THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

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

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

v.

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

No tenet is more universally accepted than that an insurance policy is a contract between the insurance company and the policyholder which imposes obligations on both the insurer and the insured. In order to trigger the insurance company's contractual obligations, the insured is required to provide timely notice to the insurer of any claim or lawsuit and to prove that the claim or lawsuit is covered under the provisions of the insurance policy. The insurer then has the duty to investigate the claim or lawsuit and either provide a defense and indemnity under the policy or explain why the claim or lawsuit does not trigger such benefits. This time-honored process has always been supported by the laws of this State. This was not done in this case. Instead, the insured, Covil Corporation, by and through its Receiver ("Covil"), skipped this process altogether in this case and tried to force coverage for the underlying Rollins Lawsuit under the policies of insurance issued by Pennsylvania National Mutual Casualty Insurance Company ("Penn National") without providing timely notice or even proving that coverage under the Penn National Policies is actually triggered, and, importantly, without allowing Penn National the opportunity to investigate the claim.

In their attempt to find that the end result justified the means, the lower courts have now created law to thwart the orderly process required by the insurance contract between the insurer and the policyholder and supported by decades of precedent from the South Carolina appellate courts. This Court has the opportunity to correct what has been declared by the lower courts and reinforce that in order for coverage to be afforded under an insurance policy, the insured must provide timely notice of any claim or lawsuit to the insurer and prove that the claim or lawsuit is actually covered under the insurance policy. This process cannot and should not be circumvented. Coverage is not to be assumed. Summary judgment entered in favor of Covil by

the circuit court and affirmed by the Court of Appeals should be reversed.

I. Penn National Neither Hired Defense Counsel Nor Obtained All Discovery In The Rollins Lawsuit Prior To The Mediation In The Rollins Lawsuit Or The Filing Of The Present Action.

Throughout the Respondent's Brief, Covil consistently and uniformly asserts that Penn National actually hired defense counsel in the Rollins Lawsuit and had access to all the discovery and pleadings in that Lawsuit prior to the mediated settlement conference held in the Rollins Lawsuit and prior to the filing of this lawsuit. Covil uses this mantra to justify the rulings made by the circuit court and affirmed by the Court of Appeals. Covil's declarations, however, are completely untrue and not borne out by the Record in this case.[1] Indeed, Covil either does not cite to the Record when making these bold assertions or cites to the circuit court's decision which so found without any basis.

In truth, and as demonstrated by the Record, Penn National did not retain defense counsel in, and did not have any materials from, the Rollins Lawsuit (other than the Amended Complaint) when it was notified of the mediation in the Rollins Lawsuit and when Covil filed this lawsuit. The timeline of these events supports the impossibility of Covil's assertions:

- January 27, 2020: Notice is accidentally provided to Penn National regarding Rollins Lawsuit (App. p.292)
- February 3, 2020: Rollins Lawsuit officially tendered to Penn National for defense (App. p.413)
- February 10, 2020: Notice is given to Penn National regarding mediation in Rollins Lawsuit (App. pp.415-16)
- February 25, 2020: Mediation in Rollins Lawsuit (App. p.415)
- February 28, 2020: Complaint filed in present case (App. pp.18-22)
- March 30, 2020: Defendant Penn National's Notice of Motion to Transfer Venue and Answer to Complaint filed (App. pp.23-33)
- April 22, 2020: Covil's Motion for Partial Summary Judgment filed (App. pp.34-161)

[1] The only evidence before the circuit court on Covil's motion for partial summary judgment were the documents submitted by the parties and included in the Record as no oral arguments were held on Covil's motion. (App. p.3)

Furthermore, throughout its communications with Covil regarding the Rollins Lawsuit and in the filings in this case, Penn National has made it clear that it did not have the materials from the Rollins Lawsuit prior to the mediation in that Lawsuit, and therefore could not evaluate whether coverage was afforded under the Penn National Policies or Covil's potential liability and damages in the Rollins Lawsuit. (See, App. p. 418, *Letter to Peter Protopapas from Penn National dated February 14, 2020, regarding upcoming mediation*: "However, since Penn National is unable to evaluate coverage … attached you will find a Non-Waiver Agreement."; p. 165, *Penn National's Response to Covil's Motion for Partial Summary Judgment*: "Given the late notice of the mediation and lack of sufficient information and documentation provided by Covil to Penn National prior to the mediation, Penn National was unable to evaluate its potential coverage obligation or damages prior to mediation."; p.554, *Penn National's Motion for Reconsideration*: "Then, less than a month after providing Penn National with its first notice of the Rollins Asbestos Action, and while Penn National was still in the process of gathering information from the defense counsel retained by other insurers to whom Covil had provided timely notice, Covil settled the claims asserted against it during the course of a mediation conducted on February 25, 2020 (of which Covil provided even less notice to Penn National)."; p.555, *Id.*: "… precluding Penn National from meaningfully participating in the mediation given the untimely notice and lack of information and documentation provided by Covil to Penn National prior to the mediation.")

