable . . . to define the products hazard in terms of products liability law, and apply the exclusion *only when a product, rather than a service*, is the [c]ause in fact of damages" *Id.* (emphasis added).

Similarly, Penn argues *Heyward v. American Casualty Co.*, 129 F. Supp. 4 (E.D.S.C. 1955), also relied upon by the circuit court, supports its position because the court in *Heyward* refused to exclude coverage under a products hazard exclusion where the injuries were caused by negligent installation of a heating and plumbing unit. *Id.* at 8–9; *see also B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985) (finding the products hazard exclusion did not apply because the claims regarding the accidental release of fertilizer into a creek had nothing to do with a defect in a product, but instead arose due to the negligent release of the product).

We find these cases do not support Penn's argument that the products hazard exclusion applied. Covil argues the products hazard exclusion applies only when injury is caused by a defective product placed into the stream of commerce, or when injury is caused by the insured's completed work. Here, we find Covil had neither placed a product into the stream of commerce nor relinquished possession of the product while installing it at the Bowater jobsite during the policy period

when Rollins' stepfather was exposed to asbestos; thus, Penn could not establish the applicability of the products hazard exclusion.¹

Penn also argues the exclusion applies as a completed operations hazard. Penn describes the exclusion as applying to claims (1) arising out of Covil's operations, (2) after such operations are completed, and (3) if the bodily injury occurs away from Covil's premises. Penn argues Rollins is allegedly suffering from mesothelioma arising out of Covil's installation of insulation where his stepfather worked. According to Penn, "[t]he determinative issue is whether . . . Rollins' exposure to asbestos occurred after Covil's operation[s] were completed." Penn argues a genuine issue of material fact exists, which should have precluded summary judgment, as to whether the "take-home" exposure occurred while a portion of Covil's operations had already been put to their intended use. Finally, Penn relies on *In re The Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), and argues the exclusion applies if the exposure occurred during an insured's operations and continued thereafter.

In *Wallace & Gale*, the argument was made that the completed operations hazard exclusion did not apply to asbestos-related claims because the alleged bodily injury did not begin after the insured's operations ended. *Id.* at 833–34. The court stated:

That argument, however, on its face is far broader than the district court's decision we have quoted For example, a claimant's initial exposure which occurred while Wallace & Gale was still conducting operations was not subject to any aggregate limit for policies in effect at that time even if the exposure extended beyond the operations of Wallace & Gale. Also, if exposure which began during operations continued after operations were completed, the aggregate limits of policies which came into effect after operations would apply, but, as

¹ Penn argues the circuit court's finding that there is no evidence indicating Covil supplied asbestos insulation to the Bowater facility during the covered period is inconsistent with the court's other findings. This argument was neither raised to the circuit court in Penn's motion for reconsideration nor ruled upon in the order denying reconsideration. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

stated, the aggregate limits would not apply to those policies in effect at the time of the exposure during Wallace & Gale's operations.

Id. at 834. Covil argues *Wallace & Gale* does not involve the application of policy exclusions, but concerns the inception dates of each of many policies covering the claimant's injuries and concludes if a claimant's initial exposure occurred while the insured was conducting operations, the claim would be covered without an aggregate limit of liability.

As previously noted, the circuit court found Penn provided no evidence to support the application of the completed operations exclusion. Covil's work was performed under the subcontract, which was entered into on February 26, 1986, and performed between March 11, 1986, and January 25, 1987. The policy at issue provided coverage during this period. We find because Rollins was exposed to asbestos during the period of the contract coverage, the completed operations exclusion did not apply. Because Rollins' bodily injury was not excluded under the definitions of either products hazard or completed operations, we affirm the circuit court's finding that the exclusion did not apply. *See Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) ("An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law."); *McPherson ex rel. McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993) ("[R]ules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed. This rule of construction inures to the benefit of the insured.").

CONCLUSION

Based on the foregoing, the order on appeal is

AFFIRMED.

GEATHERS, J., and HUFF, A.J., concur.

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Jan 27 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

Appellate Case No. 2020-001239

**APPELLANT’S PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING *EN BANC***

Pennsylvania National Mutual Casualty Insurance Company (“Penn National”), by and through counsel, and pursuant to the South Carolina Appellate Court Rules, Rules 221(a) and Rule 240, hereby respectfully moves and petitions the Court for a rehearing of the Court’s opinion issued January 5, 2022, (“January 5 Opinion”), affirming the trial court’s entry of partial summary judgment on behalf of Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas (“Plaintiff” or “Covil”). *Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co.*, Op. No. 5888 (S.C. Ct. App. filed Jan. 5, 2022) (Howard Advance Sheet No. 1 at 37). Penn National further

suggests rehearing *en banc* pursuant to Rule 219(b) of the South Carolina Appellate Court Rules. Consideration by the full court is necessary to maintain uniformity of decisions and involves questions of exceptional importance, including but not limited to questions relating to the standard for summary judgment and the apparent waiver of rights by parties and their insurers for mere participation in mandatory mediation under the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

The Court misapprehended the law in denying Penn National a full and fair opportunity to conduct discovery prior to entry of summary judgment and incorrectly held that an affidavit is required setting out a party's forecast of evidence expected to be discovered, in derogation of prior settled law. The Court also overlooked clear evidence of Penn National's stated intent not to waive any rights by attending mediation in compliance with the mandatory Alternative Dispute Resolution Rules of this State and incorrectly held, despite no ruling from the trial court, that participation in mediation waived Penn National's late notice coverage defense. The Court also overlooked issues of fact precluding summary judgment on the record before the trial court, as well as deficiencies with this record. Further, the Court misapprehended settled law as to the interpretation of policies of insurance in finding coverage existed for Covil under Penn National policy no. 515 50 28 53-7, effective from March 31, 1986 until March 31, 1987 ("the Policy").¹

¹ The Court of Appeals does not reference or address coverage under the renewal policy, Penn National policy no. 515 5028 53-8 and, indeed, this appears to be because there is no contest that the order only finds coverage under policy no. 515 50 28 53-7, as the renewal policy period was after the alleged exposure dates. Nevertheless, to the extent the January 5 Opinion holds or finds coverage under policy no. 515 5028 53-8, Penn National would incorporate its arguments herein, as well as all arguments previously raised by Penn National in its prior briefs and at oral argument, in reference to this policy as well.

