

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefler Toal, Circuit Court Judge

Case No. 2020-CP-40-01226
Appellate Case No. 2022-000366

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S.C. SUPREME COURT

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

Respondent,

v.

Pennsylvania National Mutual Insurance Company,

Petitioner.

RESPONDENT'S BRIEF

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I. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals properly found Penn National's late notice defense failed where Penn National suffered no prejudice, does not allege that Covil's underlying asbestos defense was deficient prior to its involvement in the underlying action, had sufficient information about the underlying action to decide to attend the mediation with a willingness to contribute toward settlement, and denied coverage based on policy exclusions?
2. Whether the Court of Appeals properly affirmed the circuit court's grant of partial summary judgment where the Receiver's motion was not premature, was based on the evidence from the underlying action, and was sufficiently supported by evidence that was before the Court without objection from Penn National?
3. Whether the Court of Appeals properly found 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 and turned over control of the worksite?

II. COUNTER-STATEMENT OF THE CASE

This is an action filed by the Court-appointed Receiver for Covil Corporation ("Covil"), a now-defunct corporation, to determine insurance coverage for an underlying asbestos lawsuit under an insurance policy issued by Petitioner Pennsylvania National Mutual Insurance Company ("Penn National"). The underlying asbestos lawsuit for which Covil sought insurance coverage from Penn National settled after a mediation which Penn National attended. When the Receiver sought contribution from Penn National, among other insurance companies issuing policies to Covil, Penn National denied coverage. As a defunct entity, Covil's only assets are its insurance policies, and it is currently defending multiple asbestos-related lawsuits. Because Penn National wrongly denied coverage, this resulted in the Receiver expending Covil's limited assets to cover Penn National's share, impacting its ability to make victims in the other suits it is defending whole. This action to determine the scope of Penn National's coverage obligations was filed shortly thereafter.

Penn National issued at least two policies to Covil between 1986 and 1988 that provided coverage for damages because of bodily injury. However, Penn National denied coverage for the

underlying asbestos suit, alleging that an exclusion for “Completed Operations Hazard and Products Hazard” applied. Penn National’s coverage position was unsupportable. It has been understood for decades that the risk insured by the “products hazard” and the “completed operations hazard” 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.”¹ 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.

In the underlying action, David Rollins (“Rollins”) sued Covil through its Court-appointed Receiver, Peter D. Protopapas, in 2019 for contributing to his mesothelioma. Covil had worked with insulation materials, which contained asbestos, at a facility (“Bowater”) where Mr. Rollin’s stepfather worked when Mr. Rollins was a child. The evidence adduced in the *Rollins* litigation established that Mr. Rollins was exposed to asbestos attributed to Covil *before* Covil completed its work with 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 products hazard and completed operations hazard policy exclusions. Penn National hired the same counsel for Covil as the other insurers in the *Rollins* lawsuit, Ellis & Winters, obtained the relevant files, evaluated that information, and made a decision to refuse to contribute to the settlement because it believed the facts of the *Rollins* case did not entitle Covil to coverage under its policies. *Rollins* settled, and the Court-appointed Receiver paid Penn National’s share of the settlement amount.

¹ Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971).

In this coverage action, the Receiver sued Penn National for breach of contract. He then moved for partial summary judgment based on the evidence in the record, including the complaint and deposition testimony in the underlying *Rollins* action, Covil's Bowater contract, Covil's Bowater payment records, and one of the two Penn National policies. Penn National opposed the Receiver's motion, alleging it did not owe coverage (1) because it received late notice of the *Rollins* action and (2) because two policy exclusions applied. Although it claimed the motion was premature, Penn National did not submit the required Rule 56(f), SCRC, affidavit to support its purported need to engage in fact-finding before the circuit court ruled on the Receiver's motion. Nor did it otherwise specifically state what discovery it believed it needed or explain how further discovery was likely to generate evidence creating a fact issue sufficient to defeat summary judgment. Finally, Penn National did not serve any discovery during the pendency of the motion and did not object to the admissibility of any specific piece of 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" exclusions 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. Penn National then sought reconsideration of the circuit court's order granting the Receiver's motion and filed an 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 because Penn National did not show it needed more discovery and because Penn National did not submit a Rule 56(f) affidavit in

support of its request for additional time. Penn National did not appeal the circuit court's order denying reconsideration.

The Court of Appeals affirmed the circuit court's decision. The Court of Appeals first found that Penn National did not preserve for review its argument that Covil's motion for partial summary judgment lacked proper evidentiary support because Covil did not include affidavits or authenticated documents. As to Penn National's argument that the motion for partial summary judgment was premature, the Court of Appeals found the argument meritless because: (1) Penn National did not participate in discovery in the six months between when Covil initiated the action and the circuit court granted partial summary judgment; (2) Penn National did not demonstrate that further discovery would uncover additional relevant evidence to defeat summary judgment; and (3) Penn National failed to comply with Rule 56(f). The Court of Appeals next agreed that Penn National's late notice defense failed because Penn National attended the *Rollins* mediation with a willingness to contribute toward settlement and chose not to contribute due to its belief that the underlying facts of the *Rollins* case did not entitle Covil to coverage. Finally, the Court of Appeals held that Penn National did not establish the applicability of either the products hazard exclusion or the completed operations hazard exclusion.

Penn National filed a Petition for Rehearing En Banc, which the Court of Appeals denied. Penn National filed a Petition for Writ of Certiorari, which this Court granted.

III. STATEMENT OF FACTS

A. Current Status of Covil Corporation.

From the time of its original formation in or about 1954, Covil was engaged in work at 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 to individuals 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.² On November 2, 2018, Chief Justice Jean Hoefer 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 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,

² 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).

Robert J. Ashworth (“Ashworth”), with whom he lived between 1980 and 1991. (R. pp. 87–88, 120). Ashworth 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 the Bowater Paper Mill (“Bowater”) where Covil operated. (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 at least 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).

Penn National denied coverage for the *Rollins* action citing “products hazard” and “completed operations hazard” exclusions. Penn National had not produced complete copies of the policies at the time Covil filed its motion for partial summary judgment in the circuit court, but Penn National admitted the definitions for the two exclusions that Covil cited were the correct definitions under the policies.³

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 from Penn National to settle *Rollins*—a fraction of the \$1,000,000 bodily injury limits of liability afforded to Covil by the Relevant Policy. Although Penn National admitted it attended the mediation with an openness to contributing to the settlement, following the mediation it refused to do so and denied that coverage was owed under the policies based on the information it had obtained. *Rollins* was thereafter settled without Penn National’s assistance.

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

³ Penn National submitted the policy materials as an exhibit to its memorandum in opposition to the Receiver’s motion for partial summary judgment. (R. pp. 423–514).

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 (Ret.) 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. pp. 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 both 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).

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). Penn National filed a Notice of Appeal on September 14, 2020. (R. pp. 563–64).