There is no evidence in the Record that supports Covil's assertions that Penn National retained defense counsel in the Rollins Lawsuit or that Covil provided Penn National with

any information or discovery from the Rollins Lawsuit.[2] Because Covil moved for partial summary judgment prior to any discovery being completed in the present case, there is no evidence that Penn National even had any of the unverified, unauthenticated, and incomplete documents upon which Covil relied in its motion for partial summary judgment. Indeed, Penn National's reliance on the products hazard exclusion and completed operations exclusion in the summary judgment filings were based on information asserted by Covil in its motion for partial summary judgment, not from any documents or discovery obtained from the Rollins Lawsuit. (See, App. pp.165-66, *Penn National's Response to Covil's Motion for Partial Summary Judgment*: "The only exposure that Covil identifies with respect to Mr. Rollins as contributing to his diagnosis with mesothelioma is "take home" exposure via his step-father … Such exposure falls within the "products hazard" exclusion and/or the "completed operations hazard" in the policies issued by Penn National to Covil …"; pp.180-81, *Id.*: "Here, the only exposure that Covil identifies with respect to Mr. Rollins as contributing to his diagnosis with mesothelioma is "take home" exposure via his step-father … Under these facts, the "bodily injury" alleged falls within the "products hazard" in the Penn National policy …").

Finally, Covil's repetitive refrain that Penn National must have had the information from the Rollins Lawsuit because Penn National indicated that it attended the mediation with a "willingness to contribute" to the settlement on behalf of Covil also has no basis in the Record. (Resp. Brief, pp.21, 28) Penn National has consistently asserted that whereas it was willing to contribute "some amount" to the settlement of the Rollins Lawsuit, it was unable to participate fully in the mediation because it did not have sufficient information to evaluate any coverage

[2] To date, Covil has never produced and Penn National does not have a copy of the settlement agreement executed by Covil in the Rollins Lawsuit. Therefore, Penn National has no knowledge of the total amount paid by or on behalf of Covil to settle its potential liability in the Rollins Lawsuit.

obligation to Covil for its potential liability in the Rollins Lawsuit:

> Given the late notice of the mediation and lack of sufficient information and documentation provided by Covil to Penn National prior to the mediation, Penn National was unable to evaluate its potential coverage obligation or the liability and damages exposure for Covil prior to the mediation. As such, although a representative of Penn National attended the mediation, and expressed a willingness to contribute some amount to the settlement on behalf of Covil, Penn National was not in a position to contribute the amount requested by Covil (and for which recovery is apparently sought in this action).

(App. p.169; see also, pp. 165, 178) To the extent that any inferences can be made from these statements, those inferences should have been made in the light most favorable to Penn National, the non-movant. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2020).

Covil's bald assertions that Penn National retained defense counsel in the Rollins Lawsuit and in fact had all of the information and discovery in that Lawsuit prior to the mediation in the Rollins Lawsuit and the filing of the present action is both untrue and completely unsupported by the Record in this case. Penn National respectfully requests that this Court review the Record in this case and base its rulings on the actual evidence in the Record. See, *Grinnell Corp. v. Wood*, 389 S.C. 350, 358, 698 S.E.2d 796, 800 (2010)(reversing the Court of Appeal's decision because the evidence in the record supported the opposite conclusion); *Gordon v. Colonial Life Ins. Co.*, 342 S.C. 152, 158, 536 S.E.2d 376, 379-80 (Ct. App. 2000)(rejecting appellant's arguments because they were not borne out by the evidence in the record).

II. Covil Concedes That Penn National Did Not Waive The Conditions In Its Policies Requiring Timely Notice When It Participated In The Court-Ordered Mediation In The Rollins Lawsuit.

Covil presents no argument in its Respondent's Brief in support of the Court of Appeals' decision that Penn National waived the conditions in the Penn National Policies requiring timely

notice of lawsuits when Penn National attended the court-ordered mediation scheduled in the Rollins Lawsuit. Therefore, Penn National respectfully requests that this Court reverse the Court of Appeals regarding its holding that Penn National's attendance at the mediation constituted a waiver of its right to timely notice under the Penn National Policies.

III. Covil's Notice-Prejudice Arguments Are Not Properly Before This Court, Should Not Be Considered, And Are Contrary To Clear Precedent From This Court.

A. *This Court Should Not Consider Covil's Notice-Prejudice Argument, As This Issue Was Not Accepted For Review In The Court's Grant Of Penn National's Petition For Writ Of Certiorari.*

There is no automatic right of appeal from the decision of the Court of Appeals to this Court. Instead, the South Carolina Appellate Court Rules require parties to petition this Court for a writ of certiorari in order to have a decision by the Court of Appeals reviewed. The procedure set forth in Rule 242 of the Appellate Court Rules allows this Court to consider and take up on review only those cases where there are "special and important reasons" justifying such review. Rule 242(b), SCACR. Petitioners are required to expressly delineate the specific question presented to the Supreme Court for its review. Rule 242(d), SCACR. Once briefing on the Petition is completed, this Court chooses which questions it will review:

> The petition may be granted or denied on any question presented. If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s).

Rule 242(i), SCACR.

In the present case, there were three questions presented. With regard to the Court of Appeals' decision on Penn National's late notice defense, Penn National presented, and this Court accepted, the following question for review:

> 1. Whether the Court of Appeals erred when it found that Penn National waived the conditions in its policies requiring

> timely notice when it participated in the court-ordered mediation in the underlying Rollins Lawsuit.

(Pet. Brief, p.1) Penn National did not request, and this Court did not accept on review, whether this Court should enact a sea-change in the rule regarding when and under what circumstances an insurer must show prejudice before the admittedly late notice of a lawsuit will bar coverage under a policy of insurance. Covil did not file any materials with the Court requesting that this issue be reviewed if the Court accepted Penn National's Petition for Writ of Certiorari. Because this issue is not properly before this Court, Penn National respectfully requests that this Court not consider Covil's arguments regarding the notice-prejudice rule. See, *Rutland v. South Carolina DOT*, 400 S.C. 209, 216 n.4, 734 S.E.2d 142, 145 n.8 (2012) ("We decline, as we must, to entertain arguments not presented to us.").

