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Dec 28 2022

SC Court of Appeals

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-40-02098

Appellate Case No. 2022-001722

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Petitioner.

**PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE
COMPANY'S RETURN TO MOTION TO DISMISS AND EXPEDITE**

INTRODUCTION

It is well-established in South Carolina that orders affecting the mode of trial must be immediately appealed. This rule is based on the principle that trial by jury is a fundamental and substantial right guaranteed by the South Carolina Constitution and the laws and rules of this State. Any order affecting such a substantial right is therefore immediately appealable. On December 7, 2022, the Circuit Court entered an order in this case in which it denied Defendant Pennsylvania National Mutual Casualty Insurance Company's ("Penn National") right to a jury trial of this case. To ensure the preservation of its right to a jury trial, Penn National immediately appealed the Circuit Court's order in accordance with well-settled law. Its actions in this case are entirely consistent with this State's jurisprudence.

Despite Penn National's clear and unequivocal right to appeal the order denying its right to a jury trial, Plaintiff Covil Corporation, by and through its appointed Receiver, Peter D Protopapas ("Covil") has taken the baseless position that Penn National's appeal is "frivolous" and should be immediately dismissed by this Court. Penn National's constitutional right to a jury trial is not "frivolous" to Penn National. Indeed, Penn National has unfailingly invoked its right to a jury trial throughout this litigation. Penn National respectfully requests that this Court summarily deny Covil's motion to dismiss this appeal and allow a full and fair review of the merits of the order at issue.

I. PROCEDURAL HISTORY

On April 27, 2020, Covil filed a Complaint for Declaratory Judgment and Breach of Contract against Penn National, Sam J. Crain & Co., Inc. and South Carolina Property and Casualty Insurance Guaranty Association. In the Complaint, Covil alleged that "claims and lawsuits," unidentified by name or case number, have been filed against Covil alleging liability

resulting from asbestos exposure caused by Covil's products. (Appx. pp.9-10, ¶7). Covil alleged that Penn National issued policies of general liability insurance to Covil for two policy periods: (1) March 31, 1986 to March 31, 1987; and (2) March 31, 1987 to March 31, 1988, and that Penn National has breached these policies. (*Id.*, ¶¶ 8-9). Specifically, the Complaint states:

9. Penn National has failed fully to acknowledge or accept its insuring obligations under the Penn National Policies, has reserved its rights, failed to acknowledge or respond to [the] tender of covered Covil Asbestos Suits, and otherwise breached its contract of insurance.

(*Id.*).

In the Complaint, Covil asserted three claims against Penn National: (1) declaratory judgment regarding compensation to be paid to the Receiver for Covil in defending unidentified "Covil Asbestos Suits" (*Id.*, p.12, ¶¶ 14-19); (2) declaratory judgment that all policies issued by Penn National are the property of the Receiver of Covil (*Id.*, p.13, ¶¶ 20-22); and (3) declaratory judgment regarding the terms of the Penn National policies, trigger of coverage, allocation, Penn National's defense and indemnity obligations, number of occurrences, coverage for the Covil Asbestos Suits and the effect of exclusions. (*Id.*, pp.13-15, ¶¶23-26).

On June 1, 2020, Penn National filed its Answer. In its Answer, Penn National responded to the allegations contained in the Complaint and raised a number of defenses. (Appx., pp.23-30) Significantly, Penn National requested a jury trial:

WHEREFORE, Penn National respectfully prays the Court as follows:

* * *

4. For a trial by jury on all issues so triable; and

(*Id.*, p.30).