The Court should grant Penn National's Petition for Rehearing and reverse the trial court's order granting partial summary judgment based on the arguments herein, as well as all arguments previously raised by Penn National in its prior briefs and at oral argument, which Penn National incorporates herein by reference.

I. The Court misapprehended the law on premature summary judgment

In this case, the trial court was asked to grant summary judgment to Plaintiff twenty-three (23) days after Penn National filed its answer. (R. pp. 34-43 (file-stamped date of April 22, 2020 on Covil's Motion for Summary Judgment); R. pp. 23-33 (file-stamped date of March 30, 2020 on Penn National's Answer). Despite the absence of any discovery conducted in the case, the fact that Penn National did not participate in the underlying action (*David D. Rollins v. Covil Corporation et al.*, Civil Action No. 2019-CP-25-0118 ("the Rollins Lawsuit")) or any previous action involving Covil because Penn National was never informed of the existence of the Rollins Lawsuit until nine (9) months after it began and only informed of an impending mediation in the action two (2) weeks before it occurred, the lack of a sufficient basis for granting summary judgment, the existence of factual disputes on the limited and deficient record in front of the trial court,² and the lack of *any* case law supporting such a premature grant of summary judgment, judgment was entered by the trial court on behalf of the Plaintiff. In the face of this undeniable procedural posture, the Court's January 5 Opinion incorrectly disposes of the prematurity of the motion for summary judgment on the basis that "Penn failed to submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct." Op. No. 5888 (Howard Adv. Sh. No. 1 at 37) (citations omitted). However, there is no requirement for such an affidavit under any existing South Carolina case law and, in fact, such a holding is contrary to the well-settled law and practice

² These issues are discussed further in Section III, *infra*.

of South Carolina, as well as *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001), which the Court cites in support of its holding.

The January 5 Opinion incorrectly applies Rule 56 of the South Carolina Rules of Civil Procedure and improperly conflates two different standards under South Carolina law relating to a premature grant of summary judgment. Initially, *there is no requirement in Rule 56 that a party opposing summary judgment provide an affidavit to the Court.* Rule 56, SCRCP. In fact, the plain language of Rule 56 states that the party resisting a motion for summary judgment may do so “by affidavits *or as otherwise provided in this rule.*” Rule 56(e), SCRCP (emphasis added). Thus, any party resisting summary judgment is entitled to rely on the record before the trial court. Rule 56 simply provides that an opposing party may not rely solely on “his [own initial] pleading” to rebut an otherwise undisputed record. *Id.*; *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (“if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, *even if no opposing evidentiary matter is presented*” (citing *Title Ins. Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976); Rule 56(c), SCRCP) (emphasis added). Here, as discussed further below, Penn National’s opposition to the motion for partial summary judgment cited to un-objected to documents in the record in support of its position and, therefore, there was no requirement for Penn National to submit an affidavit in opposition to summary judgment. *See also Doe ex rel. Doe v. Batson*, 345 S.C. at 320, 548 S.E.2d at 856 (“Rule 56(e) . . . requires a party opposing summary judgment to come forward with affidavits *or other supporting documents* demonstrating the existence of a genuine issue for trial”) (emphasis added).

In fact, the Court need not even have addressed whether the record was properly supported, as the January 5 Opinion misapprehends the law relating to a party's full and fair opportunity to conduct discovery. As held by the South Carolina Supreme Court in *Batson*, the issue as to whether the opposition to a motion for summary judgment is properly supported is a separate issue from whether a party has had a "full and fair opportunity to complete discovery." *Id.* at 321, 548 S.E.2d at 857. In *Batson*, the South Carolina Supreme Court examined the issue of prematurity and lack of a full and fair opportunity to conduct discovery *under a separate heading and with a separate analysis* from the issue of whether the response to the motion for summary judgment was properly supported in the absence of any countervailing affidavits. Importantly, the *Batson* court reversed the entry of summary judgment, *in the absence of a counter-affidavit*, because the non-moving party had not had an opportunity to fully conduct discovery. *Id.* at 321-22, 548 S.E.2d at 857.

The court in *Batson* quoted with approval both *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991), and *J.S. v. R.T.H.*, 155 N.J. 330, 714 A.2d 924, 936 (N.J. 1998). As Penn National discussed at length in its prior briefs, *Baughman* held that summary judgment was premature even two (2) years after the action was initiated because additional discovery needed to be conducted. Similarly, *Batson* cites *J.S.* for its holding that "summary judgment entered five months after defendant's answer was filed was premature." *Id.*

In *Baird*, the South Carolina Supreme Court held that summary judgment was improper where no discovery occurred between the filing of a motion to dismiss (which the trial judge converted to a motion for summary judgment upon submission of evidence outside the pleadings

by both parties) and the hearing, which was conducted three (3) months later.³ Instead, the court reiterated the law in this State that “summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” 333 S.C. 519, 529, 511 S.E.2d 69, 74 (citing *Baughman*, 306 S.C. 101, 410 S.E.2d 537). In reaching its holding, the court noted that “the parties have yet to engage in discovery.” *Baird*, 333 S.C. at 529, 511 S.E.2d at 70.