G. The Court of Appeals’ Opinion.

After briefing and oral argument, the Court of Appeals issued an opinion affirming the partial grant of summary judgment on January 5, 2022. (R. p. 684). The Court of Appeals found

the partial grant of summary judgment was neither unsupported nor premature. (R. pp. 687–88). The Court of Appeals noted Penn National failed to conduct any discovery in the six months that the action was pending, failed to demonstrate discovery would uncover any additional, relevant evidence, and failed to submit a Rule 56(f) affidavit. (R. p. 688). The Court of Appeals further agreed with the circuit court that Penn National’s late notice defense failed because it attended the mediation and decided not to contribute to the settlement based on its conclusion that a policy exclusion applied. (R. pp. 689–90). Finally, the Court of Appeals found neither the product hazard exclusion nor the completed operations hazard exclusion barred coverage in *Rollins*. (R. pp. 690–94). Specifically, the Court of Appeals found “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 [National] could not establish the applicability of the products hazard exclusion.” (R. pp. 692–93). As to the completed operations hazard exclusion, the Court of Appeals found “because Rollins was exposed to asbestos during the period of the contract coverage, the [exclusion] did not apply.” (R. p. 694). Accordingly, the Court of Appeals affirmed the circuit court’s decision. (R. p. 694).

Penn National filed a Petition for Rehearing En Banc on January 28, 2022, which the Court of Appeals denied on February 23, 2022. (R. pp. 695–721; 725–26). Penn National filed a Petition for Writ of Certiorari on March 28, 2022. This Court granted certiorari on October 11, 2022.

IV. ARGUMENT

A. Standard of Review.

The Receiver agrees that this 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). Summary judgment is appropriate when “there is no genuine issue as to any material fact.” Rule 56(c), SCRPC. The non-moving party “must come forward with specific facts showing there is a

genuine issue for trial,” and cannot rest on mere allegations or denials in the pleadings. *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Here, Penn National failed to meet its burden to produce evidence showing there was any issue of fact for trial.

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.”).

B. Penn National suffered no prejudice from the timing of the *Rollins* notice.

The circuit court correctly determined that the timeliness of the notice was not a bar to Covil’s suit. This Court, as recently as 2019, reaffirmed that South Carolina is a notice-prejudice state—meaning that for an insurer to prevail on its argument that a suit is barred because notice was untimely, that insurer must show prejudice. Penn National cannot do so here, and so instead asks this Court to ignore its caselaw and rewrite the established rule in this State for insurers to show that late notice prevents a suit from proceeding. To affirm the circuit court’s decision, this Court need not go as far as the Court of Appeals and find that Penn National “waived” its late notice defense, it simply needs to apply the well-established “notice-prejudice” rule as the circuit court correctly did in this matter.

1. South Carolina is a “notice-prejudice” state.

In 2019, this Court explained that “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).

In *Neumayer*, this Court explained the purposes of notice clauses in insurance policies and traced the development of the law pertaining to such clauses. As this Court stated, nearly all insurance policies contain notice clauses because “[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.” *Id.* (citing *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971)). *Neumayer* cited *Century Surety Co. v. Hipner, LLC*, 377 P.3d 784 (Wyo. 2016), which explained that the public policy rationale justifying allowing inclusion of these notice provisions is that an adequate investigation of insurance claims often is hindered by the passage of time and can lead to increased fraud, but “that this public policy is not harmed by **requiring insurers to be prejudiced** before denying coverage for late notice.” *Id.* at 788 (emphasis added); *see also Vermont Mut. Ins. Co. v. Singleton By & Through Singleton*, 316 S.C. 5, 11, 446 S.E.2d 417, 421 (1994) (recognizing the notice-prejudice rule does not interfere with “[t]he purpose of a notification requirement[, which] is to allow for investigation of the facts and to assist the insurer in preparing a defense.”). Although many cases discuss the issue in the context of mandatory automobile insurance, this State has long applied the notice-prejudice rule more broadly to all voluntary insurance policies. *Vermont Mut. Ins. Co.*, 316 S.C. at 12, 446 S.E.2d at 421–22 (recognizing the rule has generally applied since at least 1973).

The notice-prejudice rule “is now clearly the majority rule.” *Neumayer*, 427 S.C. at 267, 831 S.E.2d at 409. The jurisdictions which have adopted it have generally given three justifications for its adoption: (1) “the adhesive nature of insurance contracts”; (2) “the public policy objective

of compensating tort victims”; and (3) “the inequity of the insurer receiving a windfall due to a technicality.” *Century Sur. Co.*, 377 P.3d at 789. The second two policy reasons are what animated this State’s adoption of notice-prejudice rule. This Court has recognized both that there are “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 of a lawsuit,” and that notice clauses should not function as a “technical escape-hatch” to deny coverage. *Neumayer*, 427 S.C. at 266–67, 272, 831 S.E.2d at 408–09, 411. The “notice-prejudice rule balances” the insurers’ interest in including notice clauses in insurance contracts and the insured’s and public’s interest in injured parties’ right to recover “without a wholesale prohibition of these clauses.” *Id.* at 272, 831 S.E.2d at 411.

Penn National tries to limit the scope of the notice-prejudice rule to only apply when the rights of innocent third parties are implicated by the denial of coverage. (Pet. Br. p. 19). But this argument provides no relief to Penn National for two reasons: (1) the policy rationales this Court has recognized as animating the notice-prejudice rule apply even when innocent third parties are not involved; and (2) even if the rights of innocent third-parties must be implicated for the notice-prejudice to apply, this is the paradigmatic case for the application of the rule—Covil is a defunct corporation with a Court-appointed Receiver tasked with recovering insurance assets, in part, to compensate meritorious third-party tort victims. *See infra* Part IV.B.2.b (addressing the application of the notice-prejudice rule to this case).

This Court’s most recent cases addressing the notice-prejudice rule’s application in this State contain no language strictly limiting the rule to only apply in cases where the rights of innocent third parties are implicated, and in fact, cite favorably cases from other jurisdictions that extend the rule beyond when innocent third-parties are involved. *See Neumayer*, 427 S.C. at 266–

67, 272, 831 S.E.2d at 408–09, 411 (citing *Century Sur. Co. v. Hipner, LLC*, 377 P.3d 784 (Wyo. 2016) and *State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat’l Union Fire Ins. Co. of Louisiana*, 56 So. 3d 1236, 1246 (La. Ct. App. 2011)). Namely, these jurisdictions broadly apply the notice-prejudice rule to prevent insurance companies from reaping undeserved windfalls. *See, e.g., Century Sur.Co.*, 377 P.3d at 790–91 (“we have expressed our disfavor of undeserved windfalls to insurance companies”); *Nat’l Union Fire Ins. Co. of Louisiana*, 56 So. 3d at 1246 (“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 . . .”). Moreover, courts applying this Court’s decisions have not required that the rights of innocent third-parties be implicated for the notice-prejudice rule to apply. *See, e.g., 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.”); *Wright v. UNUM Life Ins. Co.*, No. 2:99-2394-23, 2001 WL 34907077, at *2 (D.S.C. Aug. 31, 2001) (applying notice-prejudice rule in first-party insurance context).