This case proceeded with discovery. On May 5, 2022, the Circuit Court entered an order requiring Penn National to incur the considerable expense to digitize its historical repository of

insurance policies (approximately 18 million pages of documents) and to allow Covil, its Receiver and their attorneys to have full and unfettered access to the created database. Because of the punitive nature of the order and the fact that the order affected a substantial right of Penn National that would be irrevocably lost absent immediate review, Penn National appealed the order.¹

While this order remained on appeal and other discovery matters were unresolved (see, Appx., pp.37-38, listing outstanding discovery issues), Covil filed a Status Report with the Circuit Court on September 6, 2022 that, for the first time, demanded a trial:

The Receiver requests an evidentiary hearing regarding Penn National's spoliation of evidence in order for the Court to make factual findings regarding the scope of the harm to Covil and to fashion appropriate remedies to address that harm. The Receiver also asks for a non-jury trial on Covil's declaratory relief against Penn National concerning Penn National's obligations to Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8.

(*Id.*, p.39; *see also*, Appx., p.72 [Transcript from 9/8/2022 status conference]: Counsel for Penn National: "Your Honor, yesterday was the first time that I had seen a suggestion of a December trial date ..."). Significantly, Covil did not (and has not to date) filed a motion for summary judgment or any motion for sanctions resulting from alleged spoliation.

On November 7, 2022, Penn National sent a letter to Ret. Chief Justice Toal confirming that Penn National demanded a jury trial in this case and requesting that its right to such a trial be

¹ Throughout its motion to dismiss, Covil states that the current appeal is the "third frivolous appeal filed by [Penn National] in this case in less than six months." (Covil's Mot., p.1 [emphasis in original]; *see also*, p.11: "Penn National's third improper appeal in the past six months in this case"). These statements are, in fact, entirely untrue. The **only** previous appeal that Penn National filed in this case is from the order entered on May 5, 2022 in which the Circuit Court ordered the previously unprecedented and extraordinary remedy of requiring Penn National to digitize its repository of historical policy related records, incur the substantial costs associated therewith, and allow Covil, its Receiver and their attorneys unfettered access to these documents. (Appellate Case No. 2022-000761). No other appeal has been filed by Penn National in this case until the present mandatory appeal.

preserved:

Penn National requested a jury trial on all issues so triable by way of its Answer to the Receiver's Complaint for Declaratory Judgment and Breach of Contract. ... Please allow this letter to respectfully confirm that Penn National preserves its right to and requests a jury trial on all factual issues in this case, including spoliation and coverage issues.

(Appx., p.57). The next day, Zitel Poswal, judicial law clerk for Ret. Chief Justice Toal, sent an email to Penn National's counsel indicating that the court recognized that Penn National had requested a trial by jury and had not waived its right to a jury trial in this case:

Chief Justice Toal has instructed me to inform you that your participation and your client, Penn National's participation in pretrial hearings, discovery activities and any other activities past, present or future pertaining to *Covil v. Penn National* will in no way waive Penn National's right to insist that it is entitled to a jury trial on all or any matters pertaining to this litigation. She will place an order reserving and preserving Penn National's position on its right to a jury trial on the record at the commencement of the Pretrial hearing on Monday, Nov. 14, 2022.

(Appx., p.58).

However, at the November 14 hearing, the Circuit Court did not place an order on the record that the matter would proceed to a jury trial. Therefore, Penn National filed a Motion to Confirm Jury Trial Demand. (Appx., pp.44-59). On December 7, 2022, an order was entered denying Penn National's right to a jury trial of the issues in this case. (Appx., p.4-5). On the same day, Penn National filed a notice of appeal from this order.

II. ARGUMENT AND ANALYSIS

A. Penn National Has The Unassailable Right To Appeal The Order Denying Its Right To A Jury Trial.

The right to a jury trial is so significant that it is explicitly protected by the South Carolina Constitution. S.C. Const. art. I, § 14. This right is also preserved in the South Carolina Rules of Civil Procedure, which specifies how the right should be demanded:

RULE 38
JURY TRIAL OF RIGHT

(a) **Right Preserved.** The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. ...

(b) **Demand.** Any party may demand a trial by jury of any issue trial of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directing to such issue. Such a demand may be endorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. ...

(d) **Waiver.** ... A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. ...

Rule 38, SCRC.P.