B. *If This Court Considers Covil's Notice-Prejudice Argument, It Should Adhere To The Established Rule That An Insured's Failure To Provide Timely Notice Bars Coverage For Claims Where No Rights Of Innocent Third-Parties Are At Issue.*

Instead of addressing the Court of Appeals' decision regarding Penn National's alleged waiver of the conditions of its policy by attending a court-ordered mediation, Covil confusingly argues that waiver "is ultimately a red herring." (Resp. Brief, p.24) Instead, Covil requests that this Court not be bound by the principles of *stare decisis*, but reshape the law regarding when and under what circumstances an insured's untimely notice of a claim to the insurer will bar coverage under the policy. This Court should decline to do so. South Carolina law regarding late notice has developed over decades, is based on sound principles, and provides the appropriate balance between contractual rights and protections to innocent third parties. In any event, the facts in the present case do not lend themselves to reversing decades of precedent.

South Carolina's late notice rule is grounded in long-established canons of insurance policy construction. Insurance policies are contracts between the policyholder and the insurance company, and are to be construed according to the law of contracts. *Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 52, 717 S.E.2d 589, 595 (2011).

> Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.

Williams v. Government Employees Ins. Co., 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2013) (internal citations and quotations omitted).

Consistent with these well-recognized principles, South Carolina courts have required an insured's adherence to the notice provisions contained in an insurance policy before coverage can be afforded thereunder:

> No rule of law is more firmly established in this jurisdiction than that one suing on a policy of insurance, where the notice required by the policy is not timely given, cannot recover. And the Court has gone so far as to hold that the failure to give the required notice in the allotted time is fatal to the right of recovery, even if it be shown that the insurance company has suffered no harm by the delay.

Lee v. Metropolitan Life Ins. Co., 180 S.C. 475, 486-87, 186 S.E. 376, 381 (1936). This rule was reiterated and reinforced by this Court thirty years later in *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 137 S.E.2d 608 (1964):

> It is well settled that, unless waived by the insurer, the failure of an insured to comply with policy provisions as to notice or forwarding suit papers, which are by the terms of the contract made conditions precedent to liability, will bar recovery.

Id. at 435, 137 S.E.2d at 613.

In 1971, this Court was faced with the issue of whether the preclusion of coverage caused by the insured's late notice of a claim was consistent with the public interest underlying

compulsory automobile insurance. *Factory Mut. Liability Ins. Co. v. Kennedy*, 256 S.C. 376, 380-81, 182 S.E.2d 727, 729 (1971). After considering that the public purpose of compulsory automobile insurance was to protect innocent victims of motor vehicle accidents, this Court made an exception to the general rule that an insured's late notice precludes coverage under an insurance policy for circumstances where the rights of innocent third parties are implicated:

> [W]e think the sound rule to be that, in actions affecting the rights of innocent third parties under an automobile liability insurance policy, the noncompliance by the insured with policy provisions as to notice and forwarding suit papers will not bar recovery, unless the insurer shows that the failure to give such notice has resulted in substantial prejudice to its rights.

Id. at 381, 182 S.E.2d 727, 729-30. See also, *Whittington v. Ranger Ins. Co.*, 261 S.C. 582, 590, 201 S.E.2d 620, 623-24 (1973)(extending the substantial prejudice rule to other types of insurance policies where the rights of innocent third parties are involved).

Thereafter, the South Carolina appellate courts have consistently and unerringly applied this rule. Where the rights of innocent third parties are implicated, the insurer has the burden of showing prejudice before coverage is precluded for late notice under an insurance policy. See, *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 421 (1994) ("Where the rights of innocent parties are jeopardized by a failure of the insured to comply with the notice requirements of an insurance policy, the insurer must show substantial prejudice to the insurer's rights."). However, where the rights of innocent third parties are not involved, the public policy exception no longer applies and the contractual obligations must be enforced as written. See, *Prior v. South Carolina Medical Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655, 657 (Ct. App. 1991) ("Here there is no innocent third party beneficiary. The Patient has been paid her judgment. … Prior failed to notify JUA in a timely manner, thus violating the insurance policy. This failure justified JUA's refusal to defend and to deny

coverage."). See also, *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999)("[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition.").

Covil argues that in *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 831 S.E.2d 406 (2019), this Court adopted a notice-prejudice rule whenever an insured fails to provide timely notice of a claim to an insurer regardless of whether the rights of innocent third parties are implicated, effectively overruling *Lee*, *Hatchett* and their progeny. Covil's argument is a mischaracterization of this Court's decision in *Neumayer*. First, the *Neumayer* Court was tasked with determining whether the statutory provision regarding automobile insurance, specifically S.C. Code Ann. §38-77-142(C), invalidated the notice and cooperation clauses contained in policies providing limits in excess of the statutorily required minimum limits. *Id.* at 263, 831 S.E.2d at 406. In considering this issue, the *Neumayer* Court traced the purpose and enforceability of notice provisions contained in an insurance policy under South Carolina law. *Id.* at 265-66, 831 S.E.2d at 408 ("In order to fully address the issue and clarify any ostensible inconsistencies in South Carolina appellate jurisprudence in this area, we examine the purpose of notice clauses and trace their history in this state.") The *Neumayer* Court then stated the current state of the rule in South Carolina:

> Courts eventually recognized the potential inequities in permitting an insurer to avoid coverage to an innocent third party merely because the at-fault party – the insured – did not inform its insurer of a lawsuit. Accordingly, many jurisdictions, including South Carolina, judicially adopted a notice-prejudice rule, whereby the insurer had the burden to show that it was substantially prejudiced by the failure of its insured to comply with the notice and cooperation provisions. *Vermont Mut. Ins. Co. v. Singleton By & Through Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 421 (1994) ("Where the rights of innocent parties are jeopardized by a failure of the insured to comply with the notice requirements of an insurance policy, the insurer must show substantial prejudice to the insurer's rights."); *Factory Mutual*, 256 S.C. at 381, 182 S.E.2d at 729-30

> ("[W]e think the sound rule to be that, in an action affecting the rights of innocent third parties under an automobile liability insurance policy, the noncompliance by the insured with policy provisions as to notice and forwarding suit papers will not bar recovery, unless the insurer shows that the failure to give such notice has resulted in substantial prejudice to its rights."); *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 67, 145 S.E.2d 673, 677 (1965) (placing the burden of proof on the insurer to demonstrate substantial prejudice). This rule prevented an insurer from relying on an immaterial breach by its own insured as a defense to paying an injured third party.

Id. at 266-67, 831 S.E.2d at 408-09. Ultimately, the *Neumayer* Court held that an insurance company could enforce the notice provision for coverage above the statutory minimum limits, provided that the insurer proved prejudice. *Id.* at 273, 831 S.E.2d at 412. Contrary to Covil's contentions, *Neumayer* did not change the law in South Carolina regarding late notice, but merely restated that where the rights of innocent third parties are implicated, the insurer must show prejudice before coverage under an insurance policy is denied.

The cases that Covil cites from other jurisdictions that have adopted a notice-prejudice rule are of no avail. The cases discuss the notice-prejudice rule in the context of injured innocent third parties. See, *Century Sur. Co. v. Jim Hipner, LLC*, 377 P.3d 784, 786 (Wyo. 2016) (coverage under umbrella policy for injuries sustained by third parties in trucking accident); *State v. National Union Fire Ins. Co.*, 56 So.3d 1236, 1240 (La. 2011) (coverage under a policy issued to the State for injuries sustained by motorist caused by the defective design and construction of an overpass guardrail); *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 194 (Pa. 1976) (coverage under automobile policy for injuries by accident victim); *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 799 (Ky. 1991) (coverage under commercial general liability policy for injuries sustained during explosion at coal mine); *State Farm Mut. Auto. Ins. Co. v. Johnson*, 315 A.2d 585, 586 (Del. 1973) (coverage under automobile policy for injuries to pedestrian).

In the present case, the rights of innocent third parties are not implicated, despite Covil's

protestations to the contrary.[3] It is undisputed that the plaintiff in the Rollins Lawsuit has been fully compensated, that Covil paid the settlement that was reached, and Covil is seeking reimbursement of the amounts it paid. (App. p.21, ¶13) Covil is not an innocent third party. In fact, it is undisputed that Covil was served with the Rollins Lawsuit on April 25, 2019, provided notice of the Rollins Lawsuit to its other insurers, and despite knowing the existence of the Penn National Policies, failed to provide notice of the Rollins Lawsuit to Penn National for nine (9) months. (App. pp.292, 413, 415-16, 418-21) At no time during the briefing in this case has Covil ever explained why the notice it provided to Penn National of the Rollins Lawsuit was so delayed. Covil's failure to provide timely notice to Penn National was not in good faith. This is clearly not a case where this Court should expand the notice-prejudice rule, the effect of which would be to reward Covil's bad faith actions in providing late notice to Penn National. See, *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 303 N.C. 387, 399, 279 S.E.2d 769, 776 (1981) ("Equity dictates that a bad faith delay in notifying an insurer, even though no material prejudice results, should bar the insured from enforcing the policy.").[4]

The doctrine of *stare decisis* requires this Court to apply the law of late notice as it has been settled in this State for decades. Where the rights of innocent third parties are not implicated, as here, coverage is not afforded to the insured where the insured fails to comply with the conditions of the insurance policy requiring immediate notice of any lawsuit.[5] Covil

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[3] In arguing that the rights of third parties have been affected, Covil speculates that other claimants may be harmed by Covil's payment of the settlement in the Rollins Lawsuit. However, there is no evidence to support Covil's assertions, and Covil cites to none. Covil's speculation and conjecture is not a sufficient basis on which to support any finding by this Court that Penn National is required to show prejudice before Covil's late notice precludes coverage.

[4] A case cited favorably by Covil in its Respondent's Brief. (Resp. Brief, p.15)

[5] Covil argues that the Penn National Policies only require "that notice be given within a reasonable time frame." (Resp. Brief, p.20) This is not true. Although the Penn National Policies require written notice of an occurrence "as soon as practicable," the Policies separately require that "If a claim is made or suit is brought, the insured shall ***immediately*** forward to the Company every demand, notice, summons or other process received by him or his

failed to provide immediate notice of the Rollins Lawsuit to Penn National; therefore, there is no coverage under the Penn National Policies for the settlement paid by Covil. However, if this Court should expand the notice-prejudice rule to find that Penn National should be required to show prejudice before coverage is precluded due to Covil's breach of the policy conditions, Penn National respectfully requests that summary judgment in favor of Covil be reversed and that discovery be allowed on the issue of prejudice.[6] See, *Greenwood Dev. Corp. v. Cincinnati Ins. Co.*, 2012 U.S. Dist. LEXIS 204018, *29 (D.S.C. 2012) (finding that insurer suffered substantial prejudice by insured's late notice because the late notice "deprived Cincinnati of any realistic opportunity to analyze coverage of the claims asserted in the complaint").