The impact on the rights of innocent third-parties may be the “driving force” behind adopting the notice-prejudice rule, but it is not the only policy purpose this Court and others recognize behind the rule, and there are good reasons to apply the rule expansively. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974) (“There can be no doubt that the purpose of a notice provision is to protect an insurance company from any prejudice resulting from an inordinate lapse of time between an accident and the company’s awareness thereof.”); *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 802 (Ky. 1991) (“in the absence of prejudice a strict forfeiture clause simply provides the insurance company with a windfall”); *Ouellette v.*

Maine Bonding & Cas. Co., 495 A.2d 1232, 1235 (Me. 1985) (“the traditional result of forfeiture is an undeserved windfall to the insurer”); *Estate of Gleason v. Cent. United Life Ins. Co.*, 350 P.3d 349, 355 (Mont. 2015) (“the notice-prejudice rule accords with the well-established contract principle of non-material breach”); *Roberts Oil Co., Inc. v. Transamerica Ins. Co.*, 833 P.2d 222, 228 (N.M. 1992) (“There is no indication in the opinion, nor any in the many other cases requiring a showing of actual prejudice, that the rule operates only when an innocent third party is or has been injured. Rather, the rule implements a fundamental characteristic of all, or nearly all, insurance contracts—namely, the essential nature of the contract as a promise by the insurer to indemnify and defend the insured against certain risks, in exchange for the insured’s payment of the premium.”); *Great Am. Ins. Co. v. C. G. Tate Const. Co.*, 279 S.E.2d 769, 774 (N.C. 1981) (“Strict interpretation of the notice requirement leads to harsh results: failure to notify the insurer within a reasonable time, for whatever reason, relieves the insurer of its obligations to defend and indemnify, the essence of the contract, even though it may have suffered no prejudice whatsoever as a result of the delay.”).

Moreover, the policy rationale that insurers should not be allowed to breach the essence of the insurance contract based on non-compliance with a non-material provision aligns with general principles of contract law. “The Restatement (Second) of Contracts allows a court to excuse a party’s failure to perform a condition in the contract if an inequitable forfeiture would occur and the condition is not a material part of the contract.” *Century Sur. Co.*, 377 P.3d at 790 (citing Restatement (Second) of Contracts § 229 (updated 2016)). “[A]llowing an insurance company, which has collected full premiums for coverage, to refuse compensation to an accident victim or insured on the ground of late notice, where it is not shown timely notice would have put the company in a more favorable position, is unduly severe and inequitable.” *Brakeman v. Potomac*

Ins. Co., 371 A.2d 193, 195 (Pa. 1977); *Estate of Gleason*, 350 P.3d at 355 (“The rule prevents insurers from suspending performance due to the insured’s failure to comply with the policy notice provision unless the insurer can establish prejudice and thus demonstrate that the failure was material.”).

To the extent earlier caselaw suggests that the notice-prejudice rule may not apply unless the rights of third-parties are implicated, those cases are out of step with how this Court’s jurisprudence has developed and its embrace of the modern notice-prejudice rule and the full range of policy rationales animating the rule in this jurisdiction and others. *Lee v. Metropolitan Life Insurance Co.*, 180 S.C. 475, 186 S.E. 376 (1936) and *Hatchett v. Nationwide Mutual Insurance Co.*, 244 S.C. 425, 137 S.E.2d 608 (1964) predate the adoption of the notice-prejudice in this state in cases like *Factory Mutual Liability Insurance Co. of America v. Kennedy*, 256 S.C. 376, 380, 182 S.E.2d 727, 729 (1971). Although *Factory Mutual* justified its departure from these earlier cases on the grounds that they did not involve innocent third parties, 256 S.C. at 380, 182 S.E.2d at 729, the jurisprudence in this State applying the notice-prejudice rule continued to further evolve and expand, as other jurisdictions adopted the modern notice-prejudice rule and justified doing so for multiple public policy reasons.

Further, there is even earlier caselaw predating *Factory Mutual* that does adopt—without discussion of innocent third-parties—the requirement that an insurer show prejudice to prevail in an untimely notice defense. See *Squires v. Nat’l Grange Mut. Ins. Co.*, 247 S.C. 58, 67, 145 S.E.2d 673, 677 (1965) (“The burden of proof is upon the insurer to show not only that the insured has failed to perform the terms and conditions invoked upon him by the policy contract but in addition that it was substantially prejudiced thereby.”). *Squires* imported the requirement of prejudice to escape insurance coverage in the notice context from cases discussing the requirement of prejudice

where an insurer claims a lack of compliance with cooperation clauses in liability policies. *See Crook v. State Farm Mut. Auto. Ins. Co.*, 235 S.C. 452, 462–63, 112 S.E.2d 241, 246 (1960); *Pharr v. Canal Ins. Co.*, 233 S.C. 266, 279, 104 S.E.2d 394, 401 (1958). *Squires* was fully aware of and cited *Hatchett* when it adopted the rule that an insurer must show prejudice to prevail on an untimely notice defense. *See* 247 S.C. at 67, 145 S.E.2d at 677. Thus, from what appears to be the earliest case in which this Court adopted the notice-prejudice rule, *see Neumayer*, 427 S.C. at 267, 831 S.E.2d at 409 (reciting history of rule in state), the rule has not been solely animated by protecting innocent third-parties but also the policy consideration that it would be inequitable to allow insurers to escape the core of the contract for a breach of a non-material provision without a showing prejudice.

The adoption of the modern notice-prejudice rule is supported by multiple policy rationales, which pertain to more than the rights of innocent third-parties. This Court has never expressly cabined the notice-prejudice rule to the third-party context and there is no reason to do so now, especially given that other jurisdictions adopting the rule also recognize a broad range of supporting policy rationales that do not support such a limitation. There is no confusion in this State’s law on this point, but to the extent Penn National insists otherwise, this Court should clarify that the notice-prejudice rule applies regardless of whether the rights of innocent third-parties are involved and that public policy and equity do not support insurers using notice clauses as a “technical escape-hatch” without first showing prejudice.

2. Penn National’s late notice defense did not preclude Covil’s suit.

Applying this well-established law requires this Court to affirm the circuit court’s finding Penn National that failed to meet its burden of proving the applicability of a “late notice” defense. Penn National produced no evidence that it suffered any prejudice from the timing of notice. Nor could it. It retained the same counsel, Ellis & Winters, to defend Covil in the *Rollins* action as the

other insurers who were participating earlier, and it does not allege that counsel's defense of Covil in the *Rollins* action was in any way deficient. No pleadings were missed. Discovery was thorough and complete. Nor did Penn National suffer any prejudice from the timing of the notice in relation to the *Rollins* mediation. Penn National received notice in time to attend the mediation with a willingness to contribute to settlement, and then it made a determination to deny coverage on the merits. And finally, even if Penn National is correct that the notice-prejudice rule only applies where innocent third parties are involved (which it is not), this is the paradigmatic case for applying the rule.

a. Penn National cannot establish prejudice.