At the very inception of this litigation, Penn National demanded a jury trial consistent with the requirements of the Rules of Civil Procedure. Penn National made the jury trial demand in its Answer, and specifically requested a jury trial on all issues so triable. (Appx., p.30). At no time did Penn National consent to the withdrawal of its demand for a jury trial. Indeed, Covil has not cited to any such withdrawal.

Despite Penn National's jury trial demand, the Circuit Court ordered that the issues in this case be "scheduled for a non-jury trial ..." (Appx., p.4). Once the Circuit Court ordered a non-jury trial in this case, Penn National was required to appeal the order immediately. Its failure to do so would have resulted in a waiver of Penn National's right to a jury trial. As the Supreme Court has held:

[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately. Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. Here,

Client's failure to immediately appeal the order designating this case as a non-jury matter bars his current appeal of that issue.

Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (internal citations omitted).

See also, Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008); *Foggie v. CSX*

Transp., Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993); *Creed v. Stokes*, 285 S.C. 542, 542-

43, 331 S.E.2d 351, 352 (1985); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-90

(Ct. App. 2004). *See also, Jean Hoefler Toal, et al., Appellate Practice in South Carolina*, 156 (3d

ed. 2016) ("The purpose of permitting immediate appeal in these cases is to preserve a party's

constitutional right to a trial by jury which would otherwise be lost.").

Covil has now moved to dismiss Penn National's appeal as "frivolous" and as a "foot dragging operation." (Covil Mot., pp.1-2). Covil's motion is wholly without merit. Penn National was required to appeal the order directing that the mode of trial of this case be a non-jury trial. If Penn National failed to appeal the order, it risked losing its substantial constitutional right to a jury trial. Covil's motion to dismiss is without basis and serves no purpose other than to delay this Court's review of the merits of Penn National's appeal. Accordingly, Penn National requests that Covil's motion be summarily denied.

B. Covil's Argument That There Is No Right To A Jury Trial For Declaratory Judgment Actions Is Contrary To The Law.

Covil appears to base its motion to dismiss on the fallacious argument that parties to a declaratory judgment action are somehow not entitled to a jury trial. Covil's argument is contrary to the common and statutory law of this State.

(1) *The Present Matter Is An Action At Law Which Undeniably Entitles Penn National To A Trial By Jury.*

There is clearly no right to a jury trial in cases in equity. *See, Fountain v. Fred's, Inc.*, 436 S.C. 40, 47, 871 S.E.2d 166, 170 (2022). However, declaratory judgment actions are neither

legal nor equitable. The nature of a declaratory judgment action is determined by the underlying issue. *See, Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 5, 656 S.E.2d 17, 18 (2007). An action at law is not converted to an equitable action because it is brought pursuant to the Uniform Declaratory Judgment Act. *Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 127, 375 S.E.2d 1, 3 (Ct. App. 1988).

Indeed, the Uniform Declaratory Judgment Act expressly provides that a party has a right to a jury trial in declaratory judgment actions:

When a proceeding under this chapter involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved.

S.C. Code Ann. § 15-53-90. *See also, Leggette v. Smith*, 226 S.C. 403, 416, 85 S.E.2d 576, 582 (1955) (quoting with approval, *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) (“And, irrespective of this provision of the statute, it is clear that the right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure.”)).

It has long been established that a declaratory judgment action which requests declarations regarding coverage under an insurance policy is an action at law. *See, Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009); *Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 429, 656 S.E.2d 784, 786 (Ct. App. 2008); *Auto-Owners Ins. Co. v. Hamin*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006); *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 5, 530 S.E.2d 132, 134 (Ct. App. 2000); *Pennell v. Foster*, 338 S.C. 9, 14, 524 S.E.2d 630, 633 (Ct. App. 1999); *Travelers Indem. Co. v. Auto World, Inc.*, 334 S.C. 137,

140, 511 S.E.2d 692, 694 (Ct. App. 1999); *United States Fire Ins. Co. v. Macloskie*, 320 S.C. 459, 462, 465 S.E.2d 759, 760 (Ct. App. 1995). *See also*, Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina*, 559 (3d ed. 2016) (“A declaratory judgment action to determine coverage under an insurance policy is an action at law.”).