None of these cases stand for the proposition that a party opposing summary judgment must provide an affidavit to demonstrate the discovery it needs to conduct.⁴ In fact, the case law cited by the January 5 Opinion expressly holds to the contrary. Therefore, the Court should grant rehearing, follow the opinions in *Batson*, *Baughman*, and *Baird*, and reverse the trial court’s grant of summary judgment to Plaintiff.

II. The Court overlooked facts and misapplied the law in holding that Penn National’s attendance at mediation waived its right to assert the notice provisions in the Policy

By holding that Penn National waived its right to assert the clear notice provisions of the Policy by attending mediation, the Court overlooked and misapprehended facts in the record and misapplied the law. The Court’s January 5 Opinion cites the “findings” of the trial court that Penn National “hired the same defense counsel as the other insurers, had access to the same defense counsel as the other insurers, and deliberately decided not to contribute” at mediation. Op. No. 5888 (Howard Adv. Sh. No. 1 at 38). The Court ignores the fact, however, that the Rollins Lawsuit

³ Although the January 5 Opinion bases its holding solely on the fact that “Penn failed to submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct,” *Batson*, *Baughman*, and *Baird* all refute the notion that summary judgment should be granted on the basis of a motion filed twenty-three (23) days after a party files its initial pleading and a decision is returned without a hearing less than four (4) months later. There has been no dilatory conduct by Penn National under the facts of this case.

⁴ In fact, as noted above, the South Carolina Supreme Court has cautioned that “if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, *even if no opposing evidentiary matter is presented.*” *Baird*, 333 S.C. at 529, 511 S.E.2d at 74 (citations omitted) (emphasis added).

was not tendered to Penn National until February 3, 2020, a notification which provided no information regarding the lawsuit other than a copy of the Complaint. (R. p. 413). Despite knowing of the mediation at that time, Covil did not notify Penn National of the pending mediation until the following week, on February 10, 2020, even though the mediation was scheduled to occur in two (2) weeks. (R. p. 415).

At that time, Covil *still* had not provided Penn National with *any* information beyond the existence of the Complaint and the impending mediation. Covil did not even provide Penn National with the identity of the attorneys defending it in the action. (R. p. 418). Instead, it was left to Penn National, only approximately eleven (11) days prior to the mediation, to locate and contact defense counsel that had been previously been retained to defend Covil in the case. *Id.* In fact, from the limited record in this case, it is clear that on February 14, 2020, eleven (11) days prior to the mediation in an action that had been ongoing for approximately nine (9) months, Penn National had not been provided with *any discovery documents to review and evaluate in preparation for the mediation.* *Id.* The January 5 Opinion ignores these crucial facts which, *at a minimum*, create an issue of fact as to late notice and misconstrues the record in reaching its conclusion as to waiver. *See, e.g. Hancock v. Mid-South Mgmt.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 802-03 (2009) (“the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment”); *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.”) (citation omitted).

Regardless, under South Carolina law, Penn National did not waive its right to contest coverage under the notice provisions of the Policy merely through its good faith attendance at

mediation and willingness to potentially contribute to a settlement. Indeed, it cannot have waived this right. Such a result is both illogical and directly antithetical to the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

Pursuant to the rules, attendance is required at mediation “[f]or any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier’s outside counsel and who has full authority to settle the claim.” Rule 6(b)(4), SCADR. Yet the Court’s entire basis for holding that Penn National waived its right to assert these provisions in the Policy is that a representative of Penn National a) attended mediation in good faith, and b) “expressed willingness to contribute to the settlement.” Op. No. 5888 (Howard Adv. Sh. No. 1 at 38-39). Both of these actions, however, are baseline requirements for any insurer to comply with the Court-Annexed Alternative Dispute Resolution Rules. *Id.* See also (R. p. 533) (citing requirement of insurers to attend mediation under the SCADR 6(b)(4)). Failure to comply will result in sanctions to an insurer. See, e.g. Rule 10(b), SCADR (“If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRC.P.”); *Jobst v. Jobst*, 424 S.C. 64, 78-79, 817 S.E.2d 515, 523-24 (Ct. App. 2018) (affirming contempt finding against party for failure to appear at mediation as required by the South Carolina ADR Rules); (R. pp. 532-35). The Court’s opinion puts Penn National and other insurers in an impossible catch-22 – attend mediation as required under South Carolina law and waive any coverage defenses or refuse to attend and be sanctioned for violating the Court-Annexed Alternative Dispute Resolution Rules. This is not the law of South Carolina, and the Court

misapprehended the law when it held to the contrary. *See also Agape Senior Primary Care, Inc. v. Evanston Ins. Co.*, 304 F. Supp. 3d 492, 502 (D.S.C. 2018) (rejecting a policy-holder’s claim that attendance by insurer’s attorney representative at mediation where coverage action relating to cases was concurrently pending elsewhere was improper and stating that “[i]f there is blame to be ascribed here, it is the South Carolina mediation rule that compels a party to mediate while there is a coverage question pending”).

This is especially true where, as here, Penn National *expressly asserted it was not waiving its rights* prior to mediation in Non-Waiver Agreement signed by Penn National and sent to the Plaintiff prior to the mediation. (R. pp. 418-421). Although Plaintiff failed to execute the Non-Waiver Agreement, this is of no moment to an analysis of waiver. As the Court correctly noted in the January 5 Opinion, waiver must be both voluntary and intentional. Op. No. 5888 (Howard Adv. Sh. No. 1 at 39) (quoting *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994) (per curiam)). Here, however, as in the *Provident Life* case quoted by the Court, in which the Court of Appeals reversed a finding of waiver by the trial court, “the . . . findings of . . . waiver are without evidentiary support.” 317 S.C. at 478. Instead, the only evidence in the record, the Non-Waiver Agreement, demonstrates that Penn National expressly intended *not* to waive any rights. *See Strickland v. Strickland*, 375 S.C. 76, 85-86, 650 S.E.2d 465, 471 (2007) (waiver only exists where it is a party’s “*unequivocal* intent to relinquish a known right”) (citing 7 S.C. Jur. *Estoppel and Waiver* § 17 (1991)).