Penn National makes no argument in its brief that it was prejudiced by the timing of the notice. Instead, Penn National argues that the law does not require that it establish prejudice. (Pet. Br. p. 19-20) (“in order to avoid coverage for the settlement, Penn National only has to show that Covil failed to provide it with timely notice of the *Rollins* Lawsuit.”). It has therefore forfeited any argument that it was prejudiced if this Court agrees with Covil's position that Penn National must show prejudice. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

Nor can Penn National establish prejudice. The purpose of a notice clause is to allow the insurer the ability “to properly investigate *and defend [its policyholder] against [a claim]*, and these clauses ensure that the insurer receives notice by imposing this obligation on the insured.” *Neumayer*, 427 S.C. at 266, 831 S.E.2d at 408 (emphasis added). 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.” (R. p. 10).⁴ Penn National

⁴ Penn National retained Ellis & Winters LLP, an experienced asbestos defense firm, that it routinely hires to defend Covil against asbestos suits.

does not allege the defense of Covil in the *Rollins* lawsuit was in any way deficient (which would strain credulity given Penn National continues to retain this same counsel in other actions to defend Covil) or that anything should have been done differently in defending Covil. It does not allege that earlier in the action before its involvement Covil received an inadequate defense. It does not allege that the settlement reached at the mediation was unfair or otherwise unreasonable. It just alleges it does not owe coverage. There simply was no interference with the action being competently defended by the timing of notice to Penn National, which is the entire purpose of a notice clause—to prevent prejudice from an inability to properly defend against the underlying claim. *Neumayer*, 427 S.C. at 266, 831 S.E.2d at 408.

Penn National directs the Court to no authority that establishes that there was prejudicial late notice in these circumstances. In support of its argument that the notice was late, Penn National argues that three cases establish that nine months between service of the *Rollins* lawsuit and notice to Penn National of the suit makes the notice untimely. (Pet. Br. p. 20). But these cases stand for no such proposition and involve clear prejudice to the insurer that is not present here.

In *Hatchett*, the insured obtained a **default judgment** from the tortfeasor and then the insured waited a month and half after default to notify the insurer, and then refused to waive the default after the insurer was notified to permit the tortfeasor to file an answer. 244 S.C. at 434, 137 S.E.2d at 612–13. The court found the notice untimely after the default because doing so deprived the insurer of the opportunity to “to investigate promptly, to negotiate a settlement without the handicap of a default position, or to sponsor the defense of the uninsured motorist, thereby insuring that the amount which plaintiff ‘shall be legally entitled to recover’ be fairly established.” *Id.* Similarly in *Founders Insurance Co. v. Richard Ruth’s Bar & Grill LLC*, the issue was not the waiting four months to provide notice, but again that the notice was provided

after a default had been entered. *See* 761 F. App'x 178, 183 (4th Cir. 2019). Nor is *Prior v. S.C. Medical Malpractice Liability Insurance Joint Underwriting Association*, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991), on point. The *Prior* court's primary holding was that the insurer had no duty to defend. *See id.* But in the alternative, *Prior* held that the insurer should have received notice almost two years before it did when the complaint was first made by the victim against the insured. *Id.* The four months between the lawsuit being filed and notice to the insurer was not found to be untimely in and of itself but was instead tied to the almost two years the insured knew of a complaint before giving notice.⁵ *Id.*

Nothing in Penn National's cases establishes prejudicial late notice where the claim against Covil was adequately defended, there was no default, discovery was completed, the insurer was able to participate in the mediation, and the insurer had sufficient information to make a determination to deny coverage under the policy. All that this State's law, as well as the Relevant Policy, requires is that notice be given within a reasonable time frame to defend the policyholder based on the circumstances.⁶ *See Vermont Mut. Ins. Co.*, 316 S.C. at 12, 446 S.E.2d at 422 (holding nothing in the record established a four-month delay was unreasonable). As the trial court explained, "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." (R. p. 10).

⁵ *Prior* also involved a scenario where the insurer began to undertake a defense of the insured under a reservation of rights but stopped after the evidence established it owed no coverage and no duty to defend. *Prior*'s notice holding is in the context of a patient who was sexually assaulted by her doctor (the insured) and who was ultimately made whole by the doctor who perpetrated the assault and not the insurer. *Prior*, 305 S.C. at 248–49, 407 S.E.2d at 656–57. As explained *infra* pp. 22–23, 23 n.8, *Prior* is generally out-of-step with this State's jurisprudence.

⁶ Although Penn National claims a condition of coverage is that the insured "immediately provide notice," (Pet. Br. pp. 13, 18), that ignores the full scope of the provision, which in subsection (a) only requires that "written notice . . . shall be given . . . as soon as practicable." (R. pp. 456, 502).

Furthermore, Penn National does not allege that the amount for which Covil settled the claim was unreasonable or not fairly established relative to Rollins's entitlement to damages based on the evidence. Therefore, it is ultimately irrelevant to the question of prejudice whether Penn National attended the mediation. But that is yet another reason that Penn National cannot establish prejudice because it had every opportunity to participate in the mediation. It did not object that settlement was improper, premature, or for an unreasonable amount. Penn National has instead alternatively explained that it (1) was not in a position to contribute in the amount requested; and then subsequently, that it (2) did not owe coverage under the policy. (R. p. 10).

Penn National engaged the same counsel as Covil's other insurers prior to the mediation, as well as had "access to all of the same materials as the insurers that elected to resolve the *Rollins* action at mediation."⁷ (R. p. 10). When it attended 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 believed that its policy exclusion barred coverage." (R. p. 10). There was no prejudice to Covil's defense against the *Rollins* action given the proximity of notice to the timing of the mediation.

Under these circumstances Penn National cannot show prejudice from the timing of the notice—it is not contested that the claims against Covil were adequately defended and that Penn

⁷ Penn National has previously claimed there is nothing in the record supporting the circuit court's findings that it had access to the materials in the *Rollins* action. This is nonsense. No insurer would represent it attended a mediation with a willingness to contribute if it had not reviewed the underlying file. The circuit court correctly inferred this finding from Penn National's own summary judgment opposition where it stated: "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," (R. p. 168), and that Penn National attended the mediation with a willingness to contribute.

National had an opportunity to participate in the settlement negotiations. The trial court correctly found based on these facts that “Penn National’s alleged late notice of the *Rollins* action is not a valid defense to breach of its insurance contract with Covil,” (R. p. 10), and it should be affirmed.

b. The rights of innocent third-parties are implicated.

As addressed above, this State’s public policy and its caselaw—consistent with that of other jurisdictions adopting the modern notice-prejudice rule—does not limit the application of the notice-prejudice rule to situations involving innocent third-parties. *See supra* Part IV.B.1. Nor would this case be a suitable vehicle to introduce such a limitation given that rights of innocent third-parties are implicated here.

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 limited insurance proceeds 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 address numerous lawsuits. Because Covil has less money to satisfy its liabilities to other innocent claimants with valid claims against Covil, the rights of innocent third-parties are clearly impacted.

Moreover, this is a third-party claim scenario: this lawsuit involves a dispute over coverage for a third-party’s (Rollins) claims against the insured (Covil). Had Covil not had other assets to settle the case and cover the amount Penn National should have contributed, the rights of an innocent third-party in this coverage dispute would have been impacted. It does not make sense that the application of the notice-prejudice rule would turn on whether the insured potentially has funds from other assets to cover the judgment, a discovery that may not be made in some instances until after disputes over coverage are litigated. This is one of the many reasons that *Prior*’s discussion of the notice-prejudice rule is inconsistent with this Court’s embrace of multiple policy

rationales for the notice-prejudice rule in modern jurisprudence.⁸ See *Prior*, 305 S.C. at 250, 407 S.E.2d at 657.