Because declaratory judgment actions seeking declarations regarding insurance coverage are actions at law, the parties are entitled to a jury trial on all factual issues. *See*, *State Farm Mut. Auto. Ins. Co. v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, 263 S.C. 391, 394-95, 210 S.E.2d 613, 615 (1974) (upholding on appeal jury responses to special interrogatories in declaratory judgment action regarding coverage under a motor vehicle policy); *Government Employees Ins. Co. v. Mackey*, 260 S.C. 306, 316, 195 S.E.2d 830, 834 (1973) (“The issues of fact in this [declaratory judgment action brought by insurer] were properly submitted to the jury with a full and correct charge by the trial judge.”); *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 61, 159 S.E.2d 921, 923 (1968) (holding that issues of fact in insurance coverage action were properly determined by a jury); *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 375, 415 S.E.2d 406, 409 (Ct. App. 1992) (reversing the grant of summary judgment for plaintiff because there existed genuine issues of material fact to be determined by a jury); *State Farm Mut. Auto. Ins. Co. v. Turner*, 303 S.C. 99, 100, 399 S.E.2d 22, 22 (Ct. App. 1990) (in declaratory judgment action brought by insurer, Court of Appeals affirmed submission of issues to a jury). *See also*, Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina*, 555 (3d ed. 2016) (“... the legal issues are for determination by a jury ...”).

In its motion to dismiss, Covil does not make the argument that the present action is one in equity. Therefore, it appears that even Covil concedes that its lawsuit against Penn National is one at law. Because the present action is one at law, it is beyond cavil that Penn National is

entitled to a jury trial on the issues.

(2) Covil Wrongly Conflates The Fact That The Present Action Is One At Law With The Argument That Matters Can Be Decided “As A Matter Of Law.”

Whether an action is one at law or in equity governs whether the parties have a right to have the issues decided by a jury. There is no right to a jury trial in cases in equity. *Fountain*, 436 S.C. at 47, 871 S.E.2d at 170. However, there is a right to a jury trial in cases at law. *Lester*, 327 S.C. at 266, 491 S.E.2d at 241; *Leggett*, 226 S.C. at 417, 85 S.E.2d at 582. The standard of appellate review is also different. With equitable cases, the appellate courts can review *de novo* both the factual findings and conclusions of law. If the case is one at law, appellate review extends only to the correction of any errors of law; factual findings by the fact-finder will not be disturbed unless the record shows no evidence to reasonably support those findings. *See, Townes Assocs., Ltd. v. Greenville*, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976) (setting the standard of appellate review for cases at law and in equity).

Covil appears to make the misleading argument that because the present action is one at law, Penn National has no right to a jury trial. This is obviously incorrect and contrary to the law in South Carolina. The right to a jury trial is inviolate in cases at law.

It appears that in making this argument, Covil conflates the fact that a declaratory judgment requesting coverage determinations is one *at law* with the notion that certain issues may be decided *as a matter of law* by a court. The Rules of Civil Procedure allow courts to decide issues as a matter of law under certain circumstances. For example, under Rule 56, courts are allowed to enter summary judgment in favor of a party where there are no genuine issues of material fact:

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. However, 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)).

In the present case, however, **Covil never moved for summary judgment.** To the contrary, Covil requested a trial of this case with findings of fact and conclusions of law:

The Receiver further requests that the Court combine the evidentiary hearing regarding spoliation with the trial on declaratory judgment issues into a single trial that lasts no more than three days. The Receiver also requests that the Parties be allowed to submit proposed findings of fact and conclusions of law in advance of trial.