Waiver also must be specifically pled by the party seeking to assert it. *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981). While the pleading does not have to specifically use the word “waiver,” the pleading must still address all the facts and allegations necessary to plead it, in the absence of its precise identification. *Id.* Here, nowhere

in Plaintiff's complaint were there *any* facts or allegations that would establish waiver and, therefore, waiver was not properly pled. *Id.*; (R. pp. 19-22).⁵ Thus, the Court has overlooked and misapprehended the evidence in reaching a directly contrary holding to the case law it cites and the record in this action, and the Court should grant rehearing and reverse the trial court's entry of summary judgment as to Plaintiff.⁶

Further, although not addressed by the Court in the January 5 Opinion, it is evident from even the incomplete record that coverage is precluded by failure of Covil to comply with the notice provisions in the Policy. The Penn National Policy contains the following conditions:

CONDITIONS APPLICABLE TO SECTION II

4. Insured's Duties in the Event of Occurrence, Claim or Suit.

- (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable.
- (b) If a claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.
- (c) The insured shall cooperate with the Company and, upon the Company's request, assist in making settlements,

⁵ South Carolina's appellate courts have also cautioned that waiver is "protective only, and [is] to be invoked as [a] shield[], and not as [an] offensive weapon[]" as would be the case in this action, had it been pled by Plaintiff. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992).

⁶ At bare minimum, the existence of the Non-Waiver Agreement creates an issue of fact that precludes summary judgment as to these provisions. *See, e.g. Hancock*, 381 S.C. at 330-31, 673 S.E.2d at 802-03 ("the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment"); *Turner*, 392 S.C. at 122, 708 at 769 ("When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.") (citation omitted).

in the conduct of suits, and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

(R. p. 456; 502). Accordingly, under the Policy, the insured has the duty to: (1) notify Penn National in writing *as soon as practicable* of an “occurrence” which may result in a claim against it; (2) *immediately* send copies to Penn National of any demands, notices, summons, or legal papers received in connection with any lawsuit; and (3) cooperate with Penn National in the defense of the lawsuit.

As more fully set forth in Penn National’s prior briefs, South Carolina courts have universally found that similar notice and cooperation clauses are valid and enforceable. *Neumayer v. Philadelphia Idem. Ins. Co.*, 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019). In the present case, Covil was served with the Rollins Lawsuit on April 25, 2019. (R. p. 291-349). Counsel was retained and an Answer was filed on behalf of Covil in the Rollins Lawsuit on May 28, 2019. (R. p. 352-391). The Rollins Lawsuit was not tendered to Penn National for defense and indemnity until February 3, 2020, over nine (9) months later. (R. pp. 412-13). This tender to Penn National was three (3) weeks prior to the scheduled mediation and eight (8) weeks prior to trial. (R. p. 516-19).

Under South Carolina law, the failure of an insured to comply with policy conditions requiring that the insured provide timely notice, forward suit papers and cooperate with the insurer with respect to a claim or lawsuit will bar coverage for the insured under the policy. *See Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass’n*, 305 S.C. 247, 250, 407 S.E.2d 655,

657 (Ct. App. 1991)(quoting *Lee v. Metro. Life Ins. Co.*, 180 S.C. 475, 186 S.E. 376 (S.C. 1936))(holding that the insured was not entitled to coverage where he failed to provide timely notice of the claim and also failed to forward suit papers until approximately four months after he had received them); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 435, 137 S.E.2d 608, 613 (1964)(stating that it is “well settled” that the insured’s failure to adhere to the notice provisions will bar recovery under the policy); *Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 616, 103 S.E.2d 272, 273 (1958)(finding that the insured’s breach of the cooperation clause relieved the insurer of its coverage obligation under the policy).

The holding in *Prior* applies with equal force and dictates the result in the present case. Indeed, the facts of the present case are even more egregious than in *Prior*. Covil did not comply with the conditions for coverage under the Policy. Further, Covil admits that the entirety of the settlement in the Rollins Lawsuit has been paid. Therefore, no rights of an innocent third-party are jeopardized by Covil’s failure to comply with the notice conditions in the Policy. Contrary to the trial court’s holding, and based on this Court’s decision in *Prior*, Covil is not entitled to coverage under the Policy for the settlement in the Rollins Lawsuit.

Further, even if the Court were to hold, contrary to established case law, that “substantial prejudice” must be shown, the facts of this case demonstrate that Penn National was in fact “substantially prejudiced” by Covil’s failure to comply with the timely notice condition contained in the Policy. By the time Covil provided notice to Penn National, in addition to the pleadings and discovery that had taken place, the following deadlines had already expired:

- Plaintiff’s Deposition (June 19, 2019)
- Defendants Answer Master Discovery (July 12, 2019)
- Designate Fact Witnesses (August 8, 2019)

- Designate Expert Witnesses (August 8, 2019)
- Deposition of Plaintiff's fact witnesses except for family members who do not have product identification testimony (January 13, 2020)
- Deposition of Defendants' fact witnesses except for Defendants' 30(b)(6) witnesses (January 13, 2020)

(R. pp. 408-10). Additionally, the Pre-trial Scheduling Order entered by the Court in the Rollins Lawsuit set a deadline of February 7, 2020 for the filing of motions for summary judgment (which was just eleven (11) days after Penn National had received its first notice of the action) and set trial for March 23, 2020 (just eight (8) weeks after Penn National's first notice of the action).