This was a third-party claim for which Penn National is denying coverage on the basis of late notice. Covil's expenditure of its limited funds, all while it is defending multiple asbestos lawsuits as a defunct corporation whose only assets are insurance policies, will impact the rights of other innocent members of the public to recover. Therefore, even if the notice-prejudice rule only applies where there are impacts on innocent third-parties, that threshold is met here. The circuit court's holding that Penn National's untimely notice defense does not bar Covil's suit should be affirmed.

3. This Court need not reach the waiver issue to affirm the circuit court.

Although the question presented for review centers on whether Penn National "waived" its late notice defense by participating in the *Rollins* Lawsuit mediation, this Court need not reach the waiver issue to affirm the circuit court. The applicable rule is the notice-prejudice rule, not waiver. Regardless of whether the Court of Appeals was correct in determining there was waiver, under well-established law Penn National did not meet its burden to establish prejudice. Thus, although the Court of Appeals evaluated the issue as one of waiver, and Penn National devotes a substantial

⁸ *Prior* predates *Neumayer* by eighteen years and was not cited in *Neumayer*'s recitation of the development of the notice-prejudice rule jurisprudence in this state. To the extent it does not embrace the full policy rationales expounded in *Neumayer* and the cases *Neumayer* cites (both from this state, such as *Squires*, and the Wyoming and Louisiana cases), its articulation of the notice-prejudice rule must give way to the current scope of the rule in this State. But as a more basic problem, in failing to cite or discuss *Squires*, *Prior* fundamentally misstated the scope of the notice-prejudice rule in the State at the time it was decided. Moreover, *Prior* did not contemplate the potential impact on other third-party victims who might have claims against the insured. *Prior* involved a doctor who sexually assaulted a patient, and the court looked no further than the fact that the victim had been paid by the doctor who committed the assault and did not consider whether there might be other victims impacted—especially where it already found no coverage was owed and the notice holding was an alternative holding.

portion of the brief to the issue, it is ultimately a red herring, and Covil urges the Court to affirm on the grounds that Penn National cannot show prejudice.

C. Covil’s motion was not premature, and the circuit court correctly exercised its discretion in determining that Penn National failed to comply with Rule 56(f) or otherwise show further discovery was likely to lead to relevant evidence to challenge summary judgment.

There is no conflict between the procedural rulings in this case and the decisions of this Court. Although Penn National tries to manufacture a conflict, the circuit court was well within its discretion to enforce compliance with the rules and require that Penn National file a Rule 56(f) affidavit. Penn National had almost six months from the time Covil initiated this action and when the circuit court ruled on the motion for partial summary judgment, during which time Penn National did not seek any discovery. The duty to indemnify is based on the insurance policy and the record developed in the underlying suit—here the *Rollins* action. All of the *Rollins* discovery was available to Penn National. Here, Penn National decided Covil was not entitled to coverage based on its reading of policy exclusions and the evidence adduced in the underlying *Rollins* action. That determination was either right or wrong based on the policy’s language and the record established in *Rollins*. There was nothing premature in the circuit court’s grant of summary judgment on the issues on which Covil moved and, in all instances, Penn National failed to undertake the procedural steps to preserve any argument that it was premature.

1. There is no conflict with the decisions of this Court.

Rule 56(f) provides that: “Should it appear from the affidavits of a party opposing the motion [for summary judgment] 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.” Rule 56(f), SCRCP (emphasis added). This Court has held

that a circuit court may excuse “strict compliance” with the requirements of Rule 56(f) to submit an affidavit stating the grounds on which summary judgment would be premature where the need for further discovery has otherwise been made known to the court. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112 n.4, 410 S.E.2d 537, 544 n.4 (1991) (“Although Plaintiffs did not file an affidavit invoking this provision, other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court.”); *see also Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001).

Nothing in *Baughman* or *Batson* prevents a circuit court from holding a litigant to the knowing consequences of failing to submit a Rule 56(f) affidavit; the standard is whether a trial court abuses its discretion by granting summary judgment where a litigant otherwise demonstrated it had not had a full and fair opportunity to complete discovery. *See Baughman*, 306 S.C. at 112, 410 S.E.2d at 543; *Batson*, 345 S.C. at 322, 548 S.E.2d at 857. Courts may find a summary judgment motion premature, even if there is no Rule 56(f) affidavit, where (1) the litigant opposing judgment has “demonstrated a likelihood that further discovery will uncover additional [relevant] evidence . . . that they are not merely engaged in a ‘fishing expedition’”; and (2) the litigant was “not dilatory in seeking discovery.” *Id.* “When a party seeks additional time, but fails to comply with [Rule 56(f)] setting forth the procedure for requesting additional time, an appellate court should be very hesitant to say the trial court abused its discretion in denying the request.” *Matter of Estate of Smith*, 419 S.C. 111, 120–21, 796 S.E.2d 158, 163 (Ct. App. 2016) (J. Few, concurring).

There is no conflict with these cases and the circuit court’s holding that a grant of summary judgment was not premature as Penn National contends. (Pet. Br. p. 28). The circuit court

determined that Penn National's failure to submit a Rule 56(f) affidavit was but one reason contributing to Penn National's failure to demonstrate summary judgment would be premature. But namely, the circuit court found that Penn Nation generally failed to demonstrate that the underlying discovery from the *Rollins* matter was not sufficient. (R. p. 16).

2. Penn National had an opportunity to conduct discovery in this case.

The rules of procedure in this State specifically allow for a party to move for summary judgment within 30 days of commencing an action. Rule 56(a), SCRCPP (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). There was nothing improper about Covil filing its partial summary judgment motion almost two months after filing suit under the Rules. Nor is there any requirement that a party wait to file a summary judgment motion for a certain time period after a party files an answer. Thus, Penn National's complaint that Covil's motion was filed just twenty-three days after Penn National filed its answer is wholly irrelevant to the analysis. (Pet. Br. p. 27).

Penn National claims it had no opportunity to engage in discovery during this period of time. (Pet. Br. p. 27). But this statement fails to account for the fact that the circuit court did not rule on Covil's motion until August 13, 2020, almost four months after the motion was filed on April 22, 2020, and almost six months after the complaint was filed February 28, 2020. Penn National has no explanation for why it did not serve any discovery whatsoever during this time period. No discovery stay was in place. Courts applying the rule from *Baughman* have affirmed the grant of summary judgment where a party failed to submit a Rule 56(f) affidavit and failed to explain why four months was not sufficient to develop documentation in opposition. *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).⁹

But here Penn National did not file a Rule 56(f) affidavit and instead solely relied on conclusory and self-serving arguments that it needed to do more discovery without specifying what it needed to discover, the evidence it was likely to discover, or what it currently sought through outstanding discovery requests. Penn National has failed to explain why six months was not sufficient to develop any of the evidence it now claims it needed to oppose summary judgment in these circumstances.