(Appx., p.39). Covil then filed Proposed Findings of Fact and Conclusions of Law, containing thirty-one (31) pages of “Proposed Findings of Fact.” (Supp. Appx., pp.1-35) These proposed findings of fact included whether Penn National issued policies of insurance in addition to two policies which were stipulated to by Penn National; whether and when injuries occurred in fourteen asbestos liability cases asserted against Covil; whether Penn National had a duty to preserve historic policies; if such a duty existed, when Penn National’s duty to preserve its historic policies was triggered; whether Penn National destroyed policies potentially applicable to Covil’s asbestos liability with culpable intent; the propriety of Penn National’s business decision to store its historic policies by policy number; the underwriting intent in issuing the policies to Covil; and the adequacy of Penn National’s search for additional policies. (*Id.*). Penn National also filed its Proposed Findings of Fact and Conclusions of Law, which consisted of fifty-eight (58) proposed findings. (Supp. Appx., pp.73-94). Penn National is entitled to a jury

trial on these issues of fact.

It is clear that the present action is one at law that requires a trial by jury on all issues. By demanding that this Court summarily dismiss Penn National's appeal of the order entered by the Circuit Court which denies Penn National's right to a jury trial in this case, Covil attempts to avoid appellate review of the merits of this appeal. This Court should not allow the summary disposition of an order that deprives Penn National of a substantial constitutional right. Instead, this Court should deny Covil's motion to dismiss and allow the Circuit Court's order to be addressed on its merits.

(3) *Penn National Has Not Waived Its Right To A Jury Trial In This Lawsuit.*

After arguing that Penn National's appeal of the order denying its right to a jury trial is "frivolous," Covil then makes the incongruous argument that Penn National actually has the right to appeal the designation of this case as non-jury but that it waived its right to a jury trial by not appealing sooner. Covil's argument is without merit.

First, the law is clear that a party must appeal from an *order* that abridges that party's constitutional right to a jury trial. *See, Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (holding that even though party made its right to a jury trial an issue throughout the litigation, its failure to immediately appeal the order actually designating the case as a non-jury matter waived his latter appeal of issue). *See also, Foggie*, 315 S.C. at 23, 431 S.E.2d at 590 (stating that appeal must be from "order of the trial judge"); *Creed*, 285 S.C. at 542-43, 331 S.E.2d at 352 (holding that because party failed to immediately appeal from the "order of reference," he waived his objection); *Bateman*, 358 S.C. at 674, 596 S.E.2d at 390 ("The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal.").

Covil's oral references to its request for a non-jury trial is insufficient to trigger any duty

by Penn National to appeal. Only when an order is entered that affects the mode of trial is a party required to appeal or risk waiving its right to a jury trial. Here, there was no *order* entered by the Circuit Court until December 7, 2022, when the order was entered indicating that the trial in this case would be non-jury. (Appx., pp.4-6). Penn National filed its Notice of Appeal on the very same day. Penn National's actions in filing this appeal are entirely proper and consistent with the requirements of South Carolina law. Penn National did not waive its right to a jury trial.

Second, the law is clear that once invoked, a demand for a jury trial can only be waived through stipulation of the parties or court order:

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the calendar and the clerk's filebook as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

Rule 39(a), SCRPC. Here, Penn National never filed a written stipulation with the court indicating that it was waiving its right to a jury trial or entered into an oral stipulation in open court that it was doing so. Indeed, Covil does not and cannot point to any such stipulation. Therefore, under the Rules of Civil Procedure, Penn National has not waived its right to a jury trial in this case. To the contrary, Penn National is seeking to preserve its constitutional right to a jury trial by filing this appeal.

C. Covil Is Not Entitled To A Non-Jury Trial Of The Issues Regarding Penn National's Alleged Spoliation.

Covil makes the incredible argument in its motion to dismiss that the issue of spoliation was not before the Circuit Court for trial because Covil "had not yet moved for" sanctions from Penn National's alleged spoliation in this case. (Covil Mot., p.8, n.11). Although it is true that

Covil had not moved for sanctions resulting from any alleged spoliation, Covil actually requested that a trial be held on whether Penn National engaged in acts that amount to spoliation of evidence. Indeed, in its initial request to set a trial date, Covil demanded a trial where issues of spoliation would be tried with the other issues in this case:

The Receiver requests an evidentiary hearing regarding Penn National's spoliation of evidence in order for the Court to make factual findings regarding the scope of the harm to Covil and to fashion appropriate remedies to address that harm. The Receiver also asks for a non-jury trial on Covil's declaratory relief against Penn National concerning Penn National's obligations to Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8.