(R. pp. 516-19).

Further prejudicing Penn National, the parties in the Rollins Lawsuit participated in a mediation on February 25, 2020, less than a month after Penn National received its first notice of the action. Covil did not provide notice of the mediation to Penn National until February 10, 2020, providing even less time for Penn National to gather the necessary information and documents in order to evaluate the matter for potential settlement. (R. pp. 415-16; 418-21). In fact, the only evidence in the record show that only eleven (11) days before mediation, Penn National had yet to receive *any discovery documents* in Rollins Lawsuit. (R. p. 415). Under these facts, Penn National was "substantially prejudiced" by Covil's untimely notice in this matter.

Therefore, even if "substantial prejudice" is required before coverage for Covil can be barred for Covil's failure to comply with the notice conditions in the Policy, which Penn National disputes, the trial court erred in finding as a matter of law that Penn National was not "substantially prejudiced" by Covil's untimely notice. Given this, any coverage under the Policy was obviated when Covil failed to comply with its contractual obligations to provide written notice of the Rollins Lawsuit as soon as practicable and to immediately send copies of the Summons and Complaint to

Penn National. “[B]reach of an insurance policy’s notice clause automatically relieves the insurer of its obligations under the contract, including the payment of proceeds due, and the duty to defend and to indemnify the insured.” *Wright v. UNUM Life Ins. Co.*, 2001 U.S. Dist. LEXIS 26063, *4 (D.S.C. 2001). Penn National respectfully requests the Court grant its petition for rehearing and reverse the grant of summary judgment to Covil.

III. The Court overlooked issues of fact precluding summary judgment on the record before the trial court and improperly ruled that Penn National waived certain arguments regarding the sufficiency of the record

The Court also erroneously held that the Plaintiff’s Motion for Partial Summary Judgment was properly supported by the evidence in the record. Initially, Penn National properly raised the issue of whether the record supported Plaintiff’s motion. In holding that the issue was not raised or ruled upon, the Court ignored the plain record, where Penn National raised numerous times the problematic record before the trial court in both its initial opposition to the Plaintiff’s Motion for Summary Judgment, as well as in its Motion for Reconsideration. *See, e.g.*, (R. p. 165 (“even if the Court were inclined to consider Covil’s Motion at this time” and noting that the only exposure asserted by Plaintiff was take-home exposure from Plaintiff’s step-father “who is *alleged to have worked* at the Bowater paper mill”) (emphasis added); R. p. 166 fn. 8 (requesting that should the trial court “not believe that the motion should be denied based on the record before the court” that the trial court find that the motion is premature because of a lack of discovery); R. p. 176 (identifying pertinent facts and documents that have not been provided to Penn National relating to the settlement of the Rollins Lawsuit); R. p. 179 n. 19 (identifying a specific example of the incomplete record in front of the trial court, as admitted by Plaintiff); R. p. 181 (noting that at the time of the motion Plaintiff’s stepfather was only “*alleged to have been present* at Bowater, while Covil performed . . . work . . .under a subcontract” and that “[*e*]ven accepting the facts

alleged by Covil for the purposes of responding to its motion” there was no coverage under the Policy) (emphasis added); R. p. 182 (noting that it was merely “alleged” that the injuries arose out of Covil’s work); R. p. 183 (“Covil’s Motion for Partial Summary Judgment should be denied based on the record before the Court” and, if not, additional discovery is required, including relating to certain specific issues identified by Penn National); R. p. 184 (noting that additional discovery is needed regarding any evidence of “alleged asbestos exposure” asserted by Plaintiff and specifically stating the record before the trial court was an “incomplete record”); R. p. 556 (noting repeatedly in the Motion for Reconsideration that “facts” relating to Mr. Rollins exposure are nothing more than allegations); R. p. 557 (again noting that additional evidence was needed relating to the “*alleged* asbestos exposure” of Mr. Rollins) (emphasis added)).

The Court’s holding improperly narrows the issue before it and is over-restrictive in its application of South Carolina’s preservation rules. Initially, as noted above, the problematic nature of the record and the lack of undisputed facts was *repeatedly* raised to the trial court. These arguments were raised and ruled upon and, therefore, Penn National’s argument regarding the improperly supported documents in the record is properly before the Court. To hold otherwise would improperly convert issue preservation into “a ‘gotcha’ game,” a result which has been repeatedly disavowed by South Carolina’s appellate courts. *See Johnson v. Roberts*, 422 S.C. 406, 411, 812 S.E.2d 207, 210 (Ct. App. 2018) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). Further, even where an argument is not “clearly preserved” but also is not “clearly unpreserved . . . any doubt should be resolved in favor of preservation.” *Id.* at 412, 812 S.E.2d at 210 (quoting *Atl. Coast*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part)). Here, the problematic, incomplete record before the trial court included unauthenticated and unsupported documents

which were not a proper basis for granting summary judgment, and the Court should grant rehearing, address this deficiency, and reverse the grant of summary judgment to Plaintiff. *See, e.g.*, Rule 56(e), SCRCP (“supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein”); *Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 352, 565 S.E.2d 309, 316 (Ct. App. 2002), *cert. denied*, 357 S.C. 191, 592 S.E.2d 625 (2004) (unsigned statement in opposition to defendant’s motion for summary judgment could not be considered by the court); *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) (holding trial court properly refused to consider verified complaint as affidavit because the allegations therein were not based on personal knowledge, would not by themselves be admissible in evidence, and did not affirmatively show that the plaintiff was competent to testify to the matters stated therein).