IV. Covil Agrees That A Rule 56(f) Affidavit Was Not Required In Order To Show That A Motion For Summary Judgment Is Premature.

Covil acknowledges that contrary to the Court of Appeals' decision in this case, this Court has never mandated strict compliance with Rule 56(f) of the South Carolina Rules of Civil Procedure before finding that a motion for summary judgment is premature. (Resp. Brief, pp.24-25) Instead, Covil makes the curious argument that no discovery was necessary in this case because Penn National had all of the information and discovery from the Rollins Lawsuit prior to the filing of the summary judgment motion, and that "further" discovery would not have uncovered "additional" relevant evidence. Covil's assertions are in fact not true and are not borne out by the evidence in the Record in this case.

A. *There Is No Evidence In The Record That Penn National Had All Relevant And Material Information And Documents Regarding The Rollins Lawsuit.*

representative." (App. pp.456, 502) It is this provision, regarding what notice is required when a lawsuit is served on the insured, that is triggered by the Rollins Lawsuit and at issue in this case.

[6] In response to Covil's motion for partial summary judgment, Penn National argued in the alternative that it was prejudiced by Covil's late notice of the Rollins Lawsuit. (App. pp.177-78, 555) However, neither the circuit court nor the Court of Appeals ruled that Penn National was required to show prejudice and failed to do so. (App. pp.10, 688-90) Therefore, the issue of prejudice is not properly before this Court.

Penn National did not have the opportunity to participate in the defense of the Rollins Lawsuit and therefore did not have access to the information obtained during the discovery in that case. It is undisputed that Covil did not provide Penn National with notice of the Rollins Lawsuit until after the pleadings were closed and all discovery in the Lawsuit had been completed. (App. pp.408-09, 517) When initial notice of the Rollins Lawsuit was given to Penn National, no information or documents were provided. (App. p.292-93) Covil finally provided a copy of the Amended Complaint filed in the Rollins Lawsuit to Penn National three weeks prior to the scheduled mediation. (App. p.413) Ten days prior to the mediation, Penn National wrote a letter to Covil indicating that it still did not have any of the documents or discovery in the Rollins Lawsuit. (App. pp.418-21) The present lawsuit was filed on February 28, 2020, three (3) days after the mediation in the Rollins Lawsuit. (App. pp.18-22)

From this timeline, the Record is clear that Penn National did not have any materials from the Rollins Lawsuit (other than the Amended Complaint) at the time of the mediation and the filing of the present lawsuit. Indeed, there is no evidence in the Record that Penn National ever received all of the information and discovery obtained in the Rollins Lawsuit. Because the parties in this case never engaged in discovery, Covil cannot point to any discovery responses or deposition testimony in the Record to show that Penn National actually received the information from the Rollins Lawsuit. Covil's assertions to the contrary in its Respondent's Brief is based on conjecture, not facts actually contained in the Record.

Whether Penn National was able to obtain materials from the Rollins Lawsuit prior to Covil's filing of its motion for partial summary judgment apparently would not have mattered precisely because Covil did not support its motion with documents from the Rollins Lawsuit. To the contrary, Covil attached to its motion for partial summary judgment portions of

two transcripts from depositions that were not taken in the Rollins Lawsuit but in other cases: deposition of Robert Ashworth taken in *Ashworth v. Air & Liquid Systems, Corp., et al.*, Civil Action No. N17C-04-003 ASB, Delaware Superior Court (App. pp.113-16); and deposition of David Wayne Rollins taken in *Taylor v. Air & Liquid Systems Corp., et al.*, Case No. 2018-CP-40-04940 (App. pp.117-120). Also, there is no indication that the other documents attached – an unsigned and incomplete Subcontract Agreement between BE&K Construction Company and Covil Corporation (App. pp.121-25); handwritten, unexplained and unauthenticated notes entitled "Bowater Project – Labor" (App. pp.126-27); and an unverified, unauthenticated, and vague interoffice memo from Bowater Carolina Company (App. p.128) – were even produced in the Rollins Lawsuit. Indeed, there was no affidavit to which these documents were attached to indicate where these documents originated. It is disingenuous for Covil to now contend that Penn National actually had all relevant documents prior to its filing its motion for partial summary judgment when the documents on which Covil relied in such motion were not even from the discovery in the Rollins Lawsuit.

This case is about whether there is coverage under the Penn National Policies for the Rollins Lawsuit. The burden is on Covil to prove that the claims asserted and damages sought in the Rollins Lawsuit fall within the coverage provided by the Policies. See, *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968). To allow Covil to skip the discovery process in this case, deprive Penn National of the ability to obtain relevant documents and information, and permit Covil to pick and choose what documents it deems significant on a dispositive motion is to sanction trial by ambush. That is contrary to purpose of discovery in civil litigation. See, *In re Anonymous Mbr. of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) ("The primary objective of discovery is to ensure that lawsuits are decided

by what the facts reveal, not by what facts are concealed. The entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party."). Such contravention of the Rules should not be allowed to stand by.