The Receiver further requests that the Court combine the evidentiary hearing regarding spoliation with the trial on declaratory judgment issues into a single trial that lasts no more than three days. ...

(Appx., p.39). Covil filed its proposed findings of fact and conclusions of law, which included findings of fact regarding whether additional policies of insurance issued by Penn National to Covil actually existed, Penn National's actions that allegedly resulted in the destruction of policies, Penn National's culpable intent, and conclusions of law regarding the sanction to be imposed on Penn National due to these alleged actions. (Supp. Appx., pp.15-21, 63-68). Clearly, Covil requested and intended to try the issues of spoliation.

Although not expressly adopted by South Carolina appellate court decisions, the Fourth Circuit Court of Appeals has held that a party requesting sanctions based on the spoliation of evidence has the burden of establishing three elements:

- (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 U.S. Dist. LEXIS 162714, *5 (4th Cir. 2013). *See also*, *Hopper v. Air & Liquid Sys. Corp.*, 2019 S.C. C.P. LEXIS 5488, *11, Case No, 2019-CP-00076 (S.C. Super. Ct. Order dated Oct. 31, 2019) (Ret. Chief Just. Toal) (holding that a party bringing a motion for sanctions based on spoliation bears the burden of establishing the three elements adopted by the Fourth Circuit in *Hawkins*). Therefore, prior to the imposition of any sanction, the party seeking such sanctions has the burden to prove whether the evidence actually existed, the opposing party's duty to preserve such evidence, and the opposing party's culpable state of mind - all factual findings within the purview of a jury. *See, Harleysville Group Ins. v. Heritage Cmtys, Inc.*, 420 S.C. 321, 346, 803 S.E.2d 288, 302 (2017) ("These questions of the insured's intent are factual in nature."); *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 32, 737 S.E.2d 857, 858 (Ct. App. 2013) (reversing directed verdict and finding that insured's intent was a factual issue that should have been decided by a jury). *See also, Evans v. Quintiles Transnational Corp.*, 2015 U.S. Dist. LEXIS 171750, *13-14 (D.S.C. 2015) (holding that on spoliation issues a jury was to resolve "any credibility questions and make a determination, first, as to whether the alleged computer file even existed on Plaintiff's computer, whether and when Quintiles should have reasonably known that the evidence may be relevant to anticipated litigations, and, if so, whether Quintiles willfully lost or destroyed the file.")

Covil does not and cannot cite to a single case from South Carolina that states that these types of credibility and state of mind determinations are outside the jury's province. Instead, Covil quotes extensively from a Texas state court case for the proposition that it is within the Court's discretion to find whether a party engaged in destructive behavior and then what sanction to assess. (Covil's Mot., p. 9, quoting from *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014)). However, Texas law is not binding on this Court.

South Carolina courts have held that once factual findings are made regarding whether a party engaged in the willful destruction of relevant evidence that a party had a duty to preserve, the role of the trial court is to determine an appropriate remedy, including whether an adverse inference jury instruction should be given. However, such a sanction still leaves it within the jury's province to determine whether to accept the adverse inference or not:

Among these 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.

Hopper, 2019 S.C. C.P. LEXIS 5488 at*16, Case No, 2019-CP-00076 (Ret. Chief Just. Toal).

As Ret. Chief Justice Toal herself found in *Hopper*, a jury has the ultimate decision regarding the inference it should make as to evidence of any lost or destroyed evidence.