3. Penn National failed to show a likelihood that discovery would uncover additional relevant evidence.

Nor can Penn National establish that further discovery would be anything other than a delay tactic and fishing expedition. The circuit court did not abuse its discretion in determining Penn National did not present grounds to delay the adjudication of Covil’s motion for summary judgment. 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) (explaining the primary source of evidence in a coverage dispute is the record from the underlying proceeding). Penn National had enough information from the underlying *Rollins* action to make a substantive determination to deny coverage. Nor can Penn National show that allowing it to conduct discovery on its own affirmative

⁹ The factual circumstances of this case differ from *Baughman* and *Batson*. In *Baughman*, the party seeking to postpone a summary judgment determination showed that the expert from whom it wanted to obtain evidence was likely to uncover additional evidence on the issue of causation and the party had been diligently seeking an appropriate expert. 306 S.C. at 112–13, 410 S.E.2d at 544. In *Batson*, the plaintiff had not yet had the opportunity to depose the defendant when the trial court indicated it was inclined to grant summary judgment and this delay was not solely attributable to the plaintiff. 345 S.C. at 322, 548 S.E.2d at 857.

defenses on policy exclusions and a condition to coverage would lead to any additional relevant evidence.

Penn National had access to the discovery from the *Rollins* litigation and another related action. Whether or not it participated in the *Rollins* action has no impact on its burdens in opposing summary judgment in the coverage action. (Pet. Br. p. 28). Penn National does not allege that the *Rollins* action was inadequately defended or that the defense counsel Ellis & Winters (which it joined in retaining for Covil's defense) was deficient in taking discovery. Nor does Penn National explain how its earlier participation in the *Rollins* action would have impacted the way defense counsel conducted discovery.

All of the documents relevant to Covil'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, and were attached to the motion for summary judgment. Penn National received copies of all of the discovery materials in *Rollins* (after all it hired the same defense counsel as the other insurers and requested copies of the files), and it appears to have, in fact, used documents from *Rollins* in opposition to Covil's partial summary judgment motion.¹⁰

Penn National makes no claim in its brief as to what specific discovery it would have sought—which alone is reason to affirm—and instead generally complains it did not participate in

¹⁰ Penn National claimed in its certiorari reply (at p. 7) there is no evidence in the record that it obtained the *Rollins* discovery, but not only did it admit that it requested the file from the defense counsel it hired (R. pp. 168, 418), its summary judgment opposition cited two deposition transcript excerpts from the *Rollins* action not attached by the Receiver to the summary judgment motion evidencing it did in fact receive the file. (R. pp. 167 n.12, 392-406). And, as discussed above, Penn National both attended the mediation with a willingness to contribute and then denied there is coverage.

the *Rollins* action or take discovery here.¹¹ But the ability of Penn National and the Receiver to conduct discovery against each other in the Coverage Action 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. It is the very evidence upon which the Receiver settled *Rollins*, and upon which the Receiver demanded that Penn National fund the *Rollins* settlement. It is also presumably the evidence upon which Penn National made a substantive determination to deny coverage under the exclusions. 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.

These facts differentiate *Ameron International Corporation v. Continental National American Group*, No. CV 11-06879 ODW MANX, 2011 WL 5873024 (C.D. Cal. Nov. 23, 2011), which Penn National cites. (Pet. Br. p. 31). In contrast to here where no specific discovery was identified or an explanation given of how it would be relevant, there the party seeking to postpone consideration of summary judgment not only "identif[ied] specific pieces of evidence on which they would have relied in opposing Plaintiff's Motion" but also "explain[ed] how these facts may controvert Plaintiff's material facts." *Ameron Int'l Corp.*, 2011 WL 5873024, at *3. It is of no help to Penn National.

¹¹ Penn National suggest that it was deprived in the *Rollins* action of an opportunity to obtain discovery on "Mr. Rollins' exposure to asbestos, the dates on which Mr. Rollins was exposed to asbestos, whether any of the asbestos to which Mr. Rollins was exposed occurred during the Penn National Policies, and if so, whether coverage for that exposure was excluded by the exclusions contained in the Penn National Policies, including the products hazard exclusion and the completed operations exclusion." (Pet. Br. p. 28). Again, Penn National does not claim that *Rollins* defense counsel was deficient or explain how its participation would have impacted the defense of Covil, such that it would have actually obtained this information through earlier participation in *Rollins*.

Penn National also asserted in the Court of Appeals that it needed discovery for its affirmative defense of late notice. As to the late notice, Penn National cannot explain how further discovery is necessary. 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. Moreover, Penn National, not the Receiver, would be best positioned to know how it was prejudice (if at all) by any alleged late notice and would have that evidence in its possession.

At bottom, Penn National has failed to articulate specific discovery that was likely to lead to relevant evidence or offer any explanation why it did not seek this discovery in the six months prior to the circuit court's order. Nor did Penn National follow the procedure for requesting any such further discovery before a summary judgment ruling was entered by submitting a Rule 56(f) affidavit. The circuit court was well-within its discretion in these circumstances to determine summary judgment was not premature and that Penn National did not meet its burden to establish further discovery would be more than a fishing expedition.

4. Penn National did not preserve for review its argument that Covil's partial summary judgment motion was unsupported.

Penn National once again refers to the evidence submitted by the Receiver as unverified, unsubstantiated, and unsworn. (Pet. Br. p. 27-28). These arguments are not only wholly irrelevant to the issue of whether Penn National met its own burdens in opposing summary judgment, but the Court of Appeals correctly held that Penn National's belatedly raised objection to the evidence submitted in support of Covil's Motion was not preserved. (R. p. 687) ("Because this issue was neither raised to nor ruled upon by the circuit court, it is not preserved for appellate review."). Penn National appears to renew its argument (albeit in a footnote) that a general sentence in its

opposition to summary judgment that the trial court “should not enter summary judgment based on the record before it” was sufficient to preserve its objections. (Pet. Br. p. 27). But this general sentence is not adequate to preserve Penn National’s evidentiary objections to the admissibility of specific pieces of evidence. That is, Penn National did not argue that (1) Covil should have submitted a Rule 56(f) affidavit in support of its Motion or (2) the circuit court should not consider specific documents Covil submitted because they were unauthenticated. At no point did Penn National make any specific evidentiary objections to the documents submitted or argue that the circuit court should not consider them, and therefore, it forfeited the issue. *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.”).

D. Summary judgment for Covil was proper because Penn National could not sustain its burden of proof on the alleged policy exclusions.

“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). Penn National had the burden to show that at least one exclusion in the Policy bars coverage for the *Rollins* settlement. The circuit court’s holding that Covil was entitled to summary judgment because Penn National failed to show there was any question of fact on the two exclusions it claimed applied should be affirmed.

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.

Here, Rollins established in his lawsuit that he suffers from mesothelioma. He established further that “take home” asbestos exposures via his stepfather 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 his stepfather between 1980 and 1991. Mr. Rollins described a family home and family vehicles filled with asbestos dust during at least the entirety of the period of the Relevant Policy.

There were two questions before the circuit court on summary judgment as to the potential applicability of two exclusions, on which Penn National bore the burden of proof:

- Was Mr. Rollins’s mesothelioma attributed to Covil caused by products Covil placed into the stream of commerce during the period of the Relevant Policy?
- Was Mr. Rollins’s mesothelioma attributed to Covil caused by Covil’s completed work during the period of the Relevant Policy?