Even assuming, *arguendo*, the issue of *authentication* was not properly raised and ruled upon, which Penn National denies, the broader issue of whether Plaintiff carried its initial burden to show entitlement to summary judgment certainly was.⁷ In addition to Penn National’s argument that summary judgment was pre-mature, Penn National raised numerous times the problematic record before the trial court in both its initial opposition to the Plaintiff’s Motion for Summary Judgment, as well as in its Motion for Reconsideration. *See, e.g.*, (R. p. 165; R. p. 166 fn. 8; R. p. 176; R. p. 179 n. 19; R. pp. 181-184; R. pp. 556-557).

⁷ The Court does not appear to have specifically addressed this issue, having amalgamated the general proposition that the record before the trial court was insufficient to establish entitlement to summary judgment with the more specific contention in support of this assertion that there were no properly authenticated documents in the record. Here, as repeatedly asserted by Penn National in its briefing before the trial court, the record was insufficient to support Plaintiff’s Motion for Partial Summary Judgment regardless of whether the documents themselves were properly authenticated.

In reviewing a Motion for Summary Judgment to determine “if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Utilizing this standard, a non-moving party need only identify “a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 802-03 (2009). Indeed, “if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, *even if no opposing evidentiary matter is presented.*” *Baird*, 333 S.C. at 529, 511 S.E.2d at 74 (citing *Title Ins. Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976); Rule 56(c), SCRPC) (emphasis added). This is because “summary judgment is a drastic remedy” and “it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial.” *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011) (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004)).

Applying this standard, it is clear that summary judgment was improper. As cited above, the facts in this case are in dispute. The trial judge’s own order, while erroneously referring to facts as “undisputed” despite the clear dispute in the record, is itself contradictory and demonstrates the unclear and disputed nature of the facts. For instance, while finding that Mr. Rollins was exposed to asbestos as a result of Covil’s work insulating pipes at the Bowater plant, the order also finds that “[b]y 1986, asbestos was not found in pipe insulation.” (R. p. 9).⁸

⁸ The January 5 Order holds that Penn National may not argue this specific inconsistency in the Court’s order because it was not raised or ruled upon in the motion for reconsideration. Op. No. 5888 (Howard Adv. Sh. No. 1 at 42). However, this holding misapplies the law of South Carolina, where courts have held that where a trial court is on notice that a party is seeking a review of all the court’s holdings or the motion is *permissive*, and not mandatory, because it is not seeking to preserve unaddressed error, the issues in the original order are preserved for review. *E.g. State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 227, 837 S.E.2d 910, 918 (Ct.

Compare, (R. p. 63, ¶ 3 (“Plaintiff’s claims against the Product Defendants, as defined herein, arise out of Defendants’ purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.”; R. p. 70, ¶ 25 (“Defendant, **COVIL CORPORATION** . . . is sued as a Product Defendant”)).

Simply put, it is facially clear from the order itself that there are factual disputes in the action. Thus, Plaintiff has not carried its burden of establishing entitlement to summary judgment. *E.g.*, *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) (“[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law” and “[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant”) (citations omitted); *S.C. Prop. & Cas. Guar. Ass’n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (“[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law” and “[a]t the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact”) (citations omitted).

Based on the foregoing, the Court has ignored conflicting evidence in the limited, incomplete record in this case and improperly applied the law as to summary judgment. Therefore,

App. 2019). In the Order Denying Penn National’s Motion for Reconsideration, the trial court held that its first order properly addressed all of Penn National’s arguments. R. p. 15. Therefore, the trial court understood Penn National’s Motion for Reconsideration both addressed *all* of its prior rulings and that the motion was permissive, not mandatory. Even assuming, *arguendo*, that this was not the case, Penn National repeatedly and squarely addressed the issue of the insufficient and unsupported record before the trial court, which was sufficient to preserve this issue for review.

the Court should grant rehearing and reverse the trial court's entry of summary judgment as to Plaintiff.

IV. The Court misapprehended settled law as to the interpretation of policies of insurance in finding coverage existed for Covil under the Penn National Policy

The Court misinterpreted the plain language of Penn National's Policy and conflated the exclusions for "products hazard" and "completed operations hazard," eliminating the existence of any distinction between the two and ignoring case law highlighting this distinction. Further, the conclusion of the Court with regard to these exclusions ignores the plainly conflicting evidence in the incomplete record, improperly dispenses of consideration of facts in conflict with its holding, and fails to identify the legal underpinnings of its holdings.

a. The "products hazard" exclusion excludes coverage for the alleged injuries

The Court misinterprets both the case law and contractual language of the Policy in determining that the products hazard exclusion could not apply to bar coverage for the claims in the *Rollins* action. Initially, the Court's bald conclusion that "we find Covil had neither placed a product into the stream of nor relinquished possession of the product while installing it at the Bowater jobsite during the policy period" is not supported by any case law or the record in this action. Op. No. 5888 (Howard Adv. Sh. No. 1 at 42). In fact, as the record demonstrates, this is precisely the allegation that was leveled against Covil in the Rollins Lawsuit. (R. p. 63, ¶ 3 ("Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina."; R. p. 70, ¶ 25 ("Defendant, **COVIL CORPORATION** . . . is sued as a Product Defendant")). Nothing in the record clearly refutes this allegation.

At best, the contract, which states only that Covil will “[f]urnish all supervision, labor, equipment, tool, *materials* . . . and incidentals required to supply and install all insulation on required piping systems,” creates an issue of fact as to whether this exclusion or the products-completed exclusion applies to the facts of the instant case. (R. p. 121). To find otherwise requires that the trial court and this Court find facts in this action, *which is expressly against established South Carolina case law*. *E.g., Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) (“[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law” and “[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant”) (citations omitted); *S.C. Prop. & Cas. Guar. Ass’n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (“[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law” and “[a]t the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact”) (citations omitted).