The Supreme Court's decision in *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) is on point. The *Kershaw* case arose out of the remediation of asbestos tiles in Kershaw County schools. Prior to filing the products liability action against United States Gypsum Company, an asbestos manufacturer, a trial court issued an order that the School Board was to notify all potential asbestos manufacturers prior to its removal of asbestos from the school. There was one school, however, where the School Board failed to notify Gypsum of the removal of the asbestos tiles prior to its doing so. Gypsum requested the court to dismiss all claims arising from the removal of asbestos from that school. The trial court denied this motion, finding that an adverse inference jury instruction would be provided instead. *Id.* at 393-94, 396 S.E.2d at 371. The Supreme Court upheld the trial court's decision:

Gypsum moved for judgment in its favor on the claims related to Camden High School because Kershaw had violated Judge Smith's order by removing asbestos prior to Gypsum's inspection. The trial judge refused

this motion, but did include a jury instruction on the destruction of evidence. The trial court permitted Kershaw to explain the circumstances surrounding its failure to notify Gypsum and instructed the jury that when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party. We believe the trial court's decision was proper under the fact of this case.

Id. at 394, 396 S.E.2d at 372. The Supreme Court agreed that the jury should be allowed to hear the evidence regarding spoliation and make a determination regarding what effect such evidence had in the case. *Id.* at 395, 396 S.E.2d at 372. *See also, Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) (holding that it was proper for a jury to hear evidence regarding the unavailability of evidence and whether to draw an adverse inference); *Gathers v. South Carolina Elec. & Gas Co.*, 427 S.E.2d 687, 689 (Ct. App. 1993) (affirming the trial court's decision to submit evidence of the loss or destruction of evidence to the jury).

Covil argues that because South Carolina does not recognize a cause of action for spoliation, a jury is not entitled to determine the facts supporting any alleged spoliation. Although it is true that South Carolina has not adopted a cause of action for spoliation, the Supreme Court has held that spoliation may be a defense to a civil action. *See, Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 153, 714 S.E.2d 537, 542 (2011) (“However, our conclusion that Hobbs is unable to bring an independent claim does not preclude him from asserting spoliation as a defense to the declaratory judgment action brought by Cole Vision and Sears.”) As with affirmative claims, it is within the purview of a jury to determine evidence regarding any defenses raised.

Despite Covil's attempt to divorce itself from its request for a trial on the spoliation issues in this case, Covil in fact requested that its evidence regarding spoliation be presented and determined at the trial. Penn National requested a jury trial on factual issues, including any

factual issues related to alleged spoliation. The Circuit Court denied Penn National's right to a jury trial of these issues. Penn National's appeal of this order is proper. Therefore, this Court should deny Covil's motion to dismiss appeal and consider this appeal on its merits.

CONCLUSION

Penn National appropriately demanded a jury trial in this case within the dictates of South Carolina law and the rights guaranteed it by the South Carolina Constitution. When the Circuit Court denied its constitutional right to a jury trial by ordering that the issues in this case would be tried non-jury, Penn National had the absolute and inviolable right to appeal this order immediately. Despite the clear law from this and the Supreme Court that Penn National is required to appeal this order or be deemed to have waived its right to a jury trial, Covil has moved to dismiss this appeal. The basis of Covil's motion is that there is no right to a jury trial of the issues in this case. However, the merits of this appeal should not be decided summarily and on an expedited basis through a motion to dismiss. Instead, this Court should be allowed a full and fair opportunity to consider the merits and make its determinations after considering the briefing and fully developed arguments of the parties. This is especially true where, as here, Penn National's constitutional right to a jury trial is at stake. Accordingly, Penn National respectfully requests that this Court deny Covil's motion to dismiss its appeal and allow the parties to fully brief the merits of the issues on appeal for this Court's consideration.

December 28, 2022

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Dec 28 2022

SC Court of Appeals

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-40-02098

Appellate Case No. 2022-001722

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Petitioner.

PROOF OF SERVICE

I certify that a true copy of **PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY'S RETURN TO MOTION TO DISMISS AND EXPEDITE** and **SUPPLEMENTAL APPENDIX** has been served on the following, this 28th day of December, 2022, by emailing a copy to each attorney listed below using their primary email address listed using their AIS E-mail address pursuant to Rule 262 of the South Carolina Appellate Court Rules:

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