The circuit court correctly determined the answer to both questions was no, and that Penn National did not produce any evidence showing a question of fact on these issues.

1. The Products Hazard Exclusion does not apply.

- a. The Products Hazard Exclusion only applies if control of the worksite has been relinquished or the product placed in the stream of commerce, and there is no evidence here establishing such.**

A standard definition¹² of a “products hazard” exclusion used by insurers in the 1980s during the coverage period for the relevant policies included the following verbiage pertinent to the issues on appeal:

¹² Penn National admitted this standard definition mirrors the definition in the Penn National policies. (R. p. 179).

[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 by or rented to the named insured and after physical possession of such products has been relinquished to others

For purposes of applying the products hazard exclusion, decades-old caselaw relied on by the courts below establishes that “physical possession” of products used on a construction project is relinquished for purposes of the products hazard only when the insured no longer has control over the jobsite:

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 Indemnity Co., 393 A.2d 1212, 1215 n. 5 (Pa. Super. Ct. 1978); *see also* (R. p. 692 (citing *Friestad*)). Other courts have similarly held that the product hazard exclusion applies only once a product has been 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); *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 . . . but rather was a component of a final product akin to a work in progress”). Here, Penn National did not attach any evidence showing that Covil had relinquished control of the worksite at Bowater or that any product had been placed in the stream of commerce when Rollins was exposed to the asbestos through the dust his stepfather transported into the family home and car. Under long-established law, Penn National cannot establish that the products hazard exclusion applies.

The rule articulated in *Friestad* and other cases makes abundant sense. A contractor insured does not “relinquish possession,” for example, over every nail used at a construction site the moment it hammers those nails into pieces of wood. The insured can modify or revise its work at the site until it “turns over” the project to the owner upon conclusion or places the product into the stream of commerce. Covil therefore did not “relinquish possession” of its products as they were installed at Bowater, before Rollins’s stepfather transported asbestos dust to the family home after leaving work each day. Covil only “relinquished possession” of the products when the Bowater project ended on January 25, 1987, after Rollins was exposed repeatedly to Bowater asbestos dust via his stepfather’s clothing.

Despite this, Penn National incorrectly asserts that coverage is not due under the product hazard exclusion because: “(1) the *Rollins* Lawsuit alleges that Mr. Rollins’ mesothelioma arose out of exposure to asbestos fibers from 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 had necessarily been relinquished,” and that “[t]here are no allegations that the asbestos fibers were still under Covil’s control when Mr. Rollins was exposed to them.” (Pet. Br. p. 38–39). But the test does not center on whether the fibers themselves were under control at the time of exposure, but instead on whether the workplace producing them was still under the insured’s control or whether the physical products or premises had been relinquished. *See Friestad*, 393 A.2d at 1215 n. 5. Thus, exposure can occur on or off premises, and the product hazard exclusion will not apply unless control of the job site or products had been relinquished, which did not happen here at the time of Mr. Rollins’s exposure.

Nor is there any merit to Penn National’s assertion that the courts below in reliance read in an extra requirement to show the application of the products hazard under the Policy. (Pet. Br. p. 40). The definition, which Penn National agrees applies, expressly says that among the requirements is that “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.”¹³ In a policy that provides general liability insurance for a contractor at a worksite, courts have correctly interpreted the last clause of this definition to require that the control of the workplace be relinquished to the owner. Far from adding an atextual element to the Policy, the products hazard exclusion definition as written has been properly applied to the facts at hand. There was no error in the circuit court determining that this exclusion did not apply.

b. Penn National’s other arguments for application of the Products Hazard Exclusion based on the *Rollins* complaint fall short.

Penn National’s other protestations as to why the products hazard exclusion applies based on the allegations in the *Rollins* complaint (1) occur without reference to the fact that Penn National bears the burden to show application of the policy exclusion; and (2) are easily dismissed.

Penn National asserts that allegations in the *Rollins* complaint dictate the scope of indemnification coverage. (Pet. Br. pp. 37–38). This assertion is incorrect. Penn National’s duty to indemnify Covil for the *Rollins* settlement is not based on the complaint but is triggered upon “the final outcome of a lawsuit against the insured.” 14 Couch on Ins. § 200.1 (Dec. 2021 update). Consequently, the evidence adduced in the underlying litigation—e.g., the documents and deposition testimony Covil used to support its motion for partial summary judgment—is the content upon which Penn National’s duty to indemnify Covil for the *Rollins* settlement is assessed.

¹³ (emphasis added).

As a result, it does not matter that the *Rollins* complaint contained allegations pertaining to both defective asbestos products and to allegations pertaining to asbestos installation and removal. Penn National was aware of the evidence adduced in the *Rollins* discovery that supported Covil's liability related to its work or operations removing or disturbing asbestos-containing thermal insulation.¹⁴

Nor is the label of Covil as a "product defendant" in the *Rollins* complaint dispositive in any manner as to the scope of coverage under the Policy. (Pet. Br. p. 40 n. 2). Coverage under a liability policy is not dictated by the form of the legal proceeding; as such, "the legal theory asserted by the claimant is immaterial to the determination of whether the risk is covered." *See* 9 Couch on Ins. § 126:3 (Dec. 2021 update). Nor is the "products hazard" exclusion a "products liability" exclusion. The products hazard exclusion in the Policy is narrower than a "products liability" legal theory of recovery because it turns on where and when the injury occurs (away from the premises and after control relinquished) and not whether an injury generally occurs. Whether Rollins labeled Covil a "Product Defendant" or a "Premises Defendant" in his complaint is immaterial to this inquiry.

Finally, Penn National argues that other jurisdictions apply the products hazard exclusion if the underlying lawsuit merely alleges liability against the insured based on the defective nature of the insured's product. (Pet. Br. p. 39). First, this argument was never raised in any of the briefing below and therefore is waived. *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (1993) (arguments not made in an initial appellate brief are waived). Second, the

¹⁴ Penn National argues that "at no time did the *Rollins* Lawsuit allege injuries arising out of Covil's work or operations." (Pet. Br. p. 40). However, Penn National's own brief betrays that argument. The *Rollins* complaint clearly alleges injuries arising out of Covil's work or operations. (Pet Br. p. 6 (citing App. p. 70) (alleging liability based on Covil's "installation and removal of asbestos-containing thermal insulation"))).

cases cited generally involve products in the stream of commerce, which then later manifest a defect, and thus do not stand for the proposition that merely pleading the existence of a defective product is sufficient to invoke a product hazard exclusion clause here. Unlike here where Covil removed or disturbed asbestos-containing products at Bowater during which time the asbestos exposure occurred, the insured in *Brewer v. Home Insurance Co.* had already designed, manufactured, and placed the product at issue (a large metal trash pipe) into the stream of commerce when it was later alleged to manifest a defect. 710 P.2d 1082, 1083–84 (Ariz. Ct. App. 1985); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 504 (Pa. 1993) (same). *Fibreboard Corporation v. Hartford Accident & Indemnity Co.* addresses the different issue of whether tort theories can fall within the scope of a product hazard coverage clause or exclusion clause. 20 Cal. Rptr. 2d 376, 382 (Cal. Ct. App. 1993); *Steadfast Ins. Co. v. Eon Labs Mfg.*, 1999 Del. Super. LEXIS 272 (Del. Super. 1999) (same); *Mass Ins. Insolvency Fund v. E. Refractories Co.*, 1997 Mass. Super. LEXIS 589, *8 (Mass. Super. 1997) (same). Similarly, *Mayor & City Council of Baltimore v. Utica Mutual Insurance Co.* addressed whether failure to warn claims fall within the scope of a products hazard exclusion. 802 A.2d 1070, 1093 (Md. 2002); *Matter of Celotex Corp.*, 149 B.R. 997, 1001 (Bankr. M.D. Fla. 1993) (same). In *Continental Casualty Co. v. Employers Insurers Co. of Wausau* there was no evidence presented that any injury occurred while operations were ongoing, and as such the claimants could only obtain liability coverage under the products hazard coverage provision. 60 A.D.3d 128, 149 (N.Y. App. Div. 2008).