One final point, Covil contends that Penn National never articulated what discovery it wished to complete in the present case. (Resp. Brief, p.28) This is also not true. In its response to Covil's motion for partial summary judgment, Penn National expressly informed the circuit court that the motion for partial summary judgment was premature and listed with particularity the discovery in which Penn National wanted to engage prior to any ruling on Covil's motion. Specifically, Penn National stated:

> Penn National will need to engage in discovery in this action, including, but not limited to, Covil's tender of the Rollins Asbestos Action to Penn National and other insurers and the reason for the failure to [sic] delay tendering this matter to Penn National, the nature and timing of the alleged asbestos exposure in such action, the settlement entered into by Covil in such action, including the total amount of the settlement and the amount (if any) that Covil itself paid to settle such action, etc.

(App. pp.183; see also, p.557: same discovery in Penn National's motion for reconsideration).

The law in this State is clear: a party should have a full and fair opportunity to engage in and complete discovery before that party is deprived of a trial by having summary judgment entered against it. See, *John Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) ("This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); *Baughman v. American Tele. & Tele. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues."); *Middleborough Horizontal Prop. Regime Council v. Montedison, S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)

("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."). Here, Penn National had no opportunity to engage in discovery. Conjecture regarding whether Penn National did or did not receive discovery material from the Rollins Lawsuit or any other relevant information is not sufficient to show that Penn National had a full and fair opportunity to complete discovery.

The evidence in the Record clearly shows the parties engaged in no discovery in the present action and that discovery was needed to determine Penn National's coverage obligations, if any, with regard to the Rollins Lawsuit. Whether Penn National submitted a Rule 56(f) affidavit or not is not determinative of whether summary judgment was premature in this case. Clearly, summary judgment was premature. Penn National respectfully requests that this Court reverse the Court of Appeals' holding to the contrary.

B. *Penn National Had No Opportunity To Engage In Discovery In This Case.*

Covil argues that Penn National could have engaged in discovery in this case between the time that Covil filed its motion for summary judgment and the date on which the circuit court entered its order granting summary judgment.[7] This argument misrepresents to this Court the status of this case at that time.

At the time that Covil filed the present action against Penn National, Covil was involved in several declaratory judgment actions with other insurers pending in federal court regarding coverage for Covil's potential liability in underlying asbestos litigation, including the Rollins Lawsuit. See, *Zurich Am. Ins. Co. v. Covil Corp.*, Case No. 1:18-cv-932, U.S. Dist. Court for the Middle District of North Carolina; *Covil Corp. v. Zurich Am. Ins. Co.*, Case No. 7:18-cv-

[7] Covil erroneously states in its Respondent's Brief that this was a six month period of time. Covil filed its motion for partial summary judgment on April 22, 2020 (App. p.34) and the circuit court entered its order granting summary judgment on August 13, 2020 (App. p.12), a period of less than four months.

03291, removed to U.S. Dist. Court for the District of South Carolina; *Protopapas v. Zurich Am. Ins. Co.*, Case No. 3:19-cv-1635, removed to U.S. Dist. Court for the District of South Carolina. Despite the pendency of these federal coverage actions, Covil consistently attempted to secure coverage determinations from Retired Chief Justice Jean Toal in South Carolina's asbestos court. As a result, on February 27, 2020, Judge Bruce Howe Hendricks entered an order enjoining Covil from seeking coverage determinations in the state court actions. (App. pp.211-35) The next day, Covil filed the present action seeking one cent less than the jurisdictional amount required for removing diversity actions to federal court. (App. p.22, ¶18: "As a direct and proximate result of Defendant's breaches of contract, Plaintiff has been injured and is entitled to recover damages in such amount as may be proven at trial but not greater than $74,999.99 …")

In responding to Covil's motion for partial summary judgment (filed immediately after Penn National filed its Answer), Penn National requested a stay of this case pending the resolution of the coverage actions pending in federal court. Specifically, Penn National represented that the Rollins Lawsuit was one of the underlying lawsuits upon which a coverage determination was being requested in the federal court cases:

> Because the relief sought by Covil in the present motion is the subject of the pending Federal Coverage Actions, this Court should decline to rule on Covil's motion at this time and stay this matter pending a resolution of the Federal Coverage Actions.

(App. p.164)

It is disingenuous for Covil to assert that Penn National could have conducted discovery during the pendency of its motion for partial summary judgment. In truth, Penn National moved for a stay of this case pending the resolution of the coverage actions regarding the Rollins Lawsuit in the previously filed declaratory judgment actions pending in federal court. Therefore, any actions by Penn National to engage in discovery in this case, prior to a ruling on the motion

to stay, would have been inconsistent with its request for a stay.

V. The Court Of Appeals Erred When It Found That Neither The Products Hazard Exclusion Nor The Completed Operations Hazard Exclusion Applied As A Matter Of Law.