Aside from the factual issues precluding summary judgment as to these exclusions, the Court also misapplies the law relating to the exclusions in question. The Court, like the trial court, improperly amalgamates the two exclusions, holding that neither exclusions applies because Covil’s operations were ongoing at the time of the exposure. Even assuming, *arguendo*, that such undisputed facts exist in the record, which Penn National has repeatedly refuted, this analysis misunderstands the difference between the two (2) exclusions.

Initially, the difference between the two (2) exclusions is evident from their face. One is titled the “Products Hazard” and one is titled the “Completed Operations Hazard.” It is only the latter which relates to and requires the completion of operations on a project. This is clear

not only from the title of the exclusion, but also from the text of the definition for the “completed operations hazard”:

DEFINITIONS APPLICABLE TO SECTION II

When used in the provisions applicable to Section II of this policy (including endorsements forming a part thereof)

* * *

“**completed operations hazard**” includes **bodily injury** and **property damage** arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. “Operations” include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include **bodily injury** or **property damage** arising out of:

- (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
- (c) operations for which the classification stated in the policy or in the company’s manual specifies “including completed operations”;

* * *

(R. p. 458; 504).

On the other hand, the “products hazard” has nothing to do with operations being performed by a company. Instead, this exclusion applies to any of the “insured’s products” after the product has left the “*physical possession*” of the insured:

“**products hazard**” includes **bodily injury** and **property damage** arising out of the named insured’s products or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs away from the premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

(R. p. 458; 504). Nothing in this exclusion makes any reference to the operations of the insured or requires that any “operations” or other work being performed by the insured be completed. Rather, the exclusion applies to any product out of the “physical possession” of the insured. *Id.*

Here, even taking as true the disputed, incomplete facts cited by the trial court in support of summary judgment in direct contradiction of the standard for summary judgment, the “products hazard” exclusion would *still* apply to the injuries in this case. This is because regardless of who installed the asbestos products in question, as set forth in the complaint of Plaintiff in the Rollins Lawsuit, the products were allegedly manufactured and/or distributed by Covil. (R. p. 63, ¶ 3 (“Plaintiff’s claims against the Product Defendants, as defined herein, arise out of Defendants’ purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.”; R. p. 70, ¶ 25 (“Defendant, **COVIL CORPORATION** . . . is sued as a Product Defendant”)). Thus, as to these products, coverage was excluded as soon as they left the *physical possession* of Covil. There is simply no dispute that the products themselves were no longer within Covil’s possession at the time of the exposure occurred.

They could not have caused exposure to third parties had they not. Thus, the Court misapplied the law as to this exclusion. *E.g. B.L.G. Enters. v. First Finn. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (“When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.”); *MGC Mgmt. v. Kinghorn Ins. Agency*, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999) (“An insurer’s obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction”).

Further, the Court mistakenly holds that the products in question were not “placed . . . into the stream of commerce.” Op. No. 5888 (Howard Adv. Sh. No. 1 at 42). The Court does not cite any support for this holding and, indeed, it is not supported by established law. As noted above, even taking the facts before the trial court as “undisputed”, despite Penn National’s repeated disputation of same, Covil was alleged to have manufactured and/or distributed a product containing asbestos. (R. p. 63, ¶ 3; R. p. 70, ¶ 25). The Plaintiff was then allegedly exposed to such asbestos as a result of “take-home exposure.” (R. p. 6).⁹

However, in order for this factual scenario to have occurred, Covil must have placed the products into the stream of commerce. This is because a company “places an item in the stream of commerce by selling it to an Initial User.” *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 879 (1997); S.C. Code Ann. § 15-73-10(1) (“One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer . . .”). Here,

⁹ As previously noted, Penn National disagrees with the characterization that the facts are “undisputed”, as shown repeatedly throughout its own filings in this action. Nevertheless, even assuming, *arguendo*, that these facts were undisputed, there is still no coverage under the Penn National policies.

the Plaintiff in the Rollins Lawsuit specifically pled product liability against Covil for the sale and distribution of the alleged asbestos products. (R. pp. 90-100.) Further, as soon as Covil sold the alleged asbestos-containing products to the Bowater facility, the items were placed into the stream of commerce, regardless of who installed them or what happened to them from that point forward. *Saratoga Fishing*, 520 U.S. at 879 (a company places an item in the stream of commerce by selling to a user); Covil Contract, R. p. 121 (requiring Covil to “[f]urnish all supervision, labor, equipment, tool, *materials* . . . and incidentals required to supply and install all insulation on required piping systems) (emphasis added). In fact, this is true regardless of whether the allegedly asbestos-containing materials were separately sold as part of Covil’s contract or simply provided for the installation. *See Henderson v. Gould, Inc.*, 288 S.C. 261, 268, 341 S.E.2d 806, 810 (Ct. App. 1986) (“[a]lthough . . . Section 15-73-10 use[s] the terms “sells” and “seller,” these terms are merely descriptive and the doctrine of strict liability may be applied if the requirements for its application are otherwise met, even though no sale has occurred in the literal sense”).