2. The Completed Operations Hazard Exclusion does not apply.

A standard definition of a “completed operations hazard” exclusion used by insurers in the 1980s during the coverage period for the relevant policies 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

“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.” *CPS Chemical Co. v. Cont’l Ins. Co.*, 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *rev’d on other grounds* by 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985).

Covil’s contracting work at Bowater occurred between March 11, 1986, and January 25, 1987. (R. pp. 7–8, 694). The Relevant Policy was in effect between March 31, 1986, and March 31, 1987. R. at 8; R. at 687. Rollins was exposed to asbestos while Covil was “still conducting operations” at Bowater during the period of the Relevant Policy. (R. pp. 693–94; *see also* R. p. 687 (“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”)).

Penn National appears to have abandoned its argument that *In re Wallace & Gale Company*, 385 F.3d 820 (4th Cir. 2004), supports applying the completed operations exclusion here, which as recently as its Petition for Certiorari (at pp. 24–25) and the Reply (at p. 14) was its key support on this issue. That is likely because, as the courts below held, *Wallace & Gale* does not establish that the completed operations exclusion in the Policy bars coverage for the *Rollins* settlement.¹⁵ *Wallace & Gale* holds that a plaintiff’s exposure to asbestos “which occurred while

¹⁵ The court in *Wallace & Gale* made an “*Erie* guess” as to how Maryland would apply the completed operations exclusion. Covil does not believe it accurately reflects South Carolina law. However, this Court need not address the question because there is nothing inconsistent with determining the completed operations exclusion does not apply here and *Wallace & Gale*.

Wallace & Gale was still conducting operations was not [within the completed operations hazard] for policies in effect at that time even if the exposure extended beyond the operations of Wallace & Gale.” *Id.* at 834 (emphasis added). Consequently, the determination that the completed operations exclusion does not apply here is consistent with *Wallace & Gale* because Mr. Rollins was exposed to the asbestos during the period of coverage under the Policy (*see* R. p. 694):

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.

Instead before this Court, Penn National only advances conjecture that there might be some take-home exposure that occurred because some portion of Covil’s operations may have already been put to its intended use, which might trigger the completed operations exclusion. (Pet. Br. p. 44). This is pure speculation. Penn National claims that Covil did not submit any evidence on this point, but Covil did not bear the burden. Penn National had the burden to show the exclusion applies and failed introduce evidence that would create a question of fact on this point. The circuit court’s holding that the completed operations exclusion did not apply should be affirmed.

3. Penn National asserts for the first time a new argument, which is waived, and attempts to upend current practice on when an asbestos injury triggers coverage in this State.

For the first time in these proceedings, Penn National advances an argument that there is no coverage under the Relevant Policy—regardless of the “products hazard” or the “completed operations hazard” exclusions—because there is no evidence that any “injury-in-fact” to Rollins occurred during the Policy Period. (Pet. Br. pp. 33–35). Arguments raised for the first time on appeal are waived, and this Court should find this issue waived. *Jackson*, 313 S.C. at 277, 437 S.E.2d at 171.

Briefly addressing the issue at a high level, there are four common theories on triggers for insurance coverage that have developed: (1) time of injury-causing event, even if no damage has manifested; (2) time when injury manifests; (3) **continuous trigger for progressive injuries**, starting any time from injury-causing event to when damage complete; and (4) injury-in-fact, which is time it can be shown damage first occurred even if not yet apparent. *Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 234–36, 486 S.E.2d 89, 90–91 (1997).

Asbestos exposure is considered to be a progressive injury. Inhaling asbestos starts a long-lasting disease process and continuous bodily injury. Microscopic dust or fibers lodge in the lungs. The asbestos-related disease process extends for years or decades culminating in illnesses like asbestosis, mesothelioma, or lung cancer. *See generally Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1038 n.3 & 1040 (D.C. Cir. 1981) (holding injury is deemed a continuous process and all policies are triggered on the claim if they were in effect either during the exposure period, or at the time of manifestation, or at any time in between); *see also Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 52 n.8, 717 S.E.2d 589, 595 n.8 (2011) (“[a] progressive injury is an injury that results from an event or set of conditions that occurs repeatedly or continuously over time”). Therefore, although Penn National proposes for the first time in this Court an injury-in-fact trigger, the proper trigger is instead a continuous trigger for asbestos injuries starting immediately at the time of exposure, and continuing to occur through progression until manifestation of the disease, as many jurisdictions have adopted. *Keene Corp.*, 667 F.2d at 1040; *see J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506 (Pa. 1993) (coverage from exposure, through pathology progression, to disease manifestation); *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985) (explaining that “every asbestos-related injury results from inhalation of asbestos fibers,” and that “[b]ecause such

inhalation can occur only upon exposure to asbestos, and because it is impossible practically to determine the point at which the fibers actually imbed themselves in the victim's lungs, to equate exposure to asbestos with 'bodily injury' caused by the inhalation of the asbestos" is the superior theory to adopt).

Covil agrees that the issue has not yet been addressed by this Court, but that is exactly the reason not to address it here in this case. This is a significant issue that will have significant impacts on asbestos insurance coverage in this State and the rights of recovery for victims of asbestos injuries. It is not an issue that Penn National should start litigating for the first time before this Court where the argument is first made in passing in merits briefing, was not raised in the petition for certiorari, and was not raised or developed below. When this issue has been properly raised in other jurisdictions, parties have devoted significant resources to the issue, briefed it extensively (often with amici on both sides of the issue weighing in), and fully developed and fleshed out the arguments through the appeals process. None of that has been done here. This case is not the correct vehicle for addressing this issue because the arguments have not yet percolated and had the benefit of the lower courts weighing in first. Nor did the parties have the opportunity to develop the argument on this point since it was not raised as an issue in the summary judgment briefing. Penn National is attempting to implement a sea change in asbestos insurance coverage in this State on an issue that it failed to raise was to the lower courts or present in its petition for certiorari.

V. CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's judgment.¹⁶

¹⁶ Penn National suggests this Court can reverse and render judgment if it disagrees with Covil that the judgment should be affirmed, but Penn National did not move for judgment in its favor below and only moved in opposition to summary judgment on issues on which it bore the burden

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of proof. Moreover, this request is at odds with its representation that more discovery is necessary here.