The insuring agreement in the Penn National Policies requires that for coverage to be triggered thereunder, the "bodily injury" must occur during the policy period. (App. pp.458, 504) This Court has previously held, contrary to Covil's assertions, that for progressive injuries "coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage." *Joe Harden Builders v. Aetna Cas. & Sur. Co.*, 236 S.C. 231, 236, 486 S.E.2d 89, 91 (1997). See also, *Crossmann Cmtys.*, 395 S.C. at 51 n.8, 717 S.E.2d at 595 n.8 ("A progressive injury is an injury that results from an event or set of conditions that occurs repeatedly or continuously over time, such as tong-term exposure to asbestos fibers or the continual intrusion of water into a building."). The issue of when asbestos-caused injuries in fact occur has not been determined by this Court. The Court of Appeals erred when it ruled as a matter of law that neither the products hazard exclusion nor the completed operations exclusion applied. However, even if asbestos injuries are caused upon inhalation of asbestos fibers, as Covil contends, the products hazard exclusion clearly precludes coverage under the Penn National Policies.

A. *Covil Cannot Justify The Court Of Appeals' Decision That The Products Hazard Exclusion Does Apply To Bar Coverage For The Rollins Lawsuit.*

It is axiomatic that the allegations made, claims asserted and damages sought in a lawsuit govern an insurer's duty to defend and ultimately its duty to indemnify the insured with regard to that lawsuit. See, *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 577, 666 S.E.2d 897, 899 (2008) ("the obligation of a liability insurance company to defend and indemnify is determined by the allegations in the complaint"); *Sloan Constr. Co. v. Central Nat'l*

Ins. Co., 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) (finding that the duties to defend and indemnify are related). This is especially true where a case has been settled as a defendant can only settle the potential liability asserted against it in the lawsuit.

In this case, it is clear that the potential liability asserted against Covil in the Rollins Lawsuit was for injuries suffered by the plaintiff from a defective condition in Covil's asbestos-containing products. (App. p.70, ¶25: "COVIL CORPORATION is sued as a Product Defendant."; p.91, ¶88, p.97, ¶¶108-09: asbestos containing products "were defective and unsafe for their intended purpose"; p.93, ¶93, p.98, ¶111, p.107, ¶153: Product Defendants' defective products "were a direct cause of Plaintiff's injuries")

The Penn National Policies specifically exclude from coverage "bodily injury … included within the … Products Hazard." (App. pp.452, 491) The Policies define "products hazard" as:

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

(App. pp.458, 504)

Providing these provisions with their plain, ordinary and popular meaning, as this Court is constrained to do, it is clear that there is no coverage under the Penn National Policies for lawsuits which allege injuries arising out of Covil's products if the injuries occur away from Covil's premises and after Covil relinquishes control over those products. See, *B.L.G. Enter.*, 334 S.C. at 535, 514 S.E.2d at 330 ("This Court must give policy language its plain, ordinary, and popular meaning."). The Rollins Lawsuit sought damages from Covil for the plaintiff's injuries which were allegedly caused by Covil's products. Because the injuries (as argued by

Covil on its motion for summary judgment) were caused by take-home asbestos fibers to which the plaintiff was exposed, the injury occurred away from Covil's premises and after Covil no longer had control over those fibers. Clearly, the products hazard exclusion contained in the Penn National Policies bars all coverage for Covil's liability in the Rollins Lawsuit.

In an attempt to avoid this straightforward application of the products hazard exclusion to the Rollins Lawsuit, Covil argues that the products hazard exclusion only applies once Covil's "control of the worksite has been relinquished" or once Covil's "product [is] placed in the stream of commerce." (Resp. Brief, pp.32-35) However, those requirements are not contained within the actual policy language in the Penn National Policies. This Court must interpret the Penn National Policies as written, without adding or ignoring the actual language contained therein. See, *Sloan Constr.*, 269 S.C. at 185, 236 S.E.2d at 819 ("Courts must enforce, not write, contracts of insurance"); *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) ("However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties."); *B.L.G. Enter.*, 334 S.C. at 535, 514 S.E.2d at 330 ("The court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully.") (internal quotations and citations omitted).

In support of its "interpretation" of the definition of the products hazard, Covil relies solely on three cases, none of which address coverage for asbestos exposure, and all of which are from other jurisdictions: *Friestad v. Travelers Indem. Co.*, 393 A.2d 1212 (Pa. Super. Ct. 1978); *B&R Farm Services, Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076 (Ind. 1985); and *Szczeklik v. Market Int'l Ins. Co.*, 942 F.Supp.2d 1254 (M.D. Fla. 2013). These cases, however,

cannot withstand the weight attributed to them.

In *Friestad*, the court was tasked with determining whether there was coverage under an insurance policy for injuries sustained by faulty installation of a furnace. 393 A.2d at 1213. The policy at issue provided premises-operations and completed-operations coverage but excluded coverage for injuries arising out of the products hazard. *Id.* at 1215. Ultimately, the court found that the injuries were covered under the completed-operation hazard coverage because the insured's liability arose from its services and that the products hazard exclusion did not apply:

> Hence, it is more preferable by far to define the products hazard in terms of product liability law, and apply the exclusion only when a product, rather than a service, is the cause in fact of damages or injury to a third person.

Id. at 1217. *Friestad* does not stand for the proposition that the products hazard exclusion only applies when an insured completes its services at a job site. To the contrary, *Friestad* plainly states that the source of the injury is determinative. If the source of the injury is the defective nature of the product, then the products hazard exclusion applies. If the source of the injury is a faulty installation, like it was in *Friestad*, the completed-operations hazard is implicated.