Thus, at the time of any alleged exposure, based on the limited, “undisputed” facts in the record, the alleged products had been placed into the stream of commerce by Covil and had left the “physical possession” of Covil. It is of no moment whether any operations of Covil were ongoing at the time, as such operations have no impact on the plain language of the “products hazard” exclusion. *See, e.g., Heyward v. American Casualty Co.*, 129 F.Supp. 4, 9 (E.D.S.C. 1955) (holding that products liability claims are excluded from coverage by the products hazard exclusion as distinguished from the provision of a service); *Friestad v. Travelers Indem. Co.*, 393 A.2d 1212, 1217 (Pa. Super. 1978) (same); *B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985) (same). To hold otherwise improperly conflates

the products hazard exclusion and the products completed exclusion. Therefore, the Court should grant rehearing and reverse the trial court's entry of summary judgment in favor of Plaintiff.

b. The products-completed operations exclusion excludes coverage for the alleged injuries

The Court also misinterprets the completed operations hazard exclusion and the law pertaining to same. The Penn National Policy states that an insured's operations "shall be deemed completed at the earliest" of three potential times: (1) when the contract entered into by the insured is completed, (2) when all operations at a specific site are completed, or (3) "when the portion of the work out of which the injury or damage arises has been put to its intended use." (R. p. 458; 504). The Court found that "Covil's work was performed under the subcontract, which was entered into on February 26, 1986, and performed between March 11, 1986 and January 25, 1987." Op. No. 5888 (Howard Adv. Sh. No. 1 at 43). The Court then held that "because Rollins was exposed to asbestos during the period of the contract coverage, the completed operations exclusion did not apply." *Id.* at 44. However, the Court misconstrues the law and the law and facts of the case.

The completed operations hazard exclusion applies if the *portion* of the operations out of which the injury arises was put to its intended use. As indicated above, Mr. Rollins' exposure during the periods of the Policy only occurred through "take-home" asbestos. If this "take-home" exposure occurred because a portion of Covil's operations had already been put to its intended use, then the completed operations hazard exclusion would apply to bar coverage. The Court disposed of this contention by simply stating that Penn National "provided no evidence to support the application of the completed operations exclusion," ignoring the fact that Penn National was prevented from conducting any discovery in the action. However, such a finding is proper for the fact-finder, not the trial court, and the Court misapplied the law in finding otherwise.

See W.N. Leslie, Inc. v. Travelers Ins. Co., 264 S.C. 408, 415, 215 S.E.2d 448, 451 (1975) (holding that whether a portion of the insured's work was put to its intended use was a jury issue). This is especially true where, as here, the trial court's order included a factual finding directly contrary to this conclusion. (R. p. 9) (“[b]y 1986 asbestos was not found in pipe insulation”).

The Court also misinterprets the *In re Wallace & Gale Co.*, 385 F.3d 820, 833-34 (4th Cir. 2004) line of cases in reaching its decision. Plaintiff alleges and the trial court found, despite disputed and unsupported facts, that Mr. Rollins' exposure to asbestos occurred both prior to, during and after the period of the Policy. *See* (R. p. 8). Given this, as the Fourth Circuit has held, the completed operations hazard exclusion applies to bar coverage. *See Generali Ins. Co. v. United States Fire Ins. Co.*, 886 F.3d 346, 354 (4th Cir. 2018)(completed operations hazard also applies to injuries where starting point of bodily injury occurred during the insured's operations and continued thereafter); *In re Wallace & Gale Co.*, 385 F.3d at 833-34. Given this, the Court should grant rehearing and reverse the trial court's entry of summary judgment in favor of Plaintiff.

Conclusion

Penn National respectfully requests that the Court grant rehearing and reverse the trial court for the reasons set forth herein. Penn National further requests rehearing *en banc* because consideration by the full court is necessary to maintain uniformity of decisions and involves questions of exceptional importance, as set forth above.

January 27, 2022.

/s/ David G. Harris II

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RECEIVED

Jan 27 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

Appellate Case No. 2020-001239

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* was served on all counsel of record by electronic mail as follows:

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This the 27th day of January, 2022.

/s/ David G. Harris II
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January 27, 2022

RECEIVED**Jan 27 2022****SC Court of Appeals****Via Federal Express**Attn: Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201Re: ***Covil Corporation v. Penn National***
Appellate Case No: 2020-001239

Dear Ms. Kitchings:

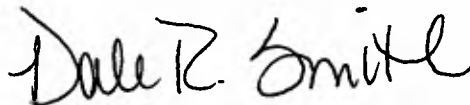
Pursuant to Section C of Supreme Court Order 2021-08-25-02, I am enclosing the filing fee of \$50.00 for Appellant's Petition for Rehearing filed with the Court today in the above-referenced matter:

If you have any questions, please do not hesitate to contact me.

With kindest regards, I am

Sincerely,

GOLDBERG SEGALLA LLP

Dale R. Smith, NCCP
Paralegal to David G. Harris II

/drs

Enclosures (*via Federal Express*)cc: All Counsel of Record (*w/ encls via E-mail*)

The South Carolina Court of Appeals

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

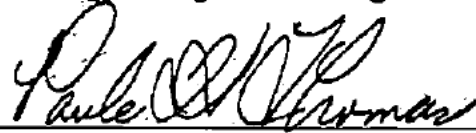
v.

Pennsylvania National Mutual Casualty Insurance
Company, Appellant.

Appellate Case No. 2020-001239

ORDER

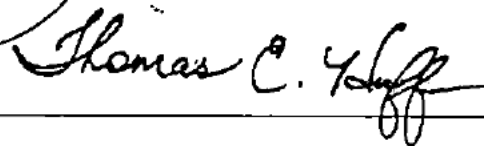
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



A.J.

Columbia, South Carolina

cc:

Shanon N. Peake, Esquire
Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire

FILED
Feb 23 2022

Jescelyn Tillman Spitz, Esquire
David Grant Harris, II, Esquire
Brady Allen Yntema, Esq, Esquire
William Bradley Nes, Esquire
David L. Brown, Esquire