The *B&R Farm* court also held that the source of the injuries was determinative of whether the products hazard exclusion applies. In *B&R Farm*, the insured sought coverage under a commercial general liability policy for contamination caused by the accidental release of its product into a creek. 483 N.E.2d at 1076. The court held that the products hazard did not apply because the injuries were not caused by any alleged defect in the insured's product:

> The claims in this case have nothing to do with any defect in a product. They arose because of negligent release of the product from the premises. Product liability clauses are designed to cover situations such as the asphyxiation of a car's passengers by a defective exhaust system; premises liability coverage is designed to cover the pedestrian who is injured if a car rolls out the factory door due to some negligent act of

an employee.

Id. at 1077. Again, *B&R Farm* does not stand for the proposition that the products hazard exclusion only applies when the insured's product is placed in the stream of commerce, as argued by Covil. To the contrary, *B&R Farm* holds that if the source of the injury is a defect in the product (as was pled in the Rollins Lawsuit), the products hazard exclusion applies to preclude coverage.

The decision in *Szczeklik* is similarly unavailing. In *Szczeklik*, the plaintiff was an employee of a subcontractor of the insured who was mounting a tire onto a split rim to form a wheel assembly, which completed product was to be sold by the insured. The wheel on which the plaintiff was working exploded causing injuries. 942 F.Supp.2d at 1257-58. The court ultimately held that the combined products-completed operations exclusion contained in the commercial general liability policy did not apply to preclude coverage for these injuries because the wheel assembly was not a completed product at the time of the injury:

> A plain reading of the Policy demonstrates that the product in this case (i.e. the rim) was not a "completed" product ready for resale by [the insured], but rather was a component of a final product akin to a work in progress.

Id. at 1264. This holding and the factual scenario from which it arose clearly distinguishes *Szczeklik* from the present case. The plaintiff in the Rollins Lawsuit was not exposed to the defects in Covil's product before that product was sold and installed, like the plaintiff in *Szczeklik*. Instead, Mr. Rollins, at the time of his alleged injury, was a child who was exposed to take-home asbestos after Covil brought its product to his step-father's worksite and relinquished control over it. As Mr. Rollins' alleged bodily injury occurred away from any worksite (and at his house), it is clear that Covil no longer had control of the product at the time of that injury.

More persuasive are the asbestos coverage cases from other jurisdictions which hold that

because the alleged injury arose out of the defective nature of the asbestos product, the products hazard exclusion applies to preclude coverage. See, e.g., *Fibreboard Corp. v. Hartford Acc. & Indem. Co.*, 20 Cal.Rptr.2d 376 (Cal. Ct. App. 1993)(the claims asserted in the underlying complaints fall within the products hazard coverage of the policy because they allege that the insured's asbestos products were defective and caused property damage and bodily injury); *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070 (Md. App. 2002) (products hazard exclusion excludes coverage for claims asserted against the installer of asbestos containing thermal insulation products for defective product and failure to warn); *Mass Ins. Insolvency Fund v. E. Refractories Co.*, 1997 Mass. Super. LEXIS 589, *8 (Mass. Super. 1997) ("When a defect inherent in the [asbestos containing insulation] product itself caused the injury, the product hazard provision applies."); *Continental Cas. Co. v. Employers Ins. Co.*, 60 A.D.3d 128, 151 (N.Y. App. 2008)(holding that claims arising out of the insured's asbestos insulating activities are included within the products hazard/completed operations coverage); *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 509 (Pa. 1992)(claims that insured manufactured and marketed asbestos products fall squarely within products hazard exclusion).

It is clear that the Rollins Lawsuit alleged liability against Covil for injuries caused by the asbestos contained in Covil's products. Therefore, when Covil settled the Rollins Lawsuit, this was the liability that was released by Covil's payment. This liability, however, is clearly excluded under the products hazard exclusion contained in the Penn National Policies. This Court should reverse the lower court's finding that the products hazard exclusion did not apply as a matter of law.

B. *This Court Should Reverse The Court Of Appeals' Holding That The Completed Operations Hazard Exclusion Does Not Apply As A Matter Of Law.*

The products hazard exclusion clearly applies to preclude coverage under

the Penn National Policies. See, *Laidlaw Envtl. Services, Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 51, 524 S.E.2d 847, 852 (Ct. App. 1999)(exclusions are to be read independently and if any one exclusion applies, there is no coverage). If this Court finds that the products hazard exclusion does not apply, then this case should be remanded for a determination of whether Mr. Rollins' injuries occurred after Covil's "operations have been completed or abandoned" (as more specifically defined in the Penn National Policies). (App. pp.458, 504) There is insufficient evidence in the Record to support the Court of Appeals' determination that the completed operations hazard does not apply.

CONCLUSION

Covil rushed to secure a coverage determination in this case, bypassing both its contractual obligations as well as the established rules of discovery. As a result, the circuit court found as a matter of law that coverage was afforded under the Penn National Policies for the Rollins Lawsuit even though Covil breached the notice provisions in the Policies and circumvented all discovery in this case. In affirming this hastily-obtained judgment, the Court of Appeals created new law at odds with long-standing precedent from this Court. The Court of Appeals' decision in this case cannot be allowed to stand. Even Covil could not fashion an argument in support of some of the Court of Appeals' holdings. Accordingly, Penn National respectfully requests that this Court reverse the entry of judgment in Covil's favor and remand this case for entry of judgment in Penn National's favor on the issue of Covil's late notice. Alternatively, this Court should remand for entry of judgment in favor of Penn National on the applicability of the products hazard exclusion. Or, this matter should be remanded for appropriate discovery.

This 30th day of January, 2023